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Solidarity Watch, collective

INTRODUCTION

This chapter deals with the repression of solidarity towards migrants which takes place through the trials of people prosecuted for direct or indirect facilitation of entry, transit and irregular stay of an illegal (art. L622-1 of Code for entry and residence of foreigners and the right to asylum, CESEDA) in France.

The focus on this narrow topic is grounded in the intertwining of European trends of securitization of migration since 2000s (Lazaridis 2016; Bigo & al 2010; Guild 2009; Huysman 2006; Pickering, Weber 2006) on one hand, especially targeting the ‘undesirable’ (Agier 2011), and of humanitarization of border, on the other hand. Besides, the so-called Mediterranean “migration crisis” of 2015[1] was a perfect example of the tension between these two logics. While people were drowning at sea, European institutions and Member States put into question the merits of public rescue operations (Moreno 2018; Little, Vaughan-Williams 2016; Pallister-Wilkins 2017; Tazzioli 2016; Williams 2014). This ‘border spectacle’ (Van Reekum 2016; De Genova 2013) accentuated the problematization of the border “as a site of suffering, violence and death, and a political zone of injustice and oppression” (Walters 2011: 150). Soon, NGOs started rescue operations but were prevented from saving migrants through interdiction of disembarkation and various sorts of prosecutions relying on the production of a governmental narrative blurring lines between (un)professional humanitarian work and smuggling in the name of the fights against irregular migration and terrorism (Tazzioli 2018; Pezzani, Heller 2015). If not new (Aradau 2004), this governmental logic resulted in the reinforcement of a ‘military-humanitarianism continuum’ (Cuttita 2014). At the same time, inlands, the repression of migration increased through the European Union: barbed wires erected in Hungary, Latvia, Austria, but also the suspension of the Schengen agreement in Sweden, Denmark, France, Belgium, and Germany[2]. Borders became more intense spaces of contentious practices for various actors: NGOs, whether professional or not, informal collectives, self-organized movements which could be local, national or transnational and even individual. This phenomenon became an issue for a vast social movement literature focusing on the new forms of activism (Stierl 2015) and the political dimension of delivering direct social goods in the name of ‘solidarity’ with migrants (Vergnano 2020; Della Porta 2018). Research led in Calais in France (Bouagga 2018; Pette 2016), Belgium (Lou Vertongen 2018), Germany (Fleischmann, Steinhilper 2017), in Ventimiglia in Italy (Barone 2018; Trucco 2016), in Hungary or Slovenia insist on the historical, processual and interactional dimension of politicization, punctuated with events (‘victories’ or repression). The distinction between activism and volunteering seems less interesting than the understanding of the logics of tension and distinction between actors positioned alongside a continuum between a ‘pole of contestation’ and a ‘pole of attestation’ (Pette 2012). It echoes with a more critical approach which stresses on the importance of problematizing “solidarity” as “the time-space of solidarity, the work of solidarity, and the others of solidarity” (Tazzioli, Walters 2019). The meaning of ‘solidarity’ is often taken for granted, even by scholars, whereas it is a moral and practical category resulting from power relationships - such as gender, race, class – performed by a wide range of heterogeneous actors, from state bureaucracies to individual acting spontaneously.

So far, the repression, understood as a set of interconnected practices performed by police, judicial and administrative authorities (e.g. surveillance, tentative of deterrence, prevention and punishment of acts of assistance) gained attention (ObsMiGam 2020; López-Sala, Barbero 2019; Della Porta 2018; Fekete 2018; Tazzioli 2018; Ilker & al 2017; Pezzani, Heller 2015).

Still, forms of state repression are rather mentioned than problematized, or listed and categorized through a socio-legal perspective – informal dissuasive practices, formal dissuasion tactics, bureau-repression, criminal prosecution (López-Sala, Barbero 2019: 11-12).

In this perspective, our research focuses on the trials based on the article L622-1 of the CESEDA in the Maritime-Alps in France since 2015. This article states that “any person who either directly or indirectly facilitates or attempts to facilitate the entry, transit and irregular stay of an alien in France” risks up to a prison sentence up to 5 years and a fine up to 30 000 euros. Since its first formulation in 1938, this legal disposition lately included the economic transaction as a distinction between help and smuggling, despite the article 27 of the Schengen Convention [3], the UN norms on smuggling adopted in 2000 and 2001 [4], and the Council Directive 2002/90/EC of 28 November 2002 [5]. Since the 1990s, and even more in 2009, the government had to face a campaign of denunciation of this disposition labeled 'solidarity crime' ('délit de solidarité') [6], led by the information and support group for immigrants (GISTI). Then, in 2012, the article L622 integrated a principle of 'immunity' to persons giving assistance that “does not result in direct or indirect compensation, and consists of the provision of legal counsel, food, housing, or medical assistance to provide dignified and decent living conditions to the illegal, or any aid meant to preserve the dignity and physical integrity of the person” (art. L622-4 CESEDA). As people claiming to act by solidarity were still prosecuted, the litigation process led the Constitutional Council (CC) to confirm the constitutional value of the principle of fraternity and the freedom to help one another on humanitarian grounds in its statement answering a question of constitutionality on May 11, 2018. Nonetheless, in its decision of July 6, 2018, the CC distinguished between facilitating entry into the French territory and assistance given once the foreign national is already within the French territory. Simply put, it has explicitly excluded immunity for the person facilitating entry into France, even when done so at no cost, to an undocumented foreigner, arguing that it constitutes an obstacle to the maintenance of public safety [7]. So far, the trial as a form of repression received scant scientific attention, from a legal perspective (de Massol de Rebetz 2017; Slama 2017), even within the literature dealing with this alpine border. It focuses on the emergence of solidarity networks (Giliberti, Queirolo 2020; ObsMiGam 2020; Giliberti 2018; Lendaro 2018) and on the importance of the historical and geographical backgrounds in the development of border control measures and forms of repression of solidarity with migrants (Del Biaggio & al. 2020; Tazzioli 2020; Gastaut & al. 2017).

From both a theoretical and heuristic points of view, focusing on the trials as a form of repression of solidarity with migrants, and on their effects on individuals and solidarity networks is relevant. Such trials testify of an extension of the 'crimmigration' (Van der Woude, Barker, Leun 2017; Joao, Van der Woude, Van der Leun 2011) from irregular migrants, defined as the target of policies, to 'their allies'. Thus, our approach completes the literature on this “space of 'glocal' solidarity” (ObsMiGam 2020) regarding repression issues but also the emergence of the opposition to the 'délit de solidarité' in this region. This question is even more important that it takes place in a context of greater repression in France. In 2015, France adopted and then prorogated six times the state of emergency after the terrorist attacks and used it to prevent foreign activists to enter territory at the occasion of the COP21. It takes place in a broader context of repression of social movements (Codaccioni 2019).

Building on the literature that focuses on legal mobilisation within social movements (Abel & al. 1981, McCann 1994, Spanou 1989, Gaïti & Israël 2003), this chapter sheds light on the judicialization¹ of the practices of solidarity that took place since 2015 in the Maritime Alps -

¹ The concept of judicialization refers to the increased use of the judicial system to determine which practices of solidarity are legitimate and which ones are not.

French region bordering Italy, and on its effects on the emergence of a space of engagement² against the "délit de solidarité". By chronologically reconstructing the main temporal phases of the emergence of this space of engagement, this contribution analyses the reactions of people that have been prosecuted, but also the way trials affect the solidarity practices of people engaged within this space of mobilization. A certaines conditions, le droit peut être opposé au pouvoir, et donc être utilisé comme une arme dans la défense d'une cause, d'une lutte, d'une revendication (Israël 2009, Turk 1976). Ce processus de weaponization of the Law devient plus visible à l'occasion des procès. The trials can be conceived as a public scene where prosecuted persons (activists, civil society' members, residents etc.) and representatives of the State come into conflict, producing judicial and political controversies. Thus, actors can use legal proceedings, such as trials, as a contentious weapon that is part of a political strategy (Israël 2009, Lopez-Sala & Barbero 2019).

The article documents how individuals constitute themselves as subjects of law and how this affects them in the course of their trial, and after it. As legal consciousness studies state, 'in order to discover the presence and consequence of law in social relations, we must understand how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings' (Ewick & Silbey 1998: 35). Then, the article interrogates how these 'individual' experiences contribute to the emergence and evolution of a collective space of engagement (Mathieu 2007, Mathieu 2010).

By looking at the individual and collective experiences of the trials, we distinguish between the use of the Law as a Shield, in order not to be convicted, and the use of Law as a Sword, mobilized as a weapon to attack and weaken the enemy through the obligation of modifying the way the State act (or not) vis-à-vis of migrants and their supports. Specifically, we will show that the weaponization of the Law and the strategic use of the Trial as a political arena emerge gradually, and concern only some of the defendants in the Maritime Alps.

By reconstructing the moments, the situations, and the specific configurations of actors, the chapter argues that the 'solidarity crime' in France refers less to a range of repressed practices than to the construction of a space of engagement. It is constituted through the gradual weaponization of trials in reaction to state repression, phenomenon which builds on the articulation between individual and collective processes of socialization and subjectivation of the law.

Fieldwork and methodology

Inspired by the Legal mobilization theory (McCann 2004), the chapter draws from a collective¹ "political ethnography" (Schatz, 2009) of the trials. For this research, we were only able to identify sixteen trials on the grounds of article L622-1, made public by the media and voluntary organizations, the vast majority of which remain unknown. Among them, one associates the motive of "membership in a criminal organization" with the aforementioned article, another that of "illegal occupation". Generally, the accused are fined. Prison sentences are rare and are suspended: four of the accused were given suspended sentences ranging from two to six months in prison.¹ The sentences of imprisonment are rare and are suspended. In addition, these lengthy judicial experiences are accompanied by various measures: police custody, searches, intimidation by the police, seizure of property, some of which has not been returned, etc. In the rare cases of acquittal, the prosecutor usually appeals the verdict. We conducted in-depth interviews with eight defendants² on their personal experience of being arrested and taken to trial (Fillieule 2001). Our methodology was designed to understand the subjective experiences of encountering justice (Ewick & Silbey 1998, Pelisse 2005) and its

² "space of engagement" refers here to a range of individual and collective solidarity practices performed within a specific spatial-temporal context where interpersonal and reputational links connect people.

effects on engagement (Fillieule & Rossier 2019, Fillieule 2020). Additional interviews were conducted with legal intermediaries, either as volunteer associations or as lawyers (six interviews). Two of the co-authors allowed us to gain access to the fieldwork. On the one hand, it is the continuation of a qualitative research based on semi-directive interviews and participant observations initiated four years ago in the Roya valley by one of the authors. On the other hand, it relies on the experience within collectives and associations dealing with 'solidarity crime' of another author who is a researcher and activist from Nice. A long-term investigation and participatory field immersion, which allows us to experience the risks ourselves and to build relationships of trust, is central to our approach (Lendaro 2018, Ayuero & *al.* 2007, Schatz 2009, Jouan 2018). Indeed, many trials are still ongoing (five of our interview partners were still engaged in legal proceedings), which accentuates the sensitivity of the testimonies collected. This is also one of the limits of the interpretation of our interview corpus: depending on the interlocutors, some may seek to control their recorded speeches and therefore avoid presenting legally reprehensible practices.

The contribution stresses the temporal and collective dimension of the weaponization of law in individual cases of prosecuted persons under the article L. 622-1 of CESEDA. In other words, weaponization of law though only some of the trials for "solidarity crimes" results from and contributes to the constitution of a space of engagement. Nevertheless, and in spite of its mediatization, this space of engagement evolves in the direction of weakened ties between activists, and a lower intensity of solidarity practices.

To unfold and empirically substantiate our argument, the chapter is structured as follows: the first part sets the scene of the 'solidarity crime' in the Maritime Alps regarding the evolution of border control policies, especially since the 2010s. The second part demonstrates how a space of engagement has emerged over time, being structured through the trials and the acquisition of knowledge and practical know-how about the law (Bumiller 2011, Boutcher & McCammon 2018, Doherty & Hayes 2015), sometimes resulting in weaponization of the trials. Finally, the last part shows that this space is characterized by conflicts over the framing of the cause and the legal and political strategies to be adopted, and dynamics of inclusion and exclusion (Willemez 2020, McCann 2006, Sarat & Scheingold 2006).

[1] The categorization of migration as 'crisis' was well deciphered by numerous publications (Lendaro, Rodier, Vertongen 2019; Dines & *al.* 2018; Duez 2018; Cantat 2016; Lendaro 2016; Pallister-Wilkins 2016).

[2] From the Convention of 1995, the implementation of the Schengen agreement of 1990 never meant the end of internal controls as they were reinforced through the increase of mobile controls and the '20 kilometers' rule (defined in the Schengen Code in 2003). In 2015 and 2016, several Member States suspended the Schengen agreement to reintroduce systematic controls at their national border.

[3] Convention implementing the Schengen Agreement of 14 June 1985.

[4] United Nations Convention against Transnational Organised Crime (A/RES/55/25) adopted by the General Assembly on January 8, 2001 and its Protocol against the Smuggling of Migrants by Land, Sea and Air adopted on November 15, 2000.

[5] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (OJ L 328, 5.12.2002).

[6] See: <https://www.gisti.org/spip.php?article1399>

[7] First, it is relevant to note that the vagueness of the article L622-1 resulted from a governmental choice. In 1997, at the National Assembly, while presenting the bill XXXX, the ministry of Home Affairs said that this wording would allow penal prosecution of individual belonging to islamist networks, terrorist networks, or related to intelligence activities. Then,

this argument was taken for granted, implicitly or explicitly, as in the report of the Law Commission presented by Thierry Mariani. Second, both for the justice and police actors, the article L622-1 is much easier to use than the paragraph 5, despite it tackles smuggling. In fact, the legal notion of 'bande organisée', core of the article L622-5 is much more difficult to prove.