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## Popular Initiative as an Instrument of Criminal Policy Towards Foreigners in Switzerland

**Abstract:** The article presents the proceedings of the popular initiative „Expulsion of foreign citizens” that was launched by Swiss People’s Party. The initiative aimed in contributing to internal security threatened by the criminality of foreigners in Switzerland by the controversial idea of expulsion of foreign criminals. The author presents the main idea and argumentation of the Swiss People’s Party. The paper presents the background of the initiative and its development. In this case even a counter-proposal was prepared by the Federal Council. The whole process led to the final stage that was the adding of 4 extra paragraphs to art. 121 of Federal Constitution in 2010. The case of this initiative presents how vulnerable can society be to popular arguments not necessarily confirmed by scientific research. In consequence of this amendment the expulsion obligation was introduced into Swiss criminal Code. It was a new penal measure that as a rule is obligatory. Some exceptions are possible under extraordinary circumstances. This federal regulation is strict and poses an important question concerning even the violation of human rights.

**Keywords:** people’s initiative, foreigners, criminality

### 1. Introduction

Popular initiative and referendum are the most common form of direct democracy in European countries.<sup>1</sup> They both exist in Swiss law on federal and cantonal level.

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1 M. Musiał-Karg, Czym jest demokracja bezpośrednia? (in:) M. Rachwał (ed.), *Uwarunkowania i mechanizmy partycypacji politycznej*, Poznań 2017, p. 40. See also: M. Marczevska-Rytko, *Inicjatywa ludowa i referendum w Szwajcarii w latach 2000–2010*, *Polityka i Społeczeństwo*, 2012, No 9, pp. 272–283, I. Rycerska, *Demokracja bezpośrednia*, (in:) T. Branecki, M. Gołoś, K. Krzywińska (eds.), *Konfederacja Szwajcarii*, Toruń 2014, pp. 22–37, E. Kuźlewska, *Referendum w procesie integracji europejskiej*, Warszawa 2006, p. 13, E. Myślak, *System polityczny Konfederacji Szwajcarskiej*, Kraków 2014, pp. 28–36, E. Myślak-Bodek, *Natura*

Those instruments are described in Title 4 of Swiss Federal Constitution<sup>2</sup> entitled “The People and the Cantons”. Popular initiative is a way to request an amendment to the Federal Constitution and may propose total or partial revision of Federal Constitution. In case of total revision of constitution its proposal must be submitted to a vote of the People. Popular initiative may be proposed by 100,000 persons eligible to vote may be within 18 months of the official publication of their initiative. A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed. If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part. In case of general proposal the Federal Assembly shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. Also if the Federal Assembly rejects the initiative, it shall submit it to a vote of the People. The People decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill. An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative. It is required that the People vote on the initiative and the counter-proposal at the same time. Any amendments to the Federal Constitution must be put to the vote of the People and the Cantons. This is called a double referendum.<sup>3</sup> Proposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them. The result of a popular vote in a Canton determines the vote of the Canton.

Until the 28 of January 2019 there were 463 of popular initiatives of which:

- 118 failed,
- 333 succeeded,
- 100 withdrawn,

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demokracji Szwajcarskiej. *Formy aktywności obywatelskiej, Państwo i Społeczeństwo* 2006, No 1, pp. 109-118. S. Grabowska, *Inicjatywa ludowa w sprawie przeprowadzenia ogólnokrajowego referendum wpływającego na ustawodawstwo (na przykładzie uregulowań szwajcarskich, włoskich i polskich)*, *Annales Universitatis Mariae Curie-Skłodowska Lublin- Polonia* 2003/2004, Vol. L/LI, p. 46 ff, G. Sabina, *Inicjatywa ludowa w sprawie zmiany konstytucji na przykładzie Konfederacji Szwajcarskiej*, *Zeszyty Naukowe Uniwersytetu Rzeszowskiego* 2004 *Prawo*, No 2 pp. 47-63, E. Kuzelewska, *Udział szwajcarskiego Zgromadzenia Federalnego w postępowaniach referendalnych*, (in:) T. Mołdawa, J. Zaleśny (eds.), *Parlamentaryzm w świecie współczesnym: między ideą a rzeczywistością*, Warszawa 2011, pp. 308-325, Z. Czeszejko-Sochacki, *Referendum i inicjatywa ludowa w systemie politycznym Konfederacji Szwajcarskiej*, *Studia Prawnicze* 1989, nNo 2/3, pp. 27-39, E. Kuzelewska, *Do the Swiss not want to join the EU? Swiss referenda on European integration*, *Przegląd Politologiczny* 2013, nNo. 3 pp. 85-97.

2 Federal Constitution of the Swiss Confederation of April 18, 1999, SR 101.

3 M. Aleksandrowicz, *System prawny Szwajcarii: historia i współczesność*, Białystok 2009, p. 118.

- 2classified,
- 4 declarednull,
- 215submitted to a vote of people,
- 22accepted by people and cantons.<sup>4</sup>

The initiative presented in this article concerned both criminal law and migration policy while it led to provisions stating the expulsion of foreign nationals who committed a criminal offence.

## 2. Initiative „Expulsion of foreign citizens”

The initiative „Expulsion of foreign citizens” was launched by Swiss People’s Party<sup>5</sup>in 2007, when they started to collect the signatures for the initiative.<sup>6</sup>Their aim was to contribute to internal security and clarify the legal situation. In the explication of this idea the Party used the following arguments. The main issue was the rate of criminality of foreigners in Switzerland.For example it was indicated that almost half offences committed in Switzerland were committed by foreigners.59 % of offenders who committed a murder were foreign citizens, and the proportion was even higher in case of rape – 62%. As well they improperly claim for social insurance or social assistance benefits.It was also highlighted that Swiss citizens feel insecure in their

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4 Source of data Federal Chancellery [https://www.bk.admin.ch/ch/f/pore/vi/vis\\_2\\_2\\_5\\_9.html](https://www.bk.admin.ch/ch/f/pore/vi/vis_2_2_5_9.html) access: 17.07.2018.

5 *Schweizerische Volkspartei (Ger.) Union Démocratique du Centre (Fr.)Unione Democratica di Centro (It.)* has following policy concerning immigration, foreigners and security:“Switzerland has always welcomed foreign workers generously, but in a controlled manner, offering them opportunities for professional development. During several votes, the Swiss people made it clear that they wanted a controlled immigration with clear rules valid for all. People who want to live in Switzerland must respect the legal system of this country, integrate and ensure their own subsistence. Only immigrants who meet these conditions must have the opportunity to naturalize after a certain period of time. [...] Switzerland was once one of the safest countries in the world. A negligent policy, lax enforcement of existing laws and the opening of borders with membership of the Schengen area have resulted in Switzerland becoming one of the countries in Europe with a high crime rate. In order to prevent Switzerland from becoming a criminal Eldorado, the sentences must be toughened and the enforcement of the criminal law must be more rigorous.” <https://www.udc.ch/parti/positions/themes/politique-des-etranagers/https://www.udc.ch/parti/positions/themes/politique-de-la-securite/>access: 17.07.2018.

6 The popular initiative is often used by political parties to increase their popularity. This also concerns Swiss People’s Party which gained the electorate thanks to its conservative opinions and idea concerning limitation of immigration into Switzerland, and become the leading party in the Parliament. See: A. Vatter, *Demokracja bezpośrednia w Szwajcarii, historia, debaty i skutki*, (in:) M. Koźbiał, M. Góra (eds.) *Demokracja bezpośrednia. Szwajcarska demokracja bezpośrednia modelem dla XXI wieku?*, Warszawa 2011, p. 47,G. Lutz, *Inicjatywa obywatelska jako metoda kontroli politycznej w Szwajcarii*, (in:) M. Góra, K. Koźbiał (eds.), op. cit. p. 89.

own country.<sup>7</sup> Authors indicated that the obligation of expulsion written in Federal Constitution will have stronger legacy and have an obligatory character for cantons. The provision concerning of Foreign Nationals Act concerning expulsion (art. 62, 63, 68) have potestative character and should have an imperative one. Moreover it will be no longer a measure used by police for foreigners but a penal measure pronounced in the sentence of judicial authority.<sup>8</sup>

The list of collected signature was presented to Federal Chancellery on the 19 of June 2007 and was accepted on the 16 of June 2007.<sup>9</sup> The initiative was presented to the Federal Chancellery on the 15 of February 2008 in the form of specific draft of the provisions proposed. Initiative succeeded on 7 of March 2008 as it fulfilled the conditions required by the art. 139 para. 1 of Federal Constitution.<sup>10</sup>

According to the idea of initiative the art. 121 of Federal Constitution was supposed to change by adding 4 extra paragraphs:

- “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.”

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7 <https://www.udc.ch/campagnes/apercu/initiative-populaire-pour-le-renvoi-des-etrangers-criminels-initiative-sur-le-renvoi/access>: 31.01.2019.

8 <https://www.udc.ch/campagnes/apercu/initiative-populaire-pour-le-renvoi-des-etrangers-criminels-initiative-sur-le-renvoi/access>: 17.07.2018.

9 Initiative populaire fédérale “Pour le renvoi des étrangers criminels (initiative sur le renvoi)” Examen préliminaire, FG 2007 4725.

10 Initiative populaire fédérale “Pour le renvoi des étrangers criminels (initiative sur le renvoi)” Aboutissement. FG 2008 1745.

On the 24 of June 2009 the draft of amendment of the constitution was prepared by Federal Council with the recommendation to reject the project.<sup>11</sup> The Federal Council argued that despite the fact that the project is compatible with Federal Constitution and peremptory norms of international law it can violate basic rights conferred in this act. Especially in the area of protection of family rights and proportionality of measures taken by the authorities. Also it can be hard to follow non-imperative norms of international law resulting from European Convention of Human Rights and Agreement on Free Movement of Persons between Switzerland and European Union.<sup>12</sup>

Moreover the Federal Council revealed the question of integration of foreigners indicating that the authorisation of stay is unlimited and unconditional. It can be only admitted if the foreigner is well integrated. That is also guaranteed to family members admitted on the base of family reunification. The good integration presupposes the respect to Swiss legal order and acceptance of fundamental values from the Federal Constitution, accompanied by the good language skills of one of the official languages. On the other hand the existing law on foreigners gives the possibility to withdraw the stay permit or not to extend the temporary one, or issue an entry ban in case when foreigner commits an offence.<sup>13</sup>

The Federal Council went further by proposing a counter-proposal to the initiative that would have required an evaluation of every single case, balancing public interests against the fundamental rights of person threatened with deportation<sup>14</sup>. The counter-proposal led to precise the reason of withdrawal of permit referring to the degree of integration. Also it proposes that foreigners can be expelled if he commits an offence liable to an imprisonment of a minimum of one year or convicted for a penalty of a minimum two year imprisonment. The margin of appreciation to decide to revoke the authorization should be restricted, subject to the constitutional principle of proportionality measures taken by the authority and public international law. This counter-proposal was supposed to help to unify the practice in cantons and make the expulsion policy more consequent.<sup>15</sup>

The counter-project was more flexible as it gave the judge the possibility to expel a foreigner whereas the initiative left no choice and gave the obligation. So there was any margin of appreciation given to the judge, under any circumstances (e.g. level of integration). Moreover the counter-project introduced the minimum of the pronounced penalty towards the foreigner, that was not included in the initiative.

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11 Message concernant l'initiative populaire «Pour le renvoi des étrangers criminels (initiative sur le renvoi)» et la modification de la loi fédérale sur les étrangers. FG 4571.

12 *Ibidem*, p. 4572.

13 *Ibidem*, p. 4573.

14 W. Haller, *The Swiss Constitution in Comparative Context*, St Gallen 2016, p. 272.

15 *Ibidem*.

According to the idea of initiative conviction to any, even the minimum penalty, gave the obligation for expulsion.

The initiative "Expulsion of foreign citizens" was voted on the 28 November 2010. The 52,93% of voters took part in it. There were 1'397'923 (52,3%) votes for the initiative and 1'243'942 (46,5%) against.<sup>16</sup> As in this case the double referendum was required the majority of people and the majority of canton was required according to art. 142 para 1. Constitution. There results for canton were 15 and 5/2<sup>17</sup> voted for. The minority 5 and 1/2 cantons voted against, and they were cantons of Fribourg, Vaud, Neuchatel, Geneva, and Basel-City.<sup>18</sup> Those cantons have the highest proportion of foreign inhabitants for example: Geneva 40%, Basel-City (36%) and Vaud 34%.<sup>19</sup> Therefore it should not be surprising that people in those cantons voted against the initiative. In the case of counter-proposal votational all cantons were against, whereas 52,6% of people were against and 44,5% voted for.<sup>20</sup>

Is it worth to remind that according to art. 139b para. 2 of the Constitution people may vote in favour of both proposals. In response to the third question, they may indicate the proposal that they prefer if both are accepted. If in response to the third question one proposal to amend the Constitution receives more votes from the People and the other more votes from the Cantons, the proposal that comes into force is that which achieves the higher sum if the percentage of votes of the People and the percentage of votes of the Cantons in the third question are added together. In this case there was a third question. In answer to the third question 1 252 761 people and 13 4/2 cantons have chosen initiative while 1 271 365 people and 7 and 2/2 cantons have chosen the counter-project. In case of such result the third question had no significance.<sup>21</sup>

The results of the vote revealed that the arguments of the Swiss People's Party were closer to the people than the ideas of Federal Council presented in the form of counter-proposal. The initiative was promoted by the party on the large scale in the radio, TV, internet, social media posters on the streets etc. They indicated the growth of the foreign population in Switzerland. Up until 2009 21% of the Swiss population were foreigners there were 21% of foreigners in Swiss population, joined by the rising immigration rates. The different criminality rates were presented as the fact that around the half of the offenders were foreigners or more than a half of convicts.

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16 Arrêté du Conseil fédéral constatant le résultat de la votation populaire du 28 novembre 2010, p. 2593.

17 According to art. 142 para 4. of the Constitution on the Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Country, Appenzell Ausserrhoden and Appenzell Innerrhoden each have half a cantonal vote.

18 Arrêté du Conseil fédéral constatant ..., *op. cit.*, p. 2595.

19 Federal Statistical Office, Switzerland's population 2016, Neuchâtel 2017, p. 7-8.

20 Arrêté du Conseil fédéral constatant ..., *op. cit.*, p. 2596.

21 *Ibidem.*

Together with the presentation of growing number of the foreign population. Those facts were true,<sup>22</sup> however simple presentation of statistical data is not enough without criminological analysis, and can be misleading. It was also strongly stress out that foreigners commit mostly violent crimes such as homicide, assault, robbery, rape, human trafficking trafficking in human beings, false imprisonment and abduction.<sup>23</sup> Thatoseinformation wassimply given on the base of statistical data from the FederalStatistical Office without any criminological analysis. Their interpretation were simplified and did not correspond to any scientific method of data analysis.<sup>24</sup> Moreover it was also emphasised that foreigners are coming from distant countries with different than democratic order anda different religion. They try to implement their legal rules into Swiss ground such as polygamy or even *vendetta*and honour killings. The unlawful claim of social benefits was also as a one of the arguments.<sup>25</sup>

As the initiative presented as a specific draft was adopted on the 28 November 2010 and according to art. 15 para. 3 of Federal Act of Political Rights it entered into force the same day.<sup>26</sup> However this was only the first step to the expulsion of foreigners. Than the works on execution of those amendments of Constitution have started. The amendmentsmade to the Constitution resulted in the need to define in different legal act following issues: loss of the right of residence and all other legal rights to remain in Switzerland, execution of expulsion and deportation, resident status in case of postponement of expulsion, ban on entry to Switzerland, legal sanctions in case of breach of ban and elements of criminal offences resulting in expulsion.<sup>27</sup>In further

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22 In years 2009-2015 offences against life and limb and violent crimes constitute the second largest group of offences committed both by Swiss nationals and foreigners. Extreme violent criminal offences such as murder, grievous bodily harm, rape and robbery constitute less than 5% of all violent crimes recorded by the Swiss law enforcement authorities. Other violent offences include domestic violence such as offences against physical integrity and sexual offences with most being connected with violent behaviour between couples. Statistique policière de la criminalité (SPC), Rapport annuel 2015, Neuchâtel 2016, p. 8, S. Steiner, Häusliche Gewalt, Migrationshintergrund und Strafverfolgung, (in) D. Fink, A. Kuhn, C. Schwarzenegger, *Migration, Kriminalität und Strafrecht: Fakten und Fiktion*, Migration, criminalité et droit pénal: mythes et réalité, Berne, 2013, p. 171. Perkowska M., Criminality by foreign nationals in Switzerland – criminological approach, Białytsok 2019, forthcoming.

23 Union démocratique du centre, Oui à l'initiative populaire pour le renvoi des étrangerscriminels (initiative sur le renvoi). Argumentaire pour la votation du 28 novembre 2010, p. 6-7.

24 As an example it was indicated that: Around a half of offenders are foreigner. The rate of foreigners in population is 21,7%. What means that foreigner s commit offences four times more often than the Swiss. Union démocratique du centre, Oui à l'initiativepopulaire...,*op. cit.*, p. 6.

25 *Ibidem*, p. 9-10.

26 Federal Decree of 18 June 2010, Federal Council Decree of 17 March 2011, AS 20111199.

27 The detailed analysis is in document: Rapport du groupe de travail pour la mise en oeuvre des nouvelles dispositions constitutionnelles sur l'expulsion des étrangerscriminels à l'intention du Départementfédéral de justice et police, Berne 2011, pp. 140.

part of this article author will focus on the elements of criminal offences resulting in expulsion and penal provisions in this area.

### 3. Penal provisions executing the initiative

According to Article 121 (4) of the Swiss Constitution, the legislature will define the offences covered by paragraph 3 in more detail and it is vested with the competence to extend the catalogue of offences included therein. As a result of the amendments<sup>28</sup> a new penal measure i.e. expulsion was introduced into the Swiss Criminal Code, which may only be imposed on foreigners – Articles 66a-66d of the Swiss Criminal Code.

Article 66a of the Swiss Criminal Code stipulates prerequisites of mandatory expulsion. A foreigner is obligatorily expelled for the period from 5 to 15 years if s/he is convicted for one of the offences enlisted therein regardless of the sentence imposed. The catalogue of the prohibited acts covered by mandatory expulsion is exhaustive<sup>29</sup> and specifies the vague entries included in Article 121 (3) of the

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28 When the Federal Council presented the project of provisions concerning expulsion of foreign offenders the Central Democratic Party launched a new popular initiative called „For the effective expulsion of foreign citizens – the implementation initiative”. They claimed that the federal authorities will implement the initiative into criminal law against the will of the people. This is the consequence of this form of direct democracy when the project is launched by the people, however the final result is elaborated by their representatives (parliament and/or government). Therefore sometimes the popular initiative is called as semi-direct democracy. The new initiative aimed in introducing into Federal Constitution regulation concerning the mandatory expulsion by introducing paragraph 9 to article 197 of the Constitution. This article stated that the tribunal or public minister pronounce the expulsion if case of conviction of foreign national to one of enumerated offences. This expulsion is mandatory and can be limited only if contrary with imperative norms of international law. However this initiative was rejected by the people on the 28 February 2016. The majority - 58,0% voted against and 41,1% for the initiative. <https://www.bk.admin.ch/ch/f/pore/vi/vis433.html> access <sup>15.08.2018.</sup>

29 Art. 66a SCC enumerates: a) intentional homicide (Art. 111), murder (Art. 112), manslaughter (Art. 113), inciting and assisting suicide (Art. 115), illegal abortion (Art. 118 para. 1 and 2); b) serious assault (Art. 122), female genital mutilation (Art. 124 para. 1), abandonment (Art. 127), endangering life (Art. 129), attack (Art. 134); c) aggravated misappropriation (Art. 138 para. 2), aggravated theft (Art. 139 para. 2 and 3), robbery (Art. 140), fraud for commercial gain (Art. 146 para. 2), computer fraud for commercial gain (Art. 147 para. 2), misuse of a cheque card or credit card for commercial gain (Art. 148 para. 2), aggravated extortion (Art. 156 para. 2-4), profiteering for commercial gain (Art. 157 para. 2), handling stolen goods for commercial gain (Art. 160 para. 2); d) theft (Art. 139) in conjunction with unlawful entry (Art. 186); e) fraud (Art. 146 para. 1) related to social insurance or social assistance, unlawful claims for social insurance or social assistance benefits (Art. 148a para. 1); f) fraud (Art. 146 para. 1), fraud in relation to administrative services and charges (Art. 14 para. 1, 2 and 4 of the Federal Act of 22 March 1974 on Administrative Criminal Law) or tax fraud, misappropriation of taxes deducted at source or any other offence related to public charges that carries a maximum penalty of a one-year custodial

Constitution such as violent offence, other serious sexual offences, offences in drugs trafficking.<sup>30</sup> According to the principle of legal certainty in penal law, the criteria to implement such a serious measure must be precise. Although the initiators of a popular initiative intended to expel those who committed serious offences,<sup>31</sup> Article 66a of the Swiss Criminal Code includes offences of different gravity, both felonies and misdemeanours, like life and limb offences, offences against property or sexual freedoms offences constituting public danger, against public health, war crimes but also offences related to drugs and those prohibited by Act on Foreign Nationals. The list does not enumerate any contravention.

The foreigner's conviction constitutes the fundamental prerequisite to impose the penal measure in a form of mandatory expulsion. The foreigner needs to be found guilty and the penalty needs to be imposed on him /her. The foreigner cannot be expelled if no penalty is imposed, for example, if s/he is exempted from punishment – Article 52 of the Swiss Criminal Code and ff.<sup>32</sup> No minimum penalty has been stipulated to order mandatory expulsion. The entry “irrespective of the sentence imposed” included in Article 66a of the Swiss Criminal Code theoretically means that a foreign perpetrator will be expelled if a minimal penalty is imposed on him / her like one daily rate of fine or deprivation of liberty for the period of three days.

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sentence or more; g) forced marriage, forced registered partnership (Art. 181a), trafficking in human beings (Art. 182), false imprisonment and abduction (Art. 183), aggravated false imprisonment and abduction (Art. 184), hostage taking (Art. 185); h) sexual acts with children (Art. 187 para. 1), indecent assault (Art. 189), rape (Art. 190), sexual acts with persons incapable of judgement or resistance (Art. 191), encouraging prostitution (Art. 195), pornography (Art. 197 para. 4 second sentence); i) arson (Art. 221 para. 1 and 2), wilfully causing an explosion (Art. 223 para. 1 no 1), misuse of explosives and toxic gases with criminal intent (Art. 224 para. 1), wilfully causing danger without criminal intent (Art. 225 para. 1), manufacture, concealment and transport of explosives and toxic gases (Art. 226), causing danger by means of nuclear energy, radioactivity and ionising radiation (Art. 226<sup>bis</sup>), preparatory offences (Art. 226<sup>ter</sup>), wilfully causing a flood or collapse (Art. 227 para. 1 no 1), criminal damage to electrical installations, and hydraulic or protective structures (Art. 228 para. 1 no 1); j) wilfully causing danger by means of genetically modified or pathogenic organisms (Art. 230<sup>bis</sup> para. 1), wilful transmission of human diseases (Art. 231 para. 1), wilful contamination of drinking water (Art. 234 para. 1); k) aggravated disruption of public traffic (Art. 237 para. 1 no 2), wilful disruption of rail traffic (Art. 238 para. 1); l) acts preparatory to the commission of an offence (Art. 260<sup>bis</sup> para. 1 and 3), participation in or support for a criminal organisation (Art. 260<sup>ter</sup>), endangering public safety with weapons (Art. 260<sup>quater</sup>), financing terrorism (Art. 260<sup>quinqüies</sup>); m) genocide (Art. 264), felonies against humanity (Art. 264a), serious violations of the Geneva Conventions of 12 August 1949 (Art. 264c), other war crimes (Art. 264d-264h); n) wilful violations of Article 116 paragraph 3 or Art. 118 para. 3 of the Foreign Nationals Act of 16 December 2005; o) violation of Art. 19 paragraph 2 or 20 para. 2 of the Narcotics Act of 3 October 1951.

30 Message concernant une modification du code pénal et du code pénal militaire (Mise en oeuvre de l'art. 121, al. 3 à 6, Cst. relatif au renvoi des étrangers criminels), CO 13.056, p. 5416.

31 Union démocratique du centre, *Oui à l'initiative populaire...*, *op. cit.*, p. 12.

32 Message concernant une modification du code pénal..., *op. cit.*, p. 5396.

The term “sentence imposed” also means that the foreign perpetrator will be expelled even if s/he is put on probation.<sup>33</sup>

Mandatory expulsion is imposed not only on the person who committed the offence but also on accomplices and those who instigated, aided, abetted or attempted to commit an offence.<sup>34</sup>

The aforementioned measure may only be imposed on foreigners i.e. nationals of other countries regardless of their legal status (whether or not they were granted refugee status or whether or not they possess residence permit of type B or C etc.). The problem arises in case of foreigners having double citizenship, however the Swiss law provides for the possibility of depriving the person of the Swiss citizenship if the person who was granted the citizenship got engaged in the conduct which is seriously detrimental to the interests or the reputation of Switzerland.<sup>35</sup>

In accordance with Article 66a (1) of the Swiss Criminal Code, expulsion is ordered obligatorily with two exceptions. The first exception, included in Article 66a (2) of the Swiss Criminal Code states that the court may refrain from ordering expulsion if it would cause serious personal hardship to the foreign national concerned and the public interest in expulsion does not outweigh the private interest of the foreign national in remaining in Switzerland. In such cases, account must be taken of the special position of foreign nationals who were born or have grown up in Switzerland. Thus, according to these provisions, serious personal hardship to the foreign convict justifies refraining from ordering mandatory expulsion. Article 66a of the Swiss Criminal Code obliges the judge to examine the convict’s personal situation, particularly if the foreign convict was born or grew up in Switzerland. The legislator assumes that such people might be assimilated with the Swiss society, which gives the grounds to refrain from ordering mandatory expulsion.<sup>36</sup>

In addition, committing the offence in justifiable self-defence [Art. 16 (1) of SCC] or in a justifiable situation of necessity [Art. 18 (1) SCC] constitutes the grounds for optional refrainment from ordering expulsion [Article 66a (3) of SCC].

Article 66a bis of SCC includes the provisions on non-mandatory expulsion i.e. the court may expel a foreign national from Switzerland for 3-15 years if s/he is convicted and sentenced or made subject to a measure under Articles 59-61 SCC or 64 SCC for a felony or misdemeanour that is not listed in Article 66a. Again contraventions are excluded as far as ordering the expulsion is concerned. Nevertheless, in case of non-mandatory expulsion there is no need to convict a foreigner hence it is possible to impose this measure even if the punishment has

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33 M. Dupuis, L. Moreillon, C. Piquet, S. Berger, M. Mazou, V. Rodigari, *Code pénal*, Bâle 2017, p. 493-494.

34 Message concernant une modification du code pénal ..., *op. cit.*, p. 5416.

35 Art. 42 of Federal Act on Swiss Citizenship from 20 June 2014 CO141.0.

36 Message concernant une modification du code pénal ..., *op. cit.*, p. 5424-5425.

been waived or if only a penal measure has been imposed. As a result, despite the fact that this expulsion is optional it is in fact more severe.<sup>37</sup>

The Swiss legislator, apart from the refrainment of ordering an expulsion, introduced some provisions which make this penal measure stricter like in the case of re-offending. Expulsion, under Article 66b of SCC, may be ordered for the period of 20 years or even indefinitely. These provisions state that any person who has been made subject to an expulsion order, who commits a further offence that meets the requirements for expulsion under Article 66a shall be expelled again for 20 years. The Swiss Criminal Code repeats the entries included in Article 121 (5) (2) of the Constitution. The expulsion must be re-ordered if conditions stipulated under Article 66a of the Swiss Criminal Code are fulfilled and it is irrelevant whether the perpetrator re-offended while completing the sentence or after the penalty was served. In case of re-ordering expulsion, this time for the period of 20 years, the earlier expulsion which was ordered for the period from 5 to 15 years is absorbed by the subsequent one.<sup>38</sup>

The legislator went even further than the Swiss constitution as the possibility of indefinite expulsion was provided for in case of recidivism if the conditions stipulated under Article 66a of the Swiss Criminal Code are met during the period of the first expulsion. According to the doctrine, recidivism only refers to mandatory expulsion stipulated under Article 66a of SCC, not non-mandatory one which is covered by Article 66b of SCC.<sup>39</sup> The indefinite expulsion is an option that can be ordered, it is not an obligation.

In accordance with Article 66c SCC, the expulsion order applies from the date on which the judgment becomes legally enforceable. Before enforcing the expulsion order, however, any unsuspended sentences or parts thereof and any custodial measures must be executed. The expulsion order is enforced as soon as the offender is conditionally or finally released from the execution of criminal penalties or measures or the custodial measure is revoked, on condition that the remainder of sentence need not be executed and no other such measure has been ordered. Expulsion may also be executed even if the release period has commenced.<sup>40</sup>

In case of transfer of the convicted person to her/his home country for the execution of criminal penalties or measures, the expulsion order applies on such transfer. The duration of expulsion is calculated from the day on which the offender leaves Switzerland.

There is also the possibility of deferring the enforcement of a mandatory expulsion order under Article 66a of SCC if the person in question is recognised by

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37 M. Dupuiset *al., op. cit.*, p. 503.

38 Message concernant une modification du code pénal ..., *op. cit.*, p. 5426.

39 M. Dupuiset *al., op. cit.*, p. 504.

40 Message concernant une modification du code pénal..., *op. cit.*, p. 5428.

Switzerland as a refugee and, if expelled, his/ her life or freedom would be endangered due to his/her race, religion, nationality, affiliation to a specific social group or his/ her political views. However, the foregoing does not apply to a refugee who may not invoke the ban on *refoulement* under Article 5 (2) of the Asylum Act of 26 June 1998.<sup>41</sup> Moreover, the deferring the enforcement of a mandatory expulsion order is also possible if the expulsion would violate other mandatory provisions of international law. For example, when the receiving state refuses to accept the foreigner or to issue travel documents.<sup>42</sup> Also, the ongoing war / civil war or other situation which would violate Article 3 of the European Convention on Human Rights<sup>43</sup> prohibiting inhuman or degrading treatment or punishment.<sup>44</sup> It needs to be highlighted that expulsion is unacceptable in any situation which would infringe the perpetrator's rights and freedoms guaranteed by the European Convention on Human Rights.<sup>45</sup>

It is difficult to assess the effectiveness of expulsion as a penal measure in combating and preventing criminality among foreigners in Switzerland, mainly due to the fact that the legislation in question has only been in force for a short time.<sup>46</sup> Moreover the executing regulation entered into force on the 1<sup>st</sup> March 2017. From this moment the execution is finally possible. The first available public data shows that in 2017 the mandatory expulsion have been pronounced in 915 convictions and the non-mandatory expulsion in 124 convictions.<sup>47</sup> As for the January 2019 there are not available data for 2018, nor for the implementation of expulsion in practice. Author can only presume that there was no expulsion executed.

This penal measure deprives any foreigner who was convicted for the acts enlisted under Article 66a of the Swiss Criminal Code of possibility of staying in the territory of Switzerland. Interestingly enough this penal measure is imposed mandatorily. The catalogue of offences is broad and encompasses both felonies / crimes and misdemeanours. The period of perpetrator's stay, its legality or lack thereof are of no significance for the court's decision. In addition, the judge may order non-mandatory expulsion if the foreigner was convicted for felony or misdemeanour which is not enumerated under Article 66a of the Swiss Criminal Code. The prerequisites to apply

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41 Asylum Act of 26 June 1998, CO 142.31.

42 The subsaharian African states may serve as an example of states here. Their nationals were not practically expelled when the former general part of the Criminal Code was in force. *L'expulsion judiciaire des étrangers en Suisse: La récidive et auteurs liés à un phénomène*, *Criminoscope* 2009, No 41, p. 4.

43 Convention for the Protection of Human Rights and Fundamental Freedoms from 4 of November 1950.

44 M. Dupuis *et al.*, *op. cit.*, p. 507.

45 M. Gafner, *Personnes de nationalité étrangère, délinquance et renvoi: Une double peine?*, *Revue de droit Administratif et de droit Fiscal* 2007, No. 1, p. 23.

46 Regulations in force since 1 October 2016.

47 <https://www.bfs.admin.ch/bfs/fr/home/statistiques/catalogues-banques-donnees/tableaux.assetdetail.5366309.html> access 31.01.2019.

this measure and which have been thoroughly described prove the severity of the measure.

On the other hand, the Swiss Criminal Code provides for some possibilities to refrain from ordering any expulsion, especially for humanitarian reasons or respect for human rights. The practice will show particular cases in which courts will refrain from ordering both mandatory or non-mandatory expulsion. Some issues will need to be addressed in this context like the protection of family bonds or the welfare of minors in case of one of their parents' obligatory expulsion. The principle of individual liability of perpetrator states that other people, especially minor children, should not suffer consequences of the perpetrator's conviction.<sup>48</sup>

#### 4. Conclusion

The example of initiative „Expulsion of foreign citizens” showed how the party could use “the fear of a stranger” to achieve its political goals. Finding the “stranger” guilty of criminal offence was an easy trick. In the situation of growing foreign population in Switzerland it was a simple argument to present the high criminality rate of foreigners. However authors of the initiative did not present the data concerning the criminality of Swiss nationals. Deeper criminological analysis reveal that the criminality of foreigners does not differ much from the criminality of nationals, especially in the group of residents.<sup>49</sup> Naturally the criminality of other groups of foreigners is different and mostly consists on offences prohibited by Federal Act on foreign Nationals related to different forms of illegal migration. Those acts however do not harm directly the citizens, they mostly harm the public order.<sup>50</sup> The society was vulnerable to its arguments and decided to give the green light to constitutional and in consequence criminal law regulations leading to expulsion of foreigners.

The expulsion possibility of even obligation in case of committing the offence listed in article 66a CPS is a restrictive measure. However the legislator introduced the possibility to abandon its pronouncement in some exceptional cases. The problem of expulsion leads to the question whether this instrument will be efficient. On one hand the answer should be positive, as expelled foreigners will not commit new

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48 M. Perkowska, *op. cit.*

49 See also: M. Killias, Immigrants, Crime, and Criminal Justice in Switzerland, *Crime and Justice, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives* 1997, Vol. 21, p. 381, similar conclusion has B. Jann, *Herkunft und Kriminalität- Ergebnisse der polizeilichen Kriminalstatistik*, (in) D. Fink, A. Kuhn, C. Schwarzenegger, *Migration, Kriminalität und Strafrecht: Fakten und Fiktion, Migration, criminalité et droit pénal: mythes et réalité*, Berne, 2013, p. 112, K. L. Kunz, *Criminalité des étrangers en Suisse. Problematique et tentative d'explication*, (in:) *Procédure pénale et exécution des peines: la questions des étrangers*, Caritas Suisse, *Comptes-rendus* 1989, No 1, p. 16.

50 M. Perkowska, *op. cit.*

offences at least during the time of expulsion. However this can have only positive preventive effect on the others discouraging them from committing an offence. The effectiveness of this measure can be evaluated after several years of its application, now it is too early.

This kind of penal measure leads also to the question of human rights that can be eventually threatened as for example family life guaranteed in the art. 8 ECHR, that can be disturbed by the separation of its members. The duty to respect private and family life limits the state's autonomy to regulate migration flow.<sup>51</sup> Another is the That is another reason why the Swiss courts will have a tough decisions to take make andwith balanceing between human rights and the security of society.

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51 W. Haller, *op. cit.*, p. 273.

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