

(In)tolerated in Germany? - The biopolitical governmentality of the framework of tolerated stay

Only a fraction of irregular migrants actually gets deported from the EU – an issue which prominently features in political debate and media reports. Yet, we tend to know less about what happens to these individuals once their removal has failed.

This paper critically investigates Germany's approach to managing the presence of rejected asylum seekers whose removal has been prevented by legal or practical issues (i.e. missing identification documents). Faced with the impossibility of enforcing deportation, immigration authorities in Germany may grant 'tolerated stay', which temporarily postpones removal proceedings. During this period of deferred removal, tolerated migrants have access to a number of public services, including healthcare. However, from a legal perspective tolerated migrants continue residing 'irregularly' in the country, as the toleration certificate does not amount to leave to remain. Recent figures suggest 247,290 'tolerated' migrants lived in Germany in 2022.

This paper investigates the janus-faced nature of the system of statutory toleration, as it analyses its rationalities of governance through the lens of minimalist biopolitical governmentality. Its findings challenge the framing of tolerated stay as a 'benevolent' approach towards situations of unreturnability and unmask its contribution to the systematic marginalisation of tolerated migrants. In particular, the discussion highlights how the system of tolerated stay becomes involved in the biopolitical 'ordering', 'othering' and disciplining of migrants.

The paper argues that these effects are enabled through offering 'minimalist care' to tolerated migrants, which brings them within the purview of the authorities. In this way, tolerated migrants may be provided with the bare necessities, yet also remain subjugated to the position of the liminal outsider with limited chances of building a genuine future in Germany.

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I. Introduction: Germany's system of tolerated stay

At 4 am in the morning the police knock on Ahmad's door. As the officers make their way into his apartment, Ahmad jumps out of the window on the second floor – in a state of 'sheer panic', as he will later tell journalists (Kuntz und Schröder 2021). Shortly after, the police will visit Farid, who is about to start his shift at the local kindergarten, where he had just begun an internship (Ibid). Confronted with the imminent threat of deportation, Nawid slits his wrists open, as the police arrive that same morning. Until the day of their deportation to Afghanistan, both young men had lived in Germany for several years (8 years in Nawid's case), learnt German and wanted to build a future there. Yet, they were merely 'tolerated'.

It is estimated that around 247.290 'tolerated' migrants lived in Germany as of 2022 (Mediendienst Integration 2023).¹ Their situation remains precarious and has been characterised as 'atypical' on several accounts (Queiroz 2018): in principle, tolerated migrants do not dispose of a legal right to remain in Germany (having had, for example, their asylum claims rejected) (Atac and Rosenberger 2019:3). Yet, authorities struggle to deport them as a result of persisting legal or practical barriers impeding their removal (for example due to a lack of cooperation from their country of origin) (Rosenberger and Koppers 2018:1). Faced with the impossibility of enforcing deportation, immigration authorities may grant 'tolerated stay' to these migrants ('Duldung') (Kirchhoff and Lorenz 2018:53).

This toleration status entails a temporary deferral of removal proceedings and may be issued for a period of between three and twelve months, thereby acknowledging the fact that removal is momentarily impeded (Castaneda 2010:246, Hinterberger 2020:300). During this period of suspended removal, the toleration certificate affords migrants access to various public services, including healthcare, and removes their criminal liability for irregular residence (Ibid 246, Hinterberger 2023:176). After a certain period, tolerated migrants may also be granted permission to work (Hinterberger 2023:239).

¹ This number was confirmed in a recent legislative proposal: 'Gesetzesentwurf der Bundesregierung zur Einführung eines Chancen-Aufenthaltsrechts' (28.09.2022), Drucksache 20/3717.

In this sense, tolerated stay differs from undocumented residence (Hinterberger 2020:130).

However, from a legal perspective the toleration status does not amount to a fully-fledged residency permit (Drangland 2020:1129): status holders remain obliged to leave the country on their own terms and tolerated stay does not grant leave to remain (Ibid, Hinterberger 2023:238). In the eyes of the law, tolerated migrants continue to be considered residing 'irregularly' in the country, with the toleration certificate merely confirming that the authorities are aware of their current unreturnability. In fact, deportation may be carried out as soon as the impediment to removal ceases to exist - in some instances without the need for authorities to give any further notice following the revocation of the toleration certificate (§60a(5) German Residence Act).

Over the past years, the system of statutory toleration has increasingly attracted scholarly attention, not least due to its 'janus-faced' nature: on the one hand tolerated stay affords migrants additional rights, yet simultaneously denies them legal residency (Hinterberger 2023:81; Hinterberger 2020:130). Tize for instance illustrates that this form of official-yet-irregular non-residency status has caused several problems in practice, particularly in cases where it developed into a permanent arrangement (2019:4). In this context, Castaneda draws attention to the practice of 'chain tolerations' (where short-term toleration certificates are issued consecutively), forcing migrants to endure this 'in-between situation' for several years or even decades (2010:253). Indeed, recent figures seem to point in a similar direction, suggesting that 136.000 individuals have been tolerated for at least five years (Press statement Federal Government 2022).

Studies critically investigating the system of tolerated stay from an empirical perspective remain scarce within the broader migration literature, even though the toleration system is considered a 'characteristic feature of Germany's migration regime' (Kirchhoff and Lorenz 2018:52). Among the few studies which have scrutinised states' responses to situations of non-removability, the German model of statutory toleration faced rather timid criticism and was deemed one of the more 'humane' approaches, compared to countries in which 'unreturnable migrants' face complete neglect or even destitution (Heegard Bauser *et al.* 2013). This study seeks to disrupt this benevolent framing of 'tolerated stay' as a literally more tolerant

approach, as it embarks on a critical inquiry uncovering the governance rationalities embedded within the system. To this end, the paper adopts an innovative conceptual approach, which combines political theory on tolerance with Foucauldian insights on biopolitical governmentality. Based on this analytical lens and empirical data gathered in the southwest of Germany, this paper reveals the extent to which the seemingly 'harmless' system of toleration is entangled in the control and governance of migrants, effectively contributing to their marginalisation and exclusion.

The findings demonstrate that the framework of tolerated stay effectuates a biopolitical structuring of migrants' every-day lives. Through offering various forms of 'minimalist care' and rendering the exercise of their (limited) rights burdensome, the system of tolerated stay serves to periodically remind migrants of being 'unwanted', while maintaining their mere physical existence under the eyes of authorities. By this very process tolerated migrants are 'marked' and (re)produced as 'merely tolerated' individuals, which in turn seeks to constrain and manipulate migrants' ability to build a life in Germany beyond the marginalised position of the 'merely tolerated'. In this way, the system aims to indirectly exercise control over unreturnable migrants, hindering them from integrating, while residing in Germany during the period of their unreturnability.

Throughout the inquiry the project was guided by the following research questions:

What does it mean to be a 'tolerated migrant' in Germany?

How does the toleration system seek to 'govern' and manage the presence of tolerated migrants in Germany?

To what extent does the statutory toleration system operate as a mechanism of minimalist biopolitical governmentality?

Focusing on these questions, the paper hopes to make several contributions: firstly, it aims to provide a comprehensive conceptualisation of the governance rationalities of tolerated stay informed through empirical findings and thus to enrich previous theoretical studies on the matter. Secondly, the study's innovative approach based on political theory and Foucauldian governmentality aims to unmask the complex role of tolerance in classifying and subjugating migrants and may hence serve as a helpful tool for future studies into similar systems (other European countries, such as Poland

and Austria also provide for statutory toleration) (Maximo Pestana 2012). Finally, the present findings may offer a useful baseline for future projects examining the ways in which migrants seek to contest and unmake these same power structures.

The first chapter discusses the model of tolerance and the extent to which it is tied to ideas of governance and the exercise of power. To this end, the chapter will review literature on tolerance from political theory and transpose these insights into the context of migration governance. In particular, the paper argues that the practice of tolerating migrants must be understood as a means of migration governance and may be fruitfully analysed from the perspective of minimalist biopolitical governmentality. After outlining the analytical framework, the paper will provide an overview of the methodological approach of the study, including data collection and data analysis methods. The final chapter will present an analysis of the empirical findings which is followed by a critical discussion of the system of tolerated stay and its governance rationalities.

II. Understanding tolerance in the context of power – From political theory to a biopolitical governmentality of unreturnable migrants

The system of statutory toleration represents Germany's approach to managing the presence of irregular migrants, whose removal is impeded (Tize 2020:3024). Deportation may be rendered impossible by practical issues, such as the unavailability of safe travel routes, missing identification documents or the destination country's refusal to accept the person (Maximo Pestana 2012:38, Hinterberger 2020:297, Strban *et al.* 2018:86). Equally, authorities may be required to defer removal proceedings in cases in which the person is deemed unfit for travel due to a medical condition (i.e. illness) or if deportation violates the principle of non-refoulement (Maximo Pestana 2012:38). In practice, situations of non-removability often involve a complex combination of variables – an analysis of which would be beyond the scope of this paper.

Though situations of ‘unreturnability’ commonly occur across Europe, states’ responses differ significantly, with some countries, such as Luxembourg, granting (short-term) residency permits to migrants, while other countries seek to induce ‘voluntary’ returns through cutting welfare entitlements (i.e. Norway) (European Migration Network 2021:31-32). Several countries, however, fail to address the issue of unreturnability altogether, leaving migrants stuck in limbo (Strban et al 2018:95). These policies of complete ‘inaction’ are particularly detrimental, as they expose migrants to high levels of precarity and increase the risk of exploitation and destitution (Strban et al 2018:89-90).

In contrast to these two extreme poles of policies oscillating between complete neglect (policies of inaction) or inclusion (through residency permits and eventual regularisation), the German system of tolerated stay seems to occupy somewhat of a middle ground: although tolerated stay does not grant leave to remain, it nonetheless formalises, and thus acknowledges, their (temporary) ‘unreturnability’, effectively suspending removal proceedings and removing criminal liability for irregular presence. Moreover, as a result of the meticulous regulation within the legal framework, tolerated migrants’ rights are comparatively well established in legal and institutional terms, which guarantees their access to healthcare, certain welfare benefits, schooling for minors and the possibility to apply for a work permit. In this way, the system of tolerated stay seeks to ensure that migrants’ basic needs are met, while avoiding the risks associated with policies of inaction (i.e. destitution).

Although the status of toleration grants migrants ‘some social rights and at least temporary security’ (Drangslund 2020:1134), a closer analysis is needed in order to interrogate its underlying rationales for doing so. Therefore, the following section will review contributions from the field of political theory, which argue that tolerance as a policy approach serves to solidify the exercise of power and control and thus must be understood in the context of modern governance (biopolitical governmentality). Building on this discussion, this paper will evaluate different concepts of biopolitics and governmentality and examine their suitability through referencing previous studies undertaken on the system of tolerated stay

A. Tolerance in political theory: From an instrument of power to biopolitical governmentality

Today, the concept of tolerance is 'ubiquitous' (Brown 2006:86) and often 'uncritically promoted' as a cosmopolitan virtue (Ibid 2, 85). Political theorists have sought to disentangle the complex concept, which is said to be one of the 'foundational pillars of liberal society' (Königs 2021:5).

In essence, tolerance involves a course of action characterised by the 'willingness to put up with' something or someone that one disapproves of, which one would 'otherwise seek to prohibit or suppress' (Horton 2021:46). In this sense, tolerance requires a 'deliberate exercise of self-restraint' (Ibid) and only ever emerges towards 'something one would prefer not to exist' (Brown 2006:26). Yet, even as the tolerator decides to 'put up with' the object of toleration, the 'original dislike' (Galeotti 2021:90) persists as the tolerators 'acceptance' does not 'cancel out' the reasons which initially gave rise to the disapproval of the object of toleration (Forst 2013:20). This ambivalence is precisely what distinguishes tolerance from other attitudes, such as 'affirmation', 'indifference' or neutrality (Forst 2013:18, Brown 2006:26). As a result, tolerance always 'carries within it an antagonism' (Brown 2006:26) and does not 'resolve, but merely contains or defuses the conflict, in which it is invoked' (Forst 2013:1). A tolerant group thus remains somewhat 'opposed (...) and sometimes even actively hostile to what is tolerated, yet is willing to permit it' (Ibid).

These considerations raise the question as to why the tolerator would indeed decide to tolerate what s/he finds objectionable instead of trying to suppress it. On this matter, authors, such as Brown and Forst, have convincingly argued that toleration as a chosen course of action not merely results from its ascribed moral value, but instead is deeply implicated in the exercise of power and control (Brown *et al.* 2015:161). Tolerance emerged as an effective instrument to consolidate the power of the ruling authority, both historically as well as at present: for instance, instead of trying to suppress Catholicism in the eighteenth century (which may have entailed a loss of authority), Protestant emperors adopted a tolerant attitude, which allowed the tolerator to assert and expand control over the tolerated group (Forst 2013:333). By means of incorporating the tolerated entity, the tolerator retains the authority to articulate the conditions for and limits of his tolerance (Brown 2006:95) and thus becomes involved

in the continuous disciplining of the tolerated group (Ibid 95). In this way, tolerance operates as a technology of 'domestic governmentality' (Ibid 87,26), regulating the behaviour and managing the 'presence of the threatening other (from) within' (Ibid 27).

The concept of 'governmentality', initially developed by Michel Foucault, refers to modern approaches to governance, which seek to govern 'indirectly' (Ibid 80). Governmental systems set out to orchestrate the behaviour of individuals ('the conduct of conduct') and produce, organise and position subjects in a way that they will start governing themselves, as opposed to classical (more direct) approaches to governance (Darling 2011:266). To this end, governmental systems employ a range of dispersed tactics and 'nonaccountable social powers' in order to regulate various aspects of individuals' lives, which are 'ordinarily conceived as unrelated to political power, governance or the state' (Brown 2006:81).

According to Brown, the practice of tolerance operates in a similar 'governmental' manner, as it organises and produces subjects so as to manipulate their behaviour (Ibid 79). Tolerance achieves this effect through semi incorporating the tolerated entity, which will 'enjoy a privileged status' (Forst 2013:333) compared to the 'non-tolerated group', which suffers from complete exclusion. Yet, in relation to the tolerator the tolerated group is still positioned as 'inferior', 'deviant' or 'undesirable' (Brown 2006:13).

These hierarchical dynamics fuelling the model of tolerance become self-sustaining and perpetuate the systemic marginalisation of the tolerated group (Brown 2006:45): By refusing to fully accept the tolerated entity on equal terms, the model of tolerance 'reifies and exaggerates the otherness' of the tolerated group, reproducing it as clearly 'distinct' from the tolerator (Brown 2006:45, 28). In this manner, the tolerated group remains subjugated to the liminal position of the semi-included outsider within this construct (Ibid 13-14, 28). As a result of this precarious position, the tolerated group must continuously earn their worthiness for continuous toleration – the conditions for which are entirely controlled by the tolerator – and may adapt its behaviour accordingly. These disciplinary effects may be amplified, as the model of tolerance also harnesses the group's desire to outgrow the position of the 'merely tolerated', which in turn may ignite a governmental process of self-governance (Ibid 81).

Viewed from a larger scale, it becomes evident how tolerance as a technique of power may be deployed to manage the life of a population as a whole, which reveals its biopolitical dimension.

The concept of 'biopolitics' played a central role in Foucault's theory of governmentality, where biopolitical rationalities are employed to govern effectively. Foucault envisaged biopolitics as a modern 'technique of power', invested in managing and administering the life of the population as a collective (Estevez 2016:248). He contrasts this modality of power (the 'power over life' (bios)) with classical sovereign power, which was historically enacted through the monarch's right to kill ('the right to take life') (Larrinaga and Doucet 2008:520). Sovereign power thus operates in a deductive, repressive and punitive fashion (Menedita 2015:44, Ane-Apatinga 2017:38, Foucault 1998:136, cited in Vaughan-Williams 2015:35). Biopower, however, 'exerts a positive influence over life' and aims to foster, optimise and multiply life (Foucault 1998:137-8, cited in Vaughan-Williams 2015:36).

Brown demonstrates that tolerance as an instrument of power represents a form of Foucauldian biopolitics, as it operates 'through the regulation of life rather than the threat of death' (Brown 2006:26) and contributes to the management of the life of the population through organising, classifying and controlling subjects' lives.

Understanding tolerance as biopolitical governmentality foregrounds its role within the consolidation of power and strategic governance of the population. In particular, it conceptualises how the marking and organisation of bodies produces subjects and 'orchestrates' their behaviours, which in turn effectuates the management of the population as a whole. These insights from political theory will inform the following analysis of the German system of tolerated stay.

B. A modified Foucauldian framework of analysis: tolerated stay as a minimalist biopolitical governmentality for unreturnable migrants

The following sections will build on the approach of tolerance as biopolitical governmentality and demonstrate why this analytical lens proves fruitful for the purposes of examining the system of tolerated stay. In a first step, a review of previous

studies on the topic will highlight to what extent the German system of tolerated stay resembles the biopolitical model of tolerance, described above. In a second step, the paper will outline why the Foucauldian approach of biopolitical governmentality requires some modification in order to capture the complexity of tolerated stay and advance the framework accordingly.

1. The German system of tolerated stay and its logics of tolerance – a literature review

In both its name and key features, the German system of statutory toleration resembles the theoretical model of tolerance (and its logic of biopolitical governmentality). Firstly, tolerated stay is only granted to migrants, who in principle were liable to deportation, and therefore remains based on an initial sense of disapproval or rejection, given these individuals were formerly denied the right to remain in Germany. Secondly, once granted, the toleration status stay exhibits both elements of 'acceptance' and 'objection' towards migrants, which is the second significant parallel to the theoretical model of tolerance as biopolitical governmentality. On the one hand, the toleration status entails a temporary suspension of deportation and affords certain additional rights, such as access to healthcare or welfare benefits and in this sense conveys a sense of 'acceptance'. On the other hand, tolerated stay does not grant leave to remain (Hinterberger 2020:293) and the 'status rights' are reduced to a minimum, while the chances of accessing regularisation remain limited (Castaneda 2011:254). These aspects embody the 'objection component' within the regulation of tolerated stay, which persists throughout their toleration.

Moreover, Castaneda's analysis highlights how the system of tolerated stay is indeed nestled within logics of migration control and governance (2010). According to Castaneda, the system of tolerated stay aims to render migrants 'deportable', despite extended periods of *de facto* residency in Germany and potential 'emotional ties to the host society' (2010:253). In this regard, Castaneda mentions the so-called 'Residenzpflicht', according to which tolerated migrants must live within a delimited area and are barred from travelling outside of it without official permission (Ibid). Thus, in practice, migrants struggle to participate in 'social or cultural events, visit friends, or

even seek more competent legal counsel from elsewhere' (Ibid). Castaneda identifies it as one of the several control mechanisms embedded within the framework of tolerated stay, all of which – she argues – serve to maintain a sense of 'deportability' among migrants, even throughout prolonged periods of 'unreturnability' (Ibid 253.). In conclusion, Castaneda finds that the framework of tolerated stay 'restricts individuals more markedly than it provides them with rights' and 'ultimately serves the long-term interest' of restrictive migration policies (Ibid 260).

Though Castaneda's observations seem to point in the right direction, her analysis remains questionable, as she fails to highlight the distinctive feature of the framework of tolerated stay: Castaneda portrays the system of tolerated stay as inherently exclusionary and seems to suggest that the creation of a deportable class of migrants is constructed through *excluding* migrants from a number of rights and services. Yet, this study – based on the insights from political theory – seeks to challenge this view and investigate, whether it is rather the very *incorporation* of tolerated migrants (albeit liminal) which causes migrants' marginalisation, as it marks them as distinct, deviant or 'deportable', thus subjugating them to the position of the 'merely tolerated'. Towards the end of her analysis, Castaneda indeed notes of the 'ambivalences and contradictions' embedded within the system of tolerated stay (2010:260), yet does not make sense of these various forms of 'incomplete inclusion', which - I will demonstrate – are a crucial characteristic of the governmentality of toleration.

In addition to these analytical details, Castaneda's ethnography appears somewhat outdated, as the system of tolerated stay has since been subject to multiple legislative amendments (Hinterberger 2020:294). In a more recent study, Drangslund investigates the modified system of tolerated stay, as she focuses on the newly created sub-category of 'tolerated stay for the purposes of completing vocational training' (Ausbildungsduldung). Introduced in the context of 'growing skills shortages' in Germany, this subtype of toleration certificate allows tolerated migrants to complete vocational training and comes with the 'promise of a German future', as it may result in the granting of a two-year residency permit upon successful completion of the training (Drangslund 2020:1129). Throughout her analysis, Drangslund homes in on the 'temporal dimensions' of the Ausbildungsduldung (2020:1130). Her findings suggest that temporal techniques such as 'future giving', 'suspension' and 'delaying' are deployed as a means of disciplining tolerated migrants in vocational training

(Drangslund 2020:1133). In this manner, migrants are expected to ‘wait well’ and perform, while ‘confined to a condition of deportability’ before they can eventually access regularisation following completion of the training (Ibid 1142).

Yet, Drangslund’s focus on temporal techniques of disciplining appears narrow and fails to situate the *Ausbildungsduldung* within the broader system of toleration, within which the idea of vocational training offers a distant gate to escape the precarity of toleration. Drangslund references these dynamics sporadically throughout her study, as she compares the *Ausbildungsduldung* to a ‘biopolitical technique of bordering’, designed to filter migrants based on their productivity and ability to fill shortages within the German labour market. However, this contribution could have been developed further, as the *Ausbildungsduldung* not only seems to operate as a mere ‘filter’, but potentially also assumes the role of a disciplining mechanism within the broader system of tolerated stay. As explored in the previous section, the tolerator not only subjugates the tolerated group, but also subsequently exploits their desire to be (fully) included (Brown 2006:81). The *Ausbildungsduldung* and its prospect of regularisation seem to be based on a similar logic, as it harnesses migrants’ desire to escape their ‘merely’ tolerated status. The idea of the *Ausbildungsduldung* would therefore not seem to unsettle but rather consolidate and reinforce the system of tolerated stay, instead of operating as a mere filter – a detail which remains absent from Drangslund’s analysis. This present paper aims to acknowledge the conceptually intimate link between tolerated stay and the prospect of regularisation in its analysis, as it focuses on the governmentality of tolerated stay as a whole.

2. Tolerated stay as minimalist biopolitical governmentality – a literature review

As outlined in the previous sections, the system of tolerated stay is firmly embedded in the exercise of power and migration governance. The following section will demonstrate why the analytical lens of minimalist biopolitical governmentality is particularly suited to conceptualise the matrix of tolerated stay as a mechanism of migration control.

Within migration studies, the framework of biopolitics has become a ‘recurrent analytical tool’ to examine how states seek to govern the life of mobile populations (Estevez 2016:248, Wiertz 2020:1). It has proven particularly useful to capture modern

mechanisms of migration governance, which aim to manage and organise migration (rather than suppressing it) by asserting control over migrants' bodies and their lives, which become subject to systems of surveillance and hierarchisation (Topak 2020:1860-1861). This distinctive approach to conceptualising such techniques of power originates in Foucauldian theories on power and governance. Foucault observed a shift from 'territory to population' as the 'primary concern of power' (Topak 2014:819). In his view, modern forms of governance no longer seek to 'demarcate' or 'fix' territory (Foucault 2003:65, cited in Vaughan-Williams 2015:39), but instead establish their power through advancing the life of the population. In order to optimise the life of a population, biopolitical systems thus invest in monitoring, sorting and controlling individuals' lives and bodies, which become the 'main site' of political intervention (Mavelli 2017:814, Rentea 2016:2). Yet, fostering the life of the population as a *whole* has historically entailed the devaluation of some individuals' lives, which is reflected in the much-cited formula that biopolitics means to 'make life and let die' (Wiertz 2020:4, Topak 2014:820).

Transposed into the field of migration studies, authors refer to biopolitical migration governance in order to describe 'deterritorialised' mechanisms that manage migration through the systematic targeting of migrants' bodies and contribute to monitoring, categorising and hierarchising of their lives (Aradau and Tazzioli 2014:205).

As the instruments of migration governance continuously evolve, some authors criticised the Foucauldian framework as insufficient in order to capture complex nature thereof, instead relying on Giorgio Agamben's reformulation of biopolitics (Estevez 2016:248). According to Agamben the idea of biopolitics is 'negatively evaluated' (Schinkel 2010:161) and revolves around the practice of the sovereign ban which produces 'bare life' (Agamben 1998, cited in Topak 2020:1861). Agamben compares the situation of 'bare life' with the figure of the '*homo sacer*' from ancient Roman law, who having committed a crime, could be killed by anyone without legal consequences, yet was unworthy of being sacrificed to the gods (Delheix 2019:653). According to Agamben, this individual, stripped of all legal protection and official status, was reduced to 'bare life' (*zoe*) through the sovereign ban, contrasted with politically qualified life (*bios*) (Ibid, Wiertz 2020:8). Placed in a 'state of exception', *homo sacer* is denied any 'legal existence' or 'protection from violence' (Davitti

2018:1182, Topak 2020:1861, Vaughan-Williams 2015:50). In contrast to Foucault, Agamben argues that the devaluation of the life of some is not a by-product of the overall strategy to foster life, but rather that it is the very essence of sovereign power to produce the 'biopolitical abandonment' (Topak 2020:1861, Vaughan-Williams 2015:50). For Agamben, the practice of the sovereign ban '(re)produce(s) the limits of the (...) political community and is 'biopolitical' in that it involves a decision (...) on the worthiness of different lives' (Vaughan-Williams 2015:53).

In the migration literature, Agamben's concept of biopolitics as the production of 'bare life' gained 'considerable popularity' and is 'commonly used as shorthand reference for politics of abandonment' targeting migrants and refugees (Johansen 2013:259). In fact, Agamben himself argued that the refugee camp represents the 'paradigmatic space of exception of modernity', located within the state's territory, yet outside 'because of a suspension of the norms and a neglect of the rights of its inhabitants (Agamben 1998:95-101, cited in Wiertz 2020:3-4). On this basis, studies have tied the Australian offshore detention centres to the production of 'bare life due', referencing the systematic neglect of individuals' rights. Similarly, De Genova described the situation of Mexican irregular migrants in the U.S as 'bare life' due to their exposure to the harmful effects of American deportation policies (De Genova 2010, Johansen 2013:259).

In some ways it might therefore appear logical to also examine the German system of tolerated stay as a mechanism producing 'bare life', while comparing the marginalised position of tolerated migrants with a permanent state of exception. Yet, authors such as Aradau, Tazzioli (2020), Vaughan-Williams (2015), Johansen (2013) and Topak (2020) have demonstrated why Agamben's concept of bare life may be ill-suited to 'capture the complexity' of contemporary migration politics. Firstly, the concept of bare life has been mobilised to theorise such a broad variety of highly heterogenous migration politics that it almost seems to have lost its conceptual sharpness and appeal (Johansen 2013:260). Further, the notion of 'bare life' suffers from the tendency to 'generalize about the nature' of border regimes and 'the experiences of migrants across time, space and subject positions, rather than offering a more nuanced, grounded approach' (Vaughan Williams 2015:54, Topak 2020:1863). In particular, Agamben's theory on 'bare life' fails to account for the 'agency of the subjugated

groups' and 'offers few analytical tools to describe the techniques' of governance used in order to foster and sustain the subjugation, as the concept is usually used to qualify the end result of such processes, which is then termed 'bare life' (Topak 2020:1858, Vaughan Williams 2015:54). As border regimes and migration policies evolve, the binary concept of inclusion/exclusion (bare life/politically qualified life) appears somewhat 'simplistic' (Topak 2020:1863, Aradau and Tazzioli 2019:204) and limited in its conceptual potential. In particular, Agamben's framework of biopolitics seems unable to capture the highly complex dynamic of tolerance, where the marginalisation and subjugation of the tolerated group is less based on their complete and brutal exclusion (as the concept of 'bare life' suggests), but rather results from their 'incomplete inclusion'. In fact, the tolerated group still enjoys a privileged position compared to those suffering from full exclusion, such as undocumented individuals. Tolerance thus appears inherently 'janus-faced' (Brown 2006:84), as it employs both elements of 'pseudo-care'/inclusion *and* subjugation/control in order to govern the tolerated group, which the concept of 'bare life' does not account for.

Having rejected the rather one-sided notion of 'bare life', this paper will instead rely on a modified understanding of Foucauldian biopolitics as an analytical lens for tolerated stay: minimalist biopolitics. Minimalist biopolitics accounts for complex techniques of power, that are not invested in truly optimising life, but still employ 'minimalist care' in order to 'hold off death, with the effect that the life that is preserved is structurally marginalised and only maintained, not fostered' (Williams 2015:17, cited in Mavelli 2017:815). While the concept emerged from Foucault's theories, it challenges the notion that that biopolitical governmentality solely arises from structures intended to foster life. Equally, it appears more nuanced than Agamben's account of biopolitical abandonment of life. Put simply, minimalist biopolitics is not 'predicated upon the enhancement of life' as such (Aradau and Tazzioli 2019:206), but rather refers to strategies of governance aimed at *sustaining* life through the 'provision of bare necessities' as a means of monitoring and controlling individuals (Walters 2010:138).

In his study on the Norwegian approach to managing the presence of rejected asylum seekers who cannot be returned (2013), Johansen provides a comprehensive account of how minimalist biopolitics operate in practice and contribute to the indirect (governmental) management of migrants' lives. In his findings, Johansen shows how

the Norwegian government invests in structures of care, specifically designed for unreturnable migrants, such as the so-called 'waiting camps', which offer shelter, three meals a day and on-site medical assistance (Johansen 2013:265, 267). Despite their humanitarian framing, Johansen's findings suggest that these camps are less concerned with truly promoting migrants' health (given the level of 'care' provided remains restricted to the bare minimum), but rather designed to monitor migrants and ensure their systematic marginalisation (Ibid 268). In particular, the waiting camps have the effect of geographically and societally segregating migrants: though migrants are theoretically allowed to move in and out of the camp, their mobility remains limited due to the isolated location of the camps, the limited availability of public transport and the lack of sufficient funds to pay for these as a result their meagre monthly allowance (Ibid 265).

Based on these findings, Johansen argues that the provision of minimalist 'care' contributes to the marginalisation and thus subjugation of migrants (Johansen 2013). In doing so, this system of minimalist biopolitics shapes migrants' lives and manipulates their ability to make choices: housed in isolated waiting camps and barred from employment, migrants are put in a position 'where the only rational choice seems to be to leave' (Ibid 266). The minimalist biopolitics of this system, which Johansen terms the 'funnel of expulsion', also reveal a governmental dimension, given they seek to indirectly induce the expulsion of the migrants (Ibid 258).

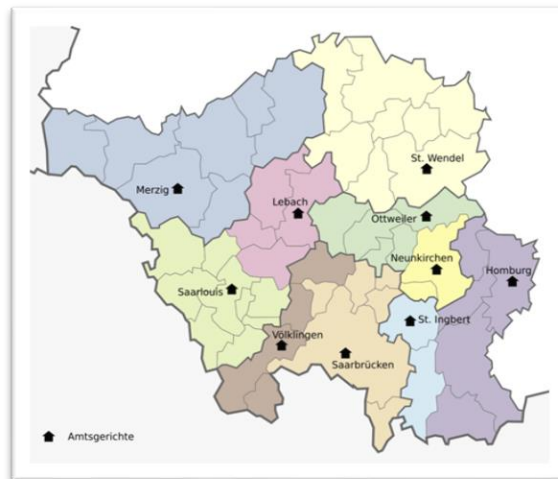
Based on this analysis, it seems evident that the model of tolerance itself is a mechanism of minimalist biopolitical governmentality, as it propagates the (minimalist) inclusion of the tolerated group as a means of asserting control over it and reinforcing its marginal position. In light of the considerable overlap with the theoretical model of tolerance (which exhibits features of minimalist biopolitical governmentality), it seems only logical to also understand the German framework of tolerated stay as minimalist biopolitical governmentality, aimed at managing the presence of unreturnable migrants. The following analysis of the empirical data will thus approach the system of tolerated stay from this angle, highlighting the ways in which the minimalist 'provision of care' becomes implicated in the regulation of migrants' lives in Germany and underpins their systematic marginalisation. Moreover, the paper will examine how these processes of 'ordering' and structuring migrants' livelihoods seek to indirectly shape migrants' behaviour and choices.

III. Methodology

This study on the migration governance rationalities embedded within the system of tolerated stay is based on a case study, which investigates the situation of tolerated migrants living in the southwest of Germany. To this end, qualitative data was gathered in fourteen semi-structured expert interviews conducted in June and July 2021. The inquiry was focused on examining how the specific regulations applicable to tolerated migrants intervene in their lives and shape their aspirations. The participants were NGO caseworkers who have been in frequent and direct contact with tolerated migrants over the past years, either in a professional capacity or as volunteers. Geographically, the dissertation focuses on the state of Saarland, located on the border with France and Luxemburg. Saarland disposes of only one migrant reception facility (in Lebach), where many tolerated migrants are housed, either on a long-term basis or provisionally until they are released into the community.



Map of Germany indicating the location of Saarland



Map of Saarland (Arrow indicates the migrant reception facility in Lebach)

A. Expert interviews and data analysis

Expert interviews are primarily employed as a method to research complex topics and to access data which are difficult to obtain (Döringer 2021:265, Bogner *et al* 2009:1). In the case of tolerated stay, the expert interview proved a suitable research method for three key reasons. Firstly, the complex framework of tolerated stay requires some degree of familiarity with the subject matter, either through professional or personal experience. Secondly, due to the potentially challenging impact of this status on migrants' (mental) health, it seemed ethically preferable to interview individuals, who regularly deal with issues relating to tolerated stay, yet are not affected by it in a personal capacity. Finally, expert interviews are generally considered a very 'efficient' way to gather a concentrated amount of data (Bogner *et al* 2009:2). In particular, the paper was interested in the experts' 'technical knowledge' (knowledge of a special field) and 'processual knowledge' (knowledge 'about interactions, routines or social processes' due to practical experience) (Döringer 2021:266).

The selection of interviewees requires a careful and reflexive approach regarding the question as to why someone may be considered an 'expert' (Gläser and Laudel 2009:118). This process is to be communicated transparently and goes beyond classic status symbols, such as a person's profession (Döringer 2021:266). For the purposes of this project, a number of criteria were established to guarantee the recruitment of individuals, who dispose of sufficient expertise formed through personal contact with tolerated migrants over extended periods. First and foremost, it appeared imperative to ensure that the interviewees have insights into the ways in which the system intervenes in migrants' lives and shapes their experiences of living in Germany. This level of insight seemed less likely to be found among decision-makers at the immigration office (who would have rather held a general knowledge of the system of tolerated stay). Instead, the study recruited social workers and caseworkers, who accompany tolerated migrants over prolonged periods and offer advice on a range of practical issues. Secondly, the project recruited volunteers who interact with tolerated migrants in their volunteer capacity offering various forms of support, such as language and integration advice.

While the initial contact with potential interviewees was established on the basis of personal contacts, the final recruitment emerged from snowballing and the application

of the selection criteria. During this process, I inquired about the scale and nature of the informant's engagement with tolerated migrants in order to ensure that participants disposed of several years of experience and personal engagement with tolerated migrants. The rigorous application of these criteria allowed for the recruitment of nine individuals working as social workers providing support to migrants from organisations, such as the German Red Cross, Caritas and Diakonisches Werk. The participants were either affiliated with the corresponding branch located in the capital region of Saarland (which remains most relevant from a migration perspective) or the office located in the reception facility in Lebach, where tolerated migrants live if they have not been allowed to move into private accommodation. These social workers were employed across the 'migration services and support' sector, offering free appointments and advice on access to language and integration classes, healthcare, employment as well as interactions with German authorities, including the immigration office. The remaining six interviewees are volunteers based in Saarland's capital region, volunteering for the Saarland 'Refugee Law Clinic' and the grassroots organisation 'Together Völklingen', which offers orientation and language support to migrants. None of my interviewees dealt exclusively with tolerated migrants, but rather provided a support to 'migrants' in general (asylum seekers, refugees and tolerated migrants). Yet, the status of tolerated migrants was a recurrent topic in the counselling sessions with their 'clients', as the next chapter will illustrate.

B. Ethical considerations and limitations

The results generated within this study reveal a number of limitations, which need to be communicated transparently. First and foremost, this study excludes the voices of tolerated migrants themselves, due to ethical considerations. Evidently, the project would have greatly benefitted from directly involving tolerated migrants and could have foregrounded their agency in navigating this complex system. However, such an approach seemed ethically questionable, particularly in light of the correlation between the status of tolerated stay and the prevalence of mental health issues among tolerated migrants. Moreover, questions around positionality (the researcher's position as a German citizen), as well as potential language barriers called into question whether interviewing tolerated migrants would have been preferable. The researcher sought to compensate for the exclusion of tolerated migrants through the

recruitment of interviewees who closely interacted with tolerated migrants, some of whom were of migrant background themselves. Although this approach avoids ethical issues, it is important to acknowledge that the interview data may not reflect the actual views of tolerated migrants, but remains based on the personal impressions of the experts as formed through their encounters with tolerated migrants. Beyond these considerations, the 'knowledge' of the experts is subject to a number of limitations and seems unable to account for all the diverse experiences of the tolerated migrants across Germany. Firstly, the small sample size and geographical focus on Saarland represents a limitation as well as the fact that the experts merely engage with a fraction of the overall group of tolerated migrants. Indeed, not every tolerated migrant in Saarland takes advantage of the counselling sessions or volunteer programmes. The researcher, however, sought to compensate for these shortcomings through increasing the sample size and ensuring that experts dispose of several years of experience of working across multiple cases.

Moreover, it is crucial to stress that 'expert knowledge' is never 'objective' and must be situated within the broader institutional context, in which it is generated (Gläser and Laudel 2009:129). Transposed to the present study, it therefore appears important to acknowledge that the experts' responses (particularly those of the social workers) cannot be fully detached from their umbrella organisations (such as the Red Cross). Although interviewees were asked to participate in their individual capacity, their interactions with tolerated migrants still emerge in a 'humanitarian context' and therefore remain somewhat tied to the respective mission of their organisation. Their encounters with tolerated migrants were primarily 'problem-focused', as migrants approached them to access advice and support. Undoubtedly, this dynamic affected the kind of data collected. However, it also proved to generate rich data on the various issues faced by migrants in their everyday lives. Finally, it is important to mention that the majority of interviews were conducted via telephone due to Covid-related restrictions. While a number of authors have expressed skepticism towards using phone calls for qualitative research purposes due to the absence of 'visual cues' (Vogl 2020:7), Christmann argues that telephone interviews are particularly suitable in the context of interviewing experts, given they tend to be less exploratory (Christmann 2009:161). In line with these considerations, the researcher carefully prepared a 'mix of open-ended

and closed-ended questions' to ensure the flow of the conversation despite the lack of 'visual cues' (Burke and Miller 2001:21, cited in Christmann 2009:166).

IV. Analysis and Discussion

The empirical part of this dissertation is divided in two main sections. In the first part, the analysis elaborates on the minimalist biopolitical dimension of the system of tolerated stay and the ways in which it seeks to control the presence of tolerated migrants in Germany. In particular, the findings illustrate how the system 'provides' for migrants as a way of securing control over them. Yet, this form of 'inclusion' and 'care' remains restricted to the provision of bare necessities and is infiltrated by logics of surveillance. Based on this minimalist approach the system seeks to sustain migrants' 'otherness' and reproduces them as 'liminal outsiders', distinct and excluded from German society despite their physical presence. Finally, a second part discusses the governmental effects of the system of tolerated stay and the ways in which it seeks to manipulate the behaviour of tolerated migrants.

A. A system of 'incomplete inclusion': Fostering the liminal position of tolerated migrants through minimalist biopolitics

The system of tolerated stay intervenes heavily in migrants' every-day lives. It does so by employing logics of minimalist biopolitics, which bring migrants within the purview of authorities (1). Through the effective combination of elements of (limited) inclusion and exclusion the system creates the liminal space of 'toleration', which seeks to reproduce migrants as distinct from German citizens, thus preventing their integration (2.).

1. *'Merely tolerated': The creation of the liminal position of tolerated migrants and logics of control*

Following the logics of minimalist biopolitics, the system of tolerated stay is premised on the idea of maintaining migrants' mere 'physical existence' by providing them with

the bare necessities and awarding them a minimum set of rights (Redfield 2005:329, Johansen 2013:267). However, in doing so, the system of tolerated stay does not seek to truly foster migrants' lives beyond physical survival, but rather subjugates them to a position of liminality, while also ensuring authorities' control over them.

These particular dynamics become visible in tolerated migrants' access to healthcare. While in principle tolerated migrants are entitled to access healthcare services, the current regulations in Saarland stipulate that tolerated migrants are not provided with the requisite health insurance card (I.3). As a result, tolerated migrants are required to request a one-off 'treatment certificate' at the 'Social Affairs Office' each time they need to access free medical treatment (to which they are entitled to) (I.1). As part of the application process the authorities verify, whether this treatment is indeed considered 'necessary' (I.12), given tolerated migrants are only entitled to free emergency treatment and treatment of acute illness (§4 Asylum Benefits Act). Several participants highlighted a number of practical problems stemming from this highly bureaucratic process, particularly in instances in which the need for medical treatment urgently occurs during the weekend (I.10). Only after 18 months of toleration, migrants may request the issuance of a health insurance card, which significantly facilitates accessing free medical treatment (I.12). The example of tolerated migrants' access to healthcare illustrates how the system of tolerated stay instrumentalises the granting of (minimalist) rights as a means of reminding migrants of their precarious position – not fully included, yet not fully excluded.

A similar dynamic characterises the regulation of tolerated migrants' accommodation arrangements. In principle, tolerated migrants are required to live in the reception facility in Lebach (I.8). Though this facility is not a 'closed facility' (i.e. a detention centre), migrants' ability to move around as well as their integration efforts remain restricted, mainly due to facility's remote location. Tolerated migrants deemed 'vulnerable' may request permission to be moved into private housing (in the context of Covid-19 this regulation especially concerned individuals with preexisting health conditions, I.12). If granted permission to do so, the 'right to move out' as well as the corresponding financial assistance may come with certain conditions attached, such as weekly reporting duties. Moreover, some tolerated migrants may be subject to the

'Residenzpflicht', which bars them from leaving a pre-determined area (even for short periods), unless granted prior permission to do so by the competent authorities (§61 Residency Law) (I.3). One respondent mentioned the case of a tolerated migrant, who struggled to visit his unmarried partner living in a different state (i.4) and another case involved a family, who was unable to attend to a relative's wedding in a different part in Germany (I.3).

Equally, the system offering financial support to tolerated migrants becomes implicated in their control and hierarchisation. Though tolerated migrants living inside and outside the reception facility are granted access to general welfare benefits and child support, these payments may be capped at the minimum level in certain circumstances (particularly if the individual is accused of obstructing removal procedures (§1a Asylum Benefits Law) (I.14). At the same time, tolerated migrants are generally barred from entering the labour market for the first three months of their stay (I.7). After this period, they may apply for a 'restricted' work permit granted on a discretionary basis by the Foreigners Office. Additionally, the application for a work permit will need to be approved by the regional labour agency, unless the person has held the toleration status for more than 48 months (I.3). Once granted, the work permit remains tied to one designated employer, whose name and address are indicated on the permit (I.6). If the migrant wishes to change occupations, the same steps must be followed again (I.6).

The above-mentioned examples share one common feature: In every instance the system of tolerated stay affords migrants some rights and a certain level of access to basic services supporting their subsistence. Yet, the scope of their entitlement remains restricted and the very process of exercising these rights is designed to confront migrants with the fact that they are 'merely tolerated'. Contrary to what Castaneda suggests, this sense is not fostered through the direct exclusion of tolerated migrants, but rather through the granting of limited rights and provision of 'reluctant' care. This form of 'reluctant' care is characterised by the creation of bureaucratic hurdles which render the exercise of the rights burdensome and forces migrants to ask permission. This very process of having to apply for various documents (i.e. the treatment certificate) instead of being able to freely participate in society forces tolerated migrants into a precarious position of dependency and relegates them to something

'inferior'. In this way, the system of tolerated stay represents a powerful mechanism designed to install a feeling of liminality and 'unwantedness' among migrants, even if they are eventually granted access to these services.

As one expert (I.9) suggested '*Obviously they can sense that Germany does really not want them*' (emphasis as in original), while another expert added '*They realise that they are in fact not really wanted here (...) The lack of prospects, the restrictions regarding their living situation... It is difficult*' (I.13).

These excerpts illustrate how the system of tolerated stay aims to 'manage' the presence of unreturnable migrants through confining them to the liminal position of 'merely tolerated' – an ambiguous space between inclusion and exclusion. This space is created through offering migrants 'minimalist', reluctant 'care' and certain (limited) rights, which allows authorities to assert control over migrants in the first place, echoing Johansen's findings on the Norwegian system (2013:267). Positioned as persons which are only entitled to 'minimalist' care and rights, the system of tolerated becomes heavily involved in the biopolitical ordering and subjugation of tolerated migrants. These governmental effects also stretch into the future, as the following section illustrates.

2. Sustaining and reproducing the 'otherness' of tolerated migrants

Although some of these hurdles may disappear after several months of residency (for instance a health insurance card may be issued), the framework of tolerated continues to (re)produce tolerated migrants as the subjugated outsider. To this end, the system deploys several biopolitical regulations, which structure migrants' lives in Germany in ways which sustain their confinement to the position of the 'merely tolerated'. In this regard, the first aspect pertains to the short-term nature of toleration certificate. Although authorities may be able to foresee that the obstacle to removal is of a long-term nature, they may nonetheless grant short-term toleration certificates for one, three or six months. At the end of this period migrants must return to the immigration office to learn whether their toleration status will be extended (I.3). Experts mentioned that this regulation represents a source of constant stress and 'pressure' for migrants (I.13):

'The question of having tolerated stay extended, this sword of Damocles over their head with the risk of deportation... every three months they reassess whether their stay will be extended or not' (I.5).

'It is very overwhelming for tolerated migrants, as their status has to be extended periodically and actually the Damocles sword of deportation remains over their head' (I.3).

Other experts described this approach of successive extension as creating moments of 'uncertainty' affecting migrants' mental and physical health (I.5). Beyond the mere psychological impact, experts suggested that the granting of successive toleration permits also affects migrants' ability to plan and imagine their future in Germany. As one respondent explained:

'The people are de facto not given a future. The deportation remains always on their back. I wish they would open it up, so that people have more clarity and security' (I.5).

,The main challenge is obviously the question of the feeling of a lack of prospects, which is often not only a feeling, but also reality. You see with toleration in this country I do not really know what will happen, if they will actually deport me (...) So I feel panic.

This is a situation of panic for migrants, most certainly... And then... there are all the restrictions for migrants and this is a burden for many. Of course, many are asking, whether they can attend the integration courses and this is often not be possible... all of these are hurdles for them, which make it difficult' (I.12).

Similar to the foregoing comment, several experts identified the difficulties in accessing official language support as a barrier for tolerated migrants wishing to establish themselves in Germany. In contrast to asylum seekers and refugees who are encouraged to participate in the free state-run integration courses, tolerated migrants are in principles excluded from them, which experts described as an 'obstacle' (I.9), a 'hurdle' (I.7) and a 'big problem' (I.1). Though tolerated migrants may be eligible to apply for spare spots, one respondent emphasised the long processing

time for such applications as well as the low chances of success (I.1). As a result of this regulation, experts suggested that the German language skills of tolerated migrants remain 'limited' (I.1) and 'rudimentary' (I.5), which is exacerbated by the fact that many tolerated migrants are required to live in the reception facility, where contact with German native speakers is limited and public transport to the next town is prohibitively expensive (I.7). Further, the chances of learning the language autodidactically while living in the reception facility are slim, as one expert explained:

(In Lebach) 'accessing the internet is difficult... nowadays everybody has a cell phone, yet try learning German from a cell phone... Well there used to be some language classes offered by volunteers, which had to be suspended due to the large demand and then the pandemic hit, which put an end to it anyway.' (I.11)

One social worker suggested that these restrictions make it 'incredibly hard' for migrants to integrate (I.1) and also affect their chances of establishing themselves on the labour market, even in cases where a working permit is granted, as remarked by another interviewee (I.9). Moreover, tolerated migrants would struggle to even find employment, given employers react with skepticism and may prefer employing migrants with a more 'secure' status (I.4, I.5), which further adds to the marginalisation of tolerated migrants.

This vicious circle mirrors what Brown observed within the theoretical model of tolerance, where the very discourse of tolerance (as opposed to inclusion) reproduces the tolerated group in their 'otherness', as they are continuously marked as 'deviant' from the tolerator (Brown 2006:45, 89). Brown argues that these effects are not incidental, but in fact form the very core of the biopolitical governmentality of tolerance, given the exaggeration of the tolerated group's otherness serves to ensure their continuous marginalisation and keeps them 'distinct' from the tolerator, thus further justifying their subjugation (Brown 2006:28).

The previous findings illustrate that a similar dynamic emerges within the system of tolerated stay, given the very configuration of the toleration status sustains and reproduces tolerated migrants in their 'otherness'. The status does so by ensuring that the level of 'inclusion' and 'care' afforded to tolerated migrants remains 'minimalistic' and does not extend beyond the 'bare necessities' required for physical survival.

Specifically, the particular structure of tolerated stay explicitly denies tolerated migrants the means to integrate into German society and thus ensures that tolerated migrants remain 'distinct' (i.e. through the exclusion from integration and language courses). This dynamic was illustrated by one expert with the following metaphor (I.7):

'For instance, you can compare it to... You are standing next to a tree with fruits, which is very close and you would like to take one of the fruits but there is no possibility... So, Germany is the tree and represents an opportunity for many people, not only an opportunity, but also a dream... The people here would like to contribute, pay taxes and so on... you know... sometimes they may be able to work and start vocational training, but it is very hard'.

Physically present, yet hindered from putting down their roots, tolerated migrants remain confined to the position of the liminal outsider through the very status, which ensures their subsistence. Instead of truly fostering life, the toleration system operates to maintain migrants' mere physical existence and in doing so reproduces migrants' as the 'merely tolerated' into the foreseeable future through their linguistic and geographical isolation and the issuance of short-term toleration certificates. In this way, migrants are catered for, but prevented from building a genuine perspective in German society (beyond mere bodily survival as a tolerated migrant). This system may severely impact migrants trapped in these situations, as one expert suggested:

'The longer they are here and sit in toleration, the more we see people becoming sick... with this permanent tension... I mean actual psychological illness, where you can tell, this changes humans' (I.13)

'Many simply feel powerless, because there are so many restrictions and limitations' (I.13)

'They linger around here (in the reception facility) and become used to it, they are provided with groceries and pocket money' (I.8).

'This is no life, no job, no language course, just so restricted: I have to eat and drink and do nothing... Just like animals'. (pause)' (I.10)

While some authors might prematurely characterise these situations as ‘bare life’, this paper urges to look beyond this simplistic framing, stressing that the harsh situation of tolerated migrants is not the result of what Agamben termed the ‘sovereign ban’. More so, the subjugation of tolerated migrants is based on their prior ‘incomplete inclusion’ and was effectively enabled through offering ‘reluctant’ care to tolerated migrants, which brings them within the purview of the authorities. Further, even as the system of statutory toleration seeks to sustain the marginalised position of migrants in the future, it does so by ‘keeping migrants close’ rather than completely abandoning them in Agambian terms. In particular, the mechanism of tolerated stay aims to perpetuate the marginalised position of migrants through rendering them dependent on the system, which simultaneously denies them the means to escape and integrate into the group of tolerators (i.e. language support). In this way, the toleration mechanism not only ‘orders’ tolerated migrants and reproduces them in their otherness through various interventions in their lives, but also seeks to indirectly modulate and regulate their behaviour (i.e. hindering them from integrating). The system thus reveals governmental logics as will be illustrated in the following section.

B. Tolerated stay and regularisation: Escaping toleration or strengthening the governmentality of tolerated stay?

While the previous sections illustrated to what extent the system of tolerated stay operates as a minimalist biopolitical control mechanism, ordering and producing migrants within Germany, this section looks into the governmental logics of this process. The key argument of this section suggests that the marginalisation produced by the framework of tolerated stay also reveals a ‘productive’, governmental dimension, because it forces migrants to ‘self-govern’ and choose between a future in or outside of Germany. This form of self-governance is boosted by the availability of options for regularisation of status, which however has the paradoxical effect of reinforcing the marginal position of tolerated migrants.

1. Prospects of regularisation for tolerated migrants?

Several experts suggested that in principle the majority of tolerated migrants are keen to ‘progress’ (I.1) (I.7). and escape the ‘rocky status’ of toleration (I.3). In this regard, the system of tolerated stay offers a novel regularisation pathway specifically designed

for young tolerated migrants interested in pursuing vocational training the so-called 'Ausbildungsduldung' (§60c Residency Law).² This sub-category of tolerated stay allows tolerated migrants to complete vocational training and suspends deportation proceedings for the entire period of the vocational training, which usually spans over two years and involves a practical and theoretical formation (Drangslund 2021:1129). Upon successful completion of the training, migrants may apply for regularisation of their status. As explored by Drangslund (2021) this instrument is relatively novel and at first sight may appear somewhat contradictory to the otherwise restrictive system of tolerated stay. Yet, the following empirical insights reveal to what extent the option of the *Ausbildungsduldung* reinforces the marginalisation and subjugation of tolerated migrants.

Firstly, a number of experts suggested that tolerated migrants struggle to secure a spot for vocational training, which indeed forms a prerequisite for applying for this particular type of toleration status.

'Though this is also very difficult with the employer. Legally complex, but also with the employers... They do not even know what tolerated stay is. Why should they offer them a spot? They are skeptical and sometimes say 'I do not want any problems for my company' and rather take someone who has a more secure status.' (I.4)

In several interviews, experts referred to the 'language barrier' as the main obstacle when looking for vocational training.

'It is then difficult to find a spot for vocational training as somebody who has a poor knowledge of German' (I.9)

'I know one case... It was with a painting company, where they said 'This will not work out!' The language skills are not sufficient (...). This case was of a

² The author is aware of the equivalent pathway towards regularisation available to mature tolerated migrants, the so-called *Beschäftigungsduldung* (§60d Residence Act). However, many interviewees reported that the *Beschäftigungsduldung* only plays a secondary role in their advisory practice, with several interviewees suggesting they had not yet come across anyone granted this special type of toleration status. One interviewee had indeed supported a tolerated migrant, which held this type of tolerated stay.

In light of the limited exposure to this type of toleration certificate among the interviewees, the researcher decided to instead focus on the *Ausbildungsduldung*, which was frequently mentioned during the interviews.

young man from Afghanistan, who could not attend the integration course' (I.13).

Another interviewee referred to the practical barriers which tolerated migrants face if they wanted to complete vocational training, such as getting to work from the reception facility:

'Again this is a matter of structural problems. The company would have to be located just around the corner (from the reception facility). If he had to take the bus, this is not possible in the early morning hours from Lebach' (I.8).

Finally, some interviewees reported the crucial role played by the language barrier in this context. Indeed, tolerated migrants must successfully complete the vocational training in order to be subsequently granted regularisation. This also includes the theoretical part of the apprenticeship and corresponding exams, which may prove challenging for those unfamiliar with the German schooling system (I.8). One expert remarked:

'It is not easy. I know few who have completed an apprenticeship throughout the time I have worked at the reception centre' (I.9)

Ironically, the barriers faced by tolerated migrants throughout this process of 'working' towards regularisation are all closely tied to the very restrictions, which the toleration system imposes on them (i.e. lack of language skills and geographical isolation). The system of tolerated stay itself is thus partially responsible for migrants' inability to access regularisation, which often remains overseen.

In addition to these barriers, a social worker highlighted that tolerated migrants struggle to satisfy the criterion of 'identity established', according to which migrants may only apply for the *Ausbildungsduldung*, if their identity is unequivocally established in legal terms (§60c Residency Law). Yet, several experts pointed out that many cases of unreturnability involve issues around identification, such as the lack of documentation (I.8). Even as migrants apply for new identification documents, it is not uncommon for some embassies of the countries of origin to refuse cooperation (I.12), which leaves the migrant in limbo and also bars access to the *Ausbildungsduldung*.

Given the *Ausbildungsduldung* requires that all issues regarding identification must be resolved in order to access regularisation, this paper argues that it must be understood as the flipside of more oppressive measures applied to tolerated migrants, who fail to take the requisite steps towards clarifying their identity (in the eyes of the immigration authorities). The system of tolerated stay specifically targets such migrants and allows for disciplinary sanctions to be imposed on those, who do not make ‘sufficient efforts’ towards establishing their identity and enabling their own deportation. For instance, tolerated migrants accused of obstructing their own removal may be banned from working indefinitely and may no longer receive monetary payments, but only ‘non-cash benefits’, as set out in §1a of the Asylum Benefits Act (I.12).

This paper argues that both of these features must be analysed in connection to one another, as they are mutually complementary: Regularisation and a German future beyond the position of toleration is offered to migrants with established identity, while migrants accused of hampering their removal may be subject to ‘punishment’. This ‘carrot and stick’ approach is, however, inherently flawed, given the above-mentioned comments suggest that even with an established identity the chances of securing vocational training remain limited (as a result of the marginalised position of tolerated migrants). One must therefore interrogate, whether the promise of a German future may not be strategically mobilised as a way of incentivising migrants to disclose their identity (in the hope of accessing regularisation), which, however, renders them ‘deportable’ before they were even able to commence vocational training.

On the other hand, tolerated migrants, who do not pursue this pathway have slim chances of escaping the position of tolerated stay and remain subject to disciplinary measures, if authorities deem their ‘cooperation efforts’ towards establishing their identity insufficient (I.13). Though there have been mass-regularisation programmes for long-term tolerated migrants in the past, access was often tied to certain criteria, which some individuals struggled to satisfy the criteria (as a result of their systemic marginalisation):

‘They required sufficient knowledge of German and financial self-sufficiency (no state support), but this is inconsistent...tolerated migrants do not have access the language classes’. (I.12)

2. *The governmental framing of choices*

Similar to what Johansen observed in this study on the Norwegian system, the German toleration system creates situation, in which migrants are expected to make a choice (Johansen 2013:266). Excluded from regularisation unless they disclose their identity or otherwise subjected to the ‘undignified condition’ of mere toleration (with potential disciplinary measures) (Castaneda 2010:253), the system aims to frame migrants’ decisions, as it predetermines their options.

As the core of this system sits the technique of minimalist biopolitics, which marginalises migrants through interventions in their every-day lives. These interventions in the form of ‘reluctant care’ and precarious inclusion not only reproduce migrants in their otherness, but also constantly convey sense of being unwanted to them. Coupled with the high levels of the uncertainty (‘Sword of Damocles’), the framework of tolerated stay attempts to manipulate migrants’ ability to plan a future in Germany and hinders their access to regularisation (Ausbildungsduldung), so that the ‘only rational choice seems to be to leave’ (Johansen 2013:266).

‘If they cannot settle here... (...) maybe it is better for some to return voluntarily, but we cannot determine this ultimately... and some indeed do leave voluntarily, not everybody stays.’ (I.13)

‘They make it very hard for them here... and yeah the idea of voluntary return plays a role’ (I.1)

These excerpts illustrate how the system of tolerated stay seeks to govern indirectly and strategically shapes migrants’ decision-making with effect of pushing them to the edge of society (and outside of the country). Even the option of the Ausbildungsduldung must be understood as a crucial component of this objective due to the structural issues in accessing this opportunity and its strong emphasis on resolving identity issues, which potentially facilitates deportation. The system of tolerated stay thus appears inherently governmental, given it explicitly refrains from adopting a ‘hard approach’ to removal and instead uses the seemingly ‘benevolent strategy’ of toleration to indirectly incentivise tolerated migrants to leave.

V. Conclusion

This paper conducted a comprehensive analysis of governance rationalities within the framework of tolerated stay, Germany's approach to managing situation of unreturnability. Inspired by insights from political theory on tolerance, this paper approached the practice of toleration as an instrument of power and (minimalist) biopolitical governmentality. This innovative analytical framework allowed the researcher to conceptualise the 'janus-faced' nature of the system of tolerated stay (Hinterberger 2020:13).

Based on the empirical findings the paper illustrated how the system of tolerated stay effectuates a biopolitical structuring of migrants' every-day lives. However, these biopolitical interventions are less a means to truly optimise migrants' lives, but rather serve to maintain migrants' physical existence under the eyes of the authorities. Illustrated by the concept of minimalist biopolitics, the restrictive provision of care has the effect of subjugating tolerated migrants to a position of liminality (not excluded, yet not fully included). Confined to this space of 'mere toleration', migrants may be provided with the bare necessities, yet are denied any support structures or means that would allow them to advance their life beyond mere physical survival in Germany. Moreover, the very attempt to exercise their rights will confront tolerated migrants with a feeling of 'unwantedness', thereby reinforcing their marginalised position as the 'merely tolerated'.

In this way, the system of tolerated stay becomes involved in 'boundary drawing' and the indirect governance of identities (Brown 2006:29), as it creates a structure in which tolerated migrants are positioned and reproduced as the 'tolerated alien' without any supposed social or linguistic ties to Germany (which is of course fictional, given many tolerated migrants live in Germany for several years). Moreover, the system of tolerated stay seeks to perpetuate tolerated migrants' position as the liminal outsider and deploys a number of mechanisms to this end, all of which are designed to 'prevent' any meaningful settlement of tolerated migrants throughout the period of their unreturnability (e.g. exclusion from integration classes and issuing consecutive short-term toleration permits). The combination of these dispersed mechanisms eventually aims to create a situation so 'unbearable', that some tolerated migrants may rather

choose to leave voluntarily instead of being locked into the position of the 'merely tolerated' (Johansen 2013:258). The system of tolerated stay is thus a paradigmatic example of governmentality, as it refrains from directly enforcing deportations, but instead seeks to induce the very same result indirectly.

Even in cases in which migrants may not choose to leave voluntarily, the system of tolerated stay still seeks to 'remove' tolerated migrants from Germany: Faced with the impossibility to deport unreturnable migrants in a geographical sense, the toleration framework focuses on removing them from German society through confining them to the space of mere toleration (instead of full inclusion). The mechanism of the *Ausbildungsduldung* must be also seen in this context and in fact serves to maintain this oppressive system, given its very structure ensures that the promise of a German future remains attainable, only for a small number of individuals and only according to the conditions controlled by the tolerator.

Viewed from this perspective the repressive effects of the system of tolerated stay are difficult to deny. Yet, the very discourse of tolerance effectively seeks to conceal these dynamics through the calculated deployment of various forms of 'minimalist care' and 'precarious inclusion'. These dynamics make it difficult to effectively unmake and protest against the system of tolerated stay, as it still appears more 'humane' than outwardly brutal policies, which subject unreturnable migrants to destitution or detention. This paper, however, hopes to serve as a foundation in this regard, having looked beyond the 'benevolent' framing of tolerated stay as generous and humane. Future studies may thus be able to build on these findings and elaborate on the model of 'tolerance' as biopolitical migration governmentality used to control and subjugate 'unruly' migrants (Brown 2006:8), even beyond the context of deportation and unreturnability.

Afterword

Since completion of this study in 2021 the issue of migrants trapped in ‘chain tolerations’ has featured in numerous political and parliamentary debates. In 2022, the German Parliament passed a new law, which seeks to address such situations by creating a novel path towards regularisation for long-term tolerated migrants. The so-called Opportunity Residence Act (Chancen-Aufenthaltsrecht) entered into force on 1st January 2023.

The central idea underlying the legislation is to offer migrants a ‘probationary right to residence’, during which they have the possibility to work towards satisfying the conditions for longer-term regularisation. To this end, authorities will grant a short-term residence permit valid for 18 months to certain eligible tolerated migrants (§104c Residence Act). The eligibility threshold for the opportunity residence card itself is intentionally set rather low, given the very objective of the law is to grant certain migrants a chance to clear the barriers to their regularisation. Most importantly, migrants are required to prove at least five years of uninterrupted residence in Germany, prior to 31st October 2022.

Estimations suggest that around 98.000 tolerated migrants would be eligible for the opportunity residence permit. During the 18 months of probationary residence migrants enjoy lawful residence and greater stability, they will be able to work and pursue education. The expectation articulated in the legislative proposal is for migrants to ‘make the most of this chance’. More specifically, migrants are expected to use this window of opportunity ‘productively’, as they work towards satisfying the missing requirements needed for longer-term regularisation under §25a and §25b of the Residence Act. In particular, migrants are required to achieve economic self-sufficiency, demonstrate a certain level of language mastery and provide proof of their identity in order to transition into long-term regularisation.

Individuals, who fail to satisfy these requirements within the 18 months period, will fall back into toleration and may be subject to deportation, in case the barrier to removal has since been cleared.

In theory, the above outlined transition may appear relatively smooth. The next years will reveal the extent to which this approach is workable in practice.

Critics have pointed out that the Opportunity Residence Act is subject to a sunset clause and will expire on 1st January 2026, which significantly minimises its impact. Moreover, the arguably arbitrary cut-off date casts further doubt on whether the new regulation will indeed realise its stated aim of resolving the issue of chain-tolerations. Due to the strict deadline stipulated by the Act, migrants, who completed their 5-year residence period after the deadline (31st October 2022), will not be able to benefit from the new legislation.

Further research is needed to evaluate whether the new regulation will indeed help long-term tolerated migrants to escape the chronic uncertainty associated with tolerated stay.

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