

The Ethical Consequences of Criminalizing Solidarity in the EU

by

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Abstract: The aftermath of the European refugee crisis can be said to have sparked a crisis of solidarity. Despite abundant demonstrations of solidarity with refugees and asylum seekers, what many saw as an exercise of their duty to help was made illegal. The critical term that emerged to refer to this conjuncture was “criminalization of solidarity”. In order to include this term in the academic debate, this article starts by disclosing the embedded claims present in its rhetorical usage. The article then scrutinizes the design of the politics of criminalizing solidarity and its consequences. It argues that at least three aspects of the politics of criminalizing solidarity plausibly indicate the possibility that regulating the aid in question will produce and reinforce consequences for the EU that are not only unintended, but also damaging. This is because, first, what I refer to as the *blending aspect* might spread the perception of illegality among several types of immigrants; second, the *moral aspect* can discharge people from their duty to help foreigners by conditioning this duty to group membership and belonging; and third, the *polarizing aspect* might exacerbate the existing divide between citizens and immigrants currently causing conflicts and social fragmentation.

Keywords: refugee crisis, immigration, border control, human smuggling, humanitarian assistance

1. Introduction

IN SEPTEMBER 2016, THE human rights activist and well-known writer Lisbeth Zornig and her husband were convicted of human smuggling for having offered transport and hospitality a year earlier to a Palestinian-Syrian refugee family in Denmark. The penalty was raised, after an appeal, to DKK 25,000 for each of them (Hvilsom, 2016). Like Zornig and her husband, others, such as 70-year-old Lise Ramslog, were also convicted on the same grounds in Denmark (Nabert et al., 2019). In February 2017, the olive farmer and activist Cédric Herrou, after having been detained several times in 2016, was convicted of aiding illegal immigrants in France and fined EUR 30,000 (Chrisafis, 2017). After a long battle, the French Constitutional Council absolved him in July 2018, although Herrou is constantly under police surveillance (Jacobs and Schechner, 2018). In the same year Herrou was acquitted, the French mountain guide Benoit Duclois was charged for assisting a pregnant Nigerian migrant to cross the snowy Italian-French border on foot. In France, even a former mayor was convicted for offering accommodation for a Kosovar family and requested to pay a fine in 2018 (Nabert

et al., 2019). In August 2018, three members of Emergency Response Centre International (ERCI), a non-governmental organization (NGO), were arrested in Greece, accused of human smuggling, espionage, money laundering and membership of a criminal organization. Among them was Sara Mardini, a renowned swimmer and Syrian refugee who, in 2015, together with her sister, swam for 3.5 hours guiding a damaged refugee boat to safety along the coast of Lesbos near Turkey (Telegraph Reporters, 2018). After spending more than 100 days in prison, she was released on EUR 5,000 bail (Campana, 2018). More recently, in 2019, the German captain of Sea-Watch 3, Carola Rackete, was arrested for manoeuvring the ship carrying 40 migrants into a port in Lampedusa without permission – 60 hours after having declared a state of emergency (Al Jazeera, 2019a). She had been accused of assisting human smugglers for having challenged the right-wing interior minister Matteo Salvini's "close-ports" policy (Al Jazeera, 2019a). In a video posted on Twitter, Rackete says she expected people to recognize that the international conventions on the safety and rescue at sea supersede the states' sovereign rights to control their borders (see 1974 International Convention on the Safety of Life at Sea; 1979 Convention on Maritime Rescue; and the 1982 UN Convention on the Law of the Sea). Rackete was saving people from otherwise certain death. Although the judge recognized that in court and released her, she is reported to be currently "in hiding" due to the threats she received from Salvini's supporters (Al Jazeera, 2019b).

Hundreds of similar cases have arisen over the last five years (see Nabert et al., 2019). Religious figures such as pastors and priests (including a priest nominated for the Nobel Peace Prize), firefighters, lifeguards, local politicians and many volunteers are represented in this list. In the first three months of 2019 alone, almost 80 new cases had been registered (Levoy and Binder, 2019). Although the cases are spread widely across Europe, it is observed that the number of prosecutions has risen rapidly within the Member States in which far-right parties have greater political power and influence (Nabert et al., 2019). The causes of the instauration of a politics that criminalizes solidarity has indeed been strongly linked to the rise of far-right ideologies and their increasing power to institutionalize aporophobic and xeno-racist biases (for an illuminating discussion on the causes of the politics of criminalization of solidarity, see Fekete, 2018).¹

The picture that has been drawn above is not exhaustive, but it should suffice to illustrate what human rights activists and migration supporters have called the "criminalization of solidarity". Generally speaking, the term critically describes state attempts to prevent non-state actors from acting in direct solidarity with immigrants requiring assistance through the instrumental use of criminal law and

1 I thank an anonymous reviewer for the reference.

with the ultimate goal of curtailing the uncontrolled influx of immigrants into EU territory (e.g., Hayes and Barat, 2017; Buckler, 2018; Phipps, 2018; PICUM, 2018). In other words, the term refers to situations in which types of assistance normally understood as humanitarian by the EU become, for political reasons, classified as subversive, insurgent and criminal at the state and supra-state levels (Wilkins, 2018). Demonstrations of solidarity that became illegal include assisting certain immigrants to enter, transit or stay in EU territory by facilitating their access to transport, healthcare, housing, employment and even food and clothing (see EU Facilitators Package 2002, which includes the Council Directive, 2002/90/EC and the Framework Decision, 2002/946/JHA). Prescribed penalties vary from state to state, although they are generally quite harsh.

In the Netherlands, for example, certain forms of assistance to someone considered an “illegal immigrant” can result in either a EUR 81,000 fine or four years of imprisonment. In France, such assistance can result in a EUR 30,000 fine and up to five years of imprisonment (see these and the penalties in other countries at Provera, 2015, pp. 41–43). In Greece, the length of imprisonment can be up to ten years and the fine can vary from EUR 10,000 to EU 30,000 for every person assisted (Carrera et al., 2018, p. 33). Aggravating circumstances that include financial gain and/or membership of an organized group can increase the sanctions considerably. In France, for example, membership of an organized group assisting certain immigrants can be sanctioned with ten years of imprisonment and a EUR 750,000 fine. And in Italy, it can result in imprisonment for five to ten years and a fine of EUR 15,000 for every person involved. If a direct or indirect financial benefit is established, the imprisonment penalty is increased by a third to a half and the fine is increased to EUR 25,000 for every person involved (Carrera et al., 2018, p. 35). On 5 August 2019, under Salvini’s government, a piece of legislation formally criminalizing solidarity by directly targeting NGOs and people rescuing migrants at sea was approved by the Italian Parliament (Solidar, 2019).

Although the criminalization of solidarity in the sense of policing or sanctioning non-state actors for certain acts of aid is not something entirely new in Europe, having played an important role in previous attempts to externalize its borders (del Valle, 2016), this strategy can be said to have acquired a new dimension when used in response to the so-called European refugee crisis, for two reasons (Agustín and Jorgensen, 2019). First, non-state actors are now coerced to partake in the creation of hostile environments for asylum seekers and refugees in order to persuade the latter to return and discourage or prevent others like them from setting foot in EU territory. Second, the ultimate target-group for this policy is no longer so-called “economic” immigrants in general, but asylum seekers and refugees who are, in principle, protected by international human rights and EU

law. The new dimension added to this strategy of border control has recently revived academic interest in the topic. To date, most recent academic contributions are, however, still limited to documenting particular occurrences of the criminalization of solidarity in different geographical locations and denouncing it as a problem from different perspectives (Fekete, 2009, 2018; Webber, 2017; Maccanico et al., 2018; Rozakou, 2018). Less attention has been paid to exploring the possible damaging consequences of the misuse of criminal law as a mere tool for reducing immigration. Key studies have nevertheless warned that the criminalization of solidarity can have damaging consequences for power legitimacy (Provera, 2015), democracy, rule of law, fundamental rights and social trust (Carrera et al., 2018; Carrera et al., 2019) and have even pointed to the direct and indirect effects of this provision on the EU due to its implementation gaps (Allsopp, 2016; Allsopp and Manieri, 2016). Stipulating that the intended goal of regulating the aid in question is to reduce illegal immigration, these damaging consequences to power legitimacy, democracy, rule of law, fundamental rights and social trust should be seen as unintended ones. How precisely the intended consequences can lead to unintended and damaging ones is, however, an aspect that has been neglected in these works.

This article contributes to the recent scholarship on the criminalization of solidarity by filling in this gap from the perspective of moral and legal philosophy. It asks the question: *how can the politics of criminalization of solidarity disarray from the intended to unintended and even damaging consequences for the EU?* It advances a consequentialist argument and argues that determined aspects of this regulation of aid can indicate the possibility of such disarray occurring. Due to space and focus constraints, I do not question whether the intended consequences of the politics of criminalizing solidarity are moral or not, even if I have reasons to think that they can be damaging enough on their own (for this, see Landry, 2016; Costelo, 2018). This means that I will not discuss here whether the states' right to exclude immigrants is morally justifiable. States do have this right to exclude as a matter of fact, which I take for granted in this article. My goal here is rather to expose the possibility that the misuse of criminal law as an instrument for border control backfires against the EU's own objective of creating an area of freedom, security and justice within its territory. This is the case mainly because the politics of criminalizing solidarity has the capacity to corrupt the sense of solidarity that is meant to underpin the coexistence of our plural and diverse societies within the EU.

"Solidarity" is certainly a very fluid concept, used to describe a variety of attitudes and actions. This concept has, furthermore, certainly suffered many transformations over time (Stjernø, 2005). Using the concept in one sense does not necessarily corrupt the other senses. The sense of solidarity underpinning the

coexistence of plural and diverse societies in the EU, however, is a sense of solidarity captured by what has been described as a “vision of sociality” that transcends national citizenship (Heath, 2016; Rakopoulos, 2016). It is argued that this vision, which in times of crisis and austerity emerges as a “vision of shared human struggle”, has the capacity to bridge the differences among people through empathetic understandings and symmetrical material and non-material exchanges. Solidarity, in this sense, is not grounded on one’s relationship to a state, but on one’s commitment to secure human sociality even when the state fails in providing its conditions. It is then precisely this sense of solidarity that is put under pressure when states illegitimately use their power to rule over a sphere that should be out of their scope.

The article has five parts. Section 2 starts by disentangling the term “criminalization of solidarity”, separating its rhetorical usage from its analytical one. Section 3 argues that at least three aspects of the politics of criminalizing solidarity indicate the possibility of disarray from intended to unintended and damaging consequences for the EU. Section 4 considers some objections, and section 5 concludes.

2. Criminalizing Solidarity: Disentangling the Rhetorical and Analytical Usage of the Term

The term “criminalizing solidarity” certainly has a strong rhetorical appeal. From an analytical point of view, however, it lacks precision. In order to secure a more solid conceptual basis for further debate on the topic, this section clarifies the meaning of the term by disentangling claims associated with it. The term “criminalization of solidarity” professes a radical criticism of the states’ regulation of certain acts of aid and builds on the notion’s fluidity in expanding its coverage. In its formulation, the term conveys at least two claims that need to be elucidated. First, we could think that given that, in a certain sense, the idea of solidarity seems to be associated with an elevated disposition that tends to express what is morally right, the formulation of the term “criminalization of solidarity” appears to rely on an intuition that criminalizing it must therefore be morally wrong. The sense that I have in mind is based on an interpretation of the concept of solidarity that originally has a link to religion and that consists in affirming that a moral duty commands us to be solidary with others. By referring to this sense, I do not intend to claim that the religious interpretation of the concept is the main or the most ordinary one, but only to consider that, despite the secularization of Europe, supported by Reale (2005), this view of solidarity seems to remain in the background of our basic intuitions about the concept. This idea is well captured by Lisbeth Zornig when she says the following about her and her husband’s

conviction: “I was angry...angry about being criminalized for acting with simple human decency...My husband and I could not have acted differently. It would have been a betrayal of everything we hold dear and believe in, including what we teach our children” (McMahon, 2017, p. 29).

Even if, analytically speaking, solidarity is actually a morally neutral term in the sense that there can be occurrences of expressions of solidarity that could be criminalized without them being morally wrong (e.g., helping a justly convicted criminal to evade justice), the term builds upon the claim that the solidarity being criminalized is, for all the effects, a moral kind of solidarity that should not be criminalized (see section 2.1). What supports this claim seems to be an understanding of solidarity as “a vision of human sociality” that ultimately transcends citizenship or particular group belonging. That means an understanding of solidarity that links human beings with each other based on an idea of human dignity, of “human decency” as Zornig describes it, and emerges even when the state fails in providing the conditions for its realization. The idea of solidarity that is denoted in this context refers then to a kind of solidarity that should not be criminalized because the state has no legitimate power to interfere in this realm and rule on when and how people could (or could not) be solidary with each other. This is especially problematic when the role of criminal law stops being to protect society against deviant behaviour, and becomes a tool to force people to accept a situation in which they must advance a specific political agenda with which they do not even agree.

Second, regarding the fluidity of the idea of solidarity in itself, solidarity can indeed be understood and expressed in many different ways. As the examples above show, not all acts of solidarity are being criminalized – but only some by determined agents and directed to a determined group of people in need. In a simplified scheme, solidarity can be understood and expressed in terms of positive attitudes or in terms of supportive action. Solidary attitudes are positive mental dispositions that people have towards others based on, for example, sympathetic feelings towards refugees and asylum seekers, a desire to assist them, a belief that they ought to be assisted or even the knowledge of their human rights. Solidary actions are the supportive deeds performed by some people in favour of others by, for example, offering food, clothing, transport or advice to asylum seekers and refugees, demonstrating in favour of their cause, or even writing in support of their rights. Whereas the examples cited above illustrate the criminalization of solidarity only in terms of penalizing acts when it comes to aiding certain immigrants in entering, transiting or residing in EU territory, the term suggests that criminalizing acts of solidarity can have an overall impact on solidary attitudes as well (see section 2.2).

2.1 Criminalization of humanitarian assistance

Disagreement with the first claim – that is, with the one that assumes that the kind of acts of assistance that are being criminalized should not be criminalized – operates by seeking to make the usage of this term appear nonsensical. In the text of the Facilitators Package there is no direct mention of the word “solidarity” as such. Other important documents that exploit the Facilitators Package in connection to the European Refugee Crisis, such as the EU Action Plan against migrant smuggling (COM(2015)285 final) and the Council conclusions on migrant smuggling ((2016)6995/16), do not mention the word “solidarity” either. Solidarity is, however, implicated in these documents, raising a source of critique for constructing the term in two senses:

- (1) First, a sense of solidarity is implicated in terms of “humanitarian assistance”. “Humanitarian assistance” is mentioned in the Facilitation Directive in order to convey the idea that Member States have the option not to sanction acts of assistance to non-nationals seeking to enter or transit across the state’s territory when these acts are motivated by humanitarian aims (Council Directive, 2002/90EC art. 1:2). However, to give to Member States the option *not* to penalize humanitarian assistance means also that they have the option to penalize it. The term “criminalization of solidarity” then incorporates this critique against the optional penalization of humanitarian assistance.
- (2) Second, these documents, taken together, mark the idea of criminalizing the facilitation of illegal immigration and human smuggling as a priority for the European Agenda on Migration (COM (2015)240 final, Brussels, 13 May) and for the European Agenda on Security (COM (2015)185 final, Strasbourg, 28 April). In a sense, it is the facilitation of illegal immigration and human smuggling that are being criminalized, not solidarity. Given the more common negative connotation of the terms “illegal immigration” and “human smuggling”, it does not seem so controversial to say that these are acts that should be criminalized (see Hidalgo, 2018, and Landry, 2016 for a different perspective on human smuggling). But the point of critique is that these documents conflate the facilitation of illegal immigration and human smuggling with solidarity and blend “illegal” immigrants with asylum seekers and refugees.

This means that the term “criminalization of solidarity” embeds a critique against (1) the optional penalization of humanitarian assistance and against (2) the conflation of humanitarian assistance and the facilitation of illegal immigration and human smuggling.

2.2 Discredit of solidary attitudes

Disagreeing with the second claim – that is, the one that assumes that criminalizing acts of solidarity can have an overall impact on the solidary attitudes as well – shows disregard for the broader effects that a prohibitive law can have. As a result, it limits the recognition of possible damaging consequences when it comes to the politics of criminalizing solidarity for our societies. A prohibitive law, however, can have either direct or indirect ambitions:

- (1) One reason why certain actions are criminalized in a society is to discourage or prevent these actions from happening as a matter of practice. This is the case when the ambition behind the law is direct: that is, when criminalizing certain acts intends to change how people act in relation to the specific regulation. In Norway, for example, it is prohibited for individuals to import potatoes without special authorization from the state. This regulation is not intended to make potatoes inaccessible to the Norwegian people or to make them dislike potatoes. It is just intended to prevent individuals from importing potatoes for reasons that are not associated with any inherent attribute of potatoes, such as protecting local farmers.
- (2) Another reason why certain acts are criminalized in a society, perhaps more meaningful from an ethical perspective, is to prevent these actions from becoming a practice that is associated with what is morally, and not only legally, right. This is the case when the ambition behind the law is indirect: that is, criminalization of certain acts is intended to change the morality underlying peoples' attitudes towards something. Through the discouragement of certain acts, attitudes that would otherwise support such acts are also discredited. An example of this is the ban on smoking in public places. When it was first introduced, many people complained that their individual freedom was being impaired by the state. Today, however, there is a clear understanding that this policy is in accordance with the public's health interests. The idea is that the criminalization of certain acts first affects people's behaviour and then, with time, alters people's moral attitudes as well.

Sometimes changes in attitudes are desirable and contribute to making society a better place, as in the above example of the smoking ban. Laws and regulations intended to prevent sexual harassment and discrimination in the workplace are other examples that show the criminalization of certain acts can have a desirable effect in changing people's attitudes as well. Sometimes, however, these changes in attitudes can go wrong, have unintended effects, or even damage the structure of the society (Bilz and Nadler, 2014). Since the criminalization of solidarity requires some people to act against their moral judgement, it is difficult to defend

the idea that this policy will impact only on people's actions and not their attitudes as well. It becomes then important to know whether attitude changes provoked and (cyclically) reinforced by the politics of criminalizing solidarity remain within the scope of the intended effects, or whether they can produce unintended and perhaps even damaging effects for society as a whole.

This means that the term "criminalizing solidarity" embraces a broad notion of solidarity that incorporates not only (1) a critique against the reduction of the denoted prohibitive law to its direct ambitions, but also (2) against the predictability of its indirect ambition in provoking attitude changes that will remain only within the scope of the intended consequences.

In summary, criminalizing humanitarian assistance (section 2.1) and its impacts on the underlying morality of the people (section 2.2) restricts solidarity, potentially affecting both the bottom-up motivation for the emergence of a duty to help in general and the top-down justification for compelling people to act in a supportive way towards needy human beings that do not clearly belong to their inner group. In order to aggregate these embedded claims in the term more clearly, I will be referring more broadly to the politics of criminalizing solidarity.

3. "You Should Have Seen That Coming!"

The EU has a stated objective of creating an area of freedom, security and justice within its territory. According to the Council Directive (2002/90EC, Preamble 1 and 2), combating the aid of illegal immigration is one of the ways to promote the creation of such an area. Therefore, the Council Directive focuses on strengthening the penal framework against the facilitation of illegal immigration. From this perspective, what has been called the politics of criminalizing solidarity has been designed to make illegal immigration more difficult, with the greater goal of strengthening freedom, security and justice within EU territory. With this in mind, we might expect that if the politics of criminalizing solidarity succeeds in combating the facilitation of illegal immigration, it would then help achieve this greater goal. On the other hand, if the politics of criminalizing solidarity fails to combat the facilitation of illegal immigration, it would then fail to promote this greater goal.

However, the mode by which the facilitation of illegal immigration is combated matters – and matters largely for the achievement of such a greater goal. By, for example, shooting down every person attempting to cross the border, illegal immigration would be erased, but with it the EU would cease to be an area of freedom, security and justice. An inadequate mode of combating illegal immigration can actually twist the expected relational outcome of a regulation, such that the *failure* to combat illegal immigration would actually contribute more to

achieving the greater goal than its success. Assuming that power legitimacy, democracy, rule of law, fundamental rights and social trust are essential elements of an area of freedom, security and justice, any law or policy set in motion by the EU that goes against these elements would be damaging in terms of establishing such an area in the EU. Going against these elements need not be within the intended effects of a law or policy. It suffices that significant adversities to these elements are among the unintended effects of a law or policy to produce damages for the creation of such an area of freedom, security and justice.

In light of this, this section aims to increase awareness of the possibility that a prohibitive regulation such as that put forward by the politics of criminalizing solidarity will produce unintended and damaging effects on the EU. This section shows that even if the politics of criminalizing solidarity achieves the goal of reducing the facilitation of illegal immigration (a matter yet to be settled empirically), it might fail to contribute to the creation of an area of freedom, security and justice within the EU territory because of its negative effects on power legitimacy, democracy, rule of law, fundamental rights and social trust in general. Instead of exposing how the politics of criminalizing solidarity impacts negatively on each of these elements individually, this section focuses on disclosing the negative impacts from some aspects related to the form and content of this specific prohibition of aid. I argue that at least three aspects of this prohibitive law provide for the possibility that the politics of criminalizing solidarity will negatively affect people's attitudes towards foreigners in general and produce unintended and damaging consequences for the EU.

The three aspects of this prohibitive law are the following: (a) it coerces people to abide by a law criminalizing the facilitation of illegal immigration when the distinctions between "legal" and "illegal" immigrants and between solidarity and human smuggling are not clear for them (*the blending aspect*); (b) it coerces some people to act against what they see as the fulfilment of their duty to help (*the moral aspect*); and (c) it is implemented in times of increasing dissensus about our duties to foreigners (*the polarizing aspect*).

3.1 *The blending aspect*

We saw above that the aim of the Facilitators Package and further related documents is, literally, to combat illegal immigration. As illegal immigrants, asylum seekers, refugees, and legal (newcomers or settled) immigrants belong to different legal categories of immigrants, these documents should only be targeting the illegal ones. An illegal immigrant is defined, according to the Council Directive, as a person who is not a national of a Member State that enters, transits across or resides within the territory in breach of its laws concerning the entry, transit and residence of aliens. A facilitator of illegal immigration is there defined as any

person who intentionally assists an illegal immigrant in entering or transiting across the territory of a Member State. It also includes those who, for financial reasons, intentionally help an illegal immigrant to reside within the territory of a Member State. This applies both when this assistance is connected with the “unauthorised crossing of the border” and when it is done for the purpose of “sustaining networks which exploit human beings” (Council Directive, 2002/90/EC, art. 1(a)(b) and Preamble 3). In order for the Facilitators Package and related documents to affect *de facto* only the illegal immigrants, the facilitators – that is, those assisting immigrants to enter, transit across or reside or stay in EU territory – should be able to distinguish illegal immigrants from the others. The definition provided by the Facilitation Directive should provide the tools to enable people to make this distinction.

Even though international human rights norms and EU directives do not criminalize the activity of seeking asylum *per se* (see UN General Assembly, 1951, FRA, art. 18, CEAS, ECHR), and even though these norms and directives from above compel Member States to refrain from criminalizing such activity, asylum seekers and refugees, as well as those acting in solidarity with them, are directly affected by criminal laws targeting instances of so-called “illegal” immigration. Human rights spell out the duties that states have towards asylum seekers and refugees, but they do not exactly challenge the sovereign right of states to control their borders. Claiming compatibility with human rights norms, the EU finds justification for affirming a distinction between “legal” and “illegal” immigrants (one of the Common European Asylum System’s (CEAS) main tasks) and for incentivizing Member States to criminalize what they call “illegal” immigration and those who support it (Richey, 2013).

Compatibility between international human rights and EU directives in relation to Member States’ regulations is certainly highly questionable – especially after taking into account the observed effects that these regulations produce in alienating human beings from some of their most basic rights. The criteria used to classify persons as asylum seekers, refugees or “illegal” immigrants are not always easy to identify in practice and especially not in critical circumstances. Before delivering help to an immigrant, one might need to first be able to identify whether the recipient is “legal” or “illegal” in order to avoid the risk of being criminally charged. The outcome is, more often than not, uncertain.

In addition, it does not take much for someone with asylum seeker or refugee status to acquire an illegal status. Breaching one of the numerous administrative policies imposed on newcomers might already be enough to produce this effect (Anderson, 2013). Asylum seekers who use any other entry point than those determined by the state, or lack the appropriate papers to document their identity and status, already run the risk of being deemed illegal. Escaping from a

detention centre or leaving a refugee camp without permission can also easily become a source of illegality – even though these places are repeatedly reported for constantly violating the human rights of immigrants (Parekh, 2016). Overstaying in a country after being refused refugee status or humanitarian protection, due to a legal mismatch between the cause of displacement and what is strictly outlined in the current norms and laws, also deems them illegal despite the real, life-threatening risks of returning home. This is, for example, the case for many Afghan asylum seekers who have been systematically denied refugee status since 2015 despite being victims of extreme violence in their home country (AIDA, 2017). As much as 72% of rejected applicants sent back to Afghanistan have had to flee again (Samuel Hall/NRC/IDMC, 2018).

This shows that the distinction between a “legal” and an “illegal” immigrant in practice is much more complex than the theoretical definition can actually cover. From the perspective of a possible agent of solidarity, this complexity creates an atmosphere of confusion in which it can become quite difficult to know for sure whether one is helping an asylum seeker, a refugee or a “illegal” immigrant. To avoid the risk of being charged and facing harsh penalties, the safest course of action might be to avoid helping entirely. In this sense, the politics of criminalizing solidarity produces the immediate effect of reducing their impetus to help such people. The simple fear of suffering a penalty might coerce many into not delivering help in the same way that the simple fear of punishment might coerce many not to commit a crime. In fact, regarding humanitarian organizations, there is already plenty of evidence linking the politics of criminalizing solidarity with a decline in humanitarian interventions, especially regarding activity at the sea (e.g., Serrano-Conde, 2019; McMahon, 2017, p. 36). First, investigations and prosecutions have prevented these organizations from acting in the field by blocking search and rescue boats under the suspicion that they are engaged with criminal associations that facilitate illegal immigration. Second, prosecutions have forced organizations to redirect the focus of their work from assisting people to defending themselves. Third, the association of humanitarian organizations with potential criminal activity has already affected their funds due to the reduced number of donations.

From the point of view of a possible recipient of solidarity, the sense of confusion is no less pronounced. First, their presence is quasi-criminal, according to administrative law; second, solidarity on the part of those people who wish to help them has been legally criminalized. Social networks have always been an important source of orientation for immigrants (Blumenstock et al., 2019). It is through social networks that they find the support they need to claim their rights, especially when states have failed to recognize them and provide for them. The politics of criminalizing solidarity imposes serious limitations on what people can do in such social networks. Without the mediating role that social networks

provide in terms of guidance and help, asylum seekers and refugees find themselves alone against a state that, in many cases, repudiates them. Social isolation leads to legal isolation, which is how states make it even more difficult for them to access their basic rights. The stage for a hostile environment is set and the conditions for assistance are obliterated. Alienated from their basic rights, coming to or remaining in the EU offers them little improvement on their previous condition. The intended outcome appears to be to prevent them from coming, as well as pressuring those who are already in the EU to leave its territory. Moreover, it is precisely because the rights of asylum seekers and refugees are recognized, as stated in the human rights framework, that the criminalization of solidarity with them emerges. One cannot send them back to the place they are fleeing from (because of their right to *non-refoulement*), but instead one can create conditions that will first constrain their arrival and then pressure those who manage to cross the borders to move away “voluntarily”.

This means that if the combatting of illegal immigration is to be carried out in accordance with human rights, as claimed, the job of controlling illegal immigration (if applicable) should be left to authorities that are able to make a distinction between “legal” and “illegal” immigrants and not imposed on citizens who will, in practice, struggle to verify their status accurately, given the complexity of the legal framework regulating the rights of aliens. If individuals are penalized for helping illegal immigrants when they are unable to distinguish illegal immigrants from refugees, asylum seekers, or even from legal (newcomers or settled) immigrants, the politics of criminalizing solidarity first discourages acts of solidarity with immigrants in general (even with those that are, in principle, protected by international law and entitled to protection) and, second, discredits solidary attitudes towards these immigrants as a block. The *blending effect* might cause the erosion of the different categories of immigrants, as they all wrongly inherit the negative status of perceived illegality and the attribute of being undeserving. Considering all this, it is likely that, if the politics of criminalizing solidarity works, it will not only reduce illegal immigration, but also reduce immigration in general, including the number of already settled immigrants in the EU. While this, though unstated, can be a desirable effect from the point of view of those advancing and supporting the criminalization of solidarity, it is worth noting that the costs of non-immigration might be higher to Europe than the costs of immigration, when we take into account the dependence of several sectors on migrant labour such as health and elderly care, industry, agriculture and construction, among others (EESC, 2018).

3.2 *The moral aspect*

Many of us would agree that assisting someone in need when one is capable of doing so is the morally right thing to do. Need for assistance and capacity to

assist are, however, not the only things normally taken into consideration when making such a judgement. In many cases, the person in need must be seen as someone deserving the assistance, and the person assisting must see themselves as being the right one to deliver this assistance. In some cases, this sense of a duty to help in terms of alleviating a critical need manifests in the shape of charity or humanitarian help. One may, for example, feel obliged or pleased to give a coin or two to a starving mother sitting next to the supermarket door or donate some money to a humanitarian organization, or feel a certain guilt for not doing so. In other cases, this sense becomes a duty that is manifested in terms of legal obligations or social norms. One can, for example, be charged for refusing to pay taxes that will, among other things, support a redistribution system intended, at least partially if not primarily, to provide critical assistance to those in need. In some countries, a person can even be charged for refusing to help someone at the scene of a traffic accident (e.g., Criminal Codes of Spain, articles 195–196; *Bekendtgørelse af straffeloven*, 2015; Denmark, §253; *Justicia*, 2019; *Strafgesetzbuch (StGB) §323c Unterlassene Hilfeleistung*; and Germany, section 323(c)).

The absence of legislation on such a duty to help is nevertheless usually filled by social norms. In Sweden, for instance, not being legally penalized for refusing to help someone in a traffic accident does not seem to make people feel less compelled to do so (von Hirsch, 2011). Legislation, in that case, is aligned with shared moral values and works more as an insurance against moral deviations, even if it tends not to be the *sole* driver of people's actions. Many of us, for example, would refrain from stealing not because of the risk of being sent to jail, though this might be an additional reason, but because, in normal circumstances, we see something fundamentally wrong with taking possession of something that belongs to another person without a previous agreement or contract. This basic harmony or connection between law and morality certainly does not make the law necessarily good or just, but it shows that a set of laws tends to, in some way, mirror the dominant moral values of a society (see Raz, 2003, which sheds light on the relationship between morality and law). This basic harmony or connection between law and morality facilitates compliance.

This means that when a law contradicts, rather than reinforces, this sense of a duty to help, its success in terms of achieving peaceful compliance and accomplishing the goal for which it is designed depends on reframing people's underlying moral attitudes. The success of the politics of criminalizing solidarity in combating illegal immigration would then depend on reframing certain acts of humanitarian assistance as a crime and on discrediting the recipients of this assistance as “undeserving”. The *blending effect*, as we saw, would make virtually every immigrant a potentially illegal and thus “undeserving” one. From this

perspective, the politics of criminalizing solidarity would not only have to discourage people and institutions from acting in accordance with what they see as their duty to help, but also to discredit solidary attitudes with immigrants from becoming associated with the fulfilment of this duty in itself. In this sense, the criminalization of solidarity would teach people that, for example, helping asylum seekers and refugees without the mediation of the state is no longer the morally right thing to do. A need for help and self-assessed capacity for helping would no longer suffice when it comes to determining the moral status of an action of critical aid. The state takes up the role of establishing the terms of the action by deciding, first, whether these immigrants are owed the assistance, and second, how and from whom they should receive it. In other words, the politics of criminalizing solidarity ultimately constrains the possibility of refugees and asylum seekers (and also other immigrants) from being objects of solidarity on the part of non-state actors.

The *moral aspect*, in this sense, serves somehow to corrupt and discharge people from what they would otherwise see as their moral duty to help immigrants in need. Considering this, if the criminalization of solidarity succeeds in curtailing (illegal) immigration, the moral intuition behind the emergence of a duty to help and its demands would be totally twisted and would affect the meaning of solidarity in a limiting way: solidarity with those in need would then risk becoming conditional on group belonging. This means that a duty to help would possibly only have space to emerge among fellows; that is, in a context in which group membership pre-establishes whether the person in need is seen as someone deserving the assistance and whether the person delivering the assistance is seen as the right one to do so.

3.3 *The polarizing aspect*

The polarizing aspect emerges when the politics of criminalizing solidarity is implemented in times of increasing dissensus about our duties to foreigners. While in the aftermath of what became known as the European refugee crisis there were abundant demonstrations of solidarity with refugees and asylum seekers from EU citizens and organizations, there was also increasing hostility towards them. While some people are disposed to help foreigners in need – refugees and asylum seekers in particular – others have little or no interest in undertaking supportive actions to help them. This means that people's intuitions vary when it comes to the moral status of solidarity not just with illegal immigrants, but even with refugees and asylum seekers.

Usually the most paradigmatic cases of moral solidarity involve children. Who would be able to say that preventing a child from drowning in a shallow pond does not outweigh the costs of getting one's clothes muddy and wet? (Singer, 1997).

The picture of the three-year-old Syrian boy, Alan Kurdi, lying dead on the beach near Bodrum, Turkey, shocked the world and was described as a “human catastrophe” (Tharoor, 2015). Children are the kind of innocent and helpless beings that have the appeal to make most people agree that, no matter what, they deserve nothing else than our care. At the other end of the spectrum are criminals of the most serious kind, such as mass murders and terrorists. If any people are unworthy of our solidarity, it is them. This is because they represent the kind of vicious figures that have not only disregarded the law, but have also purposely harmed others. True, they might end up being objects of our pity if we think of them as mentally ill or psychologically disturbed, but at least I would not expect a charitable foundation for the well-being of mass murders and terrorists to raise the same amount of funds as UNICEF, for example. But even criminals of the worst kind can be the object of one’s solidarity in different ways. Those defending their rights to a fair trial, respect for their human rights, and for a punishment that does not exceed the sentence, show solidarity with them – a moral kind of solidarity. Helping such criminals evade justice, on the other hand, exemplifies an immoral kind of solidarity if one acknowledges that this is assisting a wrongdoer in getting away with their crimes. While the moral kind of solidarity is not supposed to be criminalized, the immoral kind is.

As clear as the poles of the spectrum might look, in practice a large grey zone separates them. Activism and social movements, for example, may operate within this zone where the moral and immoral kinds of solidarity and the corresponding inferences about its criminalization are somehow blurred in the big picture. Solidarity with some might sometimes harm or allegedly harm others, which makes it even more difficult to establish its moral standing clearly among divergent groups of people. Solidarity with refugees and asylum seekers seems to be gaining space within this zone of diffusion. This is because the way refugees and asylum seekers are represented varies considerably, generating different intuitions of whether solidarity is owed to them or not in a moral sense. Some might say that refugees and asylum seekers deserve as much protection as citizens in virtue of our common humanity (cosmopolitans). Others might say that while citizens have priority in the distribution of resources, they are still entitled to some kind of immediate assistance in virtue of their critical vulnerabilities (statists). And others might even brand asylum seekers and refugees as “undeserving” by attributing to them a role in causing the collapse of their own home country and in producing their own need to flee. It should be noted that the latter view is not in accordance with international law, which grants to refugees and asylum seekers the right to seek asylum – providing a reason not to consider this view and rather prioritize any of the others.

The map of differences in people's attitudes towards immigrants or refugees and asylum seekers is not new. We know that such deep disagreements exist and that any attempt to legislate on the issue will tend to be controversial. Abortion laws are another example of regulations built over great dissensus related to the underlying moral values of the people. The controversy in itself is inevitable in such cases. The point is that by legislating on it, the state has a choice to point to the side it will endorse. In order for the politics of criminalizing solidarity to work in reducing (illegal) immigration, the state will have to give voice to a different narrative of solidarity that contradicts the narrative of the "facilitators", and would consider them wrongdoers. The narrative in question comes in the form of identitarian politics that, for example, overvalues the protection of their own people and repudiates immigrants: it is the well-known "us" against "them" discourse. This narrative would have to reaffirm that Zornig, Herrou and Rackete are traitors for putting their own people at risk when helping foreigners to enter, transit across or stay in the EU. The distance between the divergent groups can grow and lead to an increase in violent irruptions. Communication between and across such fragmented groups would be impaired by the fundamentalism of their views, as the conditions for alliances become compromised. The polarizing aspect would then exacerbate the existing divide between citizens and immigrants within the territory of the EU and jeopardize earlier integration efforts.

In summary, this section has shown that the blending, moral and polarizing aspects of the politics of criminalizing solidarity in the EU can plausibly produce and reinforce unintended and damaging consequences for the EU. This is because (a) the blending aspect might spread the perception of illegality among several types of immigrants; (b) the moral aspect can discharge people from their duty to help foreigners by predicating this duty on group membership and belonging; and (c) the polarizing aspect might exacerbate the existing divide between citizens and immigrants that is currently causing conflict and social fragmentation.

4. Objections

Many objections can be raised against the argument developed in this article. Some of them challenge the specific aspects of the politics of criminalizing solidarity as discussed above, while others could question the predictive strength of the argument as a whole. Examples of specific criticisms could be (4.1) the problem of the blending aspect is circumstantial and can be counteracted with better tools for distinguishing between "legal" and "illegal" immigrants; (4.2) the problem of the moral aspect overlooks the possibility that weakening solidarity with foreigners can actually strengthen solidarity with co-members and even enable the enlargement of the group of co-members; and (4.3) the problem with the

polarizing aspect treats dissensus as a source of social fragmentation that should be avoided, instead of embraced it as a sign of acceptance of a plurality of views. I will take these objections seriously and briefly respond to each of them, before exposing the general objection to the argument as a whole.

4.1 Objection to the blending aspect

In principle, better tools for distinguishing between “legal” and “illegal” migrants in practice would certainly help to restrict the politics of criminalizing solidarity to its intended goal of reducing the facilitation of illegal and only illegal immigration. For this to happen, the definition of illegal immigrants provided by the authorities would not only have to be capable of clarifying the meaning of “illegal immigration” in theoretical terms, but also, more importantly, make this theoretical definition somehow useful for enabling the identification of illegal immigrants in a variety of real-world circumstances. There would, of course, never be a perfect match between theory and practice, but in order to attempt to decrease the distance, the theoretical definition would have to be either meticulously complicated or dangerously oversimplified. Is a child brought to the EU illegally an illegal immigrant? Is an asylum seeker who is not yet able to apply for asylum, due to the limitations of a state’s capacity, an illegal immigrant? Is any undocumented person an illegal immigrant? Recalling that the politics of the criminalization of solidarity relies on ordinary citizens mastering these distinctions, a meticulous definition would perhaps not be so different from expecting them to master a large number of laws regulating the rights and duties of aliens. Lack of knowledge would in any case lead to the blending effect, as would an oversimplified definition.

4.2 Objection to the moral aspect

The moral aspect indicated the possibility that the politics of criminalizing solidarity would end up discharging people from moral obligations to help outsiders. This can produce an unintended negative effect concerning solidarity among EU citizens, since the citizens of different Member States are, in a sense, outsiders to each other. But it could also be the case that, as the objection claims, limiting solidarity with EU outsiders would increase solidarity among EU members. As one of the EU’s main objectives is the creation of an area of freedom, security and justice for itself and not the entire world, this effect could even be desirable. These two possible effects, the negative and, say, the “positive”, are, however, not exclusive. Both can happen at the same time at different levels up to a point where one prevails over the other. While the EU is a community with its own members, it is a community of a special kind. EU integration relies on deepening and strengthening solidarity across Member States and among the citizens of each

of these Member States, while preserving diversity of culture and of national identities and respecting the public authority of the Member States' institutions at all levels (Bonde, 2009). This means that the creation of an area of freedom, security and justice within the EU territory as a whole depends on its capacity harmoniously to create cohesion in light of its diversity. In honouring these multiple commitments, EU citizenship is not supposed to erase national citizenships and other forms of identity, but to respect, protect and even promote them. This means that the link sustaining peoples under this label of European citizenship depends, in a sense, on a link of solidarity with "foreigners" as well. Even if these "foreigners" are, in a sense, "less" foreign than someone from outside the EU, they are still non-members of the state community where the ties are supposedly stronger. The politics of criminalizing solidarity with immigrants therefore has the potential to become a symbol of the EU's failure to cultivate cohesion based on diversity.

Furthermore, the problem lies in the moral twist in itself, and whether this twist will cause negative or positive, unintended or intended, consequences. While we can largely disagree about the extent to which we have a moral duty to help foreigners, it should still be considered morally wrong to deny help in a situation of critical need. Helping refugees and asylum seekers to escape and giving them a chance to rebuild their lives is the minimum standard for a moral duty to help. Ignoring this must entail a loss of humanity and civility.

4.3 Objection to the polarizing aspect

I agree that dissensus, in general, can either be a source of conflict and social fragmentation that should be avoided or, as stated by the objection, a sign of the acceptance of a plurality of views that should be embraced. If the latter were also a possibility in this case, the polarizing aspect of the politics of criminalizing solidarity as described above would, according to the objection, perhaps not be a strong indicator of the possibility of this regulation of aid producing damaging consequences for the EU. However, while dissensus can *cause* social fragmentation, it cannot *cause* a plurality of views, but can instead only be a sign of its embracement. This means that promoting a plurality of views should be achieved by other means than by embracing dissensus in itself. For example, suppose we have three divergent groups in a society: group 1 believes "A" to be correct; group 2 believes "B" to be correct; and group 3 is indifferent. Whether, however, the co-existence of these divergences of views among the three groups would be a sign of acceptance of a plurality of views depends primarily on the way the discussants see and interact with each other. If, for instance, they respect each other as discussants (which does not require them to arrive at a final consensus), this would be a positive sign of the acceptance of a plurality of views in a society. If, however, they

disregard each other and, for instance, reject the competing positions perhaps simply because they are held by “others”, then rather than being a sign of acceptance of a plurality of views, dissensus is a sign of its rejection.

The politics of criminalizing solidarity, as we know well by now, aims at preventing non-state actors from acting in a certain way. It makes use of criminal law to impose a prohibition and restrict people’s actions. Within the context of the illustration above, it is a situation in which disagreement at the policy level makes group 1, which believes in “A”, not only disagree with groups 2 and 3, but also impose on groups 2 and 3 the obligation to act according to “A”. As such, it seems that the dissensus employed by the politics of criminalizing solidarity cannot possibly be a sign of acceptance of a plurality of views in a society, but only of its rejection. In fact, it even seems to consist in an attempt to erase any plurality of views, which, in a situation in which the disagreements remain, could only lead to social fragmentation.

4.4 General objection

The final objection that I want to discuss here is the one I labelled “general”, for it attacks the predictive force of the argument as a whole. According to this objection, it is a weakness of this argument that it artificially singles out the politics of criminalizing solidarity from a large and robust body of laws and complex conjuncture. Thus, even if it turns out to be the case that the politics of criminalizing solidarity produces and reinforces unintended and damaging consequences for the EU, as the argument advanced in this article has indicated, other laws, regulations and policies set in motion by the EU could compensate and correct for these negative effects. In this sense, the predictive force of the argument would be limited by its failure to take into account other relevant factors in determining whether the negative impact of the politics of criminalizing solidarity would be significant for the EU project overall.

Here, I am willing to accept that the argument could be said, in this sense, to be limited, but not that this limitation affects the plausibility of its conclusion in a negative way – for two reasons. First, it was never the goal of this article to draw up a comprehensive picture, infer likelihood, and conclude with a straightforward prescriptive approach. The goal was rather to draw attention to the possibility that the politics of criminalizing solidarity might produce and reinforce unintended consequences and that, given its design, some of the unintended consequences might even be damaging for the EU. Second, this article does not argue that the damaging consequences for the EU would be enough to, say, dismantle it, but only that they might contribute to its weakening. The argument advanced in this article rather indicated that if, however, the EU fails to compensate or correct for these damaging consequences through additional means, their

impact could be greater. The approach is, in this sense, more evaluative than prescriptive. However, we still have two reasons to think that the argument advanced in this article can actually be stronger in the normative sense than initially suggested.² One of them is that, depending on the context, perhaps the most efficient way of preventing the damaging consequences of a piece of legislation is not by correcting or balancing them with additional regulations, but by modifying or removing the piece of legislation that creates the need for remedial action. The other reason, more specifically related to the regulation of aid challenged in this article, is that its decontextualization from a large and robust body of laws and conjuncture might actually minimize its consequences instead of overrating them. This is because, although there are laws and policies aimed at improving integration between immigrants and citizens in Europe, there are also several laws and policies aiming at (administratively) criminalizing immigration in itself. It could then be the case that, if the politics of criminalizing solidarity operates synergistically with the latter, even if it opposes the former, the negative consequences identified in this article could actually be normatively stronger than argued or expected.

5. Conclusion

The aftermath of what became known as the European refugee crisis can be said to have sparked a crisis of solidarity in Europe, having introduced a gap between the motivation of non-state actors to help and its enforcement at the state and supra-state levels. Although many demonstrations of solidarity with refugees and asylum seekers were made by EU citizens and residents, alongside humanitarian organizations, what they saw as an exercise of their duty to help other human beings was transformed into something illegal. EU regulations and the Member States' policies were tightened to ban such solidarity. Saving people from drowning in the Mediterranean Sea, giving them shelter or a lift, or simply distributing food and water at detention centres or refugee camps became a crime in certain circumstances. As a result, individuals accused of human smuggling, facilitation of illegal immigration and trespassing, among other things, have been arrested, prosecuted and fined. Moreover, the work of humanitarian organizations has been curtailed and closely monitored.

The critical term that emerged among migration supporters and activists to refer to this conjuncture was “criminalization of solidarity”. In order to include this term in the academic debate, this article started by disclosing the embedded claims present in the rhetorical usage of the term. The term “criminalization of solidarity”

² I thank an anonymous reviewer for these suggestions.

was seen as incorporating a critique of the criminalization of humanitarian assistance, as well as its impact on the underlying morality of the people. The term proposed for referring to these aggregated critiques was “the politics of criminalizing solidarity”. The article then scrutinized the design of the politics of criminalizing solidarity and its consequences. It was argued that at least three aspects of the politics of criminalizing solidarity – the blending aspect, the moral aspect and the polarizing aspect – plausibly indicate the possibility that regulating the aid in question will produce consequences for the EU that are not only unintended, but also damaging.

The effects that these three aspects supposedly produce in order to make the politics of criminalizing solidarity achieve its goal of reducing illegal immigration are the same ones capable of producing unintended and damaging consequences for the EU. Therefore this article called for a more careful evaluation of this strategy. By way of analogy, for summarising the rationale of the argument, we can think of a situation where someone obtains a gun to protect himself against theft. This person might have managed, with the help of the gun, to scare away some suspicious people that he believes would otherwise have stolen his wallet, but ended up shooting his own foot instead. In addition to the pain and the costs of treating the injury, this would have made him unable to work for some time and he would have ended up losing more money than he had in his wallet when the suspicious people approached him. This accident could have been avoided with better planning and by having a better overview of the possible consequences beyond the intended one. If, despite his mistake, he is adequately supported by a well-functioning system that provides him with healthcare straight away, he will suffer less damage than would otherwise be the case. If, on the other hand, he is not the only one failing to plan properly and, for instance, the hospital has failed to account for the number of emergencies, thus delaying his treatment, then the damaging consequences will probably have an even worse impact.

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