Oñati Socio-Legal Series (ISSN: 2079-5971)
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Immigrants' condition of expulsability: A comparative approach to the German and French legal framework

OÑATI SOCIO-LEGAL SERIES VOLUME 14 ISSUE 6 (2024), 1698–1722: THE INFLUENCE OF NEW TECHNOLOGIES ON LAW
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.2119
RECEIVED 27 JUNE 2024, ACCEPTED 11 SEPTEMBER 2024, FIRST-ONLINE PUBLISHED 8 OCTOBER 2024, VERSION OF RECORD PUBLISHED 1 DECEMBER 2024

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Abstract

This paper examines recent amendments to French and German immigration law aimed at accelerating and enhancing the expulsion of unwanted immigrants of the territory. The main normative changes resulting from these reforms, entailing an unprecedented retraction of legal safeguards against expulsion and significantly exacerbating immigrant's condition of expulsability, will be presented in comparative terms, without losing sight of the European dimension. Specifically, these reforms shape immigrant's expulsable presence on the territory through three aspects: an increase on the precariousness of foreigner status, a reduction of the sphere of freedom needed to lead a dignified life and an expansion of exceptionality that obliges us to reconsider our social contract to include a human-rights based approach to immigration.

Key words

Immigration; expulsion; exceptionality; expulsability; human rights

Resumen

El presente artículo analiza las recientes reformas en materia de política migratoria de Francia y Alemania, dirigidas a acelerar y mejorar el proceso de expulsión de los "inmigrantes no deseados" del territorio. El examen, en términos comparativos, de las principales modificaciones en ambos cuerpos normativos –sin perder de vista la dimensión europea– permitirá concluir cómo se ha efectuado una retracción sin precedentes de las salvaguardas legales contra la expulsión, agravando significativamente la condición de expulsabilidad de las personas inmigrantes.

Este artículo ha sido realizado en el marco del proyecto I+D+i PID2023-147896OB-I00 "Derechos humanos e inmigración: repensar la integración en tiempos oscuros", financiado por el Ministerio de Ciencia, Innovación y Universidades.
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Específicamente, estas reformas moldean la presencia potencialmente expulsable del inmigrante en el territorio a través de tres aspectos: un aumento en la precariedad del estatus de extranjero, una reducción de la esfera de libertad necesaria para llevar una vida digna y una expansión de la excepcionalidad que nos obliga a reconsiderar nuestro contrato social para incluir un enfoque basado en los derechos humanos en el tratamiento del fenómeno migratorio.

Palabras clave

Inmigración; expulsion; excepcionalidad; expulsabilidad; derechos humanos

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1. Introductory remarks

Within the framework of the 2024 European elections, amid a highly polarized political landscape, the governance and regulation of immigration emerged as pivotal elements in numerous political platforms, substantially influencing electoral debates. The terms "immigration", "refugees", and "Muslims" have increasingly been utilized as "categories of practice" (Brubaker and Cooper 2000, 4) in everyday discourse, serving both self-identification and the identification of others, and are imbued with significant stigmatizing implications due to prevailing power asymmetries. In the specific contexts of Germany and France, political parties such as "Rassemblement National" and "Alternative für Deutschland," known for their stringent anti-migration policies, have consolidated their positions as the foremost and second leading political forces respectively in the lead-up to the European elections. This tense and delicate scenario, wherein the rights of immigrants appear to be increasingly constrained, necessitates an examination of recent legal amendments in French and German immigration law to evaluate how domestic institutions are addressing this crisis-framed immigration debate.

Nevertheless, if the subject matter of the present paper is the new legal reforms that the French and German legislators have introduced concerning migration management and its impact on the expulsion regime of foreigners – being so spatially, temporally and thematically clearly delimited – it is essential to consider developments in migration policy at the European Union (EU) level in order to avoid a reductionist or impoverished apprehension of issues under consideration.[1]

Therefore, before delving into the necessary aspects to comprehend recent national reforms in France and Germany (1.2), a brief overview of European migration policy and its prospective developments concerning the Pact on Asylum and Migration (1.1) will be carried out, both detaining as a connecting thread the conformation and expansion of immigrants' condition of *expulsability* originally rooted in the Nation-state paradigm (Sayad 2008, 101), but now assuming a supranational dimension within the European Union that needs to be considered. In this sense, the condition of expulsability, pushed to its limit by two reforms of French and German migration law, must be placed in relation to the latest changes in the European migration framework, reflecting the securitarian and "crisis-thinking" (Moreno-Lax 2023, 11) trend that is installed in migration management structures at the EU level.

1.1. Contextualization of domestic law reforms in the European Union migration legal framework

From the perspective of the Nation-state, Sayad (2008, 112) stated that expulsability is contained in the very condition of the immigrant, insofar as, according to national ideology, non-national presence is deemed intrinsically illegitimate, abnormal and jeopardizing and therefore governed by "the imperative of provisionality" (2008, 103). Furthermore, even if citizenship is the category par excellence of the Nation-state, the foreigner (or the immigrant) is the second most important institution, as a negative

[1] To deeper apprehension of non-removability in the EU legal framework and the creation of "grey areas", see Queiroz 2018.

dimension of citizenship (Solanes 2016, 162), which means that although provisional, illegitimate or expulsable, the presence of the immigrant in the configuration of the Nation-state is fundamental, having also a supra-national projection in the European Union that complexifies this positioning and needs therefore to be briefly mentioned.

In this regard, it must be mentioned that protection against expulsion at the EU-level is governed by Directive 2004/38, which is primarily based on a proportionality test weighing the degree of the foreign nationals' integration into the host Member State against the imperative grounds of public order. Therefore, integration serves as a hallmark of how European societies define themselves in response to migration (Thym 2016, 90), and, accordingly, the expulsability of the immigrant is determined by his or her adherence to the values upheld by the host society.[2]

Delving into the New Pact on Migration and Asylum, that will enter into force in 2026 – except for the already applicable Union Resettlement and Humanitarian Admission Framework Regulation –, it should be noted that it is based on four main pillars: secure external borders; fast and efficient procedures; effective system of solidarity and responsibility and embedding migration in international partnerships. Even if it is considered an historic achievement for some Member States, after long years of negotiation, this agreement is far from reflecting a consensus between all Member States. Thus, 18 May 2024 a letter signed by 15 unsatisfied Ministers was sent to the European Commission (*Joint Letter*, 2024) calling for outsourcing of migration and asylum policy and a strengthening of the return policy, not only by fully implementing return decisions but also by cooperating with third countries "where returnees could be transferred to while awaiting their final removal". Nevertheless, the problem is not the absence of unanimity – which is sane in every democratic system –, but the absence of *volonté générale* in a context of extreme polarization that reflects a sort of European existential crisis to which some respond by emphasizing the need to recover their "lost place in the world", threatened by globalization, immigration, demographic decline or global warming, that subjects Europeans in a perceived condition of *placelessness* (Azoulai 2024, 5).

The fight against illegal migration under the guise of asylum claims pervades all aspects covered by the Pact and could be deemed its primary objective. The cornerstone of this endeavor is the mandatory border procedure aimed at accelerating asylum claims' assessment to determine its inadmissibility or unfounded character through a reinforcement of screening procedures in the "pre-entry" phase within a period of 12 weeks. For those who the screening (covering identity, health, security and vulnerability checks) has determined no right to entry, a return procedure is established at the border, based on the establishment of a sort of legal fiction of "non-entry" reminiscent of the illegal pushback practice (Hernández 2024, 89), permitting States to navigate their obligations under international law such as principle of non-refoulement or the right to asylum as stated by the Geneva Convention and by article 18 of the Charter of Fundamental Rights of the EU.[3] Push-backs not only occur at the Union's borders but

[2] See, f. ex., Case C-378/12 *Onuekwere,* EU:C:2014:13 or Case C-145/09 *Tsakouridis*, EU:C:2010:708.

[3] Although case law regarding guarantees against expulsion is less developed within the Union, the CJEU issued an important ruling on December 17, 2020 (*Commission v. Hungary*, C-808/18), in which it found that Hungarian authorities had flagrantly violated, over several years, EU regulations governing the guarantees

also between Member States ("internal" push-backs) which, as Moraru points out, are a reflection of an endemic lack of solidarity between ME (Moraru 2022, 158). As argued by Cassarino and Marin (2022, 2), this is a malpractice widely extended already by the "hotspot approach" but acquiring now a problematic legal validation, that challenges the classical definition of externalization via new border deterritorialization logics and suspends the rule of law through the creation of non-legally justified ad hoc, mobile and variable border (Solanes 2016, 173).

Even if asylum procedure is not the object of this paper, it is important to note that, in a context of mixed irregular flows, guaranteeing international protection for those in need is becoming increasingly complex, being possible to identify not only a sort of "endemic wish" to reduce right to asylum to its minimum expression (Solanes 2020, 32) – following the paradox pointed out by Fassin (2015, 287), according to which the more discredit falls on asylum seekers, the more the asylum institution itself gains in value – but also the purpose of plainly instrumentalizing and denaturalizing the asylum institution to restrict irregular entries. These transformations of migration and asylum regulations at the European level give a new twist to the condition of the foreigner, who is not even recognized as an immigrant – that requires border-crossing – and therefore cannot be expulsed *stricto sensu.* Instead of being object of an expulsion, this foreigner will not be directly admitted or will be returned, which is nothing but a euphemistic and distorted language perversion (De Lucas 2020, 92).

The categorization of the immigrant (as a "genuine asylum seeker", as an "economic migrant", as a "minor", etc.), which is the aim of this pre-entry screening, is also the first and major step to determine the foreigner's life path. If EU law is fundamentally a categorical legal order aimed at establishing new categories that can be superposed to the national orders and amplify the legal and conceptual field of reality, in the case of immigrants, categorization has a "totalizing" and "reifying effect" (Azoulai 2018, 521), impacting on every domain of life (family, labor, housing, etc.) and fixing immigrants' position in the European territory. This means that the screening can not only determine the impossibility to stay in European territory and the obligation to reorientate the migratory path but is also a clear portrayal of the transcendence of categories' assignment (in this case, legitimate asylum seeker) or its negation for a foreigner, that beyond categories operability dives into existential matters.

It has to be noted that if we look outside the margins of the European Union, we can identify that the United Kingdom is following the same line, with the approval of the Illegal Migration Act (IMA) in July 2023 as a great triumph of the Brexit, being now possible for the British Government[4] to put the "Rwanda scheme" (outsourcing of asylum claims to safe third-countries) in place because it could now depart from the requirements of the Qualification Directive, the Procedures Directive, the Dublin III

and procedures that Member States must follow to allow the submission of an application for international protection; to detain applicants for international protection; to expel a third-country national; and to allow applicants for international protection to file an appeal with suspensive effect against the rejection of their application.

[4] It should be noted that the change in the head of government following the July 4, 2024 elections, with a new Primer Minister, has resulted in the suspension of this plan.

Regulation and the Trafficking Directive.[5] Paradoxically, in this case, European regulations serve as a bulwark against the UK's notably stringent measures, as illustrated by a significant ruling of the High Court of Justice of Northern Ireland, which found that certain provisions of the IMA contravened the UK's obligations under Article 2(1) of the Windsor Framework (WF) and the European Convention on Human Rights (ECHR). Consequently, these provisions were invalidated in Northern Ireland for undermining rights protected by the Belfast Agreement ([2024] NIKB 35).

The internalization of externalization, meaning the separation of "territory" from "legal order" that takes place *within* the EU as a consequence of the screening procedure (Cassarino and Marin 2022, 4) needs to be complemented with a domestic and comparative law approach, that focuses on the normalization of the exceptionality that prevails on the migratory national regime. Given that both Germany and France have a predominant role in determining the principal orientations of migration policy at the EU-level, currently focused on fighting unauthorized arrivals and detecting "false" asylum seekers at the borders, emerges as essential to examine these new regulations at the national level in order to obtain an integral understanding of the approach of the European Union and its Member States in relation to (unwanted) migration management and expulsion. Both levels hold different but complementary approaches that constitute in its entirety an authentic removal *apparatus,* a network of heterogenic elements (discourses, institutions, police measures, laws, etc.), "discursive and non-discursive", at the intersection of power relations and relations of knowledge, with an strategic nature or "responding to an urgent need" (Foucault 1980, 194–195).

1.2. Initial necessary notes on the French and German legal framework

A new wave of migratory reforms and decisions is shaking the European region. This is due both to the need to adapt national legal frameworks to the European standards — particularly regarding the recast of the Long-Term Resident and Single Permit Directives — and to the aim of combatting unwanted or *suffered* migratory flows, as seen in the Netherlands (*Hoofdlijnenakkoord*, 2024), Italy (*Protocol*, 2023), Germany, and France. Additionally, the recent adoption of the Common Implementation Plan for the Pact on Migration and Asylum requires EU countries to revise their national asylum and migration laws within two years, in line with the new obligations from this agreement. As previously mentioned, asylum seekers are increasingly being included in this category of undesirables, especially after the so-called "refugee crisis" of 2015. Since then, the humanitarian approach that had dominated before began to shift, becoming ambivalent and distorted, with the asylum regime being subjected to the imperatives of control and economic efficiency that now characterize migration policies.

As will be lately developed, two fundamental reforms have been introduced in France and Germany, covering a wide range of areas (integration, permits, asylum procedure, etc.) but being possible to find in both explicit references to removal measures or expulsion mechanisms, aimed at their flexibilization, acceleration and expansion. If in the French case the reform possesses a sort of substantive nature, oriented towards

[5] Nevertheless, the execution of this plan is finding several obstacles. Among others, Whitehall union is challenging Rwanda law by making civil servants to break the law to comply with ECHR order to stop the flight.

weakening previously protected categories against an expulsion measure, in the German case legislative changes are more focused on procedural questions in order to make deportation more effective, lowering guarantees and limiting fundamental rights.

When discussing the "condition of expulsability", it has to be noted that there is no uniform terminology at the domestic level to refer to the process of expulsion. In the present paper, when we talk about "condition of expulsability" we are apprehending the legal concept of "expulsion" broadly, according to the definition in international law that defines expulsion as the "formal act or conduct attributable to a State by which a non-national is compelled to leave the territory of that State",[6] excluding extradition to another State or the non-admission of aliens to the territory.[7]

With an omni-comprehensive approach, we would understand expulsion as an ontological rupture of the relationship of the foreigner with the territory as proposed by De Genova and Peutz (2010, 1), who defined expulsion as "the compulsory removal of "aliens" from the physical, juridical, and social space of the State" that provides the State to delimitate its spatiality, capturing by this the profounds effects that an expulsion process has on an individual and a community. This all-encompassing and ontological approach to expulsion will permit us to connect different dimensions that compound the expulsion apparatus and constantly construct the condition of expulsability we are referring to.

In the French context, the term "expulsion", in its literal translation, it is used to refer to "arrêtés d'expulsion", which are administrative decisions to remove a foreigner from France in exceptional situations, linked to the protection of public order, state security or national safety (L. 631-1 CESEDA). Moreover, apart from the judicial measures[8] – which are no under the scope of the present paper – the most common administrative removal measure is the so-called "Obligation de quitter le territoire français" (OQTF), whose literal translation is "obligation to leave the French territory", imposed to those foreigners who are not provided of a legal permit to reside – because it has been removed or not renewed or because they have entered through irregular channels and have never been able to regularize their situation– that can be accompanied with an administrative prohibition to return (L. 611 *ff*. CESEDA).

Concerning the German legal context, expulsion *(Ausweisung)* is also a public-order measure regulated in article 53 and *ff*. of the Residence Act or "Aufenthaltgesetz" (AufenthG from now on) that is adopted against a foreigner whose residence constitutes a threat to public order and security, to the liberal democratic basic order or other significant interests of the Federal Republic of Germany (§53, paragraph 1, AufenthG). The effective execution of an expulsion-order has been traditionally called "Abschiebungen", but under the influence of the European law, this term has been

[6] International Law Commission, Draft articles on the expulsion of aliens, sixty-sixth session. Cf. Vid. A/RES/69/119.

[7] Those have to be differentiated from "pushbacks" (*devoluciones en caliente*), which are express *expulsions* (and not returns or non-admissions) immediately after border crossing without consideration of their individual circumstances, violating the Protocol 4 of the ECHR.

[8] As judicial measure we refer to the *Interdiction judiciaire du territoire français (IJTF)* (prohibition on French territory), which is a principal or supplementary penalty imposed by a criminal court on a foreign national who has committed a crime, resulting in deportation or house arrest during the process.

progressively substituted by "Rückführungen", translated as "return". An expulsion can also be executed for those without residence permit who were obliged to leave the country ("ausreisepflichtig", §50-52 AufenthG) within a departure period that has already expired, accompanied by a re-entry ban for maximum 5 years (§11, paragraph 3 AufenthG), that can be extended to 10 years for those expulsed because of criminal sentences or constituting a threat to public order and security (§11, paragraph 5 AufenthG).

With the entry into force of the current reforms, immigrants' stay in the territory is almost negatively defined: only if there are no reasons to expulse, the presence of non-nationals can be *tolerated.* This negative apprehension of the presence of the non-national finds its complementary opposite in the regularization paths that both Germany and France are progressively opening in order to palliate labor shortage and the demographic challenge by attracting a trained, self-sufficient, able-to-work and to-reproduce immigrant. This two-headed migration policy, with two opposite directions – one attracting, the other one removing – should not obscure the reality: the condition of expulsability is inherent to the immigrant in the national-order, as Sayad remarked, but also in a market-driven order in which talent attraction measures are inserted, as long as capacities, training and work experience are fundamental to build up the fences of the expulsability, delimitating the degree of exposure to such a drastically measure based on a "human-capital" conception of citizenship (Ellerman 2020, 2517).

2. Implications of the French and German migration reform: what changes have been introduced?

In the following lines, the previously mentioned legal reforms of the French (2.1) and German (2.2) migration legal order will be in detail exposed, focusing on the legal provisions that concern the process of immigrants' expulsion of the territory and how the evolution of the norms is aimed at creating an expansive blurred area of exceptionality justifying a perpetually provisional existence in the limits of the Nation-state.

2.1. The new French legal reform to "control immigration"

A new immigration legal reform entered into force in France January 26, 2024, the Law to Control Immigration and Improve Integration *(Loi pour contrôler l'immigration, améliorer l'intégration)*, introducing several changes on the French legal order after an "elongated and tumultuous legislative route" (Basilien-Gainche 2024) including a decision of the Constitutional Court (decision n° 2023-863 of January 25, 2024) that dismissed more than a third of the articles.

While addressing various aspects in relation to migration management, one of the pillars of this Act is "to secure [our] borders, prevent threats to public order, and facilitate the removal of illegal aliens" (*Circulaire du 5 février 2024*; own translation). In this sense, Title III and IV of the law have as principal purpose the "improvement of foreigners' removal dispositive representing a serious threat to public order" (arts. 35-46) and to "ensure the effective implementation of removal decisions" (arts. 47-52), which has translated into a heavy blow to the system of protection against an expulsion measure. This normalization of the exceptionality turns human rights obligations mentioned above

into the last bastion that immigrants preserve to meet the demands emanating from human dignity.

Focusing on the expulsion of immigrants, this reform has almost denatured the categories of persons protected against a measure of expulsion (arrêté d'expulsion) in the sense of L631-1 CESEDA, but also those who were protected against an "Obligation to leave the country" (OQTF, from now on), regulated in articles L611 and *ff.* CESEDA. These two measures, together with the expulsion ordered by a criminal judge as an additional or principal penalty (the so-called "Interdiction judiciaire du territoire" or ITF),[9] are the principal removal measures that integrate the dispositive of aliens' removal in France.

It has to be noted that, according to well-established case law (Conseil d'Etat, 1977; Conseil d'Etat, 2e et 7e ss), the commission of criminal offenses cannot, in themselves, legally justify an expulsion order and do not exempt the competent authority from examining, based on all the circumstances of the case, whether the presence of the person concerned on French territory is such as to constitute a serious and present threat to public order. Thus, administrative police should consider the overall circumstances of the foreigner beyond the commission of a particular criminal act, including evidence of reintegration or social, familiar or work-related ties in France. In this sense, a proportionality test, broadly protected by ECHR case-law under articles 3 (*Soering v United Kingdom, Cruz-Varas v Sweden, Savran v Denmark)* and 8 (*Boultif v Switzerland, Üner v the Netherlands)* of the ECtHR, should be carried out even for those without special protection according to the principles of proportionality and necessity that frame the activity of the administrative police.[10]

First, I will address the inclusion of various provisions on articles L. 631-2 and 631-3 that amplify the acts and conducts that are considered of gravity enough to constitute an exception to protected categories. Secondly, I will make some remarks concerning the absolute deletion – excepting for minors – of the circumstances that that could justify exemption from an OQTF.

2.1.1. The normalization of exception: expanding threats to public order

If an order of expulsion under L631-1 CESEDA can take the form of an "arrêté préfectoral" (APE) or an "arrêté ministériel" (AME), depending on the acts justifying the expulsion (R632-1 and R632-2 CESEDA), the current reform has implied a considerable increase of the competences of the prefect to order expulsions based on L631-1 CESEDA. The system of protection against an expulsion measure is based on two major pillars: a quasi-absolute protected category, corresponding to those with a strong and close bond with France; and those with a relative protection, referring to immigrants with a weaker bond with France.

[9] The ITF regime (L541-1 à L541-4 CESEDA) has also been flexibilized by the Loi nº 2024-42 in similar terms, by the inclusion in the Criminal Code of more exceptions to the protected categories and the generalization of the ITF for those crimes punished with three years or more of imprisonment (article 35 Loi nº 2024-42).

[10] Administrative police (literal translation from "police administrative") refers to the administrative activities with normative power aimed at preventing disturbances to public order, including tranquility, security, healthiness and dignity.

The first group is contemplated in article L. 631-3, which includes a wide range of cases: habitual residents since the age of 13 years in France; regular residence for more than 20 years on the territory; regular residents for more than 10 years and having married a French citizen more than 4 years, etc. In global terms, we could say that there is a temporal exceptionality (long-term residents, 1º and 2º), a familiar exceptionality (for parents or spouses of French citizens, 3º and 4º) and a humanitarian exceptionality, concerning those in need of medical treatment that cannot be guaranteed on the country of origin (5º).

Before the reform of January 2024, these categories could not be expulsed unless they have committed acts that conflict with the republican values and the foundations of the State; acts related to terrorist activities; or acts that constitute a deliberate and direct provocation to discrimination, hatred or violence against a group of people or specific person. Additionally, if those acts were constitutive of intrafamilial violence; if the foreigner has been condemned to minimum 5 years of imprisonment or if he/she lived in a polygamous family, none of the exceptional categories were applicable. In other terms, these foreigners with a special, long and strong bond with France, should commit acts of special gravity against democratic values and basic principles of equality and non-discrimination in order to lift the protections. For the second case, those with a less intense bond with the French territory, they were protected against an expulsion unless "imperious necessity for the State safety and public security"; polygamy or if they have been sentenced to 5 years or more of imprisonment.

With the current reform, that introduces several exceptions to those already existing, protected categories against an expulsion measure have been completely weaken and both groups of special protection against expulsion have been almost equalized. Two new exceptions have been introduced to both protected categories: firstly, protected categories are not applicable if the expulsion order is based on the commission of acts of violence as defined by article 222-11 of the Criminal Code against elective public officers (such as a mayor, a deputy mayor, a president of the departmental council or a regional council), those detaining public authority (judges, the military or the prefects) or those exercising a mission of public service (teachers or healthcare professionals). Secondly, the fact of not being provided with a residence permit can justify an expulsion, but only if the permit has not been removed or refused to renew because of public order reasons,[11] proceeding in this case to order a OQTF under article L. 611-1, 5º, as we will see below.

Another central change that has entered into force concerns the expulsion of convicted foreigners, as it has to be noted that currently is not the actually imposed penalty which counts to assess the necessity of expulsion, but the minimum penalty foreseen in the Criminal Code, extending thus its scope of application. Additionally, regarding categories with a relative protection (L. 631-2), now considered as exceptions to the

[11] With this punctuation, the legislator intended to prohibit the misuse of procedure consisting of placing in an irregular situation a foreigner in a regular situation, by the withdrawal of his residence permit for the *sole purpose* of subsequently expulsing him. If a foreigner who has become in an irregular situation due to a previous withdrawal of his title for reasons of public order and that this foreigner is still on the national territory, on the other hand, he may be subject to expulsion in the event of new facts characterizing a serious threat to public order.

protection regime those criminals convicted for crimes punished with minimum 3 years of imprisonment. In the case of the quasi-absolutely protected categories (L. 631-3), the new text opens also the possibility of expulsion for recidivists convicted for crimes punished with minimum 3 years of imprisonment. Finally, the concept of intrafamilial violence has also been expanded to ascendants, and it's now a general exception for both categories of protection, previously limited to the assumptions of L-631-3-3º and 4º (spouses or parents of French citizens who have resided in France regularly for more than 10 years).

Concerning the OQTF – that is the removal measure for persons that are not provided of a legal permit to reside – there has been an almost absolute disappearance of the previously protected categories against this mechanism. Concretely, article L. 611-3 contemplated formerly a broad list of assumptions that were considered not able to be object of an OQTF, such as habitual residents since the age of 13 years, regular residents since more than 20 years or parents of a French citizen. With the current wording, only minors are exempted from enduring an OQTF. The rationale behind this reform, as explained in the above-mentioned circular, is that there is no reason for those cases to find themselves in an irregular situation, as all of them are assumptions that should permit in principle to acquire a regular permit, a pragmatic justification that disregards human rights law obligations by carrying out a complete abstraction of personal circumstances.

As stated previously, it must be noted that the suppression of protected categories does not mean systematic expulsion, being in any case mandatory to carry out a weighting based on the principles of proportionality and necessity. The threat's gravity and imminence has to be balanced with the harm caused to private and family life, protected by article 8 ECHR, taking into account that criminal offenses committed by the person concerned cannot, in themselves, legally justify an expulsion order if the whole of the circumstances of the case have not been profoundly examined in order to determine that the presence of the person concerned on French territory is of a nature to constitute a serious and present threat to public order (Conseil d'Etat, 2e et 7e ss-sect.).

Deepening in the above mentioned right to private and family life, needless to say that categories that were previously protected against an expulsion measure are still and in any case protected by article 8 ECHR, which obliges public authority to take into account the intensity of links with France, the age of arrival must therefore be examined and length of residence in the territory, family situation, where applicable, nationality of the spouse, the duration of the marriage, the effectiveness of life together, the existence of children, etc. Additionally, the invocation of the right to an effective remedy (§13 ECtHR) with reference to an expulsion procedure plays a fundamental role, especially for the protection of the "absolute rights" usually invoked, such as right to life (§2 ECtHR) and freedom from torture and inhuman or degrading treatment (§3 ECtHR) because of the automatic suspensive effect of the appeal when exists a real risk of its violation (Solanes 2017, 218).[12]

[12] Without aiming to delve deeply, as it would exceed the scope of this work, it is worth noting that the Charter of Fundamental Rights of the European Union also contains provisions that must guide the actions of authorities when carrying out an expulsion, condensing all guarantees in Article 19 of the CFR. Likewise, the CJEU has also ruled on the matter, with the famous *López Pastuzano* (C-636/16) judgment, where it held

In conclusion, in both types of measures ("arrêté d'expulsion" and OQTF) the figure of the protected categories has been profoundly distorted or emptied based on the instrumentalization and expansion of the supposed threat to public order, which causes that exceptional removal measures become ordinary law. Even if human-rights obligations remain when statutory law fades, the appeal against an illegal expulsion measure will become longer and more complex, placing immigrants closer to defenselessness. This normalization of exceptions has led to a situation where the suspension of rule of law-based governance has become a form of governance.

If the objective of the French law, as we have seen, is to amplify the scope of persons that can be expulsed or removed, the new German migration law is more aimed at making the process of deportation itself more effective, through its acceleration and the increase in successfully carried out deportation.

2.2. Legal amendments on German migration law "to ameliorate deportation"

As has been already introduced, a new act was adopted the 21st February 2024 in order to ameliorate the process of deportation ("Gesetz zur Verbesserung der Rückführung"), which entry into force is fragmented (§11) between the day after its publication (the 27th February 2024) and the 1st August 2024 for two main points of the reform concerning mandatory identification documents and processing of personal data (article 1, paragraph 6) and also the determination of the responsible jurisdiction for ordering home search (article 11, paragraph d).

German law follows a similar system to France concerning the decision making of the expulsion of a foreigner whose stay endangers public security and order, the liberal democratic basic order (*freiheitliche demokratische Grundordnung* or *fdGO*) or other significant interests of the Federal Republic of Germany. Thus, authorities are compelled to weigh up the interest in expulsion ("Ausweisungsinteresse", §54 AufenthG) with the concerned person's interest in remaining ("Bleibeinteresse", §55 AufenthG), being both divided in *particularly* strong interests (§ 54, paragraph 1) or either simply strong interest (§ 54, paragraph 2), depending on the gravity of the acts committed. As stated in §53, after an integral and individual evaluation of the circumstances, if the public interest in expulsing outweighs, expulsion should be carried out, but considering that his proportionality test should be informed, as previously claimed, by principles and obligations of human rights law.

With this recent reform, the fact of being convicted with minimum a year of imprisonment because of the commission of criminal acts such as smuggling (§ 54, 1 and 1c, AufenthG) or the existence of conclusive evidence of belonging or having belonged to a criminal organization (§ 54-1-2a, AufenthG) are considered as constitutive of generating a strong interest to expulse. In the same line, the assumptions constituting a simple interest to expulse have also been amplified: v. e. to be sentenced several times in a period of 12 months to imprisonment or to a fine under 90 days for having committed crimes against physical integrity (§223-231 StrafG), theft and embezzlement

that Directive 2003/109 opposes the expulsion of a long-term resident solely on the basis of past criminal convictions without examining whether the person poses a genuine threat to public order or public security and without taking into account factors such as the length of residence, age, consequences of the expulsion, and ties to the territories of origin and destination.

(§242-248c StrafG) or robbery and blackmail (§249-256 StrafG); the fact of being participator or principle perpetrator in a smuggling crime (§96 and 97 AufenthG), punishing also attempted crime; or when being convicted of having committed criminal acts with racist, xenophobic, anti-Semitic or other inhumane aims and motives (§ 46-2-2 StGB), among others.

As we can see, the German state has carried out a reform that follows the same logic of the French one: to open more paths to expulse those immigrants that are considered a threat to public order, an undefined legal concept that is progressively broader interpreted. However, the main point of the German reforms does not reside on this, but on the two – alarming – provisions that I will explain in the following.

2.2.1. A significant reduction in procedural safeguards against expulsion and the resurgence of control imperative

"We must finally deport on a large scale those who have no right to stay in Germany", has Chancellor Olaf Scholz affirmed in an interview with *Spiegel* (Hickmann and Kurbjuweit 2023), a goal that has been materialized in two types of measures: actions regarding the acceleration of immigrants' expulsion with a "Tolerated Stay Permit" ("Duldung") and those aimed at easing identity clarification and the search of the immigrant concerned by the expulsion order.

Firstly, it has to be clarified that the German Residence Act (Aufenthaltgesetzt or AufenthG) contains a specific provision ("Duldung", §60a AufenthG) for those who are obliged to leave the country, but their departure is temporarily not feasible for factual or legal reasons (severe illness, lack of identification papers, etc.). Combined with the general regulation of the "Duldung", there are also specific toleration status for those entitled with a "Duldung" that have started a qualified training ("Ausbildungsduldung", §60c, AufenthG) or have a job ("Beschäftigungsduldung", §60d, AufenthG) and also those with an "unclear identity" ("Duldung für Personen mit ungeklärter Identität", §60b), also known as "Duldung light". The fact that the "Duldung" is a provisional authorization that suspends without removing the order of expulsion implies that holders of this "pseudo-permit" find themselves in a very precarious situation, a sort of "liminal-legality" (Menjívar 2006) that "enables governmental actors to reassert and maintain control over populations identified as risky in ways that do not trigger the rights-protective schemes" (Chacón 2015).

In response to the large number of immigrants who find themselves in a precarious and supposedly temporary status, the "Opportunity Residence Act" came into effect on December 31, 2022 (§ 104c Chancen-Aufenthaltsrecht, AufenthG). This law allows individuals with toleration status and their families (§ 104c-2, AufenthG) who meet specific legal requirements — such as five years of continuous residence in Germany as of October 31, 2022, adherence to the liberal democratic order, no criminal record, and truthful identity information — to obtain a residence permit valid for 18 months. During this period, they are permitted to work, whether in dependent employment or self-employment. After 18 months, access to a permanent residence title is possible according to §25a (in case of well-integrated juveniles and young adults) and §25b (in case of permanent integration). This succession of permits is representative of the European

neoliberal model[13] called in the German legal doctrine *Aufenthaltsverfestigung* (consolidation of residence), according to which initially only a temporary residence permit is offered, "so that the migrant personally has to shoulder the cost of integration and gradually prove their worthiness to be admitted for good" (Joppke 2024, 815).

This type of reform has led some scholars such as the aforementioned Joppke to claim that Germany has left behind the imperative of control (linked to sovereignty) in favor of the integration of all immigrants (associated with governability) (Joppke 2024, 817), which it could be qualified by taking into account the Return Improvement Act, which once again demonstrates an inclination towards the exercise of sovereign power of expulsion and territorial and population control. In this sense, before the current reform, those who were beneficiaries of a "Tolerated Stay Permit" ("Duldung") for more than a year, but whose expulsion should be executed because the suspension has been revoked, should be notified a month in advance (previous §60a, paragraph 5, sentence 4 and 5).

Currently, this prior notification has been only maintained for foreigners with children under 12 years (paragraph 5a) and only if the foreigner has not provided false information or documents to hinder its expulsion, which means that even in this particular situation of vulnerability, procedural guarantees are conditioned. Additionally, the expulsion of foreigners under arrest or public custody has no longer to be previously notified (§59, paragraph 5, sentence 2 AufenthG), being previously mandatory to notify 7 days in advance. Both measures have been adopted in order to reduce the workload of immigration authorities, considering that as this notification it's not an independent administrative act, it "is unnecessary and only leads to an additional burden on the immigration authorities" (BMI 2023, p. 51; own translation).

Concerning the second set of measures, in order to augment the success rate of deportations, several changes have been introduced that pretend to amplify authorities' faculties to access and register private spaces and processing of data. Concretely, in § 48 three new provisions have been introduced (§48, paragraph 3, 3a-3c) to delimitate the processing of data and facilitate so the determination of the identity. If an unidentified foreigner refuses to cooperate in the procurement of its identity and there is actual evidence that he/she is in possession of identity documents, it is possible to search in its living space and personal belongings, that in case of "imminent danger" ("bei Gefahr im Verzug") no longer require a court order (§48, paragraph 3 *in fine*).

In this vine, it has been included a provision that permits the authority that must carry out the deportation to enter third party apartments and shared premises, when foreigners' home is localized in a communal accommodation (§58, paragraph 5, sentence 2) and opens also more possibilities to execute night-time expulsions by remarking that they can be justified if there is no other way to carry out the expulsion because of circumstances out of control of authorities (§58, paragraph 7, sentence 2). Additionally, in order to ensure the feasibility of the expulsion, the foreigner can be placed in so-called Custody Pending Departure ("Ausreisegewahrsam") by judicial order up to 28 days in any suitable facility (§62b, paragraph 1, AufenthG), previously limited to ten days only in bordering emplacements. This kind of detention, in contrast to the preventive

[13] As opposed to the classically Canadian or American model, which is oriented towards community settlement, but in recent years the two have shown a convergence. See: Dauvergne 2016.

detention of §62 ("Abschiebungshaft"), is laxer in terms of requirements, being the only conditions the expiration of the departure period, the non-cooperation of the person concerned and the deception about personal information.

This latest wording should consider that Custody Pending Departure must be carried out "in the transit area of an airport or in an accommodation from which the departure of the person concerned is possible" (§62b) since the CJEE had ruled on 17 July 2014 that detention for the purpose of removal of illegally staying third-country nationals had to be carried out in specialized detention facilities in all Federal States of Germany (*Bero v Regierungspraesidium Kassel & Bouzalmane v Kreisverwaltung Kleve)*. In this sense, since custody pending departure and preventive detention are not criminal detentions, according to the new §62d Residence Act, foreigners should compulsorily receive a legal representative when ordering deportation detention or deportation custody. This measure, impulse by the Greens, has received a great number of criticisms, alleging that the mandatory involvement of a lawyer can significantly neutralize the temporal extension of the detention foreseen in the same article and contradict Acts ultimate finality (Breyton 2024) and attributing a lack of clarity regarding the moment of decision making, according to the Senate (Bundesrat 2024).

To conclude this section, it can be asserted that the recent changes in German legislation represent a reform primarily focused on procedural and technical aspects. This reform prioritizes instrumental rationality aimed at ensuring administrative efficiency, yet it inadequately considers the rights of the individuals affected. This emphasis on control linked to sovereign power has reasserted itself in immigration policy, to the detriment of the protection and promotion of human rights.

3. Contouring the condition of expulsability: grey areas and nuances

That said, I would like to revisit my previous statement concerning the condition of expulsability. As we have attested, in the German and French context two important reforms have been adopted directly affecting the process of expulsion, making removal easier, faster and devoid of adequate procedural guarantees. When talking about condition of expulsability, the emphasis is not solely on the act of expulsion itself, but rather on the state preceding the actual execution of the expulsion order, what is commonly apprehended as deportation or removal (Kälin 2020).

If our analysis focuses on the national framework, echoing Sayad's assertion that the universalization of the "national fact" ties migratory movements intrinsically to the national order (Sayad 2008, 1), within the context of the European Union as a supra-national entity that distorts state boundaries and redistributes responsibilities for migration control and management, the condition of expulsability gains added complexity. This complexity is further underscored by the introduction of European citizenship, which dismantles barriers between EU nationals while concurrently creating a new category exclusionary of "third-country nationals".

In order to approach the idea of a "condition of expulsability", it is adequate to begin with an empirical approach that illustrates the gap between the large investments in immigration control and the declining "proceeds" thereof in terms of expulsions, demonstrating that this "policy does seem to lack rationality" (Leerkes and Broeders 2010, 836). According to German government data, in 2023, 16,430 persons were

expulsed (an annual increase of 27%) (Deutscher Bundestag 2024), who in average have been residing in Germany for two years and five months. This represents only 34% of the planned expulsions, as 31.300 deportations could not be effectively executed. Besides, the 31st Decembre 2023, 242,642 persons who are legally obliged to leave the country (ausreisepflichtig) were registered as still staying in Germany, being almost 80% of them "geduldet" (with a toleration status), and 35% of those with a toleration status have resided in Germany for more than six years but continuing to be encapsulated in a provisionality and expulsability scheme. In this sense, the term "Ketten-Duldung" "is used to refer to these sorts of cases, those whose toleration status is particularly insecure, long-lasting or has no end in sight" (Tize 2020, 3027), as Ketten ("chain") alludes to the frequent approvals of short-term permission to stay, forming a long and multigenerational concatenation of toleration status to which an unannounced expulsion has now been added.

On the one hand, the "Duldung" mechanism highlights the limitations of migration law enforcement and the multiplication of internal borders as an inner technified and bureaucratized immigration containment mechanism that is activated when coercive means fail, as historically this "toleration status" has been used to control the massive influx of "threatening" asylum-seekers in the 90s in complementarity to deportation (Kirchhoff and Lorenz 2018, 52). The novelty introduced by this reform, in line with European regulation and pre-entry screening, aligns with Balibar's statement of a "reduplication of external borders in the form of internal borders" (Balibar 2004, 10). This manifests in the erosion of internal guarantees due to "legalized expansions of power" and "contractions of pre-existing legal safeguards" (Moreno-Lax 2023, 4), establishing an internal border regime akin to external frontiers where speed and constraint predominate. Consequently, the suspension of the rule of law, previously associated with classical external borders, is now encroaching upon national boundaries through migration legislation involving the "Duldung" institution.

The Duldung is a clear example of the ambivalent approach taken by migration authorities toward immigrants. While their presence is not fully accepted, those who prove their worthiness to stay—through work or vocational training—are provisionally tolerated. This "provisional" status is often extended for years, subjecting the immigrant's life to this governmentality technique. The suppression of the previous notification of the expulsion for immigrants with a "Tolerated Stay Permit" for more than a year deepens in this condition of expulsability. This change does not necessarily lead to quicker or easier expulsions, but it disregards the material and emotional ties immigrants may have formed during their stay. In essence, it strips away their humanity.

In the French case, the distance between the orders pronounced and the removal measures effectively carried out is also not new, extensively highlighted by multiple reports,[14] specially concerning the OQTF, with an execution rate that is situated between 6–10% of the whole measures pronounced (Cour de Comptes 2024). Additionally, it seems that the priority of the actual migration policies is to reinforce the expulsion of those who are considered a threat to public order and national safety, by establishing a direct linkage between the triad migration – criminal activity – expulsion justifying the

[14] For example: rapport d'information n° 626; rapport n° 433.

enforcement of a sort of "administrative law of the enemy" that considers convicted immigrants as traitors to the social contract.

In any case, the reasons behind the ineffectiveness of the expulsion dispositive are numerous, ranging from difficulties to determinate the person's identity to the non-cooperation of third countries or administrative workload. In this sense, the risk of amplifying the reasons that can lead to an expulsion is to deepen in the so-called "scissors effect", with an increase on the expulsions ordered but not causing necessarily a proportional augmentation of their effective enforcement, situating progressively more foreigners in a liminal space justified by the exceptionality of their circumstances which is the starting point to multiple violation of rights with complete impunity. Thus, this liminal space is not an interlude between two substantive spaces where nothing happens but a position where the crudest expressions of violence take place. By way of example, the condition of expulsability is also the condition of labor exploitability, as the consequence of this policies is the creation of a pool of flexible and cheap workers condemned to clandestinity who will find themselves in a much more vulnerable situation of being exploited, as the "expulsability" of persons without residence permit shapes the terms of their exploitation in the work world (Chauvin *et al.* 2021).

Nevertheless, employment detains an ambiguous relation with migration policies that forces us to qualify the alleged condition of expulsability, because these measures aimed at augmenting the capacities to expulse are combined with the opposite dimension which is regularization. Concretely, both states are trying to open progressively more and more channels to regularize the situation of immigrants on the territory, specially though labor or training (as shown with the Chancen-Aufenthalt), which means that States are more selective regarding the kind of immigrant whose presence are disposed to accept, on the basis of capacities, talent and education, expanding a human capital approach to migration management.

So even if the analyzed reforms harden and expand the removal apparatus and the category of unwanted immigrants increases, efforts are put at the same time into attracting and constructing a skilled and market-driven class of immigrants that can be useful to palliate labor shortage affecting European countries. In this sense, Elrick and Winter (2018, 21) show that the "dichotomy between economic utility and identity maintenance" it is a chimera, it does not stand, since both dimensions have the same direction: "building the national middle-class status group". While arguing this conclusion would take more space than we have available, it is true that two dimensions can be identified in migration management of european states like Germany and France: a nationalistic and security-oriented trend and a workfare and neoliberal orientation, which is apprehended by scholars like Joppke (2021) as neoliberal nationalism.

The condition of expulsability, actively created by states, reminds us of Agamben's thesis according to which "bare life" – an existence reduced to the mere biological act of living – is actively constructed by political orders and embodied by the figure of the "homo sacer" (Agamben 1998, 93), that contains a paradox in its very nature, as *homo sacer* refers to a person that has been convicted for committing a crime but cannot be sacrificed; however, whoever kills him will not be punished for homicide. This homo sacer is situated in a zone of indifference or exception – from which bare life is born – created by a sovereign power situated within and above the law (1998, 15).

The condition of expulsability in which immigrants are permanently caught under the risk of being subjected to an expulsion order – as a manifestation of sovereign power – is the place where this bare life is embodied. This vital condition of bare life, that Agamben localized paradigmatically in concentration camps, in detention centers or in *zone d'attente* of the airports (1998, 223), is expanded through migration laws as those analyzed in the present paper that are characterized by consolidating a state of exceptionality whose particularity, following Agamben, is that it maintains a relation to the rule through its suspension.

The suppression of categories protected against expulsion, the reduction of procedural guarantees regarding expulsion process, the expansion of conducts that are considered of gravity enough to adopt a measure of expulsion, etc. reflect a suspension of the regular juridico-political order that constitutes itself as an inclusion that excludes: immigrants maintain a strong bond with the rule of law but sustained in an exceptionality order, that serves paradoxically to strengthen the link between national citizens and the Nation-state and reinforce a sovereign power whose credibility has been in a waning crisis since the expansion of globalization, awakening in the subjects of late modernity the desire to erect protective walls and reestablish dominance (Brown 2010, 107).

4. Conclusions

The analysis of the new French and German migratory framework epitomizes the *zeitgeist* of the post-2015 era, with a migration-crisis paradigm that has solidified into a novel form of governance. This paradigm not only rationalizes but also institutionalizes the state of exceptionality that is inherent in migration law, progressively integrating it into a broader institutional framework. Even if logics that classically conceive the presence of immigrants in the Nation-state order as deviant, threatening and provisional have acquired some layers of complexity due to the supra-national dimension fostered by the European Union, if we focus on a domestic level, latest reforms of removal policies in France and Germany have notably deepened the condition of expulsability that pervades immigrants' life path within national boundaries.

Nevertheless, it would be reductionist to assert that the unique purpose of the French and German government is to expulse undesirable immigrants and fortify their borders, as there is also a strong interest in attracting skilled labor force and integrate foreigners through employment to overcome labor shortage in specific sectors such as healthcare or IT. The dual approach of reinforcing expulsions to maintain public order and national safety, alongside attracting workers to bolster robust industries and sustain a competitive labor market, may seem divergent. Still, both strategies reflect a shift towards a more selective and market-driven migration policy which could hardly be deployed without a securitization turn that alleviates the lack of legal and logistic infrastructure needed to correctly integrate the attracted population.

Beyond these points, which are crucial but whose development exceeds the scope of this article, the systematic and comparative analysis of last changes in the expulsion regime of immigrants in Germany and France allows us to affirm three interrelated points that elucidate how the condition of expulsability of the immigrant is legally constructed. In the first instance, the already precarious legal status of the immigrant has been weakened by the reduction of legal safeguards against an expulsion, progressively

withdrawing from a rights-based status towards an operational status or even a symbolic category stripped of substantive rights and employed by public authorities to deploy governmentality and strengthen sovereignty "by asserting symbolical control over unwanted immigration with a view to upholding popular support and trust in national government" (Leerkes and Broeders 2010, 832).

The German case is paradigmatic in this sense, as the suppression of the prior notification duty and the expansion of authorities' powers to enter and register private spaces further exacerbate the existing power asymmetry between the foreigner and the institutions, responding to an instrumental rationality of administrative efficiency but also to a social demand of sovereignty performance. This precariousness will also be exacerbated by the greater exposure to expulsion measures in the French case, both OQTFs and "arrêtés d'expulsion", with a new regulation that effectuates a distortion of previously protected categories against an expulsion order that renders this figure practically ineffectual.

Secondly, immigrants' sphere of autonomy and liberty has been curtailed through the broadening of grounds justifying an expulsion and the relaxation of exceptions previously safeguarded. This perpetuates a pervasive threat of expulsion hovering over the immigrant throughout the whole extent of the stay and functioning as a mechanism of continual control. Beyond the tangible harm caused by the enforcement of an expulsion order, if we consider that the expulsion apparatus is not characterized by its particular effectiveness, with a notable disparity between ordered expulsions and those ultimately enforced, the suppression of protections against an expulsion will have an impact on the possibilities of leading a dignified, stable and secure life, since the consciousness of expulsability can have a totalizing effect that prevents the immigrant to develop a life under normal conditions. Thus, proportionality test, which remains in force in both cases, seems crucial to safeguard human rights at stake, as even if persons with strong familiar and social bonds with the territory are now no longer protected against an expulsion – as is the French case – basic standards emanating from human rights law (such as right to family life), remain in force.

Thirdly, the expanding invocation of exceptionality applied to immigrants, justified under the auspices of public order and national security concerns, risks becoming entrenched as an irreversible trajectory. If an expulsion of the territory can be considered as a sort of punishment for breaking the social contract – a sort of banishment to bare life – the increase in reasons of sufficient gravity to justify this measure prompts critical reflection on the imperative to rebuild the social contract in more inclusive terms. The prevailing scenario underscores that the substantial number of foreigners compelled to navigate societal edges under conditions of expulsability constitutes not a residual but a structural issue. Rather than perpetuating the proliferation of borders and the suspension of the rule of law in relation to immigrants, there exists an urgent need to redefine the foundational tenets of our social contract to foster greater cohesion and integration across all societal sectors, with human rights serving as its cornerstone. The condition of expulsability, resonating with also Sayad's concept of "absent presence" (cited by De Lucas 2011, 3) reminds us, necessitates a renewed political pact that provides not merely visibility but genuine presence to immigrants (De Lucas 2011, 10), prioritizing dignity and the guarantee of human rights at its core.

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