

Unsustainable Migrant Policies in the French Legal System

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Introduction

Human trafficking and smuggling are ancient practices that have experienced rapid growth in recent years with globalization, but, above all, due to the development of organized crime networks.¹ This paper argues that Criminal Law takes into account the particular nature of these offenses, their specific motive, and mainly seeks to aggravate the repression.

And yet it could be argued that repression isn't the only way to reduce migrant crime. Migrants might not fall into crime if they were easily integrated into society. If specialization of the Criminal Law is indeed needed it is because most of the current migration policies in France doesn't take into account illegal immigrants who therefore find themselves isolated and without enough resources to survive. As for the legislations and measures that do exist, the migrants are not made aware of them and subsequently they do not profit from them.

Also, the criminal procedure authorizes a specific regime to combat human smuggling that deviates greatly from ordinary law, to increase the efficiency of the investigation. Furthermore, the specialization of judicial actors allows them to have a better knowledge of the repressive texts to be applied. This specialization was accompanied by a reinforcement of the technical and legal means at the disposal of the investigators, with the aim of identifying and effectively repressing organized offenses such as human smuggling.

Following this approach, the present article is classified in two main parts, each of them focusing on the most central features of the French justice system. The first part sets the scene by discussing the core notions of migrant's rights and their integration in society (I), while the second part is dedicated to the complex issues raised by strategies of investigation procedure against human smuggling (II).

I. Being a migrant in France

A. Over-pressured integration policies

If migrants and refugees are supposed to be given priority over social housing, due to an over-pressured urban environment and limited funding to build or renovate places, it is often difficult for them to find a place to live, especially if they have children. They are compelled to stay with friends or family if they have

¹ TOSUN, L., 2011, *La traite des êtres humains: étude normative*, Droit, Université Grenoble Alpes, pp. 11-12.

any, or are often regrouped with people of the same nationality in a residence, which does not facilitate future social integration or the learning of French.²

And yet language practice is peculiarly important since there are nearly no university courses in France taught in English, for instance. Refugees and asylum seekers can freely obtain the student statute if they register as French learners, but it takes at least one or two years to obtain the qualifications, and by then a huge number are discouraged and taking jobs with no connection to their skills instead of continuing their studies.³ This is especially infuriating because the majority of migrants in France currently hold a degree but are unable to prove this, or have a degree that is not valid in France.⁴

The health policies are no better. In principle, universal health coverage has been instituted in France since 1999, but this has changed with a law from March 7, 2016 which excludes persons waiting for a proper residence permit. This law also admits the cancellation of former decisions allowing residence permits for medical reasons.

The AME (State Medical Help) – a measure specifically designed to help illegal immigrants – does exist, but it appears that, due to a lack of information, 80% of migrants in France in 2016 didn't benefit from it.⁵

These State policies are complemented by civil and NGO interventions but their means of action are often limited as well, sometimes because of a lack of communication with the national administrative tools. Indeed, the ideals of social support are often contradicted by the administrative and management set of rules put in place by public donors.⁶

NGOs are competing for calls for tenders, and therefore are less prone to interorganizational solidarity.⁷ They have to adapt and propose new alternatives and more economical solutions, sometimes to the discredit of the cause they represent. Organizations may be forced to merge, often despite having very different perspectives. It empowers them to advance financially in order to implement their action prior to receiving any funds. Poverty is fought here with a mercantile logic.

2 RICHARD, J-L., 2009, « Diversité, représentation statistique et intégration en France: réflexivité et approches pluridisciplinaires au cœur du débat », *Migrations Société*, vol. 122, no. 2, p. 209.

3 DARES ANALYSES, 2018, « Les réfugiés en France: des travailleurs étrangers presque comme les autres ? », no. 037, Août, *Ministère du Travail*.

4 OCDE, 2007, « Adéquation entre formation et emploi : un défi pour les immigrants et les pays d'accueil », dans *Perspectives des migrations internationales 2007*, Éditions OCDE, Paris.

5 DEFENSEUR DES DROITS, 2018, *Exilés et droits fondamentaux, trois ans après le rapport Calais*. Défenseurs des droits, décembre, p. 76.

6 PETTE, M., 2014, « Associations: les nouveaux guichets de l'immigration ? Du travail militant en préfecture », *Sociologie*, vol. 5, no. 4, p. 415.

7 RYFMAN, P., 2014, VI. « De la diversification des financements à une concurrence accrue », Philippe Ryfman (éd.), *Les ONG. La Découverte*, p. 61.

The funding is less important, and it also appears that the objectives of the missions are controlling the migrant populations more than providing actual support and accompaniment. And when NGOs do adopt strong policies, they are either decried or used as justifications for the State to not get more involved in complicated matters,⁸ notably giving help to illegal immigrants.

B. Illegal immigration and its consequences

The rules concerning the comings and goings of foreigners over the national territory are different and depend on the nationality of the immigrants.⁹ Illegal immigration has diverse forms: an illegal entrance can be followed by regularization or be just a transit through another country.¹⁰ There are also cases of illegal residence which were preceded by a perfectly legal entrance into France. It is estimated though that 90% of illegal immigration in Europe is caused at least at one moment by some kind of smuggling.¹¹

Human smuggling is strongly associated in the public mind with a spiral of sinking boats, violence and crime. Smuggling is not only about entrance and exit; it influences the whole living conditions of those caught in it. Indeed, 303 smuggling networks were apprehended in 2017: 139 were focused on helping irregular entrance, while 62 were dedicated to provide work-force for non-declared jobs.¹²

The impact of these networks on migrants' lives is twofold. First, smuggling is actually advertised to some foreigners as a proper opportunity, the only possible way to have a better and richer life in France.¹³ Rare are those who agree to go this way knowing the full extent of the risk and danger they are going to face. This influence is real because some migrants would not have thought to leave their original country had they not been contacted by some smugglers.¹⁴

8 DAADOUCI, C., 2017, « Travaillleurs sociaux precarisés, étrangers maltraités », *Plein droit*, GISTI, n.º 112, p. 2.

9 DECAUX, E., 2009, *Les formes contemporaines de l'esclavage*, Les livres de poche de l'académie de droit internationale de La Haye, p. 18.

10 VAZ CABRAL, G., 2006, *La traite des êtres humains, réalités de l'esclavage contemporain*, La découverte, p. 7.

11 EUROPOL-INTERPOL, 2016, Joint report, Migrant smuggling networks, executive summary, p. 2.

12 Antoine Peillon, 2018, « Passeurs », Les nouveaux esclavagistes, La Croix, p. 4.

13 LAUWEREYS, S., « En 2016, le business des passeurs de migrants s'élevait à 7 milliards de dollars », *Le Parisien*, 10th July 2018, URL: <https://www.leparisien.fr/societe/en-2016-les-passeurs-de-migrants-ont-touche-7-milliards-de-dollars-10-07-2018-7814781.php>

14 UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2020, *Global report on trafficking in persons*, p. 15.

Moreover, using smuggling services is very expensive. The people who choose this opportunity all have at least an average income in their original country, but they are often dispossessed of most of their savings, which places them in a state of vulnerability when they arrive in France.¹⁵

That's why illegal immigrants are the preferential victims of this new "modern slave trade". They are threatened by the very persons who put them in the situation to be denounced to the French authorities. They lack valuable prospect and are forced to get non-declared work – often in building and cooking businesses – some migrants go one step further and try prostitution, counterfeiting or selling drugs.¹⁶ This of course creates insecurity for them, but also does so for others, and crime networks are largely expanded thanks to that.

The anxiety of being discovered hinders illegal migrants to take measures to free themselves or to try to get their legal situation in order by contacting NGOs.¹⁷ They are isolated and feel disregarded and cannot therefore access the integration policies available to legal immigrants and refugees.¹⁸

Interpol has estimated at 5 to 6 billion euros the annual revenue created by this exploitation in 2015.¹⁹ Smuggling networks have developed into veritable industries of crime with very rigorous strategies. The managing, accounting and money transfers are often organized through different countries, which makes them very hard to follow.²⁰

Human smuggling is the second most profitable criminal activity in the world after drug trafficking,²¹ and it is undeniable that it creates a huge discrepancy in the safety and economy of the receiving countries.²² Smuggling networks are therefore a true danger for the illegal exploited immigrants, but also for the State that is prevented from controlling and establishing efficient migration policies.

Although human rights concerns may have provided some impetus or cover for collective action, it is the sovereignty-security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts.

15 UNITED NATIONS, 2019, *Le trafic illicite de migrants dans le contexte plus large de la migration et de ses facteurs*, Education pour la justice Série de modules universitaires, Vienne.

16 UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2020, *Global report on trafficking in persons*, p. 11.

17 COUR DES COMPTES, 2004, rapport public particulier, *L'accueil des immigrants et l'intégration des populations de l'immigration*, p. 194.

18 SENAT, Rapport de commission d'enquête n.º 300 (2005-2006) de Georges Othily et François-Noël BUFFET, fait au nom de la commission d'enquête, déposé le 6 avril 2006, url: https://www.senat.fr/rap/r05-300-1/r05-300-1_mono.html#toc112.

19 EUROPOL-INTERPOL, 2016, Joint report, *Migrant smuggling networks*, executive summary, p. 2.

20 BASILIEN-GAICHE, M., 2011, « La lutte contre la traite des êtres humains: directive communautaire, contentieux européens et impasse française », *Revue de l'Union Européenne*, pp. 8-9.

21 RESCUE AND RESTORE, 2012, *Human trafficking fact sheets*, p. 1.

22 EUROPEAN COMMISSION, 2015, *A study on smuggling of migrants*, Final Report, p. 92.

Wealthy states are increasingly concerned that the actions of traffickers and migrant smugglers may interfere with orderly migration and facilitate the circumvention of national immigration restrictions.²³ Evidence of organized criminal involvement in trafficking and migrant smuggling operations has provided affected states with additional incentives to tackle organized crime like smuggling.

In order to prevent these constantly expanding criminal activities, the French legislators have developed new solutions to fight smuggling activities.²⁴

II. Legal tools to combat smuggling

Smuggling is defined by the Palermo protocol and taken up by various international and European instruments. French law defines it in article 225-4-1 of the Criminal Code as: “Human trafficking is the recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour. Human trafficking is punished by seven years’ imprisonment and by a fine of €150,000.”

Human trafficking and smuggling are often difficult to detect and prosecute. The convictions of the offender of such offenses obviously exist, but some offenders successfully escape convictions due to the lack of evidence. This could give rise to a feeling of impunity in public opinion. Indeed, there seems to be a two-speed justice. The first is very fast, stern, and concerns many “daily” offenses. These offenses are simple and the evidentiary issues rarely arise, as the facts often appear blatant. The second concerns human trafficking offenses where judicial time is much longer, because the nature of these offenses requires a thorough investigation and important means of investigation. The question of proof arises almost systematically. And in practice, the number of relaxes, due to lack of evidence or to some fault in the procedure, is automatically larger.

But this difference of fact between ordinary and human trafficking offenses is due to the very specific nature of these offenses, which are very difficult to prove and therefore to pursue. To effectively search for evidence of the offence of

23 BOURGEOIS, B., 2012, « Les infractions pénales réprimant le phénomène de la traite des êtres humains à des fins d'exploitation par le travail », AJ Pénal, p. 205.

24 LAURE, M., GAINCHE, B., 2011, « La lutte contre la traite des êtres humains: Directive communautaire, contentieux européen, et impasses françaises », *Revue de l'Union européenne*, p. 5.

trafficking of human beings, it is necessary for law enforcement to use effective tools. Consequently, effective means of combatting this offense have been put in place in French law.²⁵

A. The specialization movement of the criminal justice system against smuggling

One procedural means that can be used in the fight against trafficking is the use of joint investigation. The purpose of these joint investigation teams is to intervene in complex procedures linked to organized crime.²⁶ Thus, an investigation carried out only on a national territory would be irrelevant since these networks cross borders both humanly and financially. The specialization movement seeks to eliminate “safe havens” where organized criminal activities or the concealment of evidence or profits can take place, doing this by promoting the adoption of basic minimum measures in order to combat transnational organized crime more effectively.²⁷

It is article 695-2 of the Code of Criminal Procedure which allows the creation of these joint investigation teams: “Where there is need to carry out, in the context of a French prosecution, either complex inquiries involving the mobilization of extensive resources and which concern other member states, or where several member states are carrying out inquiries into offences which call for coordinated and concerted action between the member states concerned, with the prior agreement of the Minister of Justice and the consent of the member state or states concerned, the competent judicial authority may create a joint investigation team. Foreign agents seconded by another member state to a joint investigation team may, within the limits of the powers conferred on them by their role, and under the supervision of the competent judicial authorities, have to carry out their mission appropriately over the whole national territory”.

1) Specialization of criminal jurisdictions

The specialization of criminal justice has led the French legislature to specialize certain jurisdictions and judicial actors. In the jurisdictional organization of the 1970s, the specialized jurisdictions created by the law of August 6, 1975

25 JAKSIC, M., 2016, *La traite des êtres humains en France: de la victime idéale à la victime coupable*, CNRS éditions, p. 8.

26 French Code of Criminal Procedure, Article 706-73.

27 DUMOULIN, L., 2014, « Lutte contre la traite des êtres humains: l'approche financière en question », *Revue de science criminelle et de droit pénal comparé*, p. 317.

appeared to be very innovative. This specialization movement continued as the legislator reformed. But as it is proven to be effective, this specialization may seem to have some unnecessary complexities.²⁸

There are specialized interregional jurisdictions in France. They were created by the law of March 9, 2004 and replaced the first specialized jurisdictions created by the 1975 law. There are eight of them in France and different branches in Bordeaux, Fort-de-France, Lille, Lyon, Marseille, Nancy, Paris, and Rennes.²⁹ They are in charge of most of the criminal offenses in smuggling matters, provided these are of “Great Complexity”.³⁰

Some people prosecuted before these specialized courts have attempted to have the proceedings annulled on the ground that the case in question did not have the character of “great complexity”. However, this argument is doomed to failure because, in a pragmatic concern to secure procedures, the Court of Cassation (the highest court in France) ruled that the parties could not challenge the character of “great complexity” before the judge.³¹ In fact, the assessment of this condition is the sole responsibility of the judicial authority and cannot be contested by the parties.

The National School of the Judiciary has set up specific training courses in the form of practical internships in specialized interregional jurisdictions or jurisdictions and aims to deepening their knowledge. Otherwise, the assessment of the skills of the magistrates who have to deal with smuggling issues is often casuistic, depending on the training and experience of each one.

2) Specialization of judicial actors

One of the main obstacles to effective action against transnational organized crime, including both trafficking and migrant smuggling, has been the lack of specialized actors and investigative means. The improvement in the handling of highly complex cases regarding smuggling issues involved placing new means, including human resources, at the disposal of the jurisdictions.

In response to an old and recurring demand of the practice, the law of July 2, 1998 came to create the function of specialized assistants, whose role is to assist specialized magistrates in their tasks. These specialized assistants are usually appointed officials who have particular expertise in certain areas. These areas can be legal or technical. They have full access to the file and may attend

28 *Ibid.*

29 PRADEL, J., et DALLEST, J., 2012, *La criminalité organisée: droit français, droit international et droit comparé*, LexisNexis, Paris, p. 187.

30 French Code of Criminal Procedure, Article 704.

31 French Court of Cassation, Criminal Division, June, 26, 2001, No. 00-86.526.

the interrogations, the search, and all investigative actions organized by magistrates. Their study is a precious help for the judgment day for the judicial authority. However, they have no jurisdictional power. Prior to the exercise of their activity, the specialized assistants are sworn in. Given the complexity of the files and the significant workload of the training firms in particular, resorting to the service of these specialized assistants is frequent. The specialization of the French criminal justice system makes it possible to implement specific tools designed to enhance the efficiency of the repressive of offenders.

B) Expanded judicial investigation tools

The Code of Criminal Procedure devotes a whole chapter to the broad powers of investigation conferred on police officers and magistrates in human smuggling issues. These means of investigation come from those used in organized crime. This procedure has been justified because this delinquency has been considerably organized, complex and internationalized. Indeed, the legislator wished to make a gradation of these means of investigation according to the type of offense concerned.

In general, the investigative powers conferred on investigators in smuggling matters are exorbitant, since they are also used in the fight against organized crime. As such, investigators can conduct physical surveillance, which can be conducted throughout the national territory, and infiltration (delinquent networks, for example). Infiltration is the surveillance of people suspected of committing a crime by posing as one of their co-perpetrators, accomplices or concealers. Investigators will then be authorized to tap phones, recording sounds or capturing images in certain places or vehicles, as well as collecting computer data.³²

In the interest of effective law enforcement, the law of December 6, 2013 provides for the possibility of ordering an arrest for human smuggling offenses under the same conditions as in the case of organized crime, that is, for a maximum of 96 hours and with possible postponement of the intervention of a lawyer for a maximum period of 48 hours, in case of special circumstances that justify it.³³

However, the French Constitutional Council has ruled these provisions contrary to the Constitution. It has in fact held that some of the offenses, which are in themselves capable of impairing the security, the dignity or the life of people. It, therefore, considers that restoring to custody according to special terms

32 POTASZKIN, T., 2014, *L'éclatement de la procédure pénale; Vers un nouvel ordre procédural pénale*, Lextenso, Paris, p. 181.

33 French Code of Criminal Procedure, Article 706-88.

constitutes a disproportionate interference with fundamental rights of people to the aim pursued by the legislator.³⁴ Thus, the legislator has the possibility of conferring more investigative powers on investigators, provided that this does not violate the fundamental rights of suspects.

In practice, a form of reluctance is observed to verify the conviction as trafficking in human beings, which is the result of various magistrates. Indeed, the examining magistrates, in their order for referral, make little references to the offense of human trafficking. Moreover, even when the offense of human trafficking is retained, the punishment is not necessarily severed. “The penalties range from one to twelve months’ imprisonment, most often with a suspended sentence.”³⁵ This lack of effective repression of human trafficking by France has led to its conviction before the European Court of Human Rights on several occasions. This was the case in the Siliadin judgment on July 26, 2005.³⁶ In this judgment, the Court recognizes that States have an obligation to effectively repress forced labour and servitude under Article 4 of the European Convention on Human Rights. Thus, States must “adopt provisions in criminal matters which punish” the acts of trafficking.³⁷ Following this judgment, France was condemned a second time for lack of the legislative and administrative means to effectively combat servitude and forced labour, prohibited by Article 4 of the European Convention on Human Rights.³⁸ Despite this regrettable finding, it should nevertheless be noted that the number of convictions handed down under article 225-4-1 of the Criminal Code is increasing. Indeed, for the year 2009, there were no convictions for human trafficking, while there were 28 in 2014 and 127 in 2016.³⁹ Despite an improvement in law enforcement in recent years, convictions for the offense of human trafficking still remain low.

Conclusion

The French State is implementing integration policies in order to deal with its immigrants, but those practices are often insufficient, sometimes inadequate, notably because of illegal immigration. The various governments have therefore

34 French Constitutional Counsel, December 4, 2013, No. 2013-679 DC.

35 BASILIEN-GAINCHE, M., 2011, « La lutte contre la traite des êtres humains: directive communautaire, contentieux européen et impasses françaises », *Revue de l'Union européenne*, p. 8.

36 CEDH Siliadin contre France, 26 juillet 2005, n.° 73316/01.

37 CEDH Siliadin contre France, 26 juillet 2005, n.° 73316/01 point 89.

38 CEDH C.N et V contre France, 11 octobre 2012, n.° 67724/09.

39 SENAT, 2016, *Traite des êtres humains, esclavage moderne : femmes et mineur-e-s, premières victimes*, Rapport d'information du 9 mars 2016, www.senat.fr.

grasped the need to create a legal qualification enabling human trafficking to be prevented and dealt with in a uniform manner, regardless of the country of commission. This specific offense, in connection with organized crime, requires appropriate care.

The globalization of human smuggling related to the development of information technology, communication and transportation has created new opportunities for offenders at national and international levels, threatening human dignity, moral values and serving as an obstacle to the country's sustainable development in the long run. For this reason, all governments seek to identify the real causes of human trafficking offenses in order to support the fight against it and foster socioeconomic order and security by enacting regulations in this regard. Today, human trafficking crimes are one of the most important challenges faced by the international community, and France, like other countries, is grappling with this problem.

Considering the characteristics of the perpetrators of such crimes and the method of committing misdemeanours, there are many complexities to detect and prosecute, which have made the traditional criminal justice system incapable of an effective combat; therefore, the criminal policy of different countries has shifted towards specialized/differentiating the system of coping with human trafficking crimes offenses. In order to make it efficient to detect and prosecute these crimes effective judicial treatment of offenders, the French legislator has designed a special regime that is very distinct from the conventional handling system. Since the 1980s, the first manifestations of differentiation and specialization have begun and, since then, many changes have been made in the detection, prosecution and investigation of these crimes. The establishment of dedicated judicial authorities to investigate and expand the tools of judicial investigations is one of the significant actions of the French legislature. It must also be emphasized the importance and necessity of establishing a judicial police specializing in the discovery and preliminary investigation of human trafficking crimes – and the institutionalization/regulatory interaction and cooperation of effective agencies and institutions for committing human trafficking offences with the police-judicial force in the French legal system.

It is still early to evaluate the concrete results of such measures, but the legal repression of human smuggling in France is currently one of the most evolved systems in the European Union, and has helped to considerably reduce smuggling activities. The current existence of international joint teams might as well inspire other Member States of the European Union to create specialized jurisdictions and training for their law enforcement officers.

However, considering the ever-expanding networks they are fighting, such repression is going to be needed for a very long time, using many resources;

resources which are therefore not employed in the integration policies of migrants. So, if by all means such repression is laudable, it is not enough to ensure comfort and protection to the immigrants, and more funds need to be allowed to other migration policies.

Criminal activities only exist because they provide what is lacking using only legal means. The national repression of human smuggling and trafficking in order to be truly efficient needs more integration policies in France to stop the flow of potential new recruits.

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- tive communautaire, contentieux européen, et impasses françaises », *Revue de l'Union européenne*.
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