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Excluding the Unwanted: Dealing with Foreign-National Offenders in Switzerland

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1. Introduction[1]

Since the beginning of this century and following a long period of scholarly silence on the topic of the deportation[2] of foreign nationals,[3] we are witnessing a growing number of publications dealing with this subject from different angles (e. g. Anderson *et al.* 2011; Drotbohm 2011; de Genova/Peutz 2010; Ellermann 2009; Walters 2002). Most authors characterize deportation as a measure of exclusion. Hardly any, however, trouble to analyse the exact meaning of "exclusion" more precisely and question to what extent processes related to deportation can be considered as exclusion practices. As opposed to simply attaching the label "exclusion" to such policies and practices, this article argues for a more nuanced analysis which draws on the concept of social closure originally introduced by Max Weber (1968). The chapter's objective is twofold: It first aims to contribute to the theoretical discussion of the term by introducing a framework that seeks to comprehensively illuminate processes of legal and socially practiced closure directed at foreign nationals. Then it shall apply the presented framework to status-related decisions of the authorities regarding delinquents who are not full legal members of the Swiss nation-state.[4] Thereby, it intends to

1 I thank the editors and the participants of the workshop "Exclusionary Migration Policies and Practices" at the 8th Annual IMISCOE Conference in Warsaw for their comments on earlier versions of this article.

2 As terminology differs from country to country, this article uses the term "deportation" to describe the legal decision and implementation thereof to oblige foreign nationals to leave the territory of a state of which they are not citizens (see for a similar definition Anderson *et al.* 2011). Synonyms would be "expulsion" or "removal".

3 The term "foreign nationals" is preferred in this article as it is the legal distinction between nationals with full citizenship rights and foreign nationals that is decisive in whether a person can be deported or not.

4 The legal situation and practice presented here are those in force before the implementation of the so-called "expulsion initiative" accepted by national referendum in November 2010 which stipulates the automatic expulsion of any foreign national convicted of certain criminal offences or of having abused social welfare regulations.

use "exclusion" as an analytical concept, which may contribute to a better understanding of what might be at stake when states deal with criminal offenders who are not citizens. In the analysis of this process as a struggle over inclusion or exclusion between the Swiss state and the convicted foreign nationals, the main arguments and strategies of both sides will be highlighted. Particular attention will be paid to spatial exclusion, which not only characterises deportation, but – in the case of criminal offenders – also the period of imprisonment which precedes it.[5] This article takes a special interest in the way in which legal grounds are implemented into social practice, and in the structuring principles guiding such decisions.

2. Exclusion: A Dynamic and Multi-Field Approach to an Under-Defined Notion

"Exclusion" is a term that is used widely and readily, both in politics and in social sciences. Frequently it accompanies its complements, i.e. inclusion or integration, which have traditionally been the focus of migration and citizenship studies. Even though "exclusion" is commonly used nowadays, theoretical discussions of the concept are scarce. Notable exceptions to this can be found in the literature on social inequality, poverty and unemployment (e.g. Steinert/Pilgram 2007; Kronauer 2002; Castel 1995). In this context, however, the situation of foreigners and their specific legal status are only marginally touched upon. The following brief outline aims to sketch some of the dimensions and fields that characterise (social) exclusion.

2.1 Exclusion and Social Inequality

The debates on exclusion oriented towards social inequality and poverty offer some interesting insights for a migration approach to the subject. Robert Castel (1995) criticises the use of "exclusion" in the context of social inequality, because it does not take the causes of inequality into account. However, he mentions two circumstances in which he considers "exclusion" to be the appropriate term: one is the spatial exclusion from a given place or area; the second is where it concerns a specific status attributed to certain categories of the population through official procedures. According to Castel (1995, 18), the common characteristics of

5 This article, however, will focus exclusively on deportation. The exclusionary side effects of the penal system and the conditions under which foreign nationals serve their sentences have been analysed in Achermann (2008 and 2010).

any process called "exclusion" are that "it imposes a specific condition relying on rules, mobilises a specialised apparatus and is accomplished by means of rituals".[6]

Based on these arguments, the use of the term "exclusion" in the context of how Switzerland deals with non-national offenders is appropriate. Such a description does not, however, contribute much to a more precise understanding of the phenomenon. In order to develop an analytical framework, the next section shall thus turn to another approach that has already been used, especially in citizenship studies, to analyse processes of admitting or refusing membership and of granting or denying access to certain rights and resources respectively: the approach of social closure.

2.2 The Social Closure Approach

In his discussion of basic sociological terms, Max Weber (1968, 43 ff.) introduces the distinction between "open" and "closed" social relationships. For this article, we are mainly interested in the latter, which Weber defines as follows: "A relationship will […] be called 'closed' to outsiders so far as, according to its subjective meaning and its binding rules, participation of certain persons is excluded, limited, or subject to conditions" (Weber 1968, 43). "Social closure" is the term used to characterise processes by which the access of certain groups to resources is granted or refused. Without developing a theory of social closure[7] Weber slightly elaborates on the concept in the context of economic relationships that are characterised by competition. There he states that closed social relationships aim to monopolise opportunities and resources (Weber 1968, 342). Furthermore, Weber points out that the characteristics upon which the exclusion of certain "competitors" is based are externally identifiable and mostly arbitrarily chosen: "It does not matter which characteristic is chosen in the individual case: whatever suggests itself most easily is seized upon" (Weber 1968, 342).

Based on Weber's concept of social closure, I propose the following definition of social exclusion that is to be understood as one aspect of social closure: Social exclusion is both a status and a process by which a person or categories of persons are deprived of access to and participation in opportunities, resources and rights.[8] In the context of migration law and politics, the characteristic by which actual or potential exclusion is justified is the (foreign) national origin

6 This and all subsequent non-English quotations have been translated by the author.
7 See Mackert (1999) for an attempt to develop a mid-range theory of social closure.
8 This definition is inspired by Steinert (2007, 33).

and status of the person in question. For analytical purposes, though, this definition is still too general. Building on Mackert (1999), therefore a further distinction of different fields is suggested, in each of which one and the same person or group can be affected by varying processes or situations of exclusion. Mackert distinguishes the political, economic, civil, social and cultural fields.[9] In continuation of Castel's (1995) remarks on the notion of exclusion, as well as of Brubaker (1999), who underlines the importance of "territorial closure", it is suggested to furthermore include the spatial aspect of processes of social closure. Each of these fields concerns different social domains characterised by differing resources and institutions in which varying types of social closure occur according to their specific logics and interests (Mackert 1999). A deportee may for instance be in close social contact with many people in Switzerland, despite his/her spatial and legal exclusion. In addition, the different fields may affect each other, either by reinforcing or more or less compensating exclusion.

As a second line of differentiation, and based on Giddens' theory of structuration (1984), this article distinguishes two interrelated aspects: the structural-legal dimension and the dimension of social action and social relationships. Law, understood as a specific form of rules, is thereby to be seen as a structure enabling and restricting social action, which is defined, implemented, reproduced and modified by social action. For an analysis of exclusion processes, it therefore seems important to separate these dimensions in order to avoid premature conclusions. In such a differentiated perspective, exclusion has to be considered as a gradual and dynamic process in which the question will generally not be whether someone is excluded or not, but rather to what extent he or she is participating or being deprived of resources and rights more or less in a given context at a specific moment.

Furthermore, an analysis of the processes and situations of exclusion should take into account the different parties aiming at inclusion or exclusion (see Steinert/Pilgram 2007; Mackert 1999; Giddens 1984). Transposing Mackert's term "struggle over belonging" (1999), coined in the context of citizenship, to the context of deportation, we might speak of "struggles over staying" that are taking place between migrants and the state. Both parties are to be understood as reflexive and responsible actors with specific interests, resources, strategies and powers. In the present context, such a perspective suggests regarding detained foreigners as people with access to either more or fewer resources (including rights) in a specific situation – resources that allow for specific strategies in their attempt to achieve their aim of staying in the country.

Finally, regarding the consequences, or perhaps even the original goal of exclusion, it is useful to return to Weber, according to whom one of the effects of

9 See Mackert (1999, 168) for a description of these aspects which he calls "levels".

excluding certain categories of people from access to certain resources is the creation of internal cohesion and of a sense of belonging within the excluding group (Weber 1968, 46 f.). Weber thus indicates the dual character of social closure – exclusion simultaneously embraces and produces inclusion and vice versa.

2.3 Benefits for the Study of Deportation

What does such a differentiated approach to processes of exclusion contribute to migration and citizenship studies in general, and to our understanding of the way states deal with criminal foreigners in particular? First, it focuses the attention on the exclusive aspect of citizenship, which has as yet gained little attention from scholars. Second, it allows us to concentrate on one particular aspect, i. e. the unconditional right to stay in the territory of a state – a well-protected core element of national citizenship.[10] Legal exclusion from an unrestricted right of abode determines the "expulsability" of foreigners, which according to Sayad (1994) is one of the main characteristics of their situation. De Genova's concept of "deportability" further highlights the disciplinary effect of this "attendant sociospatial condition" (2002, 429 and 440). Drawing on Walters (2002), I propose to integrate these different elements into a framework suitable for a social closure perspective. In Walters' terms, deportations are a "technology of citizenship" (2002, 267). Adapting this to the approach of the present article, it follows that deportations are one of the technologies which states use in order to spatially realise the (partial) legal exclusion of foreign nationals based on their status – a status 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.

As the following will show, the analysis of the situation of foreign-national offenders reveals the complicated interplay of including and excluding factors in different fields, as well as the structural-legal provisions and social practice of both the administrations implementing them and the persons whose past and present behaviour is being evaluated. We will see that the closure line between nationals and foreign nationals is not the only such line, but that additional factors influence the decision regarding whether someone has to leave Switzerland after being released from prison.

10 Austria seems to be an exception to this general trend as people born and raised in the country are granted absolute protection against deportation (see Bichl *et al.* 2011; Fornale *et al.* 2011, 84).

The next section will turn to specific state practices in dealing with foreign-national offenders. The decision-making processes regarding the future right to stay in the country can be understood as struggles over inclusion or exclusion. Highlighting the interests, arguments, resources and strategies of actors of both parties, the section will analyse how different aspects functioning as vectors of closure intersect and finally result in defining a person's ultimate destination either inside or outside the territorial boundaries of Switzerland.

3. Arguing Over the Exclusion of Foreign-National Offenders

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).[11] 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).

Cantonal migration authorities can revoke an existing residence permit of a third country national if, among other reasons, he or she "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.[12] Citizens of EU member states can only be "removed" under the following condition: "The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."[13] In contrast to the "expulsion initiative" accepted by a national referendum in November 2010, which is however still awaiting implementation, there is until now no automatic mechanism of expulsion, and cantons can exercise discretion in deciding whether they want to deport a foreign-national offender or not. Furthermore, 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 par-

11 Federal Act on Foreign Nationals of 16 December 2005, status as of 24 January 2011 (SR 142.20).

12 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 ECHR).

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

ticular person will be allowed to stay or will have to leave. The adopted procedure is the balancing of public interest against private interest in order to evaluate whether the deportation of a specific person is proportional.[14] 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 who do not necessarily aim to stay in Switzerland *per se*, but whose main aim 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.

The following presentation of arguments used by both parties during this struggle over staying is based on an in-depth study of the situation of foreign nationals in closed – i. e. high-security – Swiss prisons.[15] The study intended to look at the topic in a comprehensive way by combining different types of data and by including the perspectives of different actors (see Achermann 2008, 2009). Data were mainly gathered in two penitentiaries, one for male and one for female inmates. The prison for men had at that moment a maximum capacity of 165 inmates and a share of up to 90 % of non-Swiss inmates. The one for women is the main prison for female inmates in German speaking Switzerland. It has a capacity of 107 places and had a share of about 50 % of foreign inmates at the moment of our research. The semi-structured interviews with inmates who agreed to participate on a voluntary basis (a form of informed consent was signed by each of them) were carried out in a room without surveillance. With a few exceptions, interviews were conducted in the mother-tongue of the inmates. For about a third of the total 60 interviews with inmates, an external interpreter was called in. In addition, we interviewed a total of 37 prison staff working in different sectors of the institution. In order to understand the decisions taken by penal and migration authorities, 9 interviews were conducted with representatives of these services. As a second important source of information, we analysed around 800 personal files on convicted foreign nationals that were archived in prisons and at a cantonal office for migration. In case the person was deported, these files included the documentation on the deportation order and on the appeal procedure. Besides additional documents which we analysed, our presence in the prisons for about 18 months (for interviewing or working on files) offered many occasions for (more or less participant) observation.

14 It was this margin of discretion and this balancing that the authors of the "expulsion initiative" principally targeted and which are now, together with its (in-)compatibility with international law, the main contested aspects regarding the implementation of the initiative.

15 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.

In the following, the authorities' reasoning in legitimising the spatial exclusion of foreign national offenders in the name of the protection of public interest is outlined as a first step. Secondly, the arguments in favour of private interest in inclusion used by the people threatened with deportation and their resources and strategies in this struggle over staying are presented. Finally, the main parameters determining the outcome of balancing public versus private interest are summarised.

3.1 Public Interest: Excluding the Unwanted in Order to Prevent Future Violations of the Law

The sentencing of a foreign national to a penal sentence is the starting point of a sometimes drawn-out process which decides on the future deportation of that person. Once a foreign national is handed "a long custodial sentence", or whenever his or her deed is thought of as having violated or threatened "public security and order", the migration authorities will begin to consider revoking his/her residence permit and consequently deporting the person after release. This highlights that deportation is a police measure aimed at protecting public security and order by preventing future violations of law and order. The competent organs responsible for this task are the migration authorities.

As the decision has to be proportional, there is no absolute scale indicating whether a certain offence or sentence induces deportation or not. However, case law has developed certain guiding principles for interpreting the rather unspecific legal articles. At present, a custodial sentence is considered to be "long" when it exceeds twelve months in the case of a person who is not married to a Swiss citizen. Regarding foreign-national spouses of Swiss citizens, deportation may be proportional once a sentence exceeds 24 months. This means that when a foreign national is given such a sentence, the offence he/she has committed may be a strong enough reason to consider their spatial exclusion from Swiss territory a proportional measure. Even though these indications are to be considered mere guidelines that have to be evaluated on a case-by-case basis, migration authorities are happy to have at least some "hard" indicators upon which they can base their argument (see also Wichmann *et al.* 2010).

Since the length of a sentence is just one, albeit a central, indicator, administrations use additional arguments in order to stress the public interest of deporting a certain criminal offender. An analysis of the motives evoked by cantonal administrations to justify the deportation of certain people reveals the important role of moral arguments. As the penal domain is based on the normative assertion of deeds that cannot be tolerated, this may not be surprising. However, it is interesting to see a kind of parallel administrative morality re-

garding foreign-national offenders complementing the moral statement of the criminal court already pronounced in the form of a specific penalty. The structural opening for this rather important moral influence is inherent in the considerable margin of discretion and the undetermined legal notions characterising the legal framework regulating deportation. Thus, a member of the administrative staff responsible for implementation has the possibility, and is even obliged, to refer to personal values and morals. Of course there are restrictions as regards the use of discretionary power, and case law has continued to specify the interpretation of undetermined legal terms. Still, there is ample scope for personal norms to affect decisions. Therefore, it is of great importance to look both at the legal text and at the practice of its implementation.

The additional evaluation of the criminal offence can be considered to result in a kind of "dual law" (Eckert 2008), differentiating the consequences of a criminal offence according to legal status and nationality. Eckert (2008) furthermore points to the current trend towards a "moralisation of rights", meaning that rights are not granted equally to everyone, but according to moral categories depicting certain people as not "worthy" of enjoying fundamental rights. A variation of this moralisation can be found in the discourse arguing in favour of the deportation of foreign criminal offenders. In addition to the length of the sentence, which in principle is already an evaluation of the gravity or the "badness" of a deed, the type of offence is also taken into account. As a consequence, the public interest in deporting a foreign national is considered to be greater in the case of particularly morally reprehensible acts such as violent or sexual offences and drug-related crimes. Furthermore, while assessing the public interest in deporting a person, the motives for an offence as well as the attitude of the convicted party regarding what they have done also matter – again in a parallel evaluation to the one already carried out by the criminal court. By highlighting for instance that the deed was motivated exclusively by "greed" or by pointing out the "reprehensible acts" and the "unscrupulousness" of a person, the moral integrity of the person may be cast into doubt or even denied. As a result, his/her personal interest weighs less in the process of balancing interests. Two consequences follow from these moral considerations: First, administrations use them to deduce the threat a person might represent, and rule on whether the risk of re-offending should be taken by allowing the person to stay in Switzerland. Secondly, they decide whether the person in question deserves to continue staying in Switzerland or not. In contrast to the penal evaluation, which concentrates on what a person has done, the administrative statement focuses much more on who a person is according to their judgment (see also Eckert 2008).

The arguments in favour of deporting foreign-national offenders include another aspect of the moral realm: the accusation of having "abused" or "not

respected" the "right to hospitality" that Switzerland has granted them. Sayad (1998) cites this point of view as central for justifying the deportation of foreign-national offenders. In his opinion, foreigners who violate the written law of the country which receives them simultaneously violate 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). The migration authorities argued in this vein in one case, in saying 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 recurrent use of the formula of the "abuse of the right to hospitality" hints at the fact that foreign nationals, even when they have lived in Switzerland for a very long time, are not accepted as participating and belonging members of society, but are rather considered to be "guests". Being as such partially excluded, 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 state will perceive this as an insult. In response to their bad behaviour, foreign offenders do not deserve any mercy and the right to hospitality will be revoked and the person deported.

It is difficult to contest these allegations for foreign-national offenders confronted with administrative arguments outlining the significant public interest in deporting them. Still, while struggling over the right to stay they try to convince the authorities that they no longer represent a threat to public security and order and therefore ask for a second chance. As they are generally detained while fighting their deportation it is, however, difficult to actually prove that they would put their good intentions into practice.

Once again, migration authorities react to these counter-arguments in a moralising way. For instance, one migration authority argues: "Whoever abuses the right to hospitality granted by Switzerland in order to deal with illegal drugs should not complain when his permit is not extended." Thus, as a consequence of their violation of the law, people are, according to this viewpoint, not entitled to complain about the administrative consequences related to their residence. As it is their own fault – and as they should have anticipated the consequences of their criminal behaviour – their interest is not considered as legitimate.

3.2 Private Interest: Assessing Attachment

The immediate interest of foreign nationals who live in Switzerland is to remain in Switzerland, i. e. to prevent spatial exclusion from the country. On a more general level, they aim for comprehensive individual autonomy including self-determination regarding their place of residence. Besides the aforementioned arguments directly addressed at contesting public interest, their main argument

for staying is their attachment to Switzerland as a country and to people living there, i. e. their participation in the social and often also the economic and cultural fields. Most individuals opposing a removal order are represented by a lawyer, which is why arguments in favour of private interest are generally structured by the legal resources at their disposal. The main legal argument advanced is that deporting the person would lead to a violation of the right to respect for private and family life (Art. 8 European Convention on Human Rights, ECHR). In certain cases, violation of article 3 of the ECHR (the principle of *non-refoulement*) is claimed, arguing that the forced "return" to the country of citizenship might put the person at risk of being "subjected to torture or to inhuman or degrading treatment or punishment". As regards the balancing of interests on which a final decision on deportation is based, the question to be answered is: Are the existing ties strong enough to attach the individual to Switzerland even though he/she has committed a criminal offence which constitutes a reason for exclusion? Thus, authorities evaluate to what extent a foreign-national offender is attached to Switzerland by different types of ties. The polysemic catchword "integration" is mostly used to subsume social, economic and cultural fields of participation or exclusion.

The arguments of migration authorities and appeal bodies concerning the social field can be classified as either referring to direct ties of the person to Switzerland or to mediated ties. Direct ties are evaluated first according to the amount of time a person has spent in Switzerland. The greater it is, the closer the attachment is considered to be, and hence the more important the personal interest. However, the time a person spends in prison is not taken into account here. While serving a sentence, time seems to stand still, at least when it comes to its inclusion effect. From the point of view of migration law and authorities, there is another explanation: "If we followed the argumentation of the complainant, a long sentence due to a severe offence would be an advantage to the person in question which would be completely unjustified." Nevertheless, if a person is released before the final decision on deportation has been taken (mostly due to pending appeals), the counting of time resumes. That is to say that once people are out of prison and again freely participate in Swiss life, not only does the length of their stay in the country continue to increase, but they also have the opportunity to prove or even strengthen their attachment to the country and thereby provide arguments in favour of allowing them to stay on.

The second factor taken into account when evaluating direct ties is whether the criminal offender in question was born in Switzerland. In such cases, in a sense of *jus soli* logic foreign to Swiss citizenship law, authorities recognise a very close relationship to the country. One official for example even admitted: "strictly speaking, he is nearly Swiss – the only thing that you can blame him for is that he did not apply for naturalisation." In the case of people raised but not

born in Switzerland, socialisation in the country is taken into account as a binding factor too; to a lesser extent, however, than for those born on Swiss territory. Transnational ties to the country of origin are automatically interpreted as diminishing the attachment to Switzerland and the interest to stay. Or, from a different angle, the reasoning is that, as the person in question is still attached to his/her country of nationality, a return may not be too hard a measure. The transnational reality of many – Swiss and foreign-national – residents that implies having relationships with both people in Switzerland and people in another country is thereby dismissed (see Dahinden 2012).

The legal attribution of any foreign national to "his/her country" is deeply rooted in officials' thinking: there are numerous quotations in which they speak of "sending a person back home". So "home" is the place where the person legally belongs, but not necessarily the place of their principal social or emotional attachment (see also Anderson *et al.* 2011). We can see here what Walters (2002, 282) describes as one of the central functions of current deportations: They represent "the compulsory allocation of subjects to their proper sovereigns".

In addition to these indicators of direct ties to Switzerland, attachment can be mediated by means of the people the foreign-national offender is in close contact with. The logic behind this reasoning is that if a person's social network is mainly or exclusively located in the country of residence, his/her deportation would lead to exclusion from these relationships and could therefore represent a violation of the right to private and family life (Art. 8 ECHR). Furthermore, possible disadvantages for family members following the deportation of their spouse or parent also have to be taken into account.[16] The authorities consider family relations as particularly important and deserving of protection.[17] So generally speaking, unless a person has children, parents or a spouse living in Switzerland, chances of him/her being allowed to stay despite a criminal conviction are very small. However, confirming the objective existence of such ties is just the first step. In a second step, these social ties are evaluated as to whether they really should be qualified as valuable ties deserving of protection and can thus serve as counter-arguments to a deportation order.

What are the criteria according to which the mediated social attachment to

16 See the judgment of the European Court of Human Rights in the case of Boultif v. Switzerland (application 54273/00), 2. 8. 2001.

17 The judgment of the European Court of Human Rights in the case of Üner v. Netherlands (application 46410/99), 18. 10. 2006 was rendered after the data for this study had been collected. In this judgment, the Court stated that not only family relations were protected by Art. 8 ECHR, but that all social relationships existing between a resident foreign national and the community of his country of residency were part of his private life in the sense of Art. 8 ECHR.

Switzerland is evaluated? First, relationships are evaluated as regards their quality in the sense of intensity and whether they are actually "lived" and do not merely exist formally. Based on information given by the persons in question, and sometimes by municipal officials such as social workers and by the prison, the authorities decide on whether these relationships closely attach the person to Switzerland and whether they deserve protection.

Then there is an evaluation of social ties based on a *jus sanguinis* logic. In this line of argument, close ties to "genuine" Swiss are the most valuable ones. This refers to family relationships (marriage or parenthood) between a foreign-national offender and Swiss citizens by birth. In these cases, the authorities may conclude that a person is closely connected to Switzerland and that his/her deportation would additionally represent disproportionate disadvantages to Swiss citizens, as they would either be separated from their spouse or parent or would have to leave their country of origin. The argument of indirect attachment of the delinquent to Switzerland counts less, however, when the spouse is a foreign resident or naturalised Swiss. When both spouse and delinquent are of the same origin, the authorities argue that family members can be expected to follow the deported person "back" to their country of origin. These arguments are based on cultural essentialist ideas according to which a person is tied to a certain state forever, even after having been naturalised elsewhere. A similar reasoning can be found in the example of an Italian who grew up in Switzerland with a Swiss foster family from the age of two. After having been convicted of drug offences, the authorities decided to deport him as he did "not dispose of any close bonds with Switzerland" and because "he is not really rooted in our country".

With respect to the qualification of relationships between parents and children, gender is an additional and influential aspect. It is commonly accepted among decision-makers that the relationship between a mother and her children deserves more protection than that between a father and his children. This means that in otherwise similar cases, a mother of minors living in Switzerland has a greater chance of being allowed to stay in the country than a man in the same situation.[18] All these evaluations are again based on the administrative staff's moral and often subjective assumptions about good, real and valuable relationships, evaluations which only marginally take into account how the people in question feel and think.

18 For a gendered analysis of the way prisons deal with female and male foreign-national inmates, see Achermann and Hostettler (2007).

3.3 Resources and Strategies of Foreign-National Offenders

The power imbalance in the "struggle over exclusion" between state actors and individual foreign-national offenders is large and obvious. Still, those threatened by deportation do have certain resources and they do find strategies with which to contest deportation orders: the right to appeal and Articles 3 and 8 ECHR. Together, these legal resources not only provide a certain scope of action, but are to be considered as a safety fence which protects the basic rights and interests of any person on Swiss territory and therefore prevents the exclusion of certain categories of people.

Yet, people contesting a deportation order have few opportunities to influence the decisions taken by migration authorities and courts. Many people feel powerless and frustrated that they can hardly ever change the minds of the officials who take the relevant decisions, even by extremely correct behaviour after their conviction. Some nevertheless try and, in certain cases, even succeed. One successful strategy is to try to make personal contact with those in charge of one's case. Once a foreign-national offender succeeds, either by being granted a personal appointment or by telephone, he or she may manage to turn from an impersonal case into a human being with an individual fate. This may result in changing the evaluation of the balancing of interest. This happened in the case of a multiple-recidivist second-generation Italian who, thanks to the support of a member of parliament, had the opportunity to talk to the head of a cantonal migration office who told us:

> "I wanted to look into his eyes and therefore made him come to my office. […] This was a case where I could see that he was in a stable psychological situation, in a good mood and really had stopped taking drugs. He had made a big effort. And he had found a Swiss girlfriend, who came with him. She too gave me an impression of stability."

After this personal encounter, the office head revised the decision to deport and decided to give the man "another chance".

3.4 The Main Parameters of the Decision-Making Process

As illustrated by the above description of the different arguments and strategies used in the "struggle over staying" between the state and foreign-national offenders, the decision on whether a person will be deported or allowed to stay is a complex one. There are no multiple-choice forms to allow for standardised decision-making. Rather, a case-by-case evaluation is carried out that balances the attachment of the person to Switzerland, i. e. his or her participation in different fields, against the threat this person has posed, and could continue to

pose, to the country. Although national and international case law is steadily being specified, officials' margin of discretion is still considerable. The moral orientation of the arguments regarding both public and private interest is in practice one effect of this constellation.

As a general rule, one might say that where there is any doubt over whether someone should be allowed to stay or be deported, migration authorities, as first-level decision makers, will mostly decide in favour of national security and public order, i. e. in favour of spatial exclusion and against the well-being of the person concerned. This dominance of the security argument is additionally illustrated by the fact that, in practice, there are cases in which no real balancing of interest takes place; there seems to be a severity threshold with crimes, expressed by the length of the sentence, beyond which personal interest no longer counts and the person will be deported in any case, unless human rights obstacles (Art. 3 ECHR) forbid the implementation of the deportation order.[19]

4. Conclusion

This article has aimed to contribute to the theoretical discussion of the concept of exclusion in migration and citizenship studies and it applied the proposed analytical framework to individual decisions regarding deportation, i. e. the spatial exclusion of foreign-national offenders from Switzerland.

The analysis of decisions to deport unwanted foreign-national offenders in the form of struggles over the spatial and legal exclusion of a person from a state of which he/she is not a citizen has revealed a complex process of including and excluding forces in different fields. The final decision is the result of balancing public and private interest. Ultimately, this process resembles taking stock of the perceived position of a person on a multi-field continuum between inclusion and exclusion. Such a differentiated analysis also helps us understand how different decisions are justified, what importance is given to which aspects and it helps us to estimate the possible courses of action for both parties. Finally, decisions on deportation demonstrate that it is worth looking at both the legal-structural level and at the level of social action. Thus, the presented cases illustrate that the reality of the social implementation of a legal text turns out to be a complex affair influenced among other things by a moral reasoning about who is wanted and who is not – a reasoning that is not directly visible in the law.

Concerning an understanding of the way in which Swiss authorities deal with foreign-national offenders, this analysis has revealed that the lack of partic-

19 In our data, a sentence of about ten years seems to mark this threshold. Recent debates suggest that this threshold might have lowered in the meantime.

ipation in full citizenship rights, or in other words the pre-existing legal exclusion that characterises the situation of any foreign national, is the starting point that renders possible the future spatial exclusion of a person should he/she disrespect national "rules". The legally and collectively attributed condition of deportability shared by all non-members can thus turn into real deportation should authorities consider an individual's behaviour to be a reason for exclusion. Thus, a two-stage exclusion process can be seen: First, the national world order that theoretically attributes every person to one nation state excludes non-nationals from the unrestricted right of abode in all other states. As non-members they remain, in a sense, suspects and a potential threat to the nation, and are therefore held in a state of "excludability". Second, if these people commit a crime, they confirm their potential as a menace. As a consequence, the threat of spatial exclusion can be realised. Thus, there is an accumulation of factors justifying the different stages of exclusion, which can, in certain cases, finally lead to a person's deportation.

The decision-making process on the deportation or stay of foreign nationals can be summarised as an interplay of closing forces. On the one hand, private interest is evaluated according to the attachment of the person to the country. On the other hand, public interest is assessed concerning the threat this person represents to public security and order. For both aspects, the evaluation is carried out in two steps. First, there is an objective evaluation – or at least the intention to perform one – of the threat a person poses based on his or her sentence, and on whether they can be considered to belong to the country by looking at participation in different fields. The second stage of evaluation is strongly moral-driven. It is the question whether the person deserves to continue to stay in the country. As regards personal interest, this is assessed through a moral qualification of the ties a person has to Switzerland: Does he/she belong to the community of Swiss residents and are his/her relationships worthy of being protected and maintained? The moral evaluation of public interest refers to the question of whether the fact of having committed a certain crime still entitles the person to any claims towards the country that granted him/her "the right to hospitality". Thereby, the criminal offence is regarded as an act of self-exclusion by which the person disqualifies him- or herself and which casts doubts on the person's moral integrity. As a consequence, his/her personal interests and claims are considered to be less important. In order to respond to such disqualifications, the strongest arguments for inclusion that might function as a security fence to prevent disproportional exclusion are based on international human rights standards.

As studies on other national contexts (see contributions in de Genova/Peutz 2010) have also shown, the spatial exclusion of persons considered to be unwanted non-members is an element of migration control that contributes to the

maintenance and reaffirmation of the national world order based on sovereign nation-states. As this article has illustrated, deportation is mainly justified by the intention to protect public security and order. This objective is to be achieved on the one hand by removing persons who have violated the law and disrespected order from the national territory. On the other hand, deportations also serve a symbolic and a general prevention purpose, demonstrating the possible effects of not respecting the law to the entire foreign population. Thus, deportations are intended to contribute to national security and public order by means of expelling potential threats and by exercising disciplinary power over every foreign national by reminding them of their deportability. Finally, the fact of categorising groups of people as "excludable", as well as the actual exclusion of people who do not belong and additionally violate the law, has a further, symbolic aspect emphasised by Max Weber (1968). According to Weber, exclusion always contributes to the reaffirmation of the cohesion and identity of the excluding actors, or in other words of those being included. The great importance that the topic of the deportation of "criminal foreigners" has recently gained in Swiss politics might be explained by this Weberian argument, as well as by aspects related to the realm of identity politics and so-called "meta-politics" (Faist 2004) that successfully link migration politics to security arguments.[20] It is more than doubtful that the acceptance of "automatic expulsions" will "increase security" as was promised during the referendum campaign. As regards decisions on deportation, the implementation of the initiative will, however, inevitably change the setting profoundly. The current procedure of balancing interests is to be replaced by automatic exclusion, disregarding the personal interest and the situation of foreign-national offenders and their families. Legal specialists are still struggling how to match the exclusionary intention of the accepted initiative with the inclusionary resources granted by national and international law. Once the precise legal articles will be written, an analysis of their implementation into practice will again be of interest and might reveal changing lines of closure.

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20 This argument is developed more extensively in Achermann (2010).

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