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Undocumented Migrants in Resistance against Detention: Comparative Observations on Germany and France

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Undocumented Migrants in Resistance against Detention: Comparative Observations on Germany and France

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Abstract:

Although the immigration policies of Germany and France share a similarly restrictive approach, the manner in which migrants protest against such policies and resist against their implementation is strikingly different. This is particularly obvious for undocumented migrants. In France, collective action of undocumented migrants has received increasing public attention over the last two decades, and detention centres have been a foremost target of such action. Resistance against detention prior to deportation culminated in achieving the closure of the country's biggest detention centre in 2008. To the contrary, undocumented migrants have hardly ever protested against their condition in Germany. Although collective action against immigration policies has reached a new level with the "Refugee Tent Action" occupying public space in Berlin and elsewhere since 2012, it continues to focus mainly on the living conditions of asylum seekers, not undocumented migrants. This discrepancy may be explained with the existence of different institutional conditions for collective action, i.e. such political opportunity structures that refer to state regulations and measures. A comparative analysis of these conditions shows that weaker resistance against immigration detention in Germany may be due to the existence of comparably more repressive and controlling immigration laws, a flexible toleration status that provides its holders with basic social security, and the scarcity of options for legalisation. The combination of harsh repression and little prospect for legalisation makes resistance appear much riskier. The risks are greater yet for holders of a toleration status since its delivery is, to some extent, subject to administrative discretion. The toleration status thus tends to divide the people susceptible to engage in collective action. The knowledge of these differences may help undocumented migrants and their supporters in both countries to develop more effective strategies of resistance against restrictive policies.

Keywords:

Undocumented Migration – Immigration Detention – Collective Action – Germany – France

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1. Introduction

Research on social movements has dedicated some attention to undocumented migrants and tried to determine the factors that condition and influence their collective action to overcome the difficulties arising from their situation.¹ One approach described political opportunity structures, i.e. “consistent - but not necessarily formal or permanent - dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure”.² As this definition encompasses a wide range of aspects, several authors tried to systematise it. *McAdam et al* identified four elements of political opportunity structures, “the relative openness or closure of the institutionalised political system, the stability of that broad set of alignments that typically undergird a polity, the presence of elite allies, the state's capacity and propensity for repression”.³ *Michels* distinguishes between institutional conditions, the presence of allies and supporters and politico-cultural conditions. Following this distinction, politico-cultural conditions include prevalent conceptions of democracy and pluralism, conflict culture and political style, whereas institutional conditions include state regulations and measures related to immigration, asylum and citizenship, corresponding control mechanisms and rules for political participation.⁴

The latter distinction provides the frame for an analysis of the institutional conditions for resistance against immigration detention in Germany and France. For the purpose of this article, the notion of immigration detention will be restricted to detention prior to deportation, excluding other forms of detention related to immigration, i.e. closed centres and camps for asylum applicants, privation of liberty during fast-track procedures (for instance in airports) and enforcement of criminal sentences for breaches of immigration law. Resistance will be understood as any strategy to avoid and oppose detention. A comparison between Germany and France is particularly interesting because – as will be shown – resistance is relatively weak in Germany and relatively strong in France, although both countries share political systems based on democracy and the rule of law and embedded in the framework of the European Union, an active civil society, comparably large numbers of undocumented migrants and strong migrant communities. A comparison of the institutional conditions for resistance against detention in both countries provides a (partial) explanation of these differences.

2. Resistance against detention in France

Although there are examples of political protest by undocumented migrants in France since the 1970s,⁵ the emergence of a social movement is linked to the adoption, in 1986 and 1993, of tighter immigration laws which, among other measures, restricted family reunion and legalisation possibilities.⁶

On March 18th, 1996, several undocumented migrants occupied St Ambroise Church in Paris

¹ Ferenczi *et al* 2011: 71-72; Schwenken 2006: 38-45, 143-156.

² Tarrow, quoted after Schwenken 2006: 38.

³ *McAdam et al* 1996: 10.

⁴ *Michels* 2010: 25-29.

⁵ Ludwig 2008: 77.

⁶ *Blin* 2010: 67-68; *Laubenthal* 2007: 63-66.

to publicise their situation and to push for their legalisation. Police evacuated the occupation on the archbishopric's request some days later. Legalisation was not obtained but several human rights associations, intellectuals and artists declared their solidarity with the movement which thus received public attention. However, without significant support from outside, around 300 undocumented migrants occupied, on June 28th, 1996, St Bernard Church in Paris and launched a hunger strike. Thanks to the benevolence of the local priest, the archbishopric tolerated their presence. Large demonstrations took place in several cities. The government, under pressure, finally evacuated the church without judicial decision, using tear gas, on August 23rd, 1996. However, 76 occupants were legalised – but four were deported. As an emblematic event, the occupation of St Bernard transformed the cause of undocumented migrants from a clandestine plight into a steady subject of public discourse and created the basis for a movement of those who self-confidently adopted the name of *sans-papiers*: several collectives and a national coordination were founded during and after the occupation.⁷

Again in 1997, the movement partially succeeded in opposing tighter immigration laws: after the Socialist victory in the 1997 parliamentary elections, the Minister for Internal Affairs issued an administrative instruction that allowed for exceptional legalisation on a case-by-case basis of around 80 000 undocumented migrants.⁸ In the following years, France witnessed frequent demonstrations, several hunger strikes and occupations (Apostolic nunciature in August 1998; Embassy of Burkina Faso in November 1998) but also an ideological divide within the movement between pragmatists who prioritised a case-by-case legalisation and idealists opposed to any trade-off on global freedom of movement.⁹ Also, the initial ethnic heterogeneity of the movement was soon replaced by smaller collectives organised along ethnic lines which up to date mark French politics.¹⁰

Sarkozy's election in 2007 contributed to place the movement in the centre of public attention again. Among other measures, numeric targets were introduced in the French immigration policy; to meet these targets, the country witnessed a dramatic increase in identity controls conducted in such a systematic way that they were soon perceived as a veritable manhunt against undocumented migrants.¹¹ As they repeatedly focussed on school children, they contributed to make the cause of undocumented migrants more visible to the mainstream society. A new provision in French law capacitated the authorities to condition family reunion to the results of a DNA analysis and thus created a public opinion widely favourable to the cause of undocumented migrants, at least in the big cities. Several collectives reactivated their struggle through demonstrations, strikes and occupations (*Bourse du Travail*,

⁷ For a detailed account of the 1996 events, see Blin 2010; Cissé 2002; Laubenthal 2007; Ludwig 2008.

⁸ *Circulaire du 24 juin 1997 relative au réexamen de la situation de certaines catégories d'étrangers en situation irrégulière*, available at: www.bok.net/pajol/concerne/circulaire.html.

⁹ The notion of global freedom of movement describes a world order in which people may freely cross borders to take residence in any place which they choose. It does not equate to the abolition of borders, since borders may be understood as demarcations for the exercise of (democratic) authority and are thus not necessarily linked to the restriction of the movement of people. Supporters of global freedom of movement essentially base their claims on the assertion that such freedom is the only solution to address global inequalities effectively and to guarantee comprehensive respect for human rights. For further reference, see, among others: Bauböck 2009: 1-31; Carens 1987: 251-273; Mau 2010: 339-361.

¹⁰ Cissé 2002: 169.

¹¹ Mucchielli 2012: 109.

headquarters of French Labour Unions, May 2008 - June 2009).¹² Many undocumented migrants have contributed to the French economy with their work and to the Treasury with their taxes and social charges and felt entitled to a right to residence in the country.

This aspect complemented the argumentation of the movement that had so far mostly focused on humanitarian considerations. Strikes were primarily directed against the government and found, in several occasions, the support of the employers. New administrative instructions allowed for a legalisation of undocumented migrants on presentation of an employment contract if they had been working in France for a specific number of years.¹³ The movement thus employed political and economic instruments alongside with legal action of allies such as the *Groupe d'information et de soutien aux travailleurs immigrés* (GISTI) which successfully challenged several immigration laws in court.¹⁴

This is the background for the subsequent observations on resistance against detention. The French movement reached the detention centres¹⁵ with Sarkozy's presidency under which their number was increased significantly. Since the creation of detention centres in 1984, individual resistance against detention and deportation as well as isolated protest took place occasionally.¹⁶ Observers noted that “the official discourse reinforced the feeling of injustice among foreigners awaiting removal while the increasing hostility of retained people made the retention centre staff more and more intractable with regard to any attempt to contest its authority”.¹⁷ This transformed isolated protest into a movement, especially in two detention centres of the Parisian region, Vincennes and Mesnil-Amelot.

In Vincennes, the evasion of a detainee in December 2007 occasioned tight security measures within the centre, perceived by many detainees as harassment. In late December, several of them launched a hunger strike and refused to regain their rooms at night, which resulted in the massive intervention of police. The general situation in France, as described above, allowed for news to spread fast outside the detention centres and into mainstream media while the government tried to minimise the importance of the events. This did not prevent the movement to spill over to Mesnil-Amelot where detainees resorted to several actions of civil disobedience: hunger strike, refusal to cooperate and to conform with internal rules, destruction of identity documents, installation of posters on windows and fences denouncing the perceived hypocrisy of the self-proclaimed home country of human rights. As a reaction, the French authorities transferred a leader of the movement to another detention centre from where he was released due to a procedural error. Another leader was deported illegally before the administrative tribunal decided on his appeal.

Nevertheless, protests continued and escalated in Vincennes. In February 2008, a staff used his electroshock weapon against a detainee within the centre facilities and injured him, thus making his hospitalisation necessary. Other detainees attempted to set fire to their mattresses.

¹² CGT 2009.

¹³ Tometten 2009: 164-166.

¹⁴ Blanchard/Fischer 2012: 28.

¹⁵ In France, administrative detention is termed *rétenion* whereas *détention* is reserved for judicial detention; however, such subtleties in vocabulary deflect from the fact that administrative detention remains one of the most serious interferences with personal liberty.

¹⁶ ASSFAM *et al* 2010: 60; Barthélémy *et al* 2009: 243.

¹⁷ Barthélémy *et al* 2009: 243 (translation by the author).

Police repression was brutal and went on for the next months, in Vincennes and other centres, despite criticism by NGOs and Members of Parliament. In this context, the death of a detainee in Vincennes, although non-imputable to French authorities, marked the final escalation: instead of informing the other detainees on the cause of death (a heart attack), the centre authorities tried to restore order through the use of tear gas within the centre facilities. This time, the attempt to set fire to several rooms was successful: on June 22nd 2008, France's biggest detention centre was completely destroyed by the flames.¹⁸ To this day, French detention centres still witness acts of civil disobedience, demonstrations, petitions, hunger strikes, arson, self-mutilation and attempted suicide directed against the conditions of detention, police violence and the lack of access to information.¹⁹

3. Resistance against detention in Germany

In Germany, social movements of undocumented migrants have been weak if at all existent. Since 1983, the Churches have granted asylum to rejected asylum seekers and people facing deportation in a considerable number of cases,²⁰ a strategy pursuing the same goals as the occupation of churches in France described above and comparable to that movement insofar neither legal system officially sanctions such action. However, the German Sanctuary Movement differs from the French movement insofar as its impulse came from the parishes, not from the migrants themselves.²¹ The Sanctuary Movement also focussed on rejected asylum seekers with a toleration status that – although not constitutive of a right to residence – prevents them from being deported and entitles them to certain social rights.²²

German civil society has generally focused on asylum-related issues and tolerated people, a feature often at odds with an approach based on the concept of global freedom of movement.²³ This is also the case for collective action by refugees within initiatives such as the *Flüchtlingsinitiative Brandenburg*²⁴, *Refugees Emancipation*²⁵ or *Women in Exile*²⁶. Other migrant associations and networks in Germany are mostly concerned with the social standing of their communities and/or the politics in their countries of origin.²⁷ It remains to be seen whether the situation has evolved with the *Refugee Tent Action*²⁸ initiated by asylum seekers from Bavaria in 2012 and supported by various groups such as the *Caravan for the Rights of*

¹⁸ See Barthélémy *et al* 2009: 233-246; Commission nationale sur les rapports entre les citoyens et les forces de sécurité, sur le contrôle et le traitement de ces rapports par l'institution judiciaire 2008: 8-10. The Vincennes detention centre opened again in December 2008, with 60 places instead of 280 (Cimade 2009: 139).

¹⁹ ASSFAM *et al* 2010; Cimade 2008; 2009.

²⁰ Hunold 2009: 132; Nagel 1995: 20-24.

²¹ Morgenstern 2003: 327.

²² Bell/Skibitzki 1998: 11; Grefen 2001: 21; Morgenstern 2003: 134.

²³ See Breyer 2011: 280-281. Exceptions include the *Kontakt- und Beratungsstelle für Flüchtlinge und MigrantInnen in Berlin*, founded in 1983 (www.kub-berlin.org), *kein mensch ist illegal!* (www5.kmii-koeln.de) founded in 1997 and several initiatives which promote access to healthcare for undocumented migrants such as the *Büro für medizinische Flüchtlingshilfe* in Berlin, founded in 1996 (www.medibuero.de).

²⁴ www.fi-b.net.

²⁵ www.refugeesemancipation.com.

²⁶ womeninexile.blogspot.de.

²⁷ Schwenken 2006: 131.

²⁸ www.refugeetentaction.net.

*Refugees and Migrants*²⁹ and *The Voice Refugee Forum*³⁰. Although it shares, at its core, claims related to asylum and the toleration status with the aforementioned actors, its march to Berlin and the subsequent (and ongoing) occupation of two of the capital's squares since October 2012 became the theatre of a broader claim for global freedom of movement and the cessation of all deportations that resemble the positions of the French *sans-papiers* movement.³¹ This similarity is even more striking not only because marches and demonstrations are instruments of protest employed in France for many years, but also because some of its members resorted to hunger strikes; moreover, supporters of the *sans-papiers* collective of Calais participated in the protesters' activities in Berlin.

Aside from the recent *Refugee Tent Action*, whose impact has yet to be assessed, two more examples for collective action of undocumented migrants are worth to be mentioned. First, *Respect*³² is a Berlin-based collective of undocumented migrant women household workers that was founded in 1998 following a European mobilisation of household workers initiated in Britain. It calls for the recognition of household work as a professional activity, the enforcement of labour rights, a secure access to healthcare and education without deportation risk and the recognition of foreign professional titles.³³ However, the movement did not raise significant public awareness so far – also because of its narrow focus and regionally limited action. Second, the *Society for Legalisation*³⁴ was founded in 2003 with support from several initiatives from the political Left with the objective to realise legalisation and freedom of movement for undocumented migrants in Germany. It participated in several demonstrations, action days and information campaigns realised with the support of other structures, but apparently disappeared in 2005.

Notwithstanding the *Refugee Tent Action*, a social movement against immigration detention rooted in the activism of undocumented migrants themselves has been improbable under these circumstances. Several local initiatives in Germany placed the struggle against immigration detention at the core of their activity but the commitment of their members has not spilt over to those susceptible to be detained so far.³⁵ There are, however, examples of civil disobedience, i.e. individual resistance against detention, although it is often difficult to distinguish between conscious disobedience and desperation. Resistance includes appeals against detention orders, vocal and written protest, hunger strikes and the refusal to cooperate with detention centre authorities.³⁶ However, it never amounted to collective action.

4. Institutional conditions as an explanation for the discrepancy between both countries

²⁹ www.thecaravan.org.

³⁰ thevoiceforum.org.

³¹ Ulu 2012: 1.

³² www.respectberlin.org.

³³ Schwenken 2006: 147-156.

³⁴ www.rechtauflegalisierung.de.

³⁵ This is confirmed by Rev. B. Fricke, Protestant pastor in the detention centre of Berlin (interview conducted by S. Münch and Z. Ferenczi, 10.02.2010), and an anonymous member of the Initiative against Immigration Detention in Berlin (interview conducted by N. Wunsch and the author, 6 January 2010), both unpublished.

³⁶ Herzog/Wälde 2004: 165.

There are only few examples for collective action of undocumented migrants in Germany and they did not have a significant impact yet. On the other hand, there is a fully-fledged movement in France which contributed to forcing the French government to change laws and regulations. Similarly, there have been isolated cases of individual resistance against detention in Germany, but neither a collective action by detainees themselves nor a wide public awareness. In France, on the contrary, the *sans-papiers* movement is closely linked to political protest within detention centres, and this protest even led to the temporary closure of the country's biggest detention centre.³⁷

This discrepancy results from significant differences with regard to the institutional conditions for collective action, as the legal framework in Germany makes it harder for irregular migrants to organise themselves.

4.1 Repression and Control

German immigration law is stricter in two crucial points: the longer duration of detention and the obligation for public administrations to convey information about undocumented migrants to the immigration authorities.

German law distinguishes between two forms of detention prior to deportation. “Preparatory detention”³⁸ applies to persons susceptible to be expelled from Germany following a criminal conviction, subject to two conditions: the decision on expulsion must be delayed for unavoidable reasons and the deportation must be significantly impeded without prior detention. This detention must not exceed six weeks and is subject to a judicial decision. The more relevant “safeguarding detention”³⁹ applies to all other deportable persons. Immigration authorities may order it for a period of six months, unless it is certain that deportation cannot take place within three months. Administrative orders are subject to appeal to the administrative jurisdictions; additionally, the administration must seize an ordinary judge with the confirmation of detention without delay, in any case before the end of the day following his/her arrest, i.e. within a maximal period of 48 hours.⁴⁰

Detention may be prolonged for another period of twelve months if the detainee frustrates the deportation. This is the case if the detainee physically resists to deportation or does not cooperate sufficiently with the administration, for example in the effort to obtain travel documents.⁴¹ The proportionality principle restricts the use of detention to the sole purpose of ensuring orderly deportation,⁴² making a detention duration of 18 months rare.⁴³ Detention in Germany is also subject to the general principle of proportionality.⁴⁴ This principle implies that the administration has the obligation – subject to judicial review – to consider alternatives to detention, provided they are as effective with regard to the purpose of ensuring

³⁷ It is not my task to judge whether the means employed are justified or justifiable.

³⁸ Article 62 (2) of the German Residence Act (*Aufenthaltsgesetz*).

³⁹ Article 62 (3) of the German Residence Act.

⁴⁰ Article 104 of the German Fundamental Law (*Grundgesetz*).

⁴¹ Duchrow/Spieß 2005: 333-334.

⁴² Ruling of the Federal Constitutional Court, 16.05.2007, 2 BvR 2106/05.

⁴³ Rev. B. Fricke mentions an average duration of detention of 6-12 weeks in the State of Berlin.

⁴⁴ The Federal Constitutional Court recognises proportionality as a constitutional principle; moreover, it is explicitly mentioned in Article 62 (1) of the German Residence Act.

orderly deportation.⁴⁵ Deportable persons must be given the opportunity to comply voluntarily with the deportation order before detention is ordered,⁴⁶ although exceptions apply to this principle. Other alternatives to detention are rarely considered in practice.

In France, detention prior to deportation is limited to a maximum duration of 45 days, unless a deportable person is criminally sentenced to an interdiction to French territory (a penalty pronounced by the penal judge without equivalent in German law) for terrorism or expelled from France for these reasons.⁴⁷ The detention order is subject to appeal within 48 hours to the administrative jurisdictions which must decide within 72 hours.⁴⁸ An ordinary judge is seized *ex officio* within five days of the detention and may prolong detention for 20 days; a second prolongation for another 20 days is subject to specific circumstances, i.e. absolute emergency, a particularly serious threat to public order or a temporary impossibility of deportation due to the lack of travel documents, the dissimulation of identity, resistance to deportation or unavailability of transport.⁴⁹ As in Germany, detention may only serve the purpose of ensuring orderly deportation so that the impossibility of deportation for a period longer than 45 days makes detention as a whole illegal.⁵⁰ As an exceptional alternative to detention, French law allows for house detention if the deportable person hands in his passport; house detention may be accompanied by electronic surveillance in specific circumstances.⁵¹

As the maximal duration of detention in France is shorter than even the average duration of detention in Germany, it is quite clear that the German system is more repressive. That Germany frequently executes immigration detention in ordinary prisons,⁵² which is not the case in France, confirms this finding. Personal liberties are generally more restricted in ordinary prisons than in specific detention centres, where detainees usually avail a wider range of means of communication and benefit from longer visit hours as well as laxer closure regulations.⁵³

In addition to that, most public administrations are under the obligation to convey information on undocumented migrants to the immigration authorities.⁵⁴ This restricts the access of undocumented migrants to public services. Only recently, hospitals and schools were exempted from this obligation; however, social welfare administrations are not, which makes it extremely risky for irregular migrants to claim their social rights.⁵⁵ This is especially

⁴⁵ Duchrow/Spieß 2005: 332.

⁴⁶ Article 62 (3) of the German Residence Act.

⁴⁷ Articles L. 551-1, L. 552-7 of the French Immigration Code (*Code de l'entrée et du séjour des étrangers et du droit d'asile*).

⁴⁸ Article L. 512-1 of the French Immigration Code.

⁴⁹ Articles L. 552-1, L. 552-7 of the French Immigration Code.

⁵⁰ Article L. 554-1 of the French Immigration Code. The duration of detention has been considerably increased from six days in 1981 to 45 days in 2011 (Blanchard/Fischer 2012: 29).

⁵¹ Article L. 552-4 of the French Immigration Code.

⁵² One may argue that this is a violation of German law, since Article 62a (1) of the German Residence Act provides that, as a rule, immigration detention must be executed in specialised detention facilities.

⁵³ Sextro/Nissen 2012: 5, 10.

⁵⁴ Article 87 of the German Residence Act.

⁵⁵ Breyer 2011: 351.

problematic with regard to healthcare. Most undocumented migrants can neither afford a private health insurance nor access public insurance given the impossibility for them to work legally. As healthcare for non-insured persons is coordinated by the social welfare administration, it is inaccessible without a risk of deportation, unless it is fully paid for or provided *pro bono*.⁵⁶ In contrast, there is no corresponding obligation for public administrations in France.⁵⁷ Undocumented migrants who are not publicly insured may thus obtain financial aid for medical purposes, the *Aide médicale d'État* being especially designed for this group of people.⁵⁸

These findings show one aspect under which the institutional conditions for resistance against immigration detention are weaker in Germany than in France: a range of instruments of repression and control directed against undocumented migrants and potentially if not systematically used against them acts as a deterrent to collective action out of fear of repression. This is especially the case for collective action against detention.

4.2 Basic social security through a flexible toleration status

The German system contains another legal instrument that acts as a deterrent to collective action and confirms the relative weakness of institutional conditions in Germany: the toleration status, a short term for “temporary suspension of deportation”.⁵⁹ More specifically, the toleration status inhibits resistance against detention in two ways: as a preliminary protection from deportation and detention, it obliterates the need to resist against such measures for its holders; concurrently, it entitles its holders to basic social benefits who may thus sense the risk – real or not – of social relegation. This second aspect is important because the toleration status – although subjectively invocable – is a discretionary and flexible instrument for the administration which is largely free to determine its duration: the toleration status may be delivered and renewed on a monthly basis for years.

The toleration status is delivered when a regional government orders the cessation of the deportation of particular groups or to specific countries or regions for a period shorter than six months,⁶⁰ or when the presence of a deportable person in Germany is considered important for the purpose of criminal prosecution.⁶¹ However, the more common case for delivery of a toleration status relates to situations where legal or factual reasons not amounting to a right to stay hinder deportation.⁶² Such reasons include the impossibility to obtain travel documents for a significant period of time, the lack of transport, the interruption of transport routes, temporary medical reasons amounting to an inability to travel and – if other conditions for the delivery of a residence permit, especially sufficient financial resources, are not met – the presence of close family members in Germany. The toleration

⁵⁶ Breyer 2011: 260.

⁵⁷ Breyer 2011: 263.

⁵⁸ Article L.251-1 of the French Code of Social Action and Families (*Code de l'action sociale et des familles*).

⁵⁹ Article 60a of the German Residence Act.

⁶⁰ Article 60a (1) of the German Residence Act. Reasons for a cessation order may be found in international law, based on humanitarian considerations or directed to safeguard political interests of the Federal Republic of Germany. Recently, cessation orders have been issued nationwide with regard to Syria and – with restrictions – to Iraq. Notwithstanding the basic protection that such orders offer to the concerned people, it must be kept in mind that deportations to these states would often be illegal anyway, given that many of the beneficiaries of a cessation order are entitled to asylum or subsidiary protection.

⁶¹ Article 60a (2) of the German Residence Act.

⁶² Article 60a (2) of the German Residence Act.

status has been criticised for the phenomenon of so-called ‘chain tolerations’ which keep people in uncertainty for years.⁶³ As a response, a fairly new legal provision now states that the toleration status should be replaced by a residence permit after 18 months,⁶⁴ but this is rarely applied.

The toleration status entitles the holder to social benefits which fall short of social benefits for unemployed persons.⁶⁵ Full access to the employment market is granted after four years of toleration; it may be permitted earlier only in the absence of applicants holding EU citizenship or an employment permit, a restriction that equals a total prohibition in practice.⁶⁶ Holders of a toleration status are, in principle, not allowed to leave the territory of the state that they have been assigned to; a breach of this prohibition constitutes a criminal offence.⁶⁷

Despite these restrictions, the situation for holders of a toleration status in Germany is better than for those who fulfil the same requirements in France, where deportation does not take place but no legal title nor any social rights beyond those granted to all undocumented migrants are available.⁶⁸ There is only one provision in French law which resembles the German toleration status: the possibility for the administration to order that a deportable person be obliged to reside in a specific area pending a preliminarily impossible deportation.⁶⁹ The maximal duration of such a measure is six months, while there is no maximal duration in Germany, but no specific (social) rights are provided with the issuance of such an order.

It might seem that considering the toleration status as one of the elements of generally weaker institutional conditions for collective action in Germany stands at odds with the finding that the German system is, under crucial aspects, more repressive and controlling than the French system. However, the combined analysis of both findings shows that this contradiction is only apparent. On the one hand, repressive instruments hinder collective action by their mere existence which results in a widespread fear of massive infringements on the right to personal liberty. This may explain the reluctance of undocumented migrants to oppose detention. On the other hand, the toleration status provides its holders with basic social and personal security which makes resistance against detention appear less urgent (tolerated people will not be detained as long as their status is valid) and riskier (because of the danger, real or not, that the state suppresses social benefits as a retaliation for undesired political action).

There are two more reasons which support that the toleration status deters collective action. One is that its creation divides the group of people without a legal residence, while collective action in France benefits from the support of such migrants who are undocumented but non-deportable for reasons that would entitle them to toleration in Germany. The other reason is that the toleration status makes administrative action appear more humane to the public

⁶³ Pro Asyl 2004.

⁶⁴ Article 25 (5) of the German Residence Act.

⁶⁵ The originally even lower level provided for in the Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz*) violated the German Fundamental Law (Judgment of the Federal Constitutional Court, 18.07.2012, 1 BvL 10/10; 2/11).

⁶⁶ Article 10 (2) of the German Employment Procedure Regulation (*Beschäftigungsverfahrensverordnung*).

⁶⁷ Articles 61 and 95 of the German Residence Act.

⁶⁸ Barthélémy *et al* 2009: 200.

⁶⁹ Article L.561-1-L. 561-2 of the French Immigration Code.

opinion: it is a tool for immigration authorities to take into account a wide range of aspects before issuing a deportation order, thereby reducing the impact of arguments against detention and deportation rooted in humanitarian considerations.⁷⁰

4.3 Options for legalisation

Legalisation options also influence collective action of undocumented migrants and resistance against detention. Legalisation is to be understood as the acquisition of a lawful residence out of an undocumented situation. It does neither encompass situations in which an applicant is not required to hold a specific visa to apply for residence,⁷¹ nor legalisation through an asylum procedure. The almost total lack of legalisation options in Germany confirms the assumption that institutional conditions for collective action are weaker there than in France.

In Germany, legalisation as defined for the sake of this analysis is restricted to two scenarios. An undocumented migrant may file a request with the Commission for hardship cases, which is established in every state and composed by government and civil society representatives.⁷² This possibility is conditioned to the prior rejection of an application for a residence permit. Following a positive decision of the Commission,⁷³ the request will be presented to the competent authority (usually the State Minister for Internal Affairs). The members of the Commission are free in their assessment of a case of hardship but the competent authority is not bound by their vote in its decision to grant an extraordinary right to residence.⁷⁴ As the Commission assesses every case individually, the hardship procedure is not designed as a basis for legalisation of a great number of people but rather as a remedy to specific circumstances. This is confirmed by the statistics: on 31 December 2012, 5968 holders of an extraordinary right to residence granted after completion of the hardship procedure lived in Germany, and 5166 among them had obtained this right more than six years earlier.⁷⁵

The other scenario – for which no statistics exist – concerns the birth of a child in Germany: Tolerated persons are not required to produce a long-term visa for the application to a residence permit, if its delivery is mandatory.⁷⁶ Mandatory delivery of a residence permit only applies in case of marriage and parenthood.⁷⁷ but only parenthood is susceptible to allow an undocumented person to obtain a toleration status in the absence of any other obstacles to deportation.⁷⁸

⁷⁰ Breyer 2011: 282.

⁷¹ Nationals from specific countries or holders of a residence permit from other EU member states may be exempted from the long-term visa requirement, see Articles 39 and 41 German Residence Regulation (*Aufenthaltsverordnung*).

⁷² See Article 23a of the German Residence Act.

⁷³ Some states require a simple majority vote, others a qualified majority vote. Hamburg requires unanimity, see Article 5 (1) of the Hamburg Law relating to the Commission for Hardship Cases (*Härtefallkommissionsgesetz*).

⁷⁴ See, for instance, the Regulation relating to the Establishment of a Commission for Hardship Cases for the State of Berlin (*Härtefallkommissionsverordnung Berlin*).

⁷⁵ Bundestag Document 17/12105, available at: dip21.bundestag.de/dip21/btd/17/124/1712457.pdf.

⁷⁶ Article 39 Nr. 5 of the German Residence Regulation.

⁷⁷ See, for instance, the Procedural Instructions of the Immigration authorities in the State of Berlin (*Verfahrenshinweise der Ausländerbehörde Berlin*), available at: www.berlin.de/labo/auslaender/dienstleistungen.

⁷⁸ The delivery of a toleration status in such a situation is not mandatory, but constant administrative practice in several German states (see, for instance, Procedural Instructions of the Immigration authorities in the State of

The conditions for legalisation in France are not as narrow. Leaving aside humanitarian aspects, the cases in which a visa is not required for the delivery of a residence permit principally include strong family ties in France, as well as birth and presence in France for a certain number of years, subject to specific deadlines.⁷⁹ Article L. 313-11 (7) of the French Immigration Code provides wider legalisation options, given its wording:

Unless his presence is a threat to public order, the temporary residence permit with the entry 'private and family life' is delivered *ex officio* to an alien not living in a state of polygamy, who does not belong to the precedent categories or to those allowing for family reunion, whose private and family ties in France, appreciated notably with regard to their intensity, duration and stability, to his conditions of existence, to his insertion into French society and to the nature of his family ties in his country of origin, are natured in a way that a refusal to authorise his residence would constitute a disproportionate infringement on his right to respect for private and family life under consideration of the reasons for the refusal, without requirement [of a long-term visa.]⁸⁰

This provision may be interpreted extensively and rejection is subject to judicial review. In 2011, 17 345 holders of a residence permit delivered on the basis of this provision alone lived in France.⁸¹

In addition, undocumented migrants may be legalised on a case-by-case basis, subject to the appreciation of the competent authority.⁸² This appreciation must take into account several aspects not determined by law but partly fixed in administrative instructions of the Minister for Internal Affairs. In recent years, these included the duration of the presence in France, the employment situation, private and family ties, school attendance of children and knowledge of French.⁸³ This legalisation option is a substitute to the former right to residence after a presence in France for ten years.⁸⁴

According to news reports, these options combined led to around 36 000 legalisations in 2012 alone, slightly more than in previous years and considerably more than in Germany.

The French system is, if not more open, at least more flexible than the German system, as it provides several possibilities for an undocumented migrant to claim a right to residence, whereas these are restricted to narrowly defined cases in Germany. This flexibility allows for another relevant conclusion: the criteria for legalisation in French law are subject to evolve, which makes them more accessible to political pressure.⁸⁵ This underlines why legalisation options are an institutional condition for the collective action and resistance against detention. If legalisation is a realistic outcome, collective action is a more reasonable struggle and the dangers it represents (because it involves making undocumented status public) are less significant in the light of its potential achievements. Similarly, the yet greater risks of resistance against detention, even through non-violent means, are more reasonable if

Berlin).

⁷⁹Article L. 313-11 of the French Immigration Code.

⁸⁰ Translation by the author.

⁸¹ Tchen/Renault-Malignac 2013: 183.

⁸² Article L. 313-14 of the French Immigration Code.

⁸³ Breyer 2011: 354; Laubenthal 2007: 61-63; Tometten 2009: 165-166.

⁸⁴ GISTI 2008: 92.

⁸⁵ Tometten 2009: 166.

legalisation is a realistic goal. Thus greater repression and control mechanisms alongside with the flexible toleration status designed to handle humanitarian cases and a narrow approach to legalisation options result in much weaker institutional conditions for collective action and resistance against detention in Germany.

5. Conclusion

Resistance against immigration detention is a characteristic phenomenon for the social movement of undocumented migrants in France but almost non-existent in Germany, which can be partially explained by differing institutional conditions. The German legal framework hinders collective action by undocumented migrants in several regards. It is more repressive and controlling but provides a more comprehensive social protection through for those granted with a toleration status, a practice without equivalent in France. This “simultaneity of opening and closure”⁸⁶ is designed in a way that tends to divide the group, contrary to France where solidarity between the different groups of undocumented migrants allows them to advocate together for a common cause. Collective action in France is also more effective because it has led, in recent years, to several legalisations and thus accomplished one of the most important short-term goals of the movement. Of course, this condition might be, at the same time, cause and consequence of resistance.

Is it therefore granted that collective action has little chance to be successful in Germany and that this analysis might, at best, provide the French government with a framework for reducing its impact? Such a conclusion would be quite disillusioning. Obviously, if this analysis proves right, France could prolong the duration of detention, introduce an obligation for public administrations to convey information on undocumented migrants to the immigration authorities and create a toleration status. But a comparative analysis may also yield to a wider reflection on the efficiency of protest and to the elaboration of stronger strategies of resistance. It is not the author's task to formulate such proposals. But he may point out that there is much to learn from a transnational approach to migration issues. And there are signs already that such an approach becomes self-evident in the struggle of undocumented migrants against detention and deportation, for freedom of movement and human rights.

⁸⁶ Schwenken 2006: 108 (translation by the author).

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