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5 Contentious citizenship

Denizens and the negotiation of deportation measures in Switzerland

Gianni D'Amato and Noemi Carrel

Escaping deportation: the case of Mariella V

Born in the Eastern part of Switzerland, Mariella V. grows up, graduates school and makes an apprenticeship in an office in her canton of birth. She is the offspring of Italian migrants who came to Switzerland in the 1950s during the apex of the Swiss Guestworker recruitment programme. Until today, Mariella holds only Italian citizenship. Her residence is, however, guaranteed by the permanent residence permit C.

Today, Mariella is over 50 years old, drug addict, HIV positive and carrier of Hepatitis C virus. She participates in a methadone programme and receives disability benefits. The same holds true for her long-term partner, Aldo R., a second-generation foreign national with Italian citizenship like Mariella. Despite the difficult circumstances, they manage to preserve their relationship with their daughter, who was taken away from them in 2004 at the age of 12 (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013; Tages-Anzeiger, 2014).

The situation of Mariella, highly problematic in social, economic and health terms, got even more difficult with the loss of her rights to reside in the country as a consequence of her criminal record. At the age of 20, Mariella was convicted for the first time after violating narcotics law. The offences continued, and by 2011 she had been convicted 24 times, including fines and sentences to imprisonment, namely 15 months in 2008, 10 months in 2009 and 32 months in 2011 after having sold 5.5 kg of heroin. This last offence was decisive for the cantonal migration office of St Gallen: shortly after the conviction, it decreed the withdrawal of her residence permit and a removal order (for the legal basis, see the following section). Her partner, who was sentenced to prison in 2011 as her accomplice, faced the same fate (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013; Tages-Anzeiger, 2014).

Leaving their country of birth was no option for Mariella and her partner, so they initiated legal and judicial proceedings to fight the administration's decision and made an appeal up to the Federal Tribunal, the Supreme Court in Switzerland. None of this was successful. According to the Federal Tribunal, selling drugs is a serious offence. It is perceived as a concrete and immediate danger to hundreds of citizens and for this reason a threat to public security, health and order. Since

Mariella repeatedly violated the law and did not leave the drug scene, a high risk of relapse was assumed in her case. In consequence, the interest in expelling Mariella was estimated as very high. Furthermore, the Federal Tribunal concluded that Mariella was not integrated in Swiss society and highlighted the fact that she had not had proper work for more than 20 years. Although the fact that she was born in Switzerland and had spent her whole life in the country was a strong argument in favour of Mariella's request, her expulsion was nevertheless perceived as reasonable. The Federal Tribunal argued that she was conversant enough with life in Italy and that her relocation would not derogate her family life, since her partner faced the same sanctions. Because her daughter had already reached the age of majority, the preservation of their relationship was considered possible even from abroad (see Judgment of the Swiss Federal Tribunal: FT/2C_407/2013).

Consequently, the Federal Tribunal confirmed the administration's decision to withdraw Mariella's residence permit and to decree an expulsion order in November 2013. But then a final appeal for reconsideration of her case to the Security and Justice Department of the Canton of St Gallen did succeed. What was decisive for the re-evaluation was the positive personal development of Mariella, resulting in good behaviour and a more stable health situation. The administration argued that her expulsion could harm this regained stability and might cause a threat to public health. An administrative appeal by the Swiss People's Party (Schweizerische Volkspartei SVP)[1] against the reconsideration of Mariella's case was rejected by the judicial committee of the Parliament of St Gallen and Mariella's right of residence was finally conformed (Neue Zürcher Zeitung, 2015; Tages-Anzeiger, 2014).

Denizenship: a status protecting foreign nationals?

Deportation is a powerful technique of states to get rid of 'undesirable foreigners' (De Genova, 2013; Walters, 2002). The degree of protection granted to non-citizens is therefore an object of contention. In Switzerland, a popular initiative[2] (accepted in 2010 and implemented in 2016) caused important legal changes regarding the expulsion of foreign residents. This raises questions about foreigners' deportability and their protection against 'disproportionate' expulsion. In particular, the legal developments regarding the rights of those residing in Switzerland for a long period or in the second generation need serious attention. In this regard, the case of Mariella impressively exemplifies the underlying norms that characterise the expulsion law. It thus presents the starting point for the following discussion focusing on denizens' deportability, the current legal developments and the consequences regarding denizens' status.

Denizens are persons with a status quite similar to that of a citizen, but according to law still considered aliens. These immigrants have resided in their 'destination' countries for long periods without becoming naturalised citizens but nonetheless have substantial sets of rights (Hammar, 1990). According to the European Union Observatory on Citizenship (EUDO) glossary, this applies for long-term resident foreign nationals whose rights include at least the

following: '[Long-term] residence permit, access to employment, enhanced protection from deportation/expulsion [compared to short-term residents] and provisions for family reunification in the country of residence'.[3]

Some perceive denizenship as a transitional status that will finally end with naturalisation, i.e. like a 'citizen in waiting'. Even though this assumption may partly correspond with the foreign residents' experience, we also have to consider the fact that a significant number of denizens may never be naturalised. If foreign nationals acquire a status that guarantees a set of rights that are to a large extent similar to citizenship rights (see EU Directive 2003/109), naturalisation may not even be perceived as a necessary step in the process. Therefore, denizenship can be considered a permanent status too. Still, there are serious differences between denizenship and citizenship. Denizens only have limited political rights and their protection from deportation is not absolute. The inviolability of the citizen's residence rights therefore still makes a serious difference (Huddleston and Vink, 2013: 6, 23; Pelacani, 2015).

In Switzerland, denizens represent an important part of the population. As of 2014, 24.26 per cent of the permanent residents were foreigners. 62.84 per cent of the foreigners had an unlimited long-term residence permit (permanent residence permit C) and 26.49 per cent had been in Switzerland for 15 years or more. Furthermore, 19.45 per cent of the foreigners were born in Switzerland, i.e. 4.72 per cent of the total permanent resident population (see Table 5.1).

Table 5.1 Permanent residents in Switzerland and four neighbouring countries

	CH	*DE*	*AT*	*IT*	*FR*
Population in total	8.237.700	81.197.537	8.507.786	60.340.328	65.800.000
Resident foreigners	1.998.500 (24.26%)	7.539.774 (9,3%)	1.066.114 (12,5%)	4.235.059 (7.02%)	4.200.000 (6.3%)
Foreigners born in the country	388.700	1.345.000	163.636	572.720	600.000
% of foreigners born in the country; 100% = total foreign population	19.45%	17.8%	15.35%	13.52%	14.2%
% of foreigners born in the country; 100% = total population	4.72%	1.66%	1.92%	0.95%	0.91%
Date of reference	31 Dec. 2014	31 Dec. 2014	1 Jan. 2015	2009	1 Jan. 2014

CH: Bundesamt für Statistik, STATPOP; see Swiss Federal Statistical Office: *The Statistical Encyclopaedia*.
DE: Zensus, 2011; Mikrozensus, 2014.
AT: Statistik Austria, Volkszählung, 2001; Statistik des Bevölkerungsstandes, ab 2007.
IT: Communi Italiani, www.comuni-italiani.it.
FR: Estimations de population basé sur le recensement de la population, 2012.

In this respect, it has to be stated that a large part of the population is subject to the law on expulsion, whereby a considerable number of them are to be considered denizens.

The consequences of an expulsion order are particularly serious for persons who have been living in a country for a long period, and even more so for persons born in that same country. Although this fact is considered by the Swiss law as well as by administrative and judicial practice, expulsion orders in according cases are no exception but an established part of the expulsion practice. Based on a survey of Swiss cantons regarding their practice in decreeing expulsions, a study of the Federal Commission on Migration (Wichmann, Achermann and Efionayi-Mäder, 2010: 8) evaluates that in 2009 expulsion orders were decreed for at least 750 persons with residence permits, due to delinquency. Unfortunately, it is not possible to precisely determine what proportion of these were persons with permanent resident permits C or persons born in the country, because there is no consistent cantonal database on expelled persons and their status. But the report concludes that in almost all the cases of serious offences (e.g. violent crimes or drug trafficking) foreigners are expelled regardless of their status (ibid.). In regard to this expulsion practice and the number of denizens living in Switzerland, it is important to pay attention to this specific group within the scientific debate on expulsion.

Of course, Switzerland is not the only country with an important population of immigrants and serious regulations on expulsions. The neighbouring countries Germany, Austria, France and Italy, for example, expel delinquent foreigners and have, compared to the Swiss law until October 2016, to some extent similar regulations.[4] However, these countries have implemented far-reaching protection from deportation for several categories of foreign residents. Second-generation immigrants are among the categories with the best protection from expulsion. In Austria, foreigners born in the country are excluded from expulsion in an absolute way. In Italy and France, they are almost absolutely protected from expulsion. Germany has stricter regulations regarding expulsion and is much closer to the Swiss legal framework. But, in contrast to Switzerland, Germany has also implemented a form of jus soli within the naturalisation law so that a much smaller proportion of second-generation immigrants are actually foreign citizens. Taken as a whole, these neighbouring countries guarantee a much higher level of protection for second-generation immigrants. Nevertheless, they can, even though in a more limited range, expel delinquent denizens, if they present a serious threat to public security (Fargahi, 2015; Fornale *et al.*, 2011; Kurt and Leyvraz, forthcoming). Consequently, the necessity of discussing the situation of denizens regarding expulsion law prevails beyond the Swiss case. However, the discussion of the Swiss case is of particular importance due to the strict formulation of the expulsion law, the low protection of denizens from deportation and the high number of denizens within the Swiss population, as well as the high number of second-generation immigrants without Swiss citizenship. Furthermore, the current adaptation of the Swiss law exacerbates the regulations on expulsions and seriously expands the reasons that can give rise to deportation. In this sense the law on

expulsion has taken a serious turn and the discussion of the situation of denizens, especially of second- or third-generation immigrants, has become even more important.

In the light of the above, this chapter will in the following discuss the legal context of Switzerland by presenting the expulsion regulations and current legal changes. Thereby the situation of denizens, and of second- and third-generation foreigners in particular, is reflected in more detail. As the discussion shows, denizens' rights are subject to modification. Thus, their position as quasi-citizens is under pressure and their belonging to Switzerland is questioned.

The legal context for denizens' deportation

While foreigners' deportability is stated in Art. 121 of the Swiss Federal Constitution, the provisions regulating the deportation of foreigners are listed in the Federal Act on Foreign Nationals (FNA) of 16 December 2005 (Federal Assembly of the Swiss Confederation, 2005/2015). This legal frame is further complemented by the Agreement with the EU on the Free Movement of Persons (AFMP, see Die Schweizerische Eidgenossenschaft, 2015), by the Asylum Act (AsylA) and by the Swiss Criminal Code. Other regulations of reference are the provisions of the European Convention on Human Rights (ECHR), addressing the protection of individuals from illegal and illegitimate state interventions. The most important legal acts for removal decisions in case of legally convicted foreigners with a permanent residence permit, as well as the legal developments, are presented and discussed in the following sections.

Denizens' deportability until 2016

One of the core values of the FNA is the maintenance of public security and order (Der Schweizerische Bundesrat, 2002). Public order is understood as a form of well-ordered cohabitation of individuals within society. Respect for the legal system and the protection of public and individual goods are constitutive for the concept of security. If foreigners offend laws or administrative decisions and therefore violate public order, then the state authorities have the right to remove and keep people away (see Staatssekretariat für Migration, SEM, 2013). The provisions that end a foreigner's residence in Switzerland are defined in the FNA's chapter 10, entitled 'End of the Period of Stay'.[5]

Removing people from the territory requires the withdrawal of their residence rights. Therefore, residence permits are revoked before issuing a removal order. People with a permanent residence permit have the right to reside in the country for an unlimited period of time. Their rights are to some extent better protected, especially for those having resided in Switzerland for more than 15 years, i.e. denizens including second- and third-generation foreigners. But their residence permit may be revoked in case of a long custodial sentence and if they violate or represent a threat to security and public order. Therefore, the Federal Act on Foreign Nationals affirms:

Art. 63:

1 The permanent residence permit may be revoked only if:
   a the requirements of Article 62 letter a or b are fulfilled;
   b the foreign national has seriously violated or represents a threat to public security and order in Switzerland or abroad or represents a threat to internal or external security;
   c the foreign national or a person they must care for is dependent permanently and to a large extent on social assistance.

2 The permanent residence permit of foreign nationals who have resided in Switzerland in a law-abiding manner for an uninterrupted period of more than 15 years may be revoked only on the grounds set out in paragraph 1 letter b and Article 62 letter b.

And referring to foreign nationals in general, Art. 62 states:

The competent authority may revoke permits . . . if the foreign national:

a or their representative in the permit procedure makes false statements or conceals material facts;
b has been given a long custodial sentence or has been made subject to a criminal measure in terms of Article 64 or Article 61 of the Criminal Code.

The FNA's regulations are furthermore completed by the AFMP, which entered into force in 2002. It restricts the deportability of EU/EFTA citizens to cases where an individual currently presents a real and serious threat to public order, security and health (see appendix I Art. 5 AFMP). Thus, persons covered by the AFMP undergo a different regime and are much better protected from a removal order irrespective of the residence permit or the length of residence (Wichmann, Achermann and Efionayi-Mäder, 2010: 29). In consequence of the revocation of a permit, the administration has the right to issue a removal order (Art. 64, FNA) and foreign nationals have thereafter to leave the country.

Within the application of the presented regulations, proportionality as addressed in Art. 96 FNA has a strong position. The type of crime, the length of penalty, the integration and length of stay in Switzerland, and also the behaviour after the criminal deed has to be taken into consideration (see Spescha *et al.*, 2015). Furthermore, a removal order and its enforcement are only admissible in compliance with Art. 8 ECHR (Protection of privacy and family life) and Art. 25 of the Swiss Federal Constitution (Protection against expulsion, extradition and deportation).[6] Until 2016,[7] the legal practice was therefore based on a case-by-case review (Achermann, 2013: 250; Wichmann, Achermann and Efionayi-Mäder, 2010: 32–35).

Usually, the cantonal administration in charge is informed about a foreign resident's criminal conviction and has to decide how to act in the specific case.[8] The revocation of a permanent residence permit from a person who has resided in Switzerland for more than 15 years is only possible when the person is sentenced to prison for a longer period and if she or he has seriously violated the public security and order or is perceived a serious threat to it. According to the Federal Tribunal (see Judgment of the Swiss Federal Tribunal BGE 135 II 377 E. 4.2 and 4.5: 379–383; Judgment of the Swiss Federal Tribunal BGE 137 II 297 E. 2: 297–302) imprisonment of more than 12 months is considered a long custodial sentence. In the case of spouses of Swiss citizens, the practice that prevails is to only consider a removal order when the person is sentenced to prison for 24 months or more (Reneja case). Some administrations also apply this practice to a wider range of people (Wichmann, Achermann and Efionay-Mäder, 2010). Beside the length of imprisonment, it is the type of crime that is considered to determine the seriousness of the violation of public law and order. In particular, violent crimes, sex crimes and drug offences are perceived as serious crimes and therefore meet these requirements. Whether or not a person has to be considered an actual threat to public order heavily depends on the likelihood of future offences. Therefore, the offender's current behaviour and the scope of committed crimes are relevant (Achermann, 2013: 248–252).

The requirement of a decision's proportionality is met through balancing the offender's interest against the state's interest. The heavier the violation or threat to public security and order that is perceived, the more likely becomes the removal order. The more a person is perceived as integrated and his or her life as related to Switzerland (i.e. place of birth, length of stay in Switzerland, social ties, employment vs. receiving social benefits, good behaviour vs. activity against law and norms), and the less a life in the country of their nationality is reasonable (based on knowledge of the country, language skills, social ties, potential hazards), the higher the requirements for removal orders. Removal orders in the case of second-generation immigrants are therefore only legitimised after heavy violent crimes and drug crimes with unfavourable prognosis for the future (ibid.; Judgment of the Swiss Federal Tribunal: FT/2C_407/2013).

A careful reading of the Federal Tribunal's assessment indicates how different factors, which basically favour the retention of the permanent residence permit, did not work in the case of Mariella V. mentioned above. Even though her whole life was anchored in Switzerland, this did not play a decisive role. She was even considered not to be integrated (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013). Thus, it is obvious that within the legal practice, integration does not primarily refer to socialisation in the Swiss context or social ties, nor does it refer to participation in society in general. Otherwise, it would have been recognised that someone has to be very well integrated in order to maintain his/her position in a criminal milieu over a long period of time. In the legal practice, integration is only acknowledged if the person conforms to the definition of a 'good citizen'. The 'good citizen' lives in conformity with the written and unwritten

social norms. He or she earns money in an orderly way, pays debts, does not rely on social benefits, respects law and order and does not commit crimes.[9] That is why a member of the second generation committing heavy crimes seems to be by definition excluded from orderly integration in Switzerland and can legitimately be deported abroad.

In strong contrast with this legal practice that refers to the 'good citizen' when evaluating integration to justify the denizen's deportation, are the positions of the Federal Chief Justice Andreas Zünd (1993) and the lawyer Babak Fargahi (2015). They focus on questions of belonging and argue in favour of a consequent protection from expulsion for people whose home country is Switzerland. Fargahi (2015) points to the limitation of the administration's discretionary power when issuing removal orders. To evaluate the reasonability of a denizen's expulsion, the administration has to consider the foreigner's relations to the country of citizenship. The absence of such relations seriously hinders the administration in issuing removal orders. He argues that these restrictions support the idea that people who do not have a real alternative to residence in Switzerland actually belong to Switzerland and therefore may not be expelled to other countries (ibid.). This approach conforms to the position of Andreas Zünd, who claimed already in 1993 a right to have a 'Heimat', i.e. an unlimited right of residence for second-generation foreigners. According to his legal opinion, second-generation immigrants belong to Switzerland irrespective of the acknowledged degree of integration. They do not have to earn the protection of their resident rights by successful integration. They belong to Switzerland because they do not belong anywhere else and therefore they should be excluded from expulsion in an absolute way (ibid.). The current legal practice that justifies the deportation of second-generation foreigners by referring to a lack of integration and focusing on the protection of the public order and security is in strong contrast with this perspective.

Plot-point: the 'deportation initiative'

In 2008, the SVP (Swiss People's Party) successfully submitted a popular initiative 'for the expulsion of foreign criminals' that seeks to implement an automatic removal of criminal foreigners and foreign nationals who engage in welfare fraud.[10] The political debate that followed identified several problems regarding the initiative's implementation. For the Federal Government it was obvious that the proposal went against international law and basic constitutional rights, but it declared it valid in order not to prejudge and limit the popular rights. It further pointed to difficulties Parliament would face in creating a list of clearly defined offences all resulting in automatic deportation. As the extra-parliamentarian Federal Migration Commission affirmed, the abolition of the case-by-case review is highly problematic regarding the continuity of the rule of law. The commission also emphasised incompatibility with the AFMP (Wichmann, Achermann and Efionayi-Mäder, 2010: 9).

To avert the initiative's acceptance and implementation, the Federal Government presented a counter-proposal that considered the claim of the popular initiative to

implement a more restrictive law regarding the removal of criminal foreigners, but sought to comply with the current legal frame. The draft foresaw the expulsion of foreign nationals convicted of serious crimes while allowing a review of each case (The New York Times, 2010).

After heated debates and a campaign utilising controversial 'black sheep' posters (Maire and Garufo, 2013), Switzerland's radical right-wing party won the voters' support. Final results of the poll on 28 November 2010 showed that 52.3 per cent of voters and a majority of Switzerland's cantons supported the rightist SVP's initiative. The counter-proposal by the government and centre-right parties found support from only 46 per cent of voters and was therefore rejected.

With the acceptance of the popular initiative, the Federal Constitution of the Swiss Confederation adopted the following formulation of Art. 121, §§ 3 to 6:

> §3 Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they:
>
> a) are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or
> b) have improperly claimed social insurance or social assistance benefits.
>
> §4 The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.
> §5 Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry is for 20 years.
> §6 Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions.[11]

Immediately after the vote, opponents undertook a last step to undo the voters' momentous decision. An immediate appeal to the Federal Tribunal was lodged that sought to void the direct democratic decision by reason of the initiative's incompatibility with human rights obligations and with agreements on the Free Movement of Persons (i.e. the AFMP). The Supreme Court rejected the appeal, reasoning that the voters were correctly informed by the government about the difficulties of implementation and that political parties are not obliged to inform objectively in their campaigns (Judgment of the Swiss Federal Tribunal: FT/1C_514/2011).

The implementation of the deportation initiative

The implementation of the initiative had to be realised within the period of five years. To initiate this process, a working group was charged with finding a solution that respected the new provisions and addressed the various legal conflicts.

In autumn 2012, the Federal Tribunal declared that the legal implementation had to respect and preserve the unity of the Constitution and referred in particular to the rule of law as addressed in Art. 5 of the Swiss Constitution. Even if Parliament would have considered adopting the new constitutional article automatically and transforming it unconditionally into law, the Federal Tribunal affirmed that the principle of proportionality and the right to legally claim a judicial review of singular cases in respect of the ECHR's 'right to respect for private and family life' (Art. 8) had to be respected.[12]

In June 2013, the Federal Government submitted an implementation provision to the Parliament that kept some distance from automatic deportation of foreign offenders and was in line with respect for human rights. In the meantime, the SVP created new pressures on the Parliament, submitting a second initiative with the objective of enforcing the result of the first deportation initiative. Moreover, at the time of writing, another initiative is in the pipeline that seeks to ensure that domestic law prevails over international law. It would therefore guarantee strict implementation of the constitutional amendment on the 'deportation initiative' and of future initiatives that conflict with the European Convention on Human Rights.

The National Council,[13] the larger House of Representatives in Parliament with the SVP as strongest party, favoured by a large majority in March 2014 the unlimited implementation of the 'deportation initiative'. It even adopted articles of the recently submitted 'enforcement initiative' of the SVP. Civil society, professional legal organisations and media responded and started a major debate. Finally, members of the Senate, the State Council (see endnote 14), significantly changed the National Council's proposition and took the implementation in a different direction. Emphasising the importance of the judiciary and legislative powers division, it decided with a large majority to object to absolute automatism in expulsion law and to introduce a 'hardship case'. This should enable the judge to prevent expulsions and bans in specific cases, such as, for example, members of the second generation born and raised in Switzerland. In this sense, the principle of proportionality should prevail. Within the Senate's debate the question on the deportability of second-generation foreigners received increasing attention and a motion to generally forbid their expulsion was submitted, but did not pass the Senate's vote (Neue Zürcher Zeitung, 2014).[14] Thus the State Council's proposition does recognise the need for better protection of second-generation immigrants from expulsion, but does not acknowledge an unlimited right of residence. The position of denizens in society is therefore confirmed: they are not perceived as part of the nation. Even those born in Switzerland do not belong to the country unconditionally.

In March 2015, the National Council turned to the opinion of the State Council and accepted hardship cases. The new law passed on 20 March. It contains an exhaustive list of offences that entail an obligatory banishment (*Landesverweis*). The law further affirms that the court might exceptionally refrain from banishment if it caused a hardship case, but only if the state's interest in decreeing the banishment does not overweigh the person's interest in residing in the country. In this regard, it also emphasises the necessity to consider the situation of second-generation immigrants in particular. This narrow margin is furthermore an attempt to enable the judge to comply with international treaties.

Towards a reconfiguration of Swiss denizenship – or, who can stay?

Since the early 1970s, several popular initiatives in Switzerland have urged votes on immigration issues, but have rarely succeeded. However, the situation started to change with the rise of the SVP in the 1990s. The conservative populist right-wing party successfully mobilises on migration issues, the differentiation of the 'true people' vs. the 'elitist government', and the tension between domestic and superior 'foreign' law, where the situation is interpreted as one of a loss of sovereignty and democratic power through the domination by human rights (Ruedin and D'Amato, 2015). At the beginning of the twenty-first century, they represent the largest party in the National Council. At the same time, xenophobic subjects have acquired the ability to win a popular majority. The 'minaret initiative' (2009), the initiative on 'the deportation of foreign criminals' (2010) and the one 'against mass immigration' (2014) were the first successful initiatives that promoted a neo-national agenda (Skenderovic and D'Amato, 2008; D'Amato and Skenderovic, 2009; van der Brug *et al.*, 2015).

Competing liberal and neo-national trends form the context of this socio-political shift. During the twentieth century, immigrants' rights gradually increased, for example in respect of residence rights, access to employment, provisions for family reunification or access to the welfare state. Finally, the Bilateral Agreements between Switzerland and the European Union (EU)[15] have considerably extended the rights of EU citizens since the end of the 1990s. But these liberal reforms have been countered by the assertiveness of neo-national positions. Thus, several reforms to facilitate access to citizenship for second-generation immigrants have failed. New requirements for residency and citizenship have been implemented and integration has become the new buzzword to measure someone's aptitude for naturalisation. Efforts are present to define national membership in exclusive, cultural nationalist terms. Moreover, former far-right positions have been successfully transferred towards the political centre. Consequently, it is quite popular within the political arena to attack the presence of migrants, to question their protection by human rights, and to predicate immigrants' residence rights on their submission to the republican values of the nation and to a life of a 'good' citizen.

This shift is quite similar to developments regarding liberalisation and neo-national trends that have been identified in the European context. As Feldblum (1998) states, the liberal and reform-oriented debate in the twentieth century on the challenges of the nation-state made a potential liberal reconfiguration of citizenship within Western European states thinkable. This optimism, strongly impressed by the end of the Cold War, the continuing evolution of European integration and the first provisions of the Maastricht Treaty (1992), seemed to produce new categories of citizenship and associated rights for EU nationals. Since then, with slightly different nuances, more protected rights for third-country nationals were incorporated in the respective directives of the EU. Consequently, different European polities have extended rights to non-citizens previously associated with formal state citizenship, such as access to social welfare, labour and markets, as much as residency and the right to vote, at least at the local level. These rights include to a certain extent also the liberty of the person to choose his place of stay and the protection from being banned. Therefore, migrants have become if not citizens, at least denizens.

In contrast with the liberal, post-national expansions of rights, there has also been a powerful neo-national reinterpretation of citizenship. Membership in neo-national terms is, according to Feldblum (1998), a reconfiguration of cultural, national and even supranational boundaries in order to ensure new closures. Popular in this matter are nativist positions, arguing for example that successful cohabitation of 'immigrants' and 'natives' is impossible due to 'cultural differences'. Such culturalist arguments focus on difference and favour developments that go against the 'new political economy' that changed the post-war order in Europe. Basically, they demand the reconstruction of European identity as a historical-organic collection of heritage to protect cultural particularities. Thus, a general affirmation of the regimes' liberalisation and de-ethnicisation is still premature. Up until the present, member states and their understanding of national identities have a strong impact in mapping ethno-national hierarchies and in defining foreignness and citizenship (Dumbrava, 2014).

Focusing again on the Swiss context, it can be concluded that the presented legal developments are clearly in line with neo-nationalist conceptions of citizenship. The new law not only dramatically expands the set of offences leading to expulsion, but also abolishes the higher protection of long-term residents. This dramatic loss of rights constitutes a reconfiguration of the denizen's status. By increasing the denizen's deportability, their status is no longer as close to actual citizenship. It can even be argued that denizenship no longer accurately describes their status. According to the EUDO glossary, the status of denizenship implies an enhanced protection from expulsion compared to short-term residents.[16] Since the current expulsion law no longer differentiates between the different residence permits, it no longer corresponds with this aspect of the definition. In regard to this particular definition, it actually abolishes the status of denizenship.

The tendency in Switzerland to degrade denizens' status is further present in another legal project. To implement the initiative 'against mass immigration', a revision of the Foreign Nationals Act (FNA) is taking place.[17] The current legislative proposal of the Federal Council (executive) lowers the status of a permanent residence permit through a derogation of the rights it grants. Thus, a further decrease of denizens' status is envisaged, and calls for more attention and discussion. At this point, the developments certainly question the actual persistence of denizenship in Switzerland.

Conclusion

The debates on the meaning of national identity and community, the integration of immigrants and the treatment of national minorities have increasingly focused on peoples' rights, and citizens have been successfully mobilised for legal projects that seek to restrict immigrants' rights. 'Who can stay?' is one of the core questions of these struggles in the field of migration and citizenship politics. Beside immigration and naturalisation law, the state's law on expulsion defines to an important extent the frame of action to regulate the population's composition. Especially in the light of the debates focusing on terrorism and security, the state's expulsion politics have gained more attention within academic discussion in recent years.[18] As a complement, this chapter focuses on the expulsion of criminal denizens in Switzerland and seeks to further stimulate reflection on questions of belonging, citizenship and a state's responsibility towards its inhabitants.

Taking the example of Mariella V., whose expulsion was confirmed by the highest Swiss Court but overruled by a judicial decision of the respective Cantonal Justice Department, the logic of the Swiss expulsion law and its underlying norms are illustrated. Considering the social, political and legal dimensions, the discussion further highlights the persistent ambivalences of the political cultures with which denizenship is confronted today.

The discussion of recent legal developments in Switzerland finally points to the fact that the new legal frame increases the demarcation between citizens and denizens, and therefore corresponds to a neo-national trend. With the acceptance of the 'initiative to deport foreign criminals' in 2010, Swiss voters supported the request to be tougher on alien offenders. Although the situation of second-generation immigrants was permanently at the centre of Parliament's debate and the need for their particular protection was often referred to, the implementation of the deportation initiative has not improved but worsened the legal protection of those 'immigrants' born and raised in the country. Their deportability, as well as an extensive catalogue of offences that result in deportation, were confirmed by the Senate and the new law entered into force in October 2016. Obviously, the control over hardship cases prevents a blind application of the new law and therefore an absolute automatism in legal practice. However, this additional provision will only meet its purpose, namely the guarantee of the rule of law, if the respective assessment of individual cases consequently takes place. To what extent this provision will enable judges to prevent denizens, especially second-generation immigrants, from being deported will be proved by judicial decisions in the coming years. In any case, it has to be noted that the law's adaptation has

caused several fundamental changes. Before 2016, the administration's decision on expulsion was based on the level of penalties and the balancing of interests in each case. Under the new law, the judge's decision is primarily based on the list of offences that demand expulsion (Kurt, 2016: 48). To prevent somebody from expulsion, a legitimation for the exceptional adoption of a hardship case is requested. Furthermore, the law abolishes the former extended protection of people with a permanent residence permit. This dramatic loss of rights heavily degrades their status and thus puts the actual status of denizenship at stake.

The current migration politics opposes the immigration of vulnerable persons and those who could become what was once called the 'dangerous class'. Immigration law is supposed to filter out all those who are poor, unemployed and in need of help, and for that reason undeserving of staying in Switzerland. For those who have immigrated, access to citizenship is impeded, especially if their behaviour does not correspond with the life of a 'good citizen'. Foreigners' residence status is not secure, and so they are kept in a deportable position. If these persons should incur undesired costs or not behave according to an orderly life, they can be expelled to their 'country of origin'. This holds true even for people born in Switzerland or denizens in general. Thus, they are not actually perceived as denizens belonging to Switzerland, but as tolerated foreigners.

The way that states deal with 'undesirable' residents is not only the result of conflict between sovereignty and rights, but also an indicator for *civility*. What is the commitment and responsibility of state and society with regard to people who were socialised and became criminal in this particular national context? Would it be legitimate to expel Mariella V. to Italy, even if she was born, became ill and became criminal in Switzerland? Against such a policy, we argue that a modern society holds responsibility towards its entire resident population. This also holds true for individuals who became deviant. Following this logic, denizens born in the country should be excluded from banishment.

Notes

1 The Swiss People's Party (SVP) is a radical populist right-wing party that successfully mobilises on migration issues (D'Amato and Skenderovic 2009). The party's mobilisation regarding the deportation of foreign resident criminals is further described in the sections on the popular 'deportation initiative' and its implementation.
2 The popular initiative is a direct democratic instrument of the Swiss electorate to require a partial revision of the Federal Constitution. If 100,000 eligible voters sign the initiative, the amendment to the Constitution is put to the popular vote. If the initiative is approved, the Parliament has to develop the required legislation to implement the initiative (www.ch.ch/en/popular-initiatives).
3 See www.eudo-citizenship.eu/databases/citizenship-glossary/glossary.
4 Like Switzerland, they weigh up the person's interest in staying in the country against the threat he or she presents to public security and order. Therefore, a case-by-case assessment takes place that considers the personal situation and respects the protection of private and family life according to ECHR (European Convention on Human Rights) regulations. Furthermore, the guideline – the longer a person resides in the country, the greater his or her interest in staying – is respected (Fornale *et al.*, 2011; Kurt and Leyvraz, forthcoming).

5 In addition to the FNA's provisions, the Swiss Criminal Code formerly enabled the judge to impose an expulsion (*Landesverweis*). In other words, the court and the administration was able to cause the removal of a convicted foreigner based on different legal regimes. To eliminate this dualism in law, the respective provisions in the Swiss Criminal Code were removed in 2007; see Achermann, 2013: 246.
6 Swiss Federal Constitution, Art. 25, 'Protection against expulsion, extradition and deportation': '1. Swiss citizens may not be expelled from Switzerland and may only be extradited to a foreign authority with their consent. 2. Refugees may not be deported or extradited to a state in which they will be persecuted. 3. No person may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment.'
7 The law's adaptation in regard to case-by-case review is described in the subsequent section.
8 For a more detailed description of administrative practice and procedures, see Achermann, 2013.
9 In other words, the conception of integration complies to a large extent with the definition in Art. 77 (VZAE) that emphasises, beside language competencies, especially the respect of law and order, as well as economic integration; see also Fargahi, 2015.
10 Even though the initiative used the term 'expulsion' or 'deportation', the content of the claimed regulations concerns the law on the revocation of residence permits and the issuing of removal orders. The execution of a person's removal is regulated in additional articles of the FNA. This includes autonomously leaving the country, along with other forms of a more controlled or even forced expulsion.
11 Adopted by the popular vote on 28 November 2010, in force since 28 November 2010 (Federal Decree of 18 June 2010, Federal Council Decree of 17 March 2011 – AS 2011 1199; BBl 2008 1927, 2009 5097, 2010 4241, 2011 2771).
12 See www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/politik/umsetzung-ausschaffungsinitiative.
13 The Swiss Parliament (legislative authority) has two chambers: the National Council (200 members) and the Council of States (46 members). The members of the National Council and the Council of States are elected by Swiss voters, see www.admin.ch/gov/en/start/federal-council/political-system-of-switzerland/swiss-parliament.html.
14 A particular case made the limited turn of the Parliament tangible. It is the case of A.R. and M.V., which had a certain resonance in press and parts of civil society. One of the members of the State Council campaigning for a change was their defender, and argued his case in the Senate in order to change the implementation of the law.
15 For an overview see www.eda.admin.ch/dea/en/home/bilaterale-abkommen.html.
16 See www.eudo-citizenship.eu/databases/citizenship-glossary/glossary.
17 For further information see www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2016/2016-03-04.html. Of special interest in this matter is the 'Zusatzbotschaft zur Änderung des Ausländergesetzes (Integration)'.
18 See for example http://eudo-citizenship.eu/commentaries/citizenship-forum, and discussion related to 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?', http://eudo-citizenship.eu/commentaries/citizenship-forum/1268-the-return-of-banishment-do-the-new-denationalisation-policies-weaken-citizenship.

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