Chapter 11
'Fortress' Switzerland? Challenges to Integrating Migrants, Refugees and Asylum-Seekers

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11.1 Introduction: Setting the Scene

Migration historically plays an important role in the Swiss economy; foreign population recruitment has contributed to both past and recent economic growth in the country and today Switzerland is recognised as a country of immigration. The end of 2018 saw 2,081,169 legally resident foreign nationals in Switzerland, 1.3% more than 2017 (SEM Migration Report 2018). More than one third of the Swiss population has an immigrant background (is an immigrant or has at least one immigrant parent), while over one quarter of the population over 15-years-old living permanently in the country was born abroad (FSO 2018).

The country has driven active economic recruitment policies, opening doors to foreign labour forces when needed while retaining quite restrictive integration and naturalization policies (Ruedin et al. 2015). In this chapter, we argue that understanding how enablers and barriers to the labour market integration of migrants, refugees and asylum-seekers (MRAs) are shaped in relation to those historical, economic and political dimensions that drive evolution of migration and asylum policy is crucial if we want to grasp Switzerland's selective regime of migration and mobility.

Foreign nationals' access to Swiss territory over the last 50 years has been mostly based on economic interests. Yet today, third country nationals who migrate to Switzerland for family reunification, education or asylum application reasons represent an important part of the immigrating population. In this context, adapting legislation to ensure MRAs integrate better into the labour market is a challenge for the Swiss authorities. Political discussions about the implementation of art. 121a Cst. on the control of immigration adopted by the popular vote on 9 February 2014 and

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the implementation of this constitutional article are, together with other legislative changes, a tipping point that shows that integration issues acquired more prominence as an important objective of immigration policy at the federal level (Graf and Mahon 2018).

As observed in other European countries, awareness of the economic and social costs of non-integration has led Swiss policy-makers to promote integration as both an *individual duty* (conditional on the requirements and individual responsibilities of a foreign person) as well as a significant *priority* for policy stakeholders at federal, cantonal, and communal levels. This *pragmatic* yet in some cases *restrictive* approach to integration has indeed evolved over time. It has also been strengthened by the divisive debates around foreigners that surrounded the 2014 initiative against mass immigration (discussed later).

Against this background, the chapter aims to identify and critically analyse the socio-economic and political structure of Switzerland to provide a timely analysis of the evolving legal and policy framework that regulates the integration of MRAs into the Swiss labour market and society. The first part of the chapter sets the scene by presenting information about the constitutional principles that govern labour, immigration and asylum. The second part examines the relevant legislative and institutional framework in the fields of migration and asylum and captures how this framework and the Swiss approach to integration has evolved and adapted over the last decade. The third part *contextualizes* the relevant legislative and institutional framework that regulates labour market access for MRAs in Switzerland, drawing attention to historical, economic and political dimensions. The concluding part of the chapter summarizes the main findings of the analysis and outlines key aspects that (still) play an *obstructing role* for the integration of MRAs. We consequently problematize some impacts of direct democratic instruments on MRAs' rights and welfare, raising questions about whether the '*Fortress*' as a 'public metaphor' for restrictive and exclusionary migration and asylum policy resonates with Switzerland's current institutional and socio-historical trajectory.

11.2 Constitutional, Regulatory and Policy Framework on Labour, Migration and Asylum

11.2.1 Constitutional Principles and Provisions

Provisions on labour are entrenched in the Swiss Constitution. In particular, art.110 Cst. on employment gives the Confederation the power to legislate on employee protection, relations between employer and employee and the employment services. The article also stands provisions on the scope of application of collective labour agreements. The confederation has legislative powers over unemployment insurance and social security (art. 114 para.1 Cst.) as well as civil law, which includes legislation on employment contracts (art. 122 para.1 Cst.). Regarding fundamental

rights in the labour area, the Constitution sets out *free choice of occupation*, *free access to an economic activity* (art. 27 para. 2 Cst.) and *freedom of association* (art. 23 and 28 Cst.) as fundamental rights. Free choice of occupation as a fundamental right (art. 27 Cst) is reserved for persons admitted without restriction in the Swiss labour market or those who are entitled to a residence permit (SCHR 2015a, b, c). The Constitution further sets out social objectives such as the objective that all persons capable of work should be able to practise an occupation under equitable conditions to assure their maintenance, and whereby children can receive appropriate education. Those objectives bind the Swiss lawmaker but cannot be directly invoked before the courts as subjective rights (art. 41 Cst.) (2007, ILO national labour law, Swiss profile) (International Labour Organization 2017).

Concurrently with these general principles on employment, the main constitutional principles on migration and asylum are those laid down in two articles under section 9 of the Swiss Constitution: *Residence and Permanent Settlement of Foreign Nationals*, art. 121 Cst. on legislation on foreign nationals and asylum and art. 121a Cst. Moreover, Art. 25 Cst. refers to migration and asylum introducing the principle of non-refoulement, adopted from the 1951 *Convention Relating to the Status of Refugees*, as a fundamental right. Art. 121 Cst. sets up the Confederation as the authority in charge of legislation on entry to and exit from Switzerland, the residence and permanent settlement of foreign nationals and granting asylum. The article also details the possibility of expelling foreign nationals from Switzerland *if they pose a risk to the security of the country* and it defines the offences for which the legal binding conviction of the foreigner may lead to the expulsion of the foreign national.

Crucially, and more recently, art. 121a Cst., in force since February 2014 after the acceptance of the initiative against mass immigration,[1] sets out the main principles controlling immigration. This must be effected autonomously by defining annual limits and a quota of residence permits delivered to foreign nationals coming to the country for gainful employment. As explained in more detail below, when defining the quotas of permits for gainful employment, two major principles need to be taken into consideration: Switzerland's *general economic interest* and *labour priority to Swiss citizens*.[2]

[1] The initiative against mass immigration, launched by the right wing party (SPV), was voted by the Swiss people on 14 February 2014. The vote led to the adoption of a new article of the Swiss Constitution on migration control. This article contained transitional provisions that gave 3 years to legislators to adapt the legislation on migration. Art. 121a Cst. provides full power and autonomy to the Swiss State to control immigration flux and policies. The article introduces a limit on the number of residence permits granted to foreign nationals using annual quotas (Boillet 2016). Art. 121 a para 3 Cst. lists the criteria to be taken into account when setting the quota: quotas and a ceiling must be defined in light of Switzerland's general economic interests and they must prioritize Swiss citizens. The criteria for granting residence permits are primarily: the application from an employer, the ability to integrate, and the adequate and independent means of subsistence of the foreign applicant. Additionally, Art. 121a para. 4 Cst. stipulates that no international agreements that breach this article may be concluded.

[2] In accordance with the principle of the national preference of Art.121a para. 3 Cst.

Apart from the chapter dedicated to foreign nationals, the Swiss Constitution also refers to migration and asylum in its fundamental principles, *by stressing the protection against expulsion, extradition and deportation* as a fundamental right. Art. 25 para 2 Cst. bans the deportation or extradition of refugees to a state in which they will be persecuted. Art. 25 para 3. Cst. mentions that no person may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment. The Asylum Act (AsylA, 26 June 1998) provides criteria to be met in order to be granted asylum and rules the request. It also provides, amongst others, the right to reside in Switzerland (art. 2, para 2, AsylA). As described by Fernández and Abbiate (2018, p. 451):

> The Lasi [AsylA] is tightly linked to the Letr [FNA] which specify the particular status of persons admitted temporarily into Switzerland (Art. 80a para 6, Art. 86, para 2, Art. 88, Art. 126a), the measures about the right to family reunification (Art. 3, para 2, Art. 47) and the departure from the country (Art. 76). (…) Contrary to the Member States of the European Union which are subject to European regulations concerning asylum, Switzerland's peculiar status makes the country not subject to most European directives concerning asylum. In this regard, Switzerland is not subject to either the Directive 2013/33 "Procedures", or the Directive 2011/95 "Qualification". This however does not mean that the country adopts a completely different legal framework.

In practice, after filing the asylum application and initial questioning, the State Secretariat for Migration (SEM) determines whether the substance of the application can be verified. In cases where it cannot be verified, the authority rejects the application by refusing it without a formal procedure or by issuing a decision of NEM (non-consideration),[3] which dismisses the application. If Switzerland is responsible for the examination of the asylum application, the SEM starts the procedure. After completion of the procedure, the SEM determines whether the asylum seeker meets the criteria in first place for refugee status and in second place, if he or she can be granted asylum. Accordingly, the SEM can render four types of decisions in addition to the NEM decision (refugeecouncil.ch 2018). After the complete examination procedure, the SEM can:

1. Grant asylum (decision in favour of granting asylum) (B permit)
2. Temporary admission as a refugee (decision against granting asylum although the person is recognised as refugee under international law, with suspension of the enforcement of the removal order) (F permit with refugee status)
3. Temporary admission (decision against granting asylum with suspension of the enforcement of the removal order) (F permit)

[3] The SEM can decide a 'non-consideration' (NEM) if the persons can return or continue: (1) to a safe third country under Article 6*a* para. 2 let. b AsylA in which he or she was previously resident; (2) to a third country that is responsible under an international agreement for conducting the asylum and removal procedures; (3) to the country of previous residence if possible; (4) to a third country for which he or she holds a visa and in which he or she can seek protection; (5) to a third country in which persons with whom he or she has a close relationship or dependants live; (6) to the their native country or country of origin under Article 31 *AsylA (article on recognition of asylum and removal decisions made i*n the Dublin Regulation (Regulation 604/2013*).*

4. Rejection (decision against granting asylum with removal order) (no legal status)

According to the AsylA, asylum may be granted to persons recognized as refugees under international law if there are no exclusion motivations (art. 49 AsylA). Those exclusion motivations are the unworthiness of the refugee status (art. 53 AsylA) and subjective post-flight grounds (art. 54 AsylA). Individuals granted asylum are entitled to receive a residence permit (B permit), which is delivered by their canton of residence.

In cases where asylum is denied, the SEM determines a removal order or an alternative measure that refers to articles 83 and 84 FNA. If the removal order execution is not permitted, not reasonable or not possible, the individual is admitted temporarily. In each case, the foreigner obtains a permit F, valid for 12 months, extendable if there are no motivations that could stop the temporary admission (art. 41 para 2 FNA).

More precisely, removal is not permitted (art. 83 para. 3 FNA) if it contravenes Switzerland's obligations under international law. It is not reasonable (art. 83 para. 4 FNA) when the removal would seriously endanger the foreigner's life, and it is not possible (art. 83 para. 2 FNA) when technical reasons prevent removal (no means of transportation, no travel documents issued from the native country, etc.). In that sense, a temporary admission is seen as an 'alternative measure' to removal. In cases where asylum is denied under the AsylA but there is a recognition of the refugee status under international law, the removal is postponed and the individual is provisionally admitted as a refugee and receives a permit F with the refugee mention. The AsylA provides for procedural guarantees and the "status" of 'temporary admittance' similar to the EU status on 'subsidiary protection'.

Since 2010, asylum legislation began a restructuration process that is still ongoing and which was not driven by the so-called 2014 Refugee Crisis. Since this period, urgent measures entered into force on 29 September 2012. Amongst those measures are: the abolition of the possibility of submitting an asylum application abroad (art. 19 and 20 AsylA), and the abolition of desertion or refusal to perform military service as asylum motivations (art. 3 para. 3 AsylA). Additional modifications entered into force stated that the removal of citizens from countries considered as safe is usually reasonable (art. 83 para. 5 FNA) and that persons subject to a legally binding removal decision for which a departure deadline has been fixed are excluded from receiving social assistance (art. 82 para. 1 AsylA). More recently, in June 2016, Swiss voters approved an amendment proposal, the main objective is to accelerate the procedures and shorten the time-limit for appeals. Amongst the new disposals of the amendment, we find: the gathering of all the persons playing a role in the asylum process in registration and procedure centres, managed by the federal authorities, the separation between applications to be processed as accelerated procedures and extended procedures with respective timelimits for the duration of the process and the granting of free legal representation (ODAE Romand 2017). However, the complete reform will enter into force by the end of 2019, but the accelerated procedure has already been tested in Zurich since 2014.

11.2.2 Legal and Policy Framework Governing the Labour Market Integration of MRAs

Switzerland's immigration policy is embodied in the Foreign Nationals Act (FNA),[4] approved by the Swiss electorate on 24 September 2006 and in force since 1 January 2008. However, persons who fall under the Swiss-EU Bilateral Agreement on the Free Movement of Persons (AFMP) face different legal treatment compared to third country nationals. The AFMP applies to citizens of EU-28/EFTA Member States and their family members, as well as to posted workers (regardless of their citizenship) of a legal entity based in an EU-28/EFTA Member State (SEM Migration Report 2018). Nationals from third countries (also called third state nationals) are subject to the FNA. This 'two circles' model of the Swiss foreign law distinguishes between the liberal European internal migration (first circle) and migration from outside Europe/EFTA (second circle) (SCHR 2015a). In practical terms, regardless of nationality or the motivations that influence their decisions to enter Switzerland, foreign nationals are subject to the ordinary regime regulated by the FNA. Two special regimes complete the ordinary regime, translated by two exceptions: AFMP and Asylum regimes. Nationals from EU/EFTA member states are subject to the AFMP, whereas persons seeking protection against persecution fall under the special asylum regime regulated by the Asylum Act (AsylA), the Geneva Convention of 1951 and the Dublin regulation (Amarelle and Nguyen 2017). In practice, the FNA is only applied where the AFMP or Asylum legislation do not contain relevant provisions that could be applied in cases where the FNA lays down more favourable provisions (Art. 2 FNA and Amarelle and Nguyen 2017).

To settle in Switzerland, people from third countries must meet very specific criteria (SEM 2017). These criteria differ and correspond to an administrative criteria allocated to immigration reasons. The Swiss foreigners legislation admits:

– Selected persons coming for gainful employment, which implies the person settles in Switzerland because she/he has been previously hired and she/he meets the various relatively strict criteria mentioned in the law. Among the range of criteria and factors assessed are the level of specialization and qualification as well as the ability to integrate into Swiss society. Furthermore, the precedence principle must be respected.[5]

[4] Now known as: Federal Act on Foreign Nationals (FNIA) since January 2019.

[5] For a foreign national to be granted a permit with gainful employment, a set of requirements must be fulfilled. A principle of priority (precedence), which states that employers must prove that they have not been able to recruit a suitable employee from the priority categories considered together as the 'internal workforce', must be respected (art. 21 FNA). Moreover, salary and employment conditions customary for the location, profession and sector must be satisfied (art. 22 FNA) and personal qualifications are thoroughly examined (art. 23 FNA). Art. 23 FNA provides that short--term stays and residence permits for work purposes may only be granted to cadre, specialist and other qualified employees with a degree from a university or institution of higher education and several years of experience. Additional criteria as professional and social adaptability, language skills and age are examined to ensure the professional and social integration of the applicant (art.

– People who do not come for gainful employment but for other specific reasons such as rentiers, for medical treatment or to study[6] must have sufficient funds to support themselves.
– Persons who come for family reunification reasons to join a Swiss or a foreign national with a residence permit. The right to admission by family reunification depends on very specific criteria such as independence from social assistance. The integration dimension is also required and has been reinforced in the Federal Act on Foreign Nationals and Integration (FNIA).

Third-country nationals willing to immigrate to Switzerland for gainful employment face several barriers before being admitted into the territory and having access to the Swiss labour market. They need to have found a job beforehand in order to receive a residence permit. According to the economic interest principle, the Federal Council has the power to limit the number of first-time short stay and residence permits for work purposes (art. 20 FNA). Concretely, in order to regulate the admission of third-country citizens, the Swiss government publishes, at the beginning of each year, the maximum quantity of permits that can be allocated to third-country nationals. Different quotas are allocated to cantons according to their size and needs, while another set of quota (package of permits) is kept at the federal level as a reserve for cantons that have exhausted their quota (Sandoz 2016b, p. 41).

The legislative framework that organises MRAs' labour, access to territory and integration has faced major changes in recent years. In September 2016, two projects were led the Swiss Parliament to decide on the amendment of the Foreign Nationals Act (FNA). The first concerned the implementation of the aforementioned Art. 121a of the Swiss Constitution on immigration control, resulting from the initiative from February 2014 against mass immigration. The article in the FNA that implements art. 121a Cst. places refugees and temporarily admitted persons in the category of a 'native workforce' that ought, from a legal point of view, to be considered as having priority access to the labour market.

The second project focused on provisions to improve the integration of foreigners and to strengthen the application of the already well-established principle of 'promoting and requiring' in the field of integration. The amendments came into force in several waves between June 2018 and January 2019. According to the amendments, the foreigner's level of integration is assessed when renewing his or her residence permit and when applying for a more long term residency permit (Art. 34 para.4 and 5 FNIA Art.42, para.3 FNIA). The amendments legally define four

23 FNA). Furthermore, foreign nationals must have suitable accommodation to be admitted (art. 24 FNA).

[6] Art. 27–29 of the FNA: Foreign nationals may be admitted for education purposes if there is confirmation from an educational establishment that the person is eligible for education or training, if suitable accommodation is available, if the person has the required financial means and if the foreign national fulfils the personal and educational requirements for the planned education or training course. Retired persons must have reached the minimum age set by the Federal Council, special relations to the country and have required financial means. In case of medical treatment, persons must also have the required financial means and a guarantee of their return.

criteria: respect for public safety and order, respect for constitutional values, language skills and participation in economic life or educational training (art. 58a FNIA). Language requirements to obtain and renew residency permits are specified and reinforced according to the status of the permit and the rights related to the permit status.

Long term residence permits (C) can now be withdrawn and replaced by other residence permits[7] if the conditions for integration are not met. In these cases, the person whose permit has been downgraded will have to wait 5 years before applying again for a long term residence permit. Also, the changes introduced for family reunification requirements demand: the spouses of holders of a residence or long term residence permit to provide proof of an A1 level orally, or to prove their enrolment in a language course. In addition, the cantons can now conclude integration agreements and set specific objectives for people who do not meet the integration criteria (Stanic 2018). Information concerning the reception of social assistance or unemployment allowance may be taken into account in assessing the level of integration and the payment of supplementary benefits may constitute a criterion for revoking the residence permit of a person without gainful employment or become an obstacle to family reunification. If the use of social assistance was already a reason for revoking the residence permit and sometimes even the long term residence permit, according to the new amendments, the long term residence permits of persons who make long-term and substantial use of social assistance may also be revoked even if they have resided in the country legally and without interruption for more than 15 years. Previously, persons residing in the country for more than 15 years without interruption were protected against this provision. It is important to note that most of the amended provisions do not apply to EU and EFTA nationals, as their stay is regulated by the Agreement on the Free Movement of Persons (AFMP), which does not impose any integration requirements (ibid). With the amendments to the foreigners legislation, Switzerland has introduced a gradual integration model, according to the following principle: the higher the legal status under the law on foreigners, the higher the requirements for integration (Kurt 2017c).

Regarding access for refugees and provisionally admitted persons, the work permit that employers used to have to apply for was replaced by a simple registration procedure that also extended their geographical work mobility within the country. The 10% tax this population had to pay on its income from gainful employment was abolished. In the event of recourse to social assistance, participation in integration programmes has been made compulsory, under penalty of reduction of benefits.

[7] Other country nationals may be granted different types of permit: These include the short stay permit (1 year permit, named 'L' permit), residence permit (more than 1 year but limited to a certain number of years and renewable, named 'B' permit) and the permanent residence permit (unlimited period and newly legal criterion for Swiss citizenship, named 'C' permit). A fourth type of permit is granted for employment in a border zone as a 'cross-border commuter permit' (art. 35 FNA).

11.2.3 Integration as an Individual Duty and a Policy Priority

To better understand the legal framework for the labour market integration of migrants and foreign nationals linked to the asylum domain, it is important to analyse the concept of integration from the point of view of Swiss law. The integration of the foreign population was already (from 2008) one of the fundamental objectives of the FNA, and was ruled by the specific ordinance on the integration of foreigners (OIE; RS 142 205). Principles of integration were given by article 4 FNA. Chapter 8 of the FNA with art. 53–58 FNA gives more focused provisions on integration, specifically on encouraging integration (art. 53 FNA) and the consideration of integration in the case of decisions, e.g. in the cases of admission or permit granting, where integration is seen as a duty (art. 54 FNA). More specifically, *the co-existence of the Swiss and foreign resident population on the basis of the values stated in the Federal Constitution as mutual respect and tolerance, which are the aims of integration. In addition to foreigners' obligation to participate in the economic, social and cultural life of the Swiss society* (art. 4 FNA).

Integration was already crucial in the FNA, where it was emphasized as a requirement and an *individual duty* of the foreign person. Moreover, in the FNIA the strong connection between work and residence permits is further stressed and a model of gradual integration is introduced, as longer-term residence permits and renewals become linked to progressively stricter integration requirements (Kurt 2017c). Obtaining, extending and being able to keep the various residence permits and family reunification becomes thus possible only if the assessment from the authorities shows that the person meets the conditions for integration.[8] Additionally, if a foreign person relies on social assistance, an aspect also assessed, may even lead to downgrading or revocation of a permit (Art.62 para 1 let.e, Art. 63 para 1 let. C and Art 63 para2 FNIA).

Next to being promoted as an individual duty, integration is also emphasized as a *policy priority* that needs to be promoted by authorities at the Confederation, cantons and communal levels (see e.g. specific provisions in art. 53FNA). Art.53 para 3. FNA sets goals of professional advancement and encouragement of foreign population as a major task fulfill by the Confederation, cantons and communes, creating favourable regulatory conditions of equal opportunities for the foreign population. Additionally, in the case of integration, national and local authorities are called to cooperate with social partners, non-governmental organisations and expatriate' organisations (art.53 para 5 FNA). Among the new elements introduced with the FNIA, we find: the protection against discrimination toward foreign population, the avoidance of underuse of the foreign population potential, the support to basic skills development and registration of unemployed refugees and temporarily admitted

[8] Criteria to assess integration are listed in Art. 58a FNIA. Those include *respect for public safety, security and order; respect for the values of the Federal Constitution; language skills; and participation in working life or efforts to acquire education.*

persons in public employment agencies. The article also includes provisions for special needs of women, children and adolescents.

The operationalization of the FNIA (art. 54) points to existing ordinary structures at federal, cantonal and municipal level as first instances through which integration must be achieved (these structures are in charge of education and training programs, employment and labour issues, social security, health, among others). The task of ordinary structures in the promotion of integration was previously stated in the former OIE, yet is now enshrined in the foreigners' act. In cases where gaps exist in ordinary structures or where offers are not accessible, the FNIA provides for a specific integration promotion that can be set at federal, municipal or cantonal level (art. 55 FNIA). In addition, Article 55a. FNIA requires cantons to immediately provide for special integration measures for foreigners with relevant needs hampering their integration (as lack of education and basic labour skills). Finally, the law also clearly specifies the distribution of competences between local and national administrations as well as financial contributions from the Confederation to other administrative levels (art. 58 FNIA).

According to the Swiss Law, immigrants' social and labour integration is a duty of the ordinary structures, also called 'established frameworks', such as the employment offices, welfare or education services. The Swiss state develops integration through the ordinary structures in accordance with their legal mandates and their existing offers and services. However, ordinary structures conceived for the needs of the local population can often not accommodate specific categories of migrants because those migrants do not meet the entry criteria (e.g. level of knowledge of the local language, lack of basic skills, years in the canton as a taxpayer, etc.) and/or the services offered do not suit specific migrants' needs. Therefore, the Law foresees for a specific provision on the promotion of integration of immigrants, which provides special support to foreigners to develop the required conditions to access existing ordinary structures. The specific provision on the promotion of integration of immigrants was a guiding principle of the former FNA, the new FNIA includes now a specific provision on this matter (art. 55 FNIA). Since 2014, Cantonal Integration Programs (CIPs) have been the policy instrument, which strategically focus on the planning and implementation of the specific provision on the promotion of immigrants' integration in collaboration with ordinary structures. Those programs are the result of a joint strategy agreed in 2011 between the Cantons and the Confederation. Each Canton established its own Cantonal Integration Program (CIP I 2014–2017 & CIP II 2018–2021) with the purpose of strengthening: *social cohesion, mutual respect, tolerance, participation, and equality of opportunities* for foreigners living in Switzerland. The programmes aim to strengthen the existing measures, reduce disparities between cantons, to fill gaps while allowing leeway to take local factors into account, and letting the cantons set their own implementation priorities.

Additionally, to further boost integration efforts regarding migrants from the asylum framework, the Confederation and the cantons established recently a joint nationwide integration agenda, the 'Swiss Integration Agenda', advanced in spring 2018 and implemented from 2019 provides for binding measures and strengthens

individual support and case management for refugees and temporarily admitted persons. Additionally, it increases the lump sum paid by the Confederation to the Cantons to fund integration measures from 6000 to 18,000 Swiss francs per refugee or temporarily admitted person. As explained in SEM's Migration Report (2018, p. 38), the Integration Agenda foresees certain clearly measurable targets that the Confederation and the cantons should abide with:

> All recognised refugees and temporarily admitted persons have basic knowledge of one national language after three years. 80% of children from the asylum system can communicate in the language of their place of residence before they start school. Two-thirds of recognised refugees and temporarily admitted persons aged between 16 and 25 are enrolled in a vocational education and training course within five years. Half of adult refugees and temporarily admitted persons are integrated in the labour market within seven years. All recognised refugees and temporarily admitted persons are within a few years familiar with the Swiss way of life and have contact with the local community. Regular reviews are needed to ensure that these targets are being met and to evaluate the impact that integration measures have had. The decision was therefore taken to develop a monitoring system; its introduction is scheduled for mid-2020.

Future assessments of the implementation of the Integration Agenda will be crucial to assess if and how the Swiss recent approach to integration has indeed functioned as an *enabler* to MRAs' labour market integration – and under what cantonal specificities and conditions. 'Promoting' and 'requiring' are the two keywords of Swiss integration policy from recent years, stating the requirements and individual responsibilities of a foreign person with regard to integration and the policy priorities involving inter alia promotion of equal opportunities (Kurt 2017b).

That said, it is relevant to consider that in practice within a context of Federalism, several acts and law provisions are loosely defined at the federal level: the cantons have a degree of flexibility and discretionality while applying the legal mandates. This is especially the case for decisions on admissions for family reunification, permit extensions and decisions involving integration as a requirement (in decisions for granting unlimited residence permits). For instance, one of the criteria for granting a residence permit to a spouse or child is having suitable housing. Criteria to assess if the foreign citizen has suitable housing can differ according to the cantons (e.g. number of bedrooms). On the one hand, this flexibility allows the cantons to adapt the provisions to its situation and needs. On the other hand, those discretionary margin lead to unequal treatment of migrants according to the cantons (Wichmann et al. 2011). Until 2018, no official definition of integration was provided by the Swiss legislation. When determining the degree of integration of foreign nationals living in Switzerland for permit decisions, the practice shows that cantonal authorities have taken their decisions based on respect for legal order and the values of the Constitution, knowledge of local language and willingness to participate in economic activities and education as well as knowledge of the 'Swiss way of life' as mentioned by the Citizenship Act. According to Wichmann et al. (2011), cantonal interpretation and practices diverge from 'inclusive' practices that have low requirements with many exceptions to 'exclusive' practices with a high requirement and a low number of exceptions. Cantonal differences, give rise to

unequal treatment, as in the case for asylum seekers, who, depending on the canton, can easily access the labour market, while in others, the exercise of a gainful activity is subject to certain restrictions. Additionally, several cantons allow asylum seekers to access language courses at an early application stage, while in others they have to wait for a positive decision on their case.

Moreover, according to the law, the integration of foreigners must first be carried out through ordinary structures and since these structures operate differently in each canton, these are additional enablers of social inequalities across cantons.

To sum up, the latest findings of a study of the Swiss Forum for Migration and Population Studies by Probst et al. (2019) into cantonal discretionary powers in migration policy distinguishes two approaches for cantonal practices to tackle integration provisions. The first are restrictive practices, whereby integration is based on individual will and responsibility; this supposes high barriers to immigrants' rights and privileges, translated into limited offers of support and conditional offers of incentives. The second comprise inclusive practices, which are enablers for immigrants' access to rights, to extensive offers of support and intensive encouragement of individual capacities, resulting in opportunity-based support and facilitated labour market access. According to the study, preferences are related to contextual factors such as political orientations, demographic factors, economic conditions and the administrative cultures of the cantons. Additionally, services in charge of integration vary according to institutional cultures and the provision of services distribution and responsibility across local structures (e.g. service for immigrant population are in some cases responsibility of the population office, while in others of the security or social affairs office). Therefore the importance and the role of ordinary structures in promoting integration also varies from one canton to another, which is due as well to the lack of presence of some of these specific structures at the local levels (Probst et al. 2019).

11.3 Contextualizing Immigration: Historical, Economic and Political Dimensions

11.3.1 Seven Phases and Major Evolutions

Historical contextualization is crucial for understanding how the recent approach to integration put forward by Swiss policy-makers and legislators has evolved and crystalized. According to Etienne Piguet (2017), the country's history of immigration can be divided into six major phases. Following Piguet's logic, we could see a seventh phase starting with the 2014 initiative against mass immigration. Piguet's first phase, from 1948 to 1962, can be seen as an open period. The labour shortage faced by the country after the Second World War drives the Government to engage in labour recruitments agreements, first with Italy, then with Spain. The beginning of this 'Open Door' period is also the starting point of the 'Gastarbeiter'

immigration regime (ibid, p. 19). Delivering seasonal and one-year renewable permits, the government sees immigration as *temporary* without the possibility of long-term residence and makes sure the situation remains temporary.

From 1963 to 1973, increasing xenophobia within the Swiss population, housing shortage and the country's struggle to deliver public goods and services, drive the country to attempt to decrease immigration. The country implements successive measures to limit labour migration and attempt to control the risks of 'foreign overpopulation' without real results (ibid). As an example of a limitation measure, with the 'simple ceiling' that has been introduced in 1963, permits were awarded only to workers in companies with less than 2% increase in overall employment compared to December 1962. However, foreign workers came to replace high numbers of Swiss workers that changed their job to pass from the secondary to tertiary sector in that period, limiting the expected results of the simple ceiling. A new attempt was made with the introduction of the 'double ceiling' in 1965, asking companies to reduce 5% of the level of their foreign workforce and not to increase their total number of foreign workers. The measure, however, had negative effects, hindering the development of small enterprises. Finally, the concept of a global ceiling, which is still in force today,[9] was introduced in 1970, with the definition of new annual quotas every year on the basis of the departures.

The first oil shock marked the start of the third phase, which led to a decrease in the total foreign population. From 1973, tens of thousands of foreigners left the country after losing their jobs. The precarious situation of immigrants raised awareness on the living and social conditions of the seasonal workers, and led the Government in 1978 to propose measures to facilitate foreigners' social integration, seeking to create a more enabling environment, by addressing a number of issues pertaining, for instance, to a person's access to local language courses or family reunification as well as the status of seasonal workers. However, the relevant proposals for legal revisions were submitted to a popular referendum in 1982 and they were rejected by a very narrow majority (50.4%).

From around 1985 to 1992, the fourth phase represents the second wave of large-scale immigration. With an improving economy, the need for a workforce pushes the authorities to implement a flexible quota system. Almost 50,000 new permits are issued every year between 1985 and 1995 and more than 130,000 seasonal workers enter the country during the same period (Piguet 2013). This new wave of immigration is primarily comprised of citizens from Yugoslavia and Portugal. The fifth phase begins in the early 1990s. If immigration to Switzerland in the 1970s was largely characterised by workers who entered the country through the quotas system, the 1980s saw a gradual change with immigration comprised of people who entered the country not for work, but for family reunification, education, retirement and asylum, amongst other reasons. Immigrants' countries of origin diversify as well, and an increasing number of migrants come from countries other than the

[9] "Quotas have continually been used since the 70's but the categories of foreigners subject to this quota system have change over time and the system as undergone numerous modifications" (Sandoz 2016b, p.40).

historically traditional sending states (Piguet 2013; D'Amato 2008). Therefore, since the beginning of the 1990s the increase and diversification of immigrants journeys and the country's fear of being isolated in the middle of Europe while the continent increasingly embraces the free movement of persons, forces Switzerland to question its migration policy.

In 2002, the beginning of the progressively implementation of the AFMP signed with the European Union and approved by the voters in 2000 marked one of the *turning points of the renewed six phase policy*. This agreement provides freedom of mobility for EU and EFTA citizens to access the Swiss labour market. In 2008, the implementation of FNA completes the renewal of the immigration policy in regards to third countries nationals (Piguet 2013; D'Amato 2008). The new act *limits with exceptions*, the third countries nationals immigration to highly skilled workers by implementing the quota system, which allowed an immigration control adapted to the needs of the Swiss economy (Piguet 2017).

We can now advance a seventh phase, a new turning point on the politization of immigration issues and more restrictive immigration policies, which coincided with the 2014 right-wing 'initiative against mass immigration', supported by 50.3% of Swiss voters, and that requests the *re-establishment of quotas for all categories of foreigners*, including European citizens. This places the government in a delicate position, as reintroducing quotas would not be compatible with the principles of the Free Movement of Persons (Sandoz 2016a, b). As a result of the approved initiative, art. 21a FNA introduces measures aimed at supporting the 'native' workforce (or domestic employees) and more precisely the unemployed people registered in Regional Employment Office. The Federal Council, the Swiss executive power, established a list of professions or sectors by an unemployment rate only the sectors touched with a unemployment rate over the 5% are subject to these measure. In practice, when an employer wants to publish a job offer, she/he has first to check if the required profile/position is included in the list. If this is the case, she/he must follow a particular procedure: the employer must announce the job vacancy to the Regional Employment Office. During five working days, the employer cannot publish this job offer on other platforms. After 3 days, the Regional Employment Office has to communicate the relevant application files to the employer. The latter has to convene interviews or tests of professional ability with the applicants who fit the required profile. Finally, if the employer hires a candidate or, on the contrary, if not satisfied, she/he has to inform the Regional Employment Office. This measure aims at fostering the workforce available in Switzerland in areas affected by high rates of unemployment by giving priority to job seekers registered in Regional Employment Offices.

Interestingly, according to Boillet and Maiani (2016) the text of the initiative (art. 121a Cst.) is a clear and direct discrimination principle towards immigrants because it *explicitly* states the *national preference*. The transposition from the constitutional art. 121a Cst. to the art. 21a FNA transforms direct discrimination into indirect discrimination. In the case of nationality, a direct discrimination is to enact a different treatment between nationals and foreigners (as did art. 121a Cst.); an indirect discrimination introduces seemingly neutral criteria but from which consequences are

similar to a direct discrimination principle. In that respect, the place of residence is considered as indirectly discriminatory (Boillet and Maiani 2016). Therefore, legally speaking, the art. 21a FNA is not compatible with the principle of equal employment opportunity (article 7 let. a AFMP) or with the principle of equal treatment (art. 9, annex 1 AFMP) (ibid). In other words, the required registration in a Regional Employment Office is more easily fulfilled by Swiss nationals and it clearly disadvantages foreign nationals who are looking for a job in Switzerland. Nevertheless, as art. 21a FNA has included temporarily admitted persons and refugees in the category of internal workforce (as mentioned above), the article should facilitate labour market integration for those two categories of persons (Graf and Mahon 2018). Although the example of the art. 21a FNA – among other changes in the legislation – does not seem to resolve conflicts with the AFMP act, it is indeed *less extreme* in comparison with art.121a Cst. Art. 21a FNA could be considered a 'light version' of the national preference principle.

The applicability in practice of Art 21a FNA is complex. Legally, for a person to be registered in a regional employment office, he or she must fulfill criteria that demonstrate his or her employability. The assessment of this employability differs from case to case and canton to canton. While the light implementation does not yet seem to have a direct positive impact on the integration of refugees and temporary migrants into the labour market. The implementation of the initiative against mass immigration was partially transformed to accompanying legal and policy measures to strengthen support for the integration of refugees and temporary, reserving as a reminder of the availability of resources and labour potential of some groups of immigrants in the territory (Graf and Mahon 2018).

Additionally, further parliamentary discussions on attempts to control immigration from the European Union still polarize public opinion. The new initiative of the SVP ('limitation initiative', August 2018), currently under examination by parliament and on which the people may be called upon to vote, calls for a constitutional amendment to renegotiate the end of the AFMP and enact a prohibition on establishing of new treaties that would grant a regime of free movement of persons to foreign people. The Federal Council and the National Council have already recommended the rejection of this initiative. The reasons given are the desire to preserve the agreements with the EU, which would be threatened by a breach of the AFMP, and the desire to preserve the country's economic interest.

11.3.2 Politics Matters No Less Than Economics

Over recent decades, most Swiss immigration policies and regulatory frameworks have been largely driven by economic considerations. As Klöti et al. (2007, p. 622) note, Switzerland is a country "which has successfully implemented guest worker initiatives with active economic recruitment policies alongside restrictive integration and naturalisation policies." Concurrently, economic considerations have often provoked hostile public opinion and a general political climate that finds against

both immigration and asylum-seekers, as suggested by the results of a number of direct democratic votes. Other than the 2014 initiative against mass immigration, these include the ban on new Islamic minarets accepted by 58% of Swiss citizens, and the popular initiative of 2010 asking for the expulsion of foreign criminals, which was accepted by 53% of Swiss voters. In this regard, to better understand the migration landscape in Switzerland, it is important to keep in mind the country's political 'infrastructure'. The direct democracy component of the Swiss political system allows citizens' initiatives to request revisions of the Federal Constitution based on 100,000 citizens signatures gathered over an 18-month period (art. 138 and 139 Cst.) Any constitutional amendment proposed by parliament has to be approved by a majority of the people and the cantons. Laws that have been passed by parliament can be challenged through an optional legislative referendum. In this case, citizens have to gather by 50,000 signatures against the law within 100 days after it has been passed. After the Second World War, referenda and initiatives became more frequent and the latter became a tool to promote political innovation *against the will of the political elite*, in particularly to limit migration flux (Linder 2010).

In a country characterised by 'solid' political stability, recent changes and the move to the right signal the salience of immigration issues. As of 2018, the Federal Council includes representatives from the Liberal Party (FDP), the Swiss Social Democratic Party (SP), the Swiss People's Party (SVP), and the Swiss Christian Democratic Party (CVP). Considerable gains made by the SVP (right-wing conservative party), which has its roots in the farming community, have marked the country polarization on immigration issues over the last two decades. Between 1995 and 2015, the SVP won additional 36 parliamentary seats, while the FDP lost 12 and the CVP 10. In this political context, migration has become a matter of *heightened political dispute*. On the one hand, populist parties have pledged more restrictive policies and promoted controversial initiatives such as the 2014 popular initiative against mass immigration (Ruedin and D'Amato 2015). Yet, as shown by the Integration Agenda and implementation of the constitutional article resulting from the initiative against mass immigration, the Swiss federal and cantonal authorities have made concrete efforts to promote a more pragmatic approach to fostering immigrants' integration, considering the social tensions and additional costs of the non-inclusion of the MRAs into the labour market.

11.4 Conclusion: 'Fortress' Switzerland?

Our review of the legal and policy framework governing immigration sheds light on the crucial role of integration, not only when discussing the potential of professional integration but also as a condition in cases of granting residence permits or extensions.

Overall, different amendments and revisions of the foreigners and asylum legislation reflect the willingness of the authorities to foster the integration of certain

groups of immigrants into the labour market. This is represented by adapting the laws and policies concerning those migrants who are likely to stay and who entail a cost to society in case of unemployment. Through the amendment process, some administrative barriers that have been removed or simplified may in fact facilitate labour market integration. These include, for instance, the abolishment of the 10% special tax that working asylum-seekers and temporary admitted foreigners without asylum recognition were required to pay, and the replacement of the employer's request by a simple announcement. Despite positive signs, though, new barriers relating to certain administrative barriers have been raised. A clear example of these new barriers concerns immigrants who rely on social assistance as they seek to gain a foothold in the labour market. Indeed, as previously mentioned, according to new FNIA provisions, dependency on social assistance is sometimes a ground for the non-renewal of residence permits; also, the fear of seeking support may result in greater insecurity and become an important obstacle to a foreign person's entry and sustainable integration into the labour market (Mexi et al 2019).

At the same time, the *fluid character of certain statuses*, such as those illustrated in the most extreme form by the "temporary admission status" (permit F), remains an important obstacle to integration (ODAE Romand 2015; Matthey 2015), despite reactions from various actors and political forces that have proposed to introduce changes. According to Matthey (2015), half of the foreigners with temporary admission end up staying in Switzerland more than 7 years, including the stay before the grant of the permit F. Though its name suggests that the person is staying temporarily in the country, migrants with permit 'F' usually stay many years in Switzerland. Stigmatization and lack of information about this status are significant obstacles, as potential employers may be afraid to hire people they perceive as not being able to stay in the territory in the long term. Moreover, permit 'F' restricts freedom of movement since the foreigner is constrained to stay in the canton where she/he was granted the temporary admission. Low mobility makes it difficult to find a job. Moreover, with the recent amendments of the immigration legislation, the type of security bestowed upon a foreign person by other types of permits, such as the long--term residence permit, has been weakened. This has become more intense with the introduction of the gradual integration model in the FNIA, which allows for the possibility to have the status of a foreigner downgraded if integration is deemed insufficient (Kurt 2017c).

Depending on the type of permit, *geographical and professional mobility* can be either allowed or not allowed. This impacts on the professional integration of foreign nationals. Since permits are linked to the cantons, third-country nationals with short stay permits wanting to change their canton of residence must request a new permit from the new canton (art. 37 FNA). This can be seen as *barrier* when looking for new work positions in other cantons. Foreign nationals who have been granted a short stay permit with gainful employment can take advantage of professional mobility only under certain conditions. In those cases, since permits are linked to employment, beneficiaries might be afraid of being dismissed.

The *recognition of qualifications* also continues to be an obstacle to overcome, as shown by the over-qualification rates. Skills acquired in third-countries are often

considered as being of lower standard. This makes granting an equivalence diploma more difficult. Additionally, for persons under the asylum framework who had to flee their countries, it is often difficult to obtain documents that certify their diploma or past professional experience (Sandoz 2016a). As stated by the Federal Commission for Migration-FCM, besides the diploma and professional certificates, informal skills also need to be considered. It is, therefore, important to validate and assess practical skills to complete the current system of diploma recognition (Release FCM 2016).

On another – very important – note, even though the legal framework for the promotion of integration has significantly evolved, certain groups of the population are *not* entitled to benefit from integration programs from their first day in Switzerland. Art.4 para. 2 FNA specifies that integration is aimed only at "foreign nationals who are lawful residents in Switzerland for the longer term". This provision excludes, therefore, asylum-seekers and irregular migrants. This is the case even though the stability of the protection rate shows that significant numbers of asylum seekers are likely to stay in Switzerland (Kurt 2017a, b). The harsh realities of asylum-seeking have been particularly documented in *The Fortress* (*La Forteresse*) – a 2008 documentary film showing how men, women and children, running from war, persecution and economic crises, are held in processing centers under conditions that closely resemble detention while they wait for the Swiss authorities to decide to grant them – or not – refugee status. While the documentary subtly problematizes the moral aspects of Switzerland's asylum policy, a recent empirical study by Hainmüeller et al. (2016) provides evidence for the fact that longer waiting times for asylum status determination delay refugees' subsequent economic integration. The authors suggest psychological distress as the primary explanation for their results.

Additionally, the federalist nature of the Swiss state does not make the task of integrating foreigners any easier. As we have seen, cantons have a relevant margin of manoeuvre which leads to the unequal treatment of immigrants groups within the territory (Manatschal 2014). Initiatives at the federal level, such as the CIPs, are paving the way for immigration policy harmonisation. Policies such as the Integration Agenda and the amendments to the FNIA should also help to reduce differences across cantons in some areas of integration. However, the implementation of laws and policies still depends heavily on the diversity of the cantons' political positioning and institutional systems in which ordinary structures are embedded. That said, differences between cantons can also be seen as opportunities. As stated by the *Laboratory Democracies* metaphor in Brandeis's decentralised democracies,[10] the different practices can serve as a laboratory, cantons and communes have the opportunity to learn from the experiences of others (Cattacin 1996), even if the exact transposition of policies is not necessarily realistic given the structural and organisational differences between the administrative levels.

[10] Refer to *New State Ice Co. v. Liebmann*, 285 U.S. Supreme Court 262 (1932).

Generally, as pointed out by the Federal Commission of Migration - FCM and the civil society, integration should be considered as a "dynamic and reciprocal process that requires the involvement of the foreign population and its hosting society. Thus, the whole society should be responsible for the foreign nationals' integration and this cannot be reduced to a simple measuring instrument" (OSAR 2018, p. 4). This assertion develops a perspective that is undoubtedly critical: over the years, the increase in the number of migrants in Switzerland has had a significant impact on public policy making and has given rise to several direct democratic votes (Sciarini 2017). Yet, ultimately, according to the Migration-Mobility Indicators from the NCCR, there has been a significant *restrictive effect* of referendums and popular initiatives on migrants' rights (Arrighi 2017).[11] Direct democratic instruments have, therefore, provided important disabling barriers to migrant integration as they have not effectively managed to challenge 'Fortress' actualities and exclusionary trajectories of boundary construction in the host labour market and society.

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[11] For more information please also refer here: https://indicators.nccr-onthemove.ch/did-federal-referendums-and-initiatives-affect-immigrants-rights/

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