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Struggling over exclusion: the decision-making process on the deportation of foreign national offenders from Switzerland

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1. Introduction

With the slogan "For more security" the Swiss People's Party (SVP) promoted their referendum in favour of the automatic expulsion of criminal foreign nationals which was launched in 2007 and voted in 2010. On the posters hanging all over Switzerland, the objective was illustrated by a white sheep kicking a black sheep out of a territory marked with the Swiss flag.[1] A majority of the Swiss voters was convinced that Switzerland could actually become more secure by accepting the amended constitutional article. The entire campaign of the authors of the popular initiative focused on the threat foreign national offenders allegedly posed to Switzerland and its citizens. In such a climate of anxieties, it was difficult to argue against the proposed amendment, not at least because it did not seem reasonable to be against "more security". This might explain the success of the referundum. As we know from the growing body of literature on deportation, security aspects and particularly concerns regarding criminal behaviour have for a long time been core-aspects of deportation practices (e.g. Cohen 1997; De Genova and Peutz 2010; Kanstroom 2007; Walters 2002). In the last decade, a growing number of scholars have started to study these practices of physical and territorial exclusion of unwanted persons from the territory of a state they are not citizens of. In the meantime, different facets of the phenomenon of deportation have been highlighted by scholars coming from numerous disciplines and using a variety of approaches. Besides more theoretical contributions on the nature and effect of deportation policies and practices especially regarding questions of migration control (e.g. De Genova 2002; Peutz and De Genova 2010; Sayad 1998; Walters 2002), the perspective of the deported persons after having been returned has been in the focus of social anthropologists (e.g. Bibler Coutin 2010; Drotbohm 2011; Peutz 2010). Other studies are rather interested in the way different national bureaucracies implement migration policies in general and particularly deportation policies in

[1] http://www.initiative-pour-le-renvoi.ch/ (last accessed on 28.06.2012).

practice (e.g. Ellermann 2009; Gilboy 1991; Heyman 2000). This article aims at contributing to the knowledge on deportation by looking at it from another perspective again: It is interested in the dynamic of the decision-making process in which the foreign national offenders who risk being deported on the one hand and "the state", or more precisely the staff of migration authorities as well as judges on the other hand, argue over the question whether a person will be excluded from the territory of a foreign nation-state or if s/he will be allowed to continue living there, in spite of having violated the law.

The referendum campaign of the Swiss People's Party was based on two premises: First, as it aimed at creating "more security", it was based on the idea that the current law and practice regarding deportation of foreign national offenders was not sufficient to guarantee security. Second, by pointing at the foreign national offenders, it suggested that they were the main cause of the alleged threatened security of Switzerland. Putting criminality in relation to the presence of migrants and suggesting that deportation would enhance or restore security is a way of creating a situation of uncertainty which justifies security measures (Bigo 1994, 1998). By the simple way of talking about migrants and migration in the context of criminality, the idea of causal relations between the two domains is transmitted, without even giving evidence of such a relation and of the expected impact of the solution that is suggested (Faist 2004). In order to refer to such a mechanism which makes that by using a security rhetoric (or security practices) when talking about a specific topic, such as for instance migration, the issue actually turns into a security issue, the term "securitization" started to be used by scholars (e.g. Buzan and Waever 2003; Huysmans 2006). Referring to different threats and fears is one of the characteristics of such securitizing processes.

Contrary to the argument in favour of the referendum on automatic expulsions, I will show in this article that both in the current legal framework and in the practice of the responsible cantonal authorities and the cantonal and federal courts the ideas of risk prevention, security and anxieties play a crucial role. After a brief introduction to the present legal situation regarding foreign national offenders and its implementation, this article will mainly focus on what I call the "struggle over exclusion" (Achermann *forthcoming [2012]*).[2] With this I refer to the decision making process on whether a foreign national offender will be deported after his/her release from prison or not. Since it can take years until the decision on deportation or stay becomes final, this period can be seen as a kind of liminal stage characterized by

[2] This expression is inspired by Jürgen Mackert's "Kampf um Zugehörigkeit" (struggle over belonging) (Mackert 1999).

uncertainty. Before concluding the article, I will show how this uncertainty affects the way the foreign national inmates experience and deal with their imprisonment and how the uncertain future place of stay influences the decisions of penal authorities regarding the custodial conditions.

This article is based on an in-depth study on the situation of foreign nationals in the Swiss penal system. Data include some 120 interviews with both male and female foreign inmates, with prison staff and with administrative staff of penal as well as of migration authorities. Furthermore, around 800 personal files on convicted foreign nationals in prisons and at a cantonal office for migration were analyzed. [3]

2. The current legal situation and its implementation

Currently, administrative consequences of a criminal conviction for the future residence of a foreign national in Switzerland are regulated in the Swiss Foreign Nationals Act (FNA).[4] The Cantons are responsible for decisions on a foreigners' residence or its termination. As a consequence, cantonal practices are heterogeneous and there are no federal statistics on the number of deportations of criminal offenders. Recent estimates suggest that around 750 foreign nationals with residence permits are deported annually for reasons related to criminal convictions (Wichmann et al. 2010).[5]

Cantonal migration authorities can revoke or not renew an existing residence permit of a third country national if, among other reasons, s/he "[…] has been given a long custodial sentence or has been made subject to a criminal measure" or "[…] has seriously or repeatedly violated, or represents a threat to, public security and order in Switzerland or abroad or represents a threat to internal or external security" (Art. 62 FNA). A revocation results in the person having to leave the country.[6] Citizens of EU member states can only be "removed" under the following condition: "The personal conduct of the individual concerned must represent a

[3] The study was directed by Hans-Rudolf Wicker (University of Bern) and financed from 2003-2005 by the National Research Program 51 "Social inclusion and exclusion" of the Swiss National Science Foundation. The research team consisted of the author, Ueli Hostettler and Jonas Weber (see Achermann 2008, 2009).
[4] Federal Act on Foreign Nationals of 16 December 2005, Status as of 24 January 2011 (SR 142.20).
[5] In order to have a global idea of the number of foreign national offenders being deported from Switzerland yearly, we would have to add the number of deported offenders who had not been entitled to stay in the country, such as for instance drug traffickers who had the intention to return to their country of origin once they had delivered their goods. Unfortunately, there are no statistics and no estimations on this number.
[6] Foreign nationals without a residence permit will in any case be deported, unless the execution of the removal order would violate the principle of *non-refoulement* (art. 3 of the European Convention on Human Rights ECHR).

genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."[7] According to this legal framework, deportations are clearly conceived as instruments in order to protect public security and order. However, the interpretation and implementation of these rather imprecise notions such as "long custodial sentence", "violating public security and order" or "representing a threat" by the cantonal administrations and courts is less then clear and creates a broad margin of discretion.

3. Struggling over exclusion

In contrast to the "expulsion initiative" which is presently still awaiting implementation, cantons can exercise discretion in deciding whether they want to deport a specific foreign-national offender. In doing so, cantonal administrations are bound to respect procedural guarantees such as the principle of proportionality. Therefore, they decide on a case-by-case basis whether a particular person will be allowed to stay or will have to leave. The procedure concretely adopted is the balancing of public interest against private interest in order to evaluate whether the deportation of a specific person is proportional. The overwhelming majority of foreigners with a residence permit in Switzerland fight hard and use most of the legal means at their disposal to be allowed to continue to live in the country. The same is true of asylum seekers though they do not necessarily aim to stay in Switzerland per se, but their main objective is not to be repatriated to their country of origin. Therefore, it is usually a court that takes the final decision on whether the decision to deport a person was proportional or not.

In the following, the entire process until a final decision on deporting a foreign national offender or not is taken, is conceived and analyzed in an agency-oriented social closure perspective (Achermann 2008; Brubaker 1999; Mackert 1999; Steinert and Pilgram 2007). Without entering into its details, this means that the decision-making process is understood as being a struggle between foreign nationals who committed a crime and the Swiss state over their right to continue to stay on its territory and to live as members of its society. Inclusion and exclusion are considered to be the two poles of a continuum of possible situations of more or less access to rights and resources and of participation in different social fields. The interaction between the different aspects and facets of legal structure and social activity finally leads to a specific outcome, which in the present case would be the decision to exclude

[7] Article 27 al. 2 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004.

a person physically from the territory of Switzerland or not. An important aspect of this approach is to conceive both "parties" in this struggle as competent, powerful and reflexive actors (Giddens 1984). In this sense, even though the power imbalance between the Swiss state and foreign national offenders is huge, the latter are still to be taken as actors who can and do take decisions and who are not mere victims of legal structures or bureaucratic orders.

In this theoretical context, the practice of deporting foreign nationals – be they offenders or not – is to be seen as one of the technologies which states use in order to spatially realise the (partial) legal exclusion of foreign nationals based on their status which is characterised by the lack of an unrestricted right of abode. In other words, as a consequence of their legal exclusion from full citizenship rights in the state of which they are not citizens, foreigners can be spatially excluded from its territory.

In the following, I will present in a first step the arguments that are used in this "struggle over exclusion" by the state – represented at first by the staff of cantonal migration authorities and, in case of appeals, by courts – in order to justify the legal and territorial exclusion of foreign national offenders. In the second step follow the arguments advanced by the foreign nationals themselves in order to contest such a decision. With regard to both perspectives, I am particularly interested in the importance of anxieties and security concerns during this process and for its outcome.

a) The State's point of view: the public interest of averting threat to public security and order

As we have seen, according to the present legal rules a foreign national resident can be deported from Switzerland if s/he has been given a "long custodial sentence" or if s/he is considered to be a threat to public security and order. The cantonal migration authorities as responsible bodies for the implementation of the Foreign Nationals Act are therefore bound to implement the legal article in a way to make sure that public security and order are protected. If the future presence of a person is considered to be risky in this regard, they will force the person to leave the country. The analysis of written deportation orders, case-law on deportation cases and of interviews with officials of migration authorities reveals that the threat a foreign national offender is thought to pose is the main argument in order to justify that a deportation order is a proportional measure. In practice, the importance of this threat is evaluated on the basis of the length of the sentence and the type of offence the person committed. In this reasoning, the longer a sentence has been given by the criminal court, the more threatening a person is thought to be. As a general rule, the Federal Court decided that a

sentence of more than one year is to be seen as a "long custodial sentence".[8] However, a closer look into the arguments and justifications allows discerning more precisely what exactly is thought to be *threatened* and what or who is perceived as being *threatening*.

Threatened goods

The main goods or objects that are presented – more or less explicitly – as being threatened are security, the credibility of the legal system, order, national identity, the hospitality of the country and its citizens, and last but not least national sovereignty. Thus, justifications of deportation orders illustrate what scholars in security studies have been repeating for quite a while: the difficulty to define precisely what security is and, as a consequence, the opportunity to use this notion as an umbrella-term for many things and situations without specifying what exactly is referred to. In practice, migration officials and courts present *security* to be threatened in the first place when referring to the criminal act. Thus, public security and, according to the type of offence, the physical integrity of the inhabitants is thought to be threatened if the person continues to live in the country.[9] From another point of view, the fact of disrespecting the law is also a threat to the legal system and its credibility. This aspect is mobilized to justify that actions need to be taken if such a violation happens. In the case of foreign nationals, in addition to the penal sanctions, administrative measures are thought to be necessary in order to protect the security of the legal system. Another variation of threatened security appears if the fact that a person did not work at all or not on a regular basis in the past and that s/he will probably depend on social welfare after release is taken as a negative aspect in balancing of public against private interest. In these cases, the potential financial burden is presented as a threat to the financial security of the state which is used to justify the territorial exclusion of an unwanted foreign national.

Even more multi-faceted in its interpretation is the threatened *order*. Its most common use is "public order" which, according to the Federal Court refers to "the sum of all the unwritten conceptions of order whose respect is, according to the ruling social and ethical point of view, an indispensable condition of an orderly way of human co-existence"[10]. This definition points to the strong dependency of conceptions of order from a specific social and cultural context. In the practice of migration officials' discourses, public order is consequently mainly

[8] Judgement 2C_295/2009, 25.09.2009.
[9] "Internal security" would be the notion used to refer to for instance terrorist threats, i.e. extreme criminal acts directed at the State and the general public. In our data however, there were no such cases.
[10] http://www.bfm.admin.ch/content/dam/data/migration/rechtsgrundlagen/weisungen_und_kreisschreiben/weisungen_auslaenderbereich/entfernungs-_und_fernhaltemassnahmen/8-entfernungs-fernhaltemassnahmen-d.pdf (05.07.2012), p. 10.

culturally interpreted and implemented. This means that the fact of not respecting the rules and norms of the "host-society" as well as the way of living of the offender before and his/her reactions after having been arrested are interpreted as unwillingness or even inability of the person to respect the existing social and normative order of the country. The non-respect of public order is therefore presented as a threat to society and her normative basis. In such cases, the offender is mostly attested a "lack of integration" which refers to the alleged position of the individual vis-à-vis Swiss society. At the same time this situation is presented as being a threat to society and its integration as a collective. As a consequence, the exclusion of the threatening person seems to be necessary and appropriate for the protection of the collective, but also justified since it is the person's fault of not having "integrated".

A very frequently used formula when justifying the deportation of a foreign national offender is the reproach that the person, by his/her way of acting, "abused of the right to *hospitality*". Here again, the arguments are related to the diffuse realm of unwritten norms, that one should nevertheless know and respect. Abdelmalek Sayad (1998) mentions this point of view as being central for justifying the deportation of foreign-national offenders. In his opinion, foreigners who violate the written law of the country which receives them violate at the same time the unwritten "law of good conduct when you are at someone else's place" - that is they commit an "error of politeness" (Sayad 1998: 13).[11] In this sense, migration authorities argued in one case that "by his way of acting [he had] displayed an attitude which does not correspond to the loyal behaviour which is the condition of any right to hospitality". The threatened object then seems to be Swiss hospitality and openness which are perceived as being central to *national identity* – among other as expressions of the highly valued "humanitarian tradition" of the country which lies at the core of the national self-image. The way the formula of the abuse of the right to hospitality is used furthermore reveals that this "error of politeness" is perceived as an insult to Switzerland and its good intentions. In this sense, the fact of accepting immigrants is presented as being an altruistic act of generosity towards "guests". As such, they are expected to respect, or to subject themselves to, the rules of their "hosts". Hence, if a foreign national dares to violate written law and unwritten norms, the right to hospitality will be revoked and the person deported.

Finally, on a different level again, authorities justify the deportation of foreign national offenders by an alleged threat to *sovereignty*. In this sense, the state has to react in a clear and strong way to offences committed by foreign nationals in order to restore and reaffirm that it

[11] Quotes originally in French were translated by the author.

is the instance in power of deciding over who has the right to reside on its territory. Urging persons who violated the law to leave is a therefore a way of demonstrating that the state is in control of what is happening on its territory (see Peutz and De Genova 2010: 2).

Threats

To a certain extent, what is being perceived as threatening is already contained in the arguments concerning the threatened goods. Still, in order to shed more light on the way deportation of foreign national offenders is justified, it seems useful to look in detail at the menaces presented in the discourses of migration officials and courts. Three broad categories of threats can be differentiated: offence-related, person-related and organization-related ones. The first and most evident threat is *recidivism*. By the means of excluding the offender from the territory, the risk that s/he will reoffend is thought to be eliminated. It is therefore not surprising that in addition to the length of the sentence which is taken by the authorities as an indicator of the badness of a deed, the type of offence is also taken into account. Violent crimes, drug and sexual offences are thereby considered to be particularly bad and the interest of preventing the risk of reoffending is therefore especially big. This type of evaluation is mostly done on the basis of the written judgement of the criminal court. Contrary to decisions by penal authorities, no professional evaluation as regards the risk of recidivism is used for this purpose. The fact that a foreign national had committed a certain offence is taken to be sufficient for proving that s/he is capable of such a violation of law and therefore enough for justifying his/her deportation.

However, the offence and the risk of it being repeated are not evaluated independently, but in relation to the *person* who committed it and to his/her characteristics. For instance, the way a person behaves after having been convicted can have an influence on the perception of the threat s/he is thought to represent. However, this influence can only be negative: The fact that a foreign national who risks to be deported behaves correctly while being in prison, that s/he may even regret his/her deed, that s/he promises not to reoffend, etc. are not accepted as arguments against a deportation order by migration authorities. On the contrary, if the person does not behave correctly in custody and/or if s/he does not show any sign of remorse and understanding that s/he did something wrong, the threat of recidivism is thought to be even bigger.

In addition, the arguments used in the decision-making process pro/contra deportation reveal the way the persons in question are perceived by migration officials and how these characteristics are thought to be related to the offence. In this context, the first and foremost

characteristic is the foreign, i.e. non-Swiss, nationality of the person. Being a foreign national resident encompasses a variety of (alleged) characteristics which can serve as arguments against them being allowed to continue living in Switzerland: they are not considered to be part of "us", are different, are citizens and therefore allegedly loyal members of another state; in short: they are outsiders (Elias 1990), who had nevertheless been accepted as "guests". In that sense, any foreign national is suspect – which is why any of them can be deported under certain circumstances. If in addition such a person confirms by committing a crime that s/he really is a risk to security and order, she confirms the pre-existing suspicion and therefore becomes an unwanted person. It is interesting however, that in our data there is no evidence that certain national or ethnic groups are perceived as particularly threatening.[12] The sex of the person is another characteristic that is – rather implicitly – influencing the evaluation of the risk a foreign national offender might represent. Both discourses and existing statistics on deported persons and custodial conditions reveal that male offenders are considered to be more threatening than female ones (Achermann 2008; Achermann and Hostettler 2007). Gender stereotypes appear for instance when migration officials talk about the relationship of mothers and fathers to their children and as a consequence about the effects the deportation of a mother or a father would have on the well-being of the children. In addition to such family-related gender stereotypes, the reasoning and acting of migration officials makes clear that they perceive male foreign national offenders as being more dangerous than female ones. Since most of these personal characteristics (offence, nationality, sex) which contribute to constitute a "dangerous other" cannot be undone or changed easily, the most effective way of preventing these perceived threats seems to be to physically exclude the person from Switzerland so that it would not be affected by any kind of risk.[13]

Interviews with migration officials and members of appealing instances reveal another threat that guides the decision-making process which is situated on the level of the administration as an *organization*. Irrespective of the precise decision and affair at stake, officials are always afraid of being corrected by a higher level of jurisdiction. This means that the genuine interest of migration authorities to avert any danger to Switzerland and its citizens that a foreign national might cause is limited by the parallel – and sometimes contradictory – interest of

[12] Still, cultural and national stereotypes are present in migration officials' discourses. But instead of being used to stress the threat a person represents, they rather appear as indicators that the person lacks attachment to Switzerland and is not integrated.

[13] Even though there are numerous examples of deported persons who try and sometimes succeed in returning to the country they had been deported from, this aspect is completely neglected in the reasoning of migration authorities.

taking decisions that will be approved by higher instances. If the higher instance corrects the migration authority's decision, the latter is not only in the position of the loser and to a certain extent also of the one who has not done his job properly, but it has additionally to bear the expenses of the costs of the appeals procedure. It is mainly due to the right to appeal and therefore the threat of being controlled and reprimanded that a cantonal migration authority as the first decision-taking actor might refrain from deporting a foreign national offender. The main motives for such a self-restricting decision are the risk of violating international human rights standards such as the right to private and family life (art. 8 ECHR) or the principle of *non-refoulement* (art. 3 ECHR). These aspects have to be taken into account when evaluating the personal interest of the persons in question which includes that migration officials have to consider the possible disadvantages a forced return to the country of their nationality could represent for themselves and their families. Contrary to the arguments in favour of deporting foreign national offenders, these aspects are however not fixed explicitly in the legal texts, but have been specified continuously in the case-law of the Federal Court and the European Court of Human Rights.

Summing up, it becomes clear that the decision on the deportation of a foreign national offender is largely influenced by a variety of intermingled anxieties at different levels and of different intensity. The diffuse and poorly specified threat which the future presence of the person on the Swiss territory would represent to equally diffuse threatened goods is the main argument legitimizing a deportation order. The legal grounds mention this motive explicitly. However, they also give the responsible officials considerable discretionary power and create the opportunity for the influence of subjective anxieties and moral standards of individual bureaucrats in their role of representating the state and society and of being responsible for the protection of public security and order by taking the necessary decision on in- or excluding foreign nationals.[14]

b) Private interest defended by the foreign national offenders: the strength of social bonds and the frightening future

As it has been mentioned before, it is only with legal residents threatened by deportation that a decision-making process including the balancing of interests takes place. It is largely up to the foreign national offenders to present the arguments defending their private interest which have to be taken into account by migration officials. Contrary to the public interest which,

[14] Ellermann (2009: 171) defends a different interpretation of bureaucratic discretion when proposing it should be increased in deportation cases.

according to the relevant legal article, puts the threat represented by a foreign national offender to the forefront, the official discourse of these persons is less security-oriented and sounds more positive. As we will see, this does not mean that they do not feel a variety of anxieties. Rather, this type of discourse is the effect of the legal structuring of the administrative procedure which takes as a starting point the threat a foreign national offender represents. The foreign nationals are then asked to react to this "accusation" and to present their private interest. Doing this, they intend to prove that authorising them to stay would be the adequate decision. Usually, there is no personal contact between the foreigner threatened by deportation – who are mostly represented by a lawyer – and migration officials (or judges or court clerks), so that the "struggle over exclusion" takes place in written form. Due to this procedure and probably also to strategic reasons, the foreign nationals demonstrate their personal interest in staying in Switzerland by highlighting three types of arguments which will be developed in this section: First and most important comes their close attachment to Switzerland and its inhabitants which aims at presenting a deportation order as a disproportionate measure. Second they respond to the alleged risk of recidivism and aim at appeasing the anxieties of the state. And as a third point follow arguments related to the negative effects of a forced return to their country of origin which are again used to underline the disproportionality of a deportation order.

The most important argument of foreign national offenders to contest their deportation is to highlight their *attachment* to Switzerland. In the written documents sent to migration authorities, they mainly develop reasons why their deportation would result in a violation of their right to private and family life (art. 8 ECHR). In order to prove this, they insist on different types of bonds they have to Switzerland as a country, to its economy and, most importantly, to persons (be they Swiss or foreigners themselves) living there (Achermann *forthcoming [2012]*). As a consequence, deportation and its expected effects on the deported person and his/her family are presented as being measures too heavy to be justified by the committed offence for which the person was serving – or had already served – his/her sentence. In the interviews with persons who knew or feared they would be deported after their release from prison, we came additionally to know the more personal, and in many cases also the very emotional variation of this legally structured discourse. In these situations, the inmates express their anxieties related to the threat of being deported. Most inmates are terrified by the idea of having to leave and being separated from their families. The prospect of having to live in a country far away from their children is for certain persons even worse

than the mere fact of having to return to their country of origin. A Brazilian woman whose daughter is a Swiss citizen because of her Swiss father was in tears when she told us: "I have to go to Brazil. My daughter will stay here. That is not possible. […] They will separate me and my daughter. She is going to blame me for this in the future; that is not okay. […] I want to stay with my daughter. If I am here, I can see here. If I am in Brazil, I cannot see her. Everything will be over. […] My daughter does not want to go to Brazil. It is better for her to stay here, because of the school and everything." But also family members express their anxieties of having to return to a country that is foreign to them.[15] Some of them write letters to migration officials and try to convince them of allowing them to stay by explaining that they do not speak the language, do not know the local cuisine and would have problems adapting to a way of life which is "completely alien to our everyday way of life". Others, among them people who do not have children, are mainly afraid of the disconnection to their past life and of an unknown future in a place they do not want to live.

The second argument of the foreign national offenders in favour of them staying in Switzerland responds directly to the public interest presented by state actors: They *negate* that there is a *risk of recidivism* by stressing that they are behaving well in prison and by promising they had been taught a lesson and had changed during their prison stay. Therefore, according to them there is no threat emanating from them and anxieties related to their future stay in Switzerland are not justified. As it has been shown before, this line of argumentation is mostly dismissed by migration officials and courts with the counter-argument that first it was just normal that a prison inmate was behaving correctly and that second, the intention to deport him/her was mainly based on the former behaviour and the threat the person represented in the past.

Finally, the foreign nationals who risk being deported try to counter the arguments of migration officials by pointing to the negative effects and risks a forced return could have for themselves and possibly also for the members of their families. In the official responses to migration authorities or courts, this bundle of arguments can be attributed to an alleged violation of the principle of *non-refoulement* (art. 3 ECHR) which would consist of being "subjected to torture or to inhuman or degrading treatment or punishment" if being deported. In a few cases, which mainly concern asylum-seekers with either a pending or a rejected request, people actually fear their life would be threatened due to the political or economic

[15] This can be the case for persons whose permit is dependent on the one of the deported person, but also for persons who would legally be entitled to stay, but who want to live with their husband/wife or father/mother and therefore feel forced to follow him/her.

situation or due to insufficient medical treatment in their country of origin. A Nigerian inmate whose asylum request had been turned down told us in the interview about his anxieties regarding deportation and the resulting mental stress: „Because there's nowhere to live, you know. It's better I die and forget it all, prison and everything. [...] You just want life somewhere. […] Sometime I tried to kill myself because this one pains me." Similar anxieties were expressed by persons who were afraid that in case of returning to their country of origin they would become a victim of "honour killing" as a consequence of their offence. A Malaysian drug trafficker feared a second punishment for her offence which would consist of being sentenced to death when returning.

Legal residents however are mostly not afraid of their life and integrity being threatened if they were deported. But still, the arguments they use both in the official communication with authorities and in the interviews give an idea of their numerous anxieties in relation to the risk of being deported. Broadly speaking, they are afraid of losing their past and present life and of losing their autonomy to decide where to live. Most of them have probably been aware of their deportability (De Genova 2002) before they were informed that the cantonal authorities were trying to turn this abstract threat into reality (see Achermann and Gass 2003). However, while the deportation order is not final many, especially second generation immigrants, cannot believe that they would really be returned to the country of which they are nationals. They cannot – or do not want to – believe that the offence they had committed and for which they were paying with their liberty would be a reason to justify their deportation. In the struggle for their future stay, they give the arguments why, according to their point of view, returning to their country of origin cannot reasonably be expected: they would be isolated because of lacking social bonds, would be confronted with major cultural differences, would have no possibilities of economic reintegration and would not know how to make a living. What aspect is highlighted more or less of course depends on the individual situation and migration history. It becomes however clear that the anxieties regarding their future which are common to most prison inmates – e.g. what will they do, how to deal with the stigma of the former prisoner[16], how to deal with liberty? – become intermingled with the anxieties of having to restart their life in freedom in a place they do not want to go to. These aspects

[16] Those foreign nationals who had not been living in Switzerland before and who mostly did not oppose to being deported are often doing quite well during their prison stay and try to take profit of it (Achermann 2008). Apart from worrying about their family members left behind, their main concern regarding their future is that people at home – in certain cases including family members – could get to know they had been in prison in Switzerland. The anxiety of having to be return as an ex-prisoner can be so strong that some persons tell they would prefer to live in another country if their family and community got to know.

however are rarely mentioned when responding to migration authorities as they do not seem to fit into the legal argumentation and procedure. They are nevertheless reflected in interviews and in personal conversations with prison staff and pastors.

4. Uncertainty in custody blocking preparations for the future

The decision-making process on the future stay or deportation of a resident foreign national offender usually takes time (Achermann 2008). At its best, the decision becomes final a few months or weeks before the end of the sentence. In certain cases, people are released before they know if they will be allowed to stay or not and have to await the final decision in freedom.[17] As a consequence of this long lasting procedure, for every person against whom a deportation order is pending time in custody is characterized by a great deal of uncertainty concerning the place where s/he will continue to live after having served his/her sentence. As the main objective – besides guaranteeing security – of a prison sentence is to help and prepare the inmates to live in freedom without re-offending (so-called resocialization or re-integration), to know where this process would take place is of basic importance for the penal system as a whole and particularly for the work of prison staff and for the prisoners themselves (Achermann 2008).

As regards the foreign national prisoners, the uncertain future can have destabilizing effects on their present and prevent them from doing in custody what prison staff and penal authorities expect them to do. Some lack motivation and initiative to take charge of their own fate as long as the future place of stay is undefined and therefore resist to any preparation for release. Some inmates suffer particularly from the pending deportation order and the fear of not being able to pursue their former life after release. As a consequence, they are completely blocked in a situation which is characterized by self-pity. They do not want to think about their future and resist to any changes in the penal regime which might help them to prepare for the future, wherever it will take place. The fact of hardly being capable of influencing the decision-making process regarding their deportation makes them feel even more impotent and reinforces their inactivity.

Members of prison staff are the ones most directly confronted with the worries of the prisoners and with their reactions to their uncertain future place of stay. Depending on their

[17] Certain cantons have started to revoke the suspensive effect of an appeal and therefore deport released offenders before the final decision is taken. If the appeal was accepted, the person would be allowed to re-enter the country.

conception of their job and of what they want to achieve with it, they will adopt different strategies of how to deal with these inmates. Their scope is however limited to everyday interactions within the prison. For the penal authorities in charge of decisions regarding custodial conditions and reintegration measures, the uncertain future place of stay is a somehow bigger obstacle for a number of decisions they have to take. Any measures aiming at concretely re-connecting inmates with life outside the prison – such as leaves (for some hours or for an entire week-end, accompanied or unaccompanied), work outside prison-walls or even jobs in the regular labour-market or the dislocation to a more open prison type – depends among others[18] on the fact if the person will be living in Switzerland after release. This criterion being undetermined causes them some trouble and is also a reason of resentment between penal and migration authorities. We observed two different ways of how the responsible cantonal services deal with the situation of having to decide whether they want to put priority on the prevention of a risk of escape or on re-integration measures. If the fear of a foreign national inmate escaping guides the decisions of the penal officials, they will opt for high security measures which aim at ensuring that the sentence is served and that the prison accomplishes its duty of keeping inmates and protecting the public. In practice this means that while a deportation order is not final, the foreign national will serve his sentence without any possibility of leaving the prison temporarily in order to re-adapt and approach to life in freedom. In case the person would nevertheless be staying in Switzerland, s/he would be released without the common preparation. This strategy actually corresponds to the one adopted by most cantons with persons whose deportation order is already final. This means that they are released and deported directly out of an extremely closed prison system.

If the second option is chosen, the fear of "missed re-integration" in case the person would be staying in Switzerland is bigger than the fear of escape. According to that rationale, in order to avoid re-offending, which could happen on the Swiss territory if the person was finally not deported, the foreign national follows the usual re-integration steps which include a progressive opening of his/her custodial conditions. In case a deportation order would be issued, this process would come to a stop. Even though the short-term objectives of the two strategies are motivated by different kind of anxieties, in the end they both aim at guaranteeing the security of the Swiss public, however with different means. There are no studies whether one of them is more or less effective from that point of view, though. As

[18] The two other main criteria are whether the person has close social relations to persons living in Switzerland and whether penal authorities estimate that there is a risk of escape (which is again dependent on an eventual deportation order). See Achermann (2008) for more details.

regards the effects on the foreign national inmates however, it becomes clear that a final deportation order and sometimes even a pending one excludes them from the benefits which a progressive opening of their custodial conditions could create for their reintegration and for their well-being while in custody.

5. **Conclusion**

The decision-making process whether a foreign national offender who used to be a legal resident in Switzerland shall be deported after release has been conceptualised in this article as a dynamic struggle over exclusion between state actors and migrants concerned. Whereas migration officials stress the threat emanating from a foreign national offender and his/her continued stay in the country, the latter demonstrate their attachment to Switzerland and try to neutralise the alleged threat. In most cases, their personal anxieties regarding the threat of being excluded and disconnected from their present life do not come as a priority in the official and legally structured struggle over deportation or stay. Rather, such fears are expressed in personal conversations. The outcomes both of individual deportation cases and of the national referendum on the automatic deportation of foreign national offender demonstrate that threat- and anxiety-related arguments are powerful and difficult to contest. Since they refer to what is commonly called security, they touch at the very basic issues both of human life and of the responsibility of states towards their citizens.

The fact that the security concerns of the state are in many cases accepted to be more important and more influential than the arguments of the foreign nationals might be explained by the interaction of different factors. Most important is probably the considerable power-gap between foreign nationals and Switzerland as a receiving state. It is the latter that, based on its sovereignty, defines and applies the legal bases for staying and deporting non-citizens and that will defend public and state security with the means at its disposal. Furthermore, in a situation where someone violates the law, the fact that the offender is a foreign national becomes of crucial importance. At that moment, deportability in the sense of a partial legal exclusion which characterises the situation of any non-citizen comes to the forefront and risks to turn form an abstract threat into real spatial exclusion. A non-member, admitted as a “guest”, who disrespects the rules of his “hosts” therefore finds himself in a weak position; even more if respecting his/her claims would imply for the state representatives to take the risk of a future violation of law with possible harms to citizens and to the state.

In such a perspective, highlighting their strong attachment to the state is a rather feeble argument of foreign nationals, which only has a chance to pass if deportation is considered to violate the human right to private and family life in a disproportionate manner. Nevertheless, if the threat the foreign national offender represents in the perspective of migration authorities is too big, the state interest in self-preservation is usually accepted to be more important than the risk of separating families. In many such cases, deportation orders are therefore approved by courts. The only really powerful argument against being deported, which applies irrespective of the threat the foreign national concerned might represent, is if s/he succeeds in proving that his/her own human security is at serious risk in case of returning to the country of origin. Even though the absolute protection guaranteed by art. 3 ECHR seems to prove that in the end, the integrity of an individual is accepted to be more important than potential risks to public security and order, it is important to remind that in practice it is rather difficult to prove a risk of violation of the principle of *non-refoulement*.

This difficulty is related to another aspect which seems to influence the reasoning especially of migration officials. In a rationale deeply rooted in a vision of an ideal world of liberal democratic nation-states where every person is attributed to one state which looks after his members, deporting a foreign national from a receiving state corresponds to sending him/her "home". The extensive use of the positively connoted notion "home" (see also Walters 2004) expresses that according to Swiss officials, the fact of returning there cannot be seen as being the cause of serious anxieties or threats or as representing an unfair act. Far more, deportation contributes to restore a somehow natural condition via the "allocation of subjects to their proper sovereigns" (Walters 2002: 282).

Finally, there is a more general tendency to prioritise security concerns which is far from being exclusive to the issue of migration and deportation, but which influences the context in which the different state actors take their decisions. The importance of a "culture of control" (Garland 2003) has grown stronger in Switzerland since about the 1990ies particularly in the penal field, but with obvious parallels in the migration domain. Since then, the main and apparently logical measure adopted in order to respond to risks and fears and to maintain security is the spatial exclusion of the alleged threat. In the case of dangerous offenders, this implies their strict enclosure into closed detention facilities, in the case of unwanted foreign nationals ordering deportation from the territory is the consequence (Achermann 2008).

Having this context in mind, it does not come as a surprise that Swiss voters accepted a popular initiative which promised to enhance security through the deportation of every

foreign national who had committed one of the crimes defined by a broad list. One and a half years after this vote, experts are still struggling how to reconcile the new constitutional article with the principle of proportionality and with international law. Admittedly, it is now widely accepted that the principle of *non-refoulement* should keep on being an absolute obstacle to deportation. Nevertheless, the present propositions for the implementation of the initiative demonstrate that the perception that foreign national offenders are in the first place a threat to Switzerland and its inhabitants will become even more dominant.[19] As a consequence, the offenders' own interests and anxieties will not be taken into account anymore at all. Whether the new legal grounds will really increase security as it has been promised by the authors of the initiative has to be questioned though. The launch of the initiative, the campaign before it was voted and the reactions to the draft law suggest that the main objective is rather to be seen as symbolic politics which aim on the one hand at reassuring the public that the Swiss People's Party is defending Switzerland against uncontrolled migration and unwanted migrants. On the other hand, every foreign national living in Switzerland has been reminded of his/her deportability and that s/he risked being kicked out of the country if s/he did not respect the rules and norms of his/her "hosts".

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