

Enforcing the rights of migrants with irregular status

City ID cards as a remedy?

IRINA FEHR

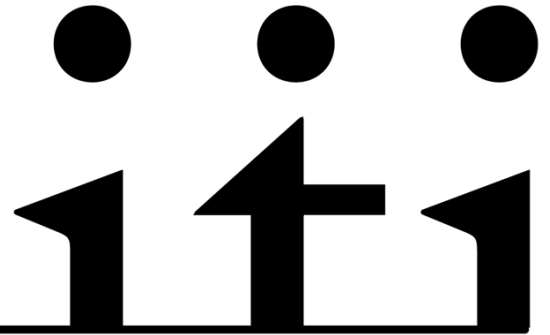
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Migrants who live in Switzerland without valid residence papers find themselves in a complex and contradictory legal position. Even though they are entitled to a great number of rights, they are rarely able to claim them in practice. This paper analyzes the challenges that migrants with irregular status face when enforcing their rights. Furthermore, a strategy that could potentially serve as a remedy to their lacking access to justice is explored; the approach of urban citizenship and the introduction of city ID cards.

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I. Introduction

Migrants who live in Switzerland without valid residence papers find themselves in a complex and contradictory legal position.¹ They have no right of residence and can be expelled from the country if their identity becomes known to the authorities.² At the same time, they are legally entitled to certain rights which do not depend on the residence status.³ Yet, in spite of having these rights, migrants without regular status are often unable to enforce them in practice. This would require, amongst other things, easier

access to law enforcement agencies.⁴ But as many irregular migrants are so concerned about drawing the attention of the authorities, they refrain from pursuing legal protections to which they are entitled.⁵

Based on these underlying facts, it is analyzed what challenges migrants with irregular status are confronted with when claiming their rights. Here, a particular focus is put on their right of access to justice. Furthermore, a potential remedy to these challenges is discussed: the introduction of a city ID card. These cards have been developed in recent years and are based on the approach of «urban citizenship». They allow all residents of a city, including irregular migrants, to identify themselves to local authorities without revealing their respective residence status.⁶ This raises the question whether the introduction of a local ID card in the city of Bern could enhance effective access to justice for its residents with irregular status when filing criminal charges, and if so, how. The city of Bern thereby represents a particularly well-suited site to address these issues: Urban citizenship practices can be increasingly observed⁷ and the municipal council has commissioned an examination regarding a potential introduction of a city ID card.⁸

¹ EFIONAYI-MÄDER DENISE/SCHÖNENBERGER SILVIA/STEINER ILKA ANITA, *Leben als Sans-Papiers in der Schweiz: Entwicklungen 2000-2010*, Eidgenössische Kommission für Migrationsfragen, Bern 2010, p. 38.

² Based on [art. 64 et seqq. AIG](#).

³ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 38.

⁴ KIENER REGINA/BREITENBÜCHER DANIELLE, Das Recht von Sans-Papiers auf Justizzugang – Erhebung und Bekanntgabe von Daten über Aufenthaltsstatus durch Justizbehörden aus grundrechtlicher Sicht, in: [Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 2019/120\(7\)](#), p. 356 et seqq.

⁵ KIENER REGINA/BREITENBÜCHER DANIELLE, Justizzugang von Sans-Papiers: Gutachten zuhanden der Integrationsförderung der Stadt Zürich, Zurich 2018, p. 2.

⁶ DE GRAAUW ELS, Municipal ID cards for undocumented immigrants: Local bureaucratic membership in a federal system, in: *Politics & Society* 2014/42(3), p. 309 et seqq.

⁷ ALBISSER RAPHAEL, «Stadtluft zum Atmen», in: [WOZ](#) of 30 March, 2017.

⁸ GEMEINDERAT BERN, *«Stadt für alle» mit Fokus Migration: Die Ziele sind definiert*, Bern 2018.

II. Data and methodology

In order to discuss the raised questions, this article follows a multidisciplinary approach. The goal is to consider the legal and the social conditions that determine whether irregular migrants can effectively claim their rights in Switzerland.

After introducing the topic of irregular migration, the legal framework regarding irregular migrants in Switzerland is examined. Based on this, the challenges of enforcing their rights in practice are taken into closer consideration. Next, it is analyzed whether a city ID card could increase access to justice for irregular migrants in the city of Bern, if they want to file criminal charges. This sociological analysis is based on five semi-structured expert interviews with different representatives of local institutions in the city of Bern. The interviews were conducted in cooperation with a study that analyzed the functionality and feasibility of a local ID card in Bern, which was carried out on behalf of the local competence center for integration. The interviews were held between March and June 2020. The mentioned study will not be published and is only addressed to the competence center for integration and the municipal council. The information gained from the interviews is thus confidential and the interviewees remain anonymous. The publication of the empirical material used for this article was specifically agreed upon with the respective interview partners.⁹

III. Irregular migration

Irregular migration is a global phenomenon, both because it involves the crossing of international borders and because it persists all around the world.¹⁰ With Switzerland situat-

ed in the middle of Europe, this chapter introduces the topic while focusing on the European context.

A. Terminology

Irregular migration is a highly controversial issue, not only in terms of its substance but also of its terminology.¹¹ There is no universally recognized definition of the phenomenon and academic literature regarding the issue is lacking terminological coherence.¹² Consequently, various terms and expressions are being used in parallel, often leading to inconsistency and confusion.¹³ Therefore, a short overview of the terms most prevalently used in academic research is crucial for a thorough discussion of the issue.

The term «illegal migration» used to be predominant in academic research.¹⁴ However, over the past two decades it has been heavily criticized. It is argued that the notion «illegal migrant» stigmatizes migrants as criminals, which risks dehumanizing the respective population group.¹⁵ In the meantime, numerous alternative expressions have emerged. Many of them have yet again been subject to criticism¹⁶ and there is no consent about which notion describes the issue most accurately. Alternatives include «unauthor-

documented Migration: Borders, Immigration Enforcement, and Belonging, Cambridge 2019, p. 27.

¹¹ See e.g., PASPALANOVA MILA, Undocumented vs. illegal migrant: Towards terminological coherence, in: *Migraciones Internacionales* 2008/4(3), p. 79 et seqq.; SCHROVER MARLOU, *Illegal migration and gender in a global and historical perspective*, Amsterdam 2008, p. 10 et seqq.

¹² GONZALES/SIGONA/Franco/Papoutsis, (fn. 10), p. 21; Paspalanova (fn. 11), p. 80.

¹³ Paspalanova (fn. 11), p. 81.

¹⁴ Paspalanova (fn. 11), p. 81.

¹⁵ DELVINO NICOLA/SPENCER SARAH, *Migrants with Irregular Status in Europe: Guidance for Municipalities*, Centre on Migration, Policy and Society (COMPAS), Oxford 2017, p. 10; Paspalanova (fn. 11), p. 82.

¹⁶ Schrover (fn. 11), p. 10.

⁹ In case of further interest and questions about the interviewees, the author can be contacted for additional information.

¹⁰ GONZALES ROBERTO/SIGONA NANDO/Franco MARTHA/Papoutsis ANNA, Un-

ized migration»,¹⁷ «clandestine migration»,¹⁸ or «undocumented migration».¹⁹ «Irregular migration» emphasizes that the respective migrants have at some point broken the rules of entry or residence but refrains from implying further illegality.²⁰ Many scholars use this notion, claiming that it entails the smallest negative political or social connotations.²¹ Against this background, this term is used in this paper. The respective population group is referred to as «migrants with irregular status» or «irregular migrants». This includes all individuals who do not or do no longer meet the conditions for a lawful entry and residence in Switzerland and who would make themselves liable to expulsion if they were detected by the migration authorities.²²

This introduction into the ambivalences of the terminology demonstrates that no term is neutral²³ and that each expression mirrors different semantics. Therefore, terminology

needs to be critically reflected upon when discussing the issue.

B. Irregular migration in the context of Europe

From a historical perspective, «irregular» migration is a rather new concept. Until the emergence of post-First World War nation states in the early 20th century, Europe hardly knew any restrictions on migration.²⁴ Since then, most countries have established a complex hierarchy of titles defining migrants' legal status.²⁵ In the aftermath of the Second World War, many European countries, including Switzerland, introduced guest worker schemes. Residence permits were issued seasonally, and the number of migrant workers could adapt according to the economic situation.²⁶ But as many of these seasonal workers did not strictly adhere to their limited residence permit, irregular migration became an increasingly common – and tolerated – phenomenon.²⁷ It was only by the 1990s that restricting irregular migration became a policy priority for Switzerland and most other European countries.²⁸

On the European level, the Schengen agreement coins the current migration framework. It states that international borders are no longer systematically enforced

¹⁷ Referring to the entry or stay in a country without authorization, which can be misleading as not everybody residing in a foreign country needs explicit authorization to do so, such as nationals of the European Union (EU) who have the right to free movement within the entire EU; cf. TRIANDAFYLLIDOU ANNA, *Clandestino Project Final Report, Pathways into irregularity: The Social Construction of Irregular Migration*, 2009, p. 3.

¹⁸ Focusing on the hidden manner in which the migration takes place. Cf. DÜVELL FRANCK, *Clandestine migration in Europe*, in: *Social Science Information* 2008/47(4), p. 486; Critics argue that this term reinforces the perception that migrants are in this clandestine position because of a criminal activity; cf. PASPALANOVA (fn. 11), p. 84.

¹⁹ Referring to the fact that someone does not possess the required papers to enter or stay in a country; cf. TRIANDAFYLLIDOU (fn. 17), p. 3; This can be misleading because the respective people often do have documents – for example passports, unlike stateless persons – but just not the ones regarding residence; cf. DELVINO/SPENCER (fn. 15), p. 10.

²⁰ TRIANDAFYLLIDOU (fn. 17), p. 3.

²¹ See e.g., DELVINO/SPENCER (fn. 15); TRIANDAFYLLIDOU (fn. 17); PASPALANOVA (fn. 11).

²² KIENER/BREITENBÜCHER (fn. 4), p. 357.

²³ CARENS JOSEPH, *The rights of irregular migrants*, in: *Ethics & International Affairs* 2008/22(2), p. 163 et seqq.

²⁴ DÜVELL FRANCK, *Illegal immigration in Europe: Beyond Control?*, London 2006, p. 24.

²⁵ LEBUHN HENRIK, *Local border practices and urban citizenship in Europe: Exploring urban Borderlands*, in: *City* 2013/17(1), p. 42.

²⁶ CARONI MARTINA/SCHIEBER NICOLE/PREISIG CHRISTA/ZOETEWIJ-TURHAN MARGARITE, *Migrationsrecht*, 4th edition, Bern 2018, p. 24; LAVENEX SANDRA/MANATSCHAL ANITA, *Migrationspolitik*, in: Knoepfel Peter/Papadopoulos Yannis/Sciarini Pascal/Vatter Adrian/Häusermann Silja (eds.), *Handbuch der Schweizer Politik*, p. 675.

²⁷ BLOCH ALICE/CHIMIENI MILENA, *Irregular migration in a globalizing world*, in: *Ethnic and Racial Studies*, 2011/34(8), p. 1271 et seqq.

²⁸ TRIANDAFYLLIDOU (fn. 17), p. 11.

between the signatory states²⁹ but at the common external borders.³⁰ As a consequence, external border controls have been increasingly supplemented by domestic bordering practices within the nations' territories.³¹ Local state agencies and ordinary service providers – such as welfare agencies, schools, hospitals or health insurance providers – regularly check identification and residence papers in order to verify if people are entitled to obtain certain services or not.³² Due to their lacking residence permit, migrants with irregular status increasingly lose access to social institutions and local services.³³

As a further consequence of the Schengen agreement, the barriers to enter and reside in Europe have become greater for non-European nationals, and for unskilled workers in particular.³⁴ And as countries limit the legal labor migration out of political interest, actual demand is met by irregular migration. Scholars thus ascribe the asymmetry between the countries' legal supply of labor and their actual demand for it as a main driver for the phenomenon.³⁵ However, people not only migrate due to economic reasons but also out of individual or political motives. This includes war, persecution, oppression, family reunification, and many more. If there are no legal channels for doing so, these people are left with the option of migrating in an irregular manner.³⁶ There-

by, it becomes evident that the nation state and its migration and asylum policies are also major determinants for irregular migration.³⁷

Hence, irregular migration in Europe can be characterized as a legal, political and social construct of the 20th century.³⁸ It results from the interplay between a capitalist economy, global migration flows and draconian immigration or asylum policies.³⁹ It further demonstrates the paradox of today's globalization, where the free flow of information, capital and goods is promoted, but not the free flow of people.⁴⁰

C. Characteristics of migrants with irregular status in Switzerland

Finding typical characteristics of the population group presents a highly challenging task. First, irregular migrants constitute a very heterogeneous group, with different motives leading them to migration, different ways into irregularity, and with individual life realities.⁴¹ Second, most irregular migrants «rely on their ability to stay hidden from public view in order to remain in host countries».⁴² This is why they constitute a comparatively invisible segment of the population. Consequently, determining the extent of irregular migration represents a nearly unfeasible task. Estimations regarding the number of migrants residing irregularly in Switzerland range from around 60'000 up to 300'000, depending considerably on the

²⁹ Which include most EU-member states plus the four non-EU states Iceland, Norway, Switzerland and Liechtenstein.

³⁰ LEBUHN (fn. 25), p. 37.

³¹ DÜVELL FRANCK, Irreguläre Migrant/innen in den Städten Europas: wirtschaftliche, ethische und politische Implikationen, Oxford 2007, p. 15.

³² LEBUHN (fn. 25), p. 42 et seqq.

³³ SCHILLIGER SARAH, Urban Citizenship, in: Aigner Heidrun/Kuming Sarah (eds.), Stadt Für Alle!: Analysen Und Aneignungen, Vienna 2018, p. 14 et seqq.

³⁴ BLOCH/CHIMIENI (fn. 27), p. 1275.

³⁵ DÜVELL (fn. 31), p. 6.

³⁶ PETRY ROSWITHA, La situation juridique des migrants sans statut légal: entre droit internatio-

nal des droits de l'homme et droit suisse des migrations, Geneva 2013, p. 13.

³⁷ Cf. BLOCH/CHIMIENI (fn. 27), p. 1277; DÜVELL (fn. 31), p. 4.

³⁸ DÜVELL (fn. 31), p. 4.

³⁹ Cf. GONZALES/SIGONA/FRANCO/PAPOUTSI, (fn. 10), p. 27.

⁴⁰ DÜVELL (fn. 31), p. 10.

⁴¹ KNOLL ALEX/SCHILLIGER SARAH/SCHWAGER BEA, Wisch und weg!: Sans-Papiers-Hausarbeiterinnen zwischen Prekarität und Selbstbestimmung, Zurich 2012, p. 10.

⁴² Cf. GONZALES/SIGONA/FRANCO/PAPOUTSI, (fn.10), p. 21.

source.⁴³ Similar difficulties arise when assessing the socio-demographic profile of irregular migrants. However, recent research has identified characteristics that migrants with irregular status in Switzerland share: There is a clear tendency that mostly young people between the age of 20 to 40 emigrate from their home countries and settle irregularly in Switzerland.⁴⁴ But as most of them become long-term residents and grow older in Switzerland, the overall population group is continuously aging.⁴⁵ At the same time, children make up a considerable part of the population group. Many babies are born into their irregular status. Recent studies estimate that up to twelve percent of all irregular migrants in Switzerland are children.⁴⁶ While for a long time the image prevailed that mostly young men came to settle and work irregularly in Switzerland,⁴⁷ female irregular migrants are increasingly noticed as well.⁴⁸ Women are described to find work primarily in private households, where they carry out care and cleaning tasks, or in the sex industry.⁴⁹ Other sectors that frequently employ migrants with irregular status are the construction industry, gastronomy, agriculture or the hotel industry. Generally speaking, these working areas are unattractive because of their low salaries or poor working condi-

tions.⁵⁰ Overall, it is estimated that nine out of ten adult migrants with irregular status engage in employment.⁵¹ This accounts for a very high proportion, but is not particularly surprising as work often constitutes a decisive reason to emigrate in the first place.⁵² There are practically no irregular migrants coming from the EU or countries of the European Free Trade Association (EFTA). In contrast, many irregular migrants originate from Latin America or Eastern Europe, as well as Asia, Africa or the Middle East.⁵³ Often, irregular migrants with the same migration background settle in nearby areas. The degree of urbanization and labor opportunities further shape the regional distribution of irregular migrants living in Switzerland.⁵⁴ Thereby, most migrants with irregular status live in cities. Consequently, urban cantons such as Zurich, Vaud, Geneva or Basel show the highest numbers of irregular migrants.⁵⁵

In addition to these socio-demographic characteristics, irregular migrants share challenges in their daily lives that result from their lacking residence permit. Due to the constant risk of deportation, everyday activities can pose a significant challenge. Buying a mobile subscription or opening a bank account, for example, is often highly challenging or impossible.⁵⁶ But also more fundamental aspects of their daily lives, as their employment, housing or healthcare situation, can be negatively affected. First, it is common for irregular migrants to be employed under exploitative conditions. Many

⁴³ Cf. KIENER/BREITENBÜCHER (fn. 4), p. 1; CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26) p. 513; EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 6; LONGCHAMP CLAUDE/AEBERSOLD MONIA/ROUSSELOT BIANCA/RATELBAND-PALLY SILVIA, *Sans Papiers in der Schweiz: Arbeitsmarkt, nicht Asylpolitik ist entscheidend*, Bern 2005, p. 4.

⁴⁴ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 28.

⁴⁵ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 28.

⁴⁶ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 513.

⁴⁷ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 7.

⁴⁸ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 28.

⁴⁹ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 53.

⁵⁰ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 8.

⁵¹ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 515.

⁵² EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 52.

⁵³ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 25 et seqq.

⁵⁴ Cf. LONGCHAMP/AEBERSOLD/ROUSSELOT/RATELBAND-PALLY (fn. 43), p. 39, p. 48 et seqq.

⁵⁵ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 25.

⁵⁶ MONEYLAND, [Bankkonto für Ausländer in der Schweiz](#), Zurich 2015.

work for low wages that do not include social security contributions and guarantee no job security.⁵⁷ Second, many irregular migrants have a physically demanding job and in case of illness, there is no income replacement. Although health insurance is compulsory for all Swiss residents, many migrants with irregular status do not have access to health insurance services.⁵⁸

This represents only a selection of their daily challenges to show the precariousness of their living conditions. There are, however, far more struggles that many irregular migrants in Switzerland are confronted with. This becomes apparent if they want to rent an apartment or get married, if they receive a child, or if they have children that need to go to school.⁵⁹

IV. The legal framework regarding irregular migrants in Switzerland

But what legal framework does exist for migrants living irregularly in Switzerland? And what legal rights and remedies can be invoked by them? These questions are discussed in the following.

A. Relevant legal sources

Various legal sources are determining the rights of migrants residing irregularly in Switzerland. These include provisions of international and national law, as well as soft law.

1. Provisions under international law

Most of the relevant provisions under international law establish fundamental and hu-

man rights. As the term «human rights» indicates, these norms generally apply to every human being, irrespective of nationality or status.⁶⁰ On the global level, the [UN-Covenant I](#) and the [UN-Covenant II](#) provide the basis for a universal human rights framework. In addition, there are several thematic UN-based human rights treaties, addressing particular target groups or specific human rights. These include the [Anti-Discrimination Convention \(ICERD\)](#), the [Convention against Torture \(CAT\)](#), the [Children's Rights Convention \(CRC\)](#), or the [Convention against the Discrimination of Women \(CEDAW\)](#).⁶¹ At a regional level, the [European Convention on Human Rights \(ECHR\)](#) provides for further human rights protection. As all of these conventions have been ratified by Switzerland, the provisions they enshrine apply to all persons within the Swiss jurisdiction, to the extent that the provisions are directly applicable.⁶² This includes irregular migrants, provided that these norms do not impose restrictions based on citizenship or residence status.⁶³ In fact, the European Court for Human Rights has already treated the question of whether the [European Human Rights Convention](#) applies to irregular migrants. It argued that an alien enjoys the protection of the convention as soon as he or she is physically present in the territory of a contracting state. Hereby, the court considered it irrelevant whether he or she entered it in a regular manner.⁶⁴ In addition, specific international treaties are determining the rights of migrant workers.

⁵⁷ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 54.

⁵⁸ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 66.

⁵⁹ Cf. EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 52 et seqq.

⁶⁰ FUNDAMENTAL RIGHTS AGENCY, [Fundamental Rights of Migrants in an Irregular Situation in the European Union](#), Vienna 2011, p. 19.

⁶¹ FUNDAMENTAL RIGHTS AGENCY (fn. 60), p. 22. Cf. art. 2 [UN-Covenant II](#) or art. 1 [ECHR](#).

⁶² FUNDAMENTAL RIGHTS AGENCY (fn. 60), p. 25; Restrictions of this kind are rare, but they can be observed, for example, in art. 12 para. 1, art. 13 or art. 25 [UN-Covenant II](#), as well as in art. 1 para. 1 of the [Protocol No. 7 to the ECHR](#); See also PETRY ROSWITHA (fn. 36), p. 39 et seqq.

⁶⁴ PETRY (fn. 36), p. 39; [ECtHR, D./United Kingdom, verdict of 2 May 1997, No. 30240/96, note 48](#).

They can also be applied to irregular migrants. These include certain ILO Conventions⁶⁵ and the International Convention for Migrant Workers (**ICRMW**). The latter grants far-reaching protection for migrant workers. However, it has not been ratified by Switzerland or any other major receiving state, and consequently does not apply to (irregular) migrants working in Switzerland.⁶⁶

It can be concluded that migrants residing irregularly in Switzerland enjoy considerable human rights protection. But although human rights apply worldwide, they are primarily implemented on the domestic level.⁶⁷ To allow a norm of international law to be enforced nationally, it is required to be made effective in domestic law and to be considered directly applicable.⁶⁸ In practice, therefore, it is necessary to take into account the specificities of both national and international law to determine whether there is effective human rights protection.

2. Provisions under national law

Swiss law features no legal provisions directed particularly at irregular migrants. Therefore, the general Swiss legal order applies to them.⁶⁹ Hereby, the Federal Constitution (**BV**)⁷⁰ plays a foundational role. It serves as the constitutive law of the country

and provides for the protection of fundamental and human rights. In addition, regulations specifically directed towards foreigners further determine the legal rights and obligations of irregular migrants. This includes the Federal Law on Foreign Nationals and Integration (**AIG**), the Federal Asylum Act (**AsylG**), or the Ordinance on Admission, Residence and Employment of Foreigners (**VZAE**). But also laws not specifically addressing foreigners are relevant for the legal position of migrants with irregular status. Regarding the employment of irregular migrants, relevant provisions can be found in the Code of Obligations (**OR**) and the Federal Act against Undocumented Employment (**BGSA**). Besides that, there are thematically specific insurance laws, such as the Federal Law on Old-age and Survivors' Insurance (**AHVG**), the Federal Law on Disability Insurance (**IVG**), the Federal Law on Health Insurance (**KVG**) or the Federal Law on Unemployment Insurance (**AVIG**) that also apply to migrants with irregular status. There is thus a wide range of national legal norms that shape the legal position of migrants residing irregularly in Switzerland.

3. Soft law

Moreover, there are some norms under soft law which concern migrants with irregular status.⁷¹ Soft law refers to those rules which are not legally binding, but are nevertheless relevant in a quasi-legal way.⁷² These rules often serve as an aid in the interpretation and concretization of legal norms.⁷³ This includes the [Resolution regarding the Human Rights of Irregular Migrants](#) or the [European Commission against Racism and Tolerance's recommendation on safeguarding irregular migrants](#).

⁶⁵ Such as the [Domestic Workers Convention of 2011 \(No. 189\)](#) or the [Convention for the Freedom of Association and Protection of the Right to Organise of 1948 \(No. 87\)](#). See also FUNDAMENTAL RIGHTS AGENCY (fn. 60), p. 22.

⁶⁶ PETRY (fn. 36), p. 101.

⁶⁷ JENSEN STEVEN/ LAGOUTTE STÉPHANIE / LORION SÉBASTIEN, The Domestic Institutionalization of Human Rights: An Introduction, in: [Nordic Journal of Human Rights](#) 2019/37, p. 165.

⁶⁸ Cf. PETERS ANNE, *Völkerrecht: Allgemeiner Teil*, 4th edition, Zurich 2016, p. 197; PETRY (fn. 36), p. 154.

⁶⁹ CARONI/SCHIEBER/PREISIG/ZOETEWELJ-TURHAN (fn. 26), p. 516.

⁷⁰ For many Swiss laws referred to in this article, there are no official English abbreviations. Therefore, this article uniformly indicates the German abbreviations for Swiss laws.

⁷¹ KIENER/BREITENBÜCHER (fn. 4), p. 361.

⁷² PETERS (Fn. 68), p. 91; GUZMAN ANDREW/MEYER TIMOTHY, International Soft Law, in: *Journal of Legal Analysis* 2010/2(1), p. 172.

⁷³ KIENER/BREITENBÜCHER (fn. 4), p. 361.

B. Overview of legal rights and obligations

The next section provides a non-exhaustive overview of the rights to which irregular migrants are entitled, as well as the obligations to which they are subject. Hereby, a particular focus lies on the right of access to justice.

1. Employment and tax regulations

First, there are relevant employment regulations. The Federal Law against Undocumented Employment (BGSA) addresses both the work that is not declared to the compulsory social insurance or tax authorities, as well as employment that violates foreigners' law.⁷⁴ Irregular migrants are not allowed to take up work in Switzerland, in which event they make themselves liable to prosecution.⁷⁵ Nevertheless, employment contracts concluded with irregular migrants are valid.⁷⁶ Second, federal tax regulations also apply to irregular migrants. Natural persons are liable to taxes if they have their tax domicile or residence in Switzerland.⁷⁷ This holds true for most migrants with irregular status,⁷⁸ which makes them obliged to pay federal taxes.⁷⁹

⁷⁴ PETRY (fn. 36), p. 205.

⁷⁵ According to [art. 115 para. 1 lit. c AIG](#); CARONI/SCHNEIDER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 517.

⁷⁶ Since they are not void according to [art. 20 para. 1 OR](#). This leads to wage payment obligations for employers and a minimum wage guarantee for irregular migrants in the amount of the usual local and occupational wage; CARONI/SCHNEIDER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 518.

⁷⁷ According to [art. 3 para. 1 DBG](#).

⁷⁸ According to [art. 3 para. 3 DBG](#) a residence becomes tax relevant if a person stays in Switzerland for 30 days and engages in gainful occupation, or if a person stays in Switzerland for longer than 90 days even without engaging in gainful occupation.

⁷⁹ CARONI/SCHNEIDER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 519.

2. Social security and social aid

Furthermore, there are relevant social security regulations. Although there is no specific norm concerning irregular migrants in the Swiss social security law,⁸⁰ they are entitled to old-age and invalidity-,⁸¹ health-, accident-⁸² and unemployment insurance.⁸³ The respective social insurance liabilities do not depend on the residence status.⁸⁴

In contrast, migrants without regular status are not entitled to social aid, which aims to secure a basic livelihood, promote economic and personal self-sufficiency, and foster professional and social integration.⁸⁵ They are, however, entitled to emergency aid. But this only serves to secure a livelihood and a decent life. The latter is therefore far less comprehensive.⁸⁶ Access to emergency aid is based on [art. 12 BV](#), which confers the right to obtain assistance in situations of distress. Case law⁸⁷ has explicitly confirmed that this right to minimum social benefits may also be invoked by foreigners, regardless of their status.⁸⁸

⁸⁰ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 71.

⁸¹ Cf. [art. 1a AHVG](#) and [art. 1b IVG](#).

⁸² Cf. [art. 3 KVG](#).

⁸³ Cf. [art. 2 AVIG](#).

⁸⁴ PETRY (fn. 36), p. 225; Still, it is not always possible to receive effective access to them. In the case of unemployment insurance, irregular migrants are not allowed to receive unemployment benefits even if they make the necessary contributions, as they cannot be officially employed, which represents a prerequisite for the issuance of benefits; EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 53.

⁸⁵ This is due to a lacking support domicile according to [art. 20 ZUG](#); a support domicile is responsible for supporting those in need, for which non-Swiss residents must have a residence permit according to [art. 4 para. 2](#) of the same law; cf. CARONI/SCHNEIDER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 522.

⁸⁶ CARONI/SCHNEIDER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 522.

⁸⁷ [BGE 131 I 166](#), E.3.1 p. 172.

⁸⁸ PETRY (fn. 36), p. 231.

3. Health related regulations

The right to assistance in emergency situations enshrined in [art. 12 BV](#) together with [art. 41 para. 1 lit. b BV](#)⁸⁹ serves as the basis for irregular migrants' health related rights. There are different interpretations of these norms: While some construe [art. 12 BV](#) as a right of access to health care, the majority opinion seems to view it rather as a right to essential care, excluding prophylactic or comfort care.⁹⁰ According to [art. 3 para. 1 KVG](#), all persons domiciled in Switzerland are obliged to take out compulsory health insurance, which was specifically confirmed by case law⁹¹ to also hold for migrants with irregular status.⁹²

4. Rights concerning children

Children and adolescents represent a particularly vulnerable group, which is why there are several legal provisions specifically addressing their rights. First, there is the right to legal recognition of identity,⁹³ and the birth of every child regardless of residence status must be registered in the civil registry.⁹⁴ Second, every child has an individual right to free primary education.⁹⁵ This entitlement does not depend on the residence status.⁹⁶ In contrast, there is no right to post-compulsory education, whether general nor vocational.⁹⁷ But since the introduction of [art. 30a VZAE](#), adolescents with irregular status can apply for a temporary residence permit in order to do an apprenticeship. This entails several requirements,

⁸⁹ Which stipulates that every person receives the necessary care for his or her health.

⁹⁰ PETRY (fn. 36), p. 259.

⁹¹ [BGE 129 V 77](#), 5.2 p. 79.

⁹² PETRY (fn. 36), p. 261.

⁹³ German: Recht auf Identität.

⁹⁴ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 526; [art. 39 para. 2 ZGB](#).

⁹⁵ According to [art. 19](#) and [art. 62 para. 2 BV](#), as well as [art. 28 CRC](#).

⁹⁶ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 527.

⁹⁷ PETRY (fn. 36), p. 277.

such as providing information about the entire family, and authorities have great discretionary powers. In consequence, only a few irregular migrants make use of this option.⁹⁸

5. Regulations concerning family life

Furthermore, irregular migrants have rights concerning their civil status and family life. The right to marry represents a fundamental right that everybody is entitled to, regardless of residence status.⁹⁹ Also, the right to family life¹⁰⁰ makes no distinction regarding citizenship or residence status.¹⁰¹ These rights, however, are not absolute. There are conditions that must be fulfilled in order to marry in Switzerland.¹⁰² And since marriage represents one way to regularize the immigration status due to family reunification (see below),¹⁰³ it has been increasingly politicized and was restricted for foreigners.¹⁰⁴ Now, [art. 98 para. 4 ZGB](#) requires fiancés who are not Swiss citizens to establish the regularity of their stay during the preparatory marriage procedure.¹⁰⁵ This provision has been

⁹⁸ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 528.

⁹⁹ According to [art. 12 ECHR](#), [art. 23 para. 2 UN-Covenant II](#) and [art. 14 BV](#); PETRY (fn. 36), p. 159.

¹⁰⁰ Anchored in [art. 13 para. 1 BV](#) and [art. 8 ECHR](#).

¹⁰¹ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 41.

¹⁰² Restrictions of basic human rights must be justified according to [art. 36 BV](#). They must be suitable, necessary and reasonable for the achievement of a legitimate objective and must respect the core content of the human right in question; cf. KIENER/BREITENBÜCHER (fn. 4), p. 360.

¹⁰³ The residence permit is granted according to the rules on family reunification under the Foreigners' Act and the Agreement on the Free Movement of Persons; cf. EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 41.

¹⁰⁴ PETRY (fn. 36), p. 159 et seqq.

¹⁰⁵ The civil registrar can access the central information system on migration and is also required to inform the alien police of fiancés' identities whose regular status has not been established; PETRY (fn. 36), p. 173.

strongly criticized¹⁰⁶ and the federal supreme court has established pertinent case law maintaining the right to marry despite irregular residence.¹⁰⁷

6. Human rights that can prevent the removal from the country of residence

The right to private and family life enshrined in [art. 8 ECHR](#) and [art. 13 BV](#) further represent some of the human rights that can prevent the removal from the country of residence, as it may limit the state's power to expel foreigners.¹⁰⁸ Case law shows, however, that irregular migrants can only deduct such a right to residence based on the right to private or family life in the case of exceptional circumstances. The European Court for Human Rights has accepted such an effect of [art. 8 ECHR](#) in a few cases.¹⁰⁹ In contrast, the Federal Supreme Court adopts a more restrictive interpretation. It argues that the provision can be invoked only by foreigners who have a close and effective relationship with a family member who has an assured right of residence in Switzerland.¹¹⁰ Similarly, the principle of *non-refoulement*¹¹¹ can also prevent irregular migrants from being removed from Switzerland. It prohibits states from returning foreigners to a country where they are at risk of torture or other ill-treatment.¹¹²

¹⁰⁶ PÉTRY (fn. 36), p. 181.

¹⁰⁷ CARONI/SCHNEIDER/PREISIG/ZOETEWELJ-TURHAN (fn. 26), p. 524; See e.g., [BGE 137 I 351](#); [BGE 138 I 41](#).

¹⁰⁸ PÉTRY (fn. 36), p. 87, p. 185.

¹⁰⁹ PÉTRY (fn. 36), p. 87; See e.g., [ECtHR, Mengesha Kimfe/Switzerland, verdict of 29 July 2010, No. 24404/05](#).

¹¹⁰ PÉTRY (fn. 36), p. 186; See e.g., [BGE 130 II 281](#), p. 285; [BGE 126 II 377](#), p. 383.

¹¹¹ This principle is codified for refugees in [art. 33 of the Convention relating to the Status of Refugees](#), and in general in [art. 3 CAT](#), in [art. 7 UN-Covenant II](#), and in [art. 3 ECHR](#).

¹¹² PÉTRY (fn. 36), p. 69 et seqq.

7. Right of access to justice

Above all, if rights cannot be enforced by courts, they remain ineffective. This is why the right of access to justice represents not only a very fundamental human right, but also the means for the protection and realization of other substantive rights.¹¹³ In Switzerland, access to justice represents a justiciable right that is anchored manifold in both national and international legal sources. The Federal Constitution establishes in [art. 29](#) the right of every person to equal and fair treatment in judicial and administrative proceedings (para. 1), the right to judicial hearing (para. 2), and the right to legal aid (para. 3). Also, effective judicial remedy is guaranteed for in [art. 29a BV](#). Furthermore, the state has a duty to realize human rights according to [art. 35 BV](#).¹¹⁴ Effective access to justice represents therefore a constitutional right that must be provided by the state for each individual under its jurisdiction, regardless of citizenship or residence status.¹¹⁵

What is more, the UN-Covenant II prescribes in [art. 14 para. 1](#) that all people are equal before the court and that everybody must have access to a fair and public hearing by a competent, independent, impartial and lawful tribunal.¹¹⁶ Similarly, [art. 6 para. 1 ECHR](#) prescribes a guarantee for judicial legal protection. In addition, [art. 13 ECHR](#) provides for a right to effective judicial remedy with regard to the rights guaranteed by the convention.¹¹⁷ Finally, several norms according to soft law specifically address the issue of access to justice for migrants with irregular status. Clause 16 of the [resolution regarding Human Rights of Irregular Migrants](#) recommends nation states to ensure that irregular migrants can effectively claim their rights in practice.¹¹⁸ Similarly, the Eu-

¹¹³ KIENER/BREITENBÜCHER (fn. 5), p. 5.

¹¹⁴ KIENER/BREITENBÜCHER (fn. 4), p. 358.

¹¹⁵ KIENER/BREITENBÜCHER (fn. 5), p. 6.

¹¹⁶ KIENER/BREITENBÜCHER (fn. 4), p. 358 et seqq.

¹¹⁷ KIENER/BREITENBÜCHER (fn. 5), p. 4.

¹¹⁸ KIENER/BREITENBÜCHER (fn. 5), p. 7.

European Commission against Racism and Intolerance has argued in its [recommendation no. 16](#) that irregular migrants should be able to report all offenses to the law enforcement authorities if they become victims of a crime, and that they should be able to testify before a judge (clause 33).¹¹⁹

Against this background, it can be concluded that migrants with irregular status are entitled to access to justice. But in practice, they often refrain from enforcing this right because that would entail disclosing their residence status. Hence, access to justice substantially depends on judicial authorities' practice of collecting and transmitting data on the residence status. In this way, it is strongly connected to the right of data protection.¹²⁰

8. Right of data protection

The protection of personal data represents a human right guaranteed by [art. 13 para. 2 BV](#). Thereby, information regarding the residence status is considered sensitive personal data that needs to be protected and whose exchange presents a restriction of the fundamental right to data protection. Consequently, information regarding the residence status can only be exchanged according to [art. 4 DSG](#) and [art. 36 BV](#). These norms state that the information exchange must be based on a sufficient legal basis, serve a recognized public interest, be proportionate, and safeguard the core content of the fundamental right.¹²¹ A legal basis in this sense has been established regarding the state authorities' – and particularly the police's – duty to transmit data on the residence status to the migration authorities, broadly anchored in [art. 97 AIG](#). This is

further concretized in [art. 82 VZAE](#): para. 1 states that the police, as well as judicial and criminal investigation authorities are obliged to automatically inform migration authorities about criminal investigations, arrests and discharges, as well as civil and criminal convictions, as far as foreigners are concerned.¹²² The ordinance further states in [art. 82 para. 2](#) that law enforcement agencies must always report to the migration authorities if they have gained knowledge about an irregular residence situation.¹²³ As a consequence of these obligations to transmit data on the residence status to the migration authorities, it has been observed that irregular migrants increasingly refrain from reporting criminal offenses with the police. This is why REGINA KIENER and DANIELLE BREITENBÜCHER argue that this practice of transmitting data on the residence status constitutes an indirect restriction of the irregular migrants' right of access to justice.¹²⁴ Furthermore, the authors criticize that the main legal basis of this obligation is only recorded at the decree and not at the statutory level.¹²⁵ Adding on, they argue that it fails to take into account the constitutionally protected interests of persons without regular residence permits and their right of access to justice in particular. Finally, the authors criticize the lacking consideration that this obligation may be detrimental to the public interest,¹²⁶ if as a consequence, irregular migrants refrain from reporting criminal offenses. Ultimately, this is said to negatively affect the enforcement of the law.¹²⁷

It can be concluded that effective data protection represents a necessary precondition for irregular migrants' access to justice. The latter can only claim their rights in practice if

¹¹⁹ KIENER/BREITENBÜCHER (fn. 4), p. 361.

¹²⁰ KIENER/BREITENBÜCHER (fn. 4), p. 357 et seqq.

¹²¹ KIENER/BREITENBÜCHER (fn. 5), p. 10; See also DAVET SUZANNE, *Meldepflichten von Behörden bei illegalem Aufenthalt*, in: *Basler Juristische Mitteilungen*, Basel 2010, p. 63.

¹²² CARONI/SCHNEIDER/PREISIG/ZOETEWELJ-TURHAN (fn. 26), p. 526.

¹²³ KIENER/BREITENBÜCHER (fn. 4), p. 367 et seqq.

¹²⁴ KIENER/BREITENBÜCHER (fn. 5), p. 45.

¹²⁵ KIENER/BREITENBÜCHER (fn. 4), p. 370.

¹²⁶ See also DAVET (fn. 121), p. 63.

¹²⁷ KIENER/BREITENBÜCHER (fn. 4), p. 370.

law enforcement agencies refrain from transmitting data on the residence status to the migration authorities.¹²⁸ But not only exchanging data on the residence status represents an indirect restriction of the irregular migrants' right of access to justice. The gathering of such data in the first place can have the same effect. According to [art. 302 para. 1 StPO](#), law enforcement agencies must prosecute all offenses that they discover in the course of their official activities. This means that they must initiate criminal proceedings where there are reasonable grounds for suspecting irregular residence. Hence, effective access to justice also fundamentally depends on whether the law enforcement agencies refrain from collecting data on the residence status in the first place.¹²⁹

C. Administrative and criminal sanctions

In order to fully understand the legal position of irregular migrants, one must further discuss the various administrative and criminal sanctions that may be imposed in connection with an irregular residence situation. First, irregular migrants can be expelled from the country based on [art. 64 et seqq. AIG](#), if their identity becomes known to the authorities. If the person concerned does not comply, he or she may be subject to a measure of constraint. The removal from the country may then be enforced, if necessary, by the use of force.¹³⁰ Also, irregular migrants may be banned from entering Switzerland for a certain period of time. In that case, the removal is accompanied by an entry ban according to [art. 67 AIG](#).¹³¹ Furthermore, irregular entry, residence or the exercise of a gainful activity without authorization can be prosecuted under criminal law according to [art. 115 AIG](#). This can lead to

penalties such as imprisonment for up to one year or monetary fines.¹³²

In addition, there are different types of sanctions against third parties who interact with irregular migrants. To name an example: Employers make themselves liable to criminal sanctions according to [art. 117 AIG](#), if they employ foreigners without valid authorization. But also transport companies make themselves liable to so-called «carrier sanctions», if they fail to comply with [art. 92 para. 1 AIG](#). According to this norm, they must take the necessary measures that can be expected of them to ensure that they only transport persons with the valid documents required for regular entry into Switzerland.¹³³ Finally, it should be noted that since 2008, any person who facilitates the irregular entry or residence of a foreigner is liable to criminal prosecution according to [art. 116 para. 1 lit. a AIG](#). This includes assistance that is provided for a purely humanitarian purpose.¹³⁴ Convictions based on this regulation are not uncommon. In 2017, a total of 785 persons were sentenced for so-called «facilitating acts» in favor of foreigners in an irregular situation.¹³⁵ This practice has gained increasing attention and various solidarity networks and politicians are calling to decriminalize humanitarian aid provided for irregular migrants.¹³⁶

D. Regularizing the residence status

Once migrants reside irregularly in Switzerland, they have only limited options to regularize their residence status. As already mentioned above, marriage constitutes one of these options if it leads to a residence permit due to family reunification. Since the adaptation of [art. 98 para. 4 ZGB](#), foreign fiancés

¹²⁸ KIENER/BREITENBÜCHER (fn. 4), p. 360.

¹²⁹ KIENER/BREITENBÜCHER (fn. 4), p. 371.

¹³⁰ PETRY (fn. 36), p. 142; [art. 73 et seqq. AIG](#).

¹³¹ PETRY (fn. 36), p. 142.

¹³² PETRY (fn. 36), p. 143.

¹³³ PETRY (fn. 36), p. 144.

¹³⁴ PETRY (fn. 36), p. 144.

¹³⁵ VUILLEMIER MARIE, Schweiz bestraft Personen, die den Sans-Papiers helfen, [Swissinfo](#), Bern 2019.

¹³⁶ VUILLEMIER (fn. 135).

need to prove the regularity of their residence in Switzerland in order to get married, which is why marriage in most cases no longer provides a means for regularization.¹³⁷ The main possibility for irregular migrants to regularize their residence status is through the «personal hardship clause». There are two paths for irregular migrants to receive a regular residence permit due to personal hardship. On one hand, based on [art. 30 para. 1 lit. b AIG](#) for irregular migrants in general. On the other, based on [art. 14 para. 2 AsylG](#) for persons falling within the scope of asylum.¹³⁸ Regarding the first path, the article allows the migration authorities to derogate from the ordinary conditions of admission and to issue a residence permit in individual cases of so-called «extreme seriousness». As this is a very broad formulation, the Ordinance on Admission, Residence and Employment of Foreigners (VZAE) further substantiates in [art. 31](#) the criteria that can constitute a personal hardship case.¹³⁹ In contrast, [art. 14 para. 2 AsylG](#) clearly determines cases of hardship for people within the scope of asylum.¹⁴⁰

Humanitarian residence permits are primarily issued by the cantons. Hereby, the cantonal migration authorities enjoy great discretionary powers.¹⁴¹ It has been repeatedly observed that the regional practices in assessing such applications vary considerably.¹⁴² This is why critics often denounce this system as a «cantonal lottery».¹⁴³ The person applying must disclose his or her identity due to [art. 31 para. 2 VZAE](#) if the identity is

not already known to the authorities. Therefore, only a few irregular migrants who live in anonymity chose to do so.¹⁴⁴ As a further option to regularize residence status, states can establish collective regularization schemes. Switzerland has not established a practice of collective regularizations and previous efforts have not yet been successful. The only similar venture is the so-called «operation papyrus»: In February 2017, the canton of Geneva started an initiative that proactively informed irregular migrants about their chances to receive a residence permit due to personal hardship. At the same time, it encouraged potential applicants to file a request. Several hundred applications were submitted. Yet they were still being assessed on an individual basis in accordance with the existing legislation. Therefore, the «operation» shows no collective character.¹⁴⁵

V. Challenges for irregular migrants when enforcing their rights

Having rights is not the same as being able to enforce them. Irregular migrants face considerable challenges in realizing their rights, which are explored in this chapter.

A. General challenges in claiming legal entitlements

Effective rights realization pre-supposes several conditions, such as knowledge of one's own legal rights, access to the relevant institutions, and legal assistance in judicial proceedings.¹⁴⁶ In this regard, and in comparison with other population groups, ir-

¹³⁷ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 529.

¹³⁸ PETRY (fn. 36), p. 290; SPESCHA MARC/BOLZLI PETER/DE WECK FANNY/PRIULI VALERIO, *Handbuch zum Migrationsrecht*, 4th edition, Zurich 2020, p. 304 et seqq.

¹³⁹ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 186 et seqq.

¹⁴⁰ PETRY (fn. 36), p. 290.

¹⁴¹ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 531.

¹⁴² PETRY (fn. 36), p. 124.

¹⁴³ PETRY (fn. 36), p. 300.

¹⁴⁴ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 531.

¹⁴⁵ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 532.

¹⁴⁶ KAUFMANN CLAUDIA, *Zugang zum Recht: vielfältig und anspruchsvoll*, in: Kaufmann Claudia/Hausammann Christina (eds.), *Zugang zum Recht: Vom Grundrecht auf einen wirksamen Rechtsschutz*, Basel 2017, p. 15 et seqq.

regular migrants are in many ways disadvantaged. First, it has been found that especially migrants with irregular status have less knowledge of their rights and the support they are entitled to.¹⁴⁷ Second, the fear of being detected is so strong that many irregular migrants shy away from contacts with official institutions or support organizations. Hence, they refrain from claiming the rights and benefits they are entitled to.¹⁴⁸ Third, access to official institutions and service providers often depends on how the respective actors make use of their discretionary powers. To give an example: In the case of health insurance companies, the practice shows that although irregular migrants are entitled to health care, many insurance providers refuse to cover them.¹⁴⁹ As a consequence, only a minority of migrants living irregularly in Switzerland are insured against illness or accidents.¹⁵⁰ With regard to health insurance, the expensive premiums pose an additional hurdle for irregular migrants. Due to a lack of income certificate or tax declaration, it is difficult for them to gain access to premium reductions, although they are theoretically entitled to the respective subsidies.¹⁵¹ This further demonstrates that there is often a chain of interrelated reasons why irregular migrants fail to claim their rights or benefits. In this case it is due to their unauthorized employment that they are not able to pay taxes. Because of a lacking tax declaration, they cannot receive premium reductions. Ultimately, this hinders their access to health insurance.¹⁵² In addition, one can observe great regional differences in the treatment of irregular migrants. The cantonal rules regarding the granting of social rights,

as well as the laws on deportations, identity checks and criminal prosecution vary considerably.¹⁵³ Finally, the fact that there is a large number of legal sources determining the rights of irregular migrants in parallel leads to conflicts of legal interests. This may also aggravate the enforcement of their rights. Foreigners' law, which is violated through an irregular entry or residence, often collides with irregular migrants' entitlements to basic rights. Consequently, if there is a conflict of legal interests, the fundamental question arises as to which rights are given priority.¹⁵⁴ Thereby, several factors need to be considered. In the event of a conflict between international human rights and national laws, the former theoretically take precedence over the latter.¹⁵⁵ This can be observed regarding the international human right to education, where it is commonly accepted that the child's right to education must prevail over national interests of foreigners' law. Therefore, the Swiss authorities generally agree that all children should be granted access to education.¹⁵⁶ In the event of a conflict between different national legal norms, there are other aspects that need to be considered. This includes the type of the norm,¹⁵⁷ the date of the adoption,¹⁵⁸ or the specificity of the norm.¹⁵⁹

¹⁴⁷ DUBACHER CLAUDIA/REUSSER LENA, *Häusliche Gewalt und Migrantinnen*, 2011, p. 15.

¹⁴⁸ KIENER/BREITENBÜCHER (fn. 4), p. 357.

¹⁴⁹ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 520.

¹⁵⁰ CARONI/SCHWEIBER/PREISIG/ZOETEWEIF-TURHAN (fn. 26), p. 520.

¹⁵¹ PETRY (fn. 36), p. 261.

¹⁵² Cf. EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 64 et seqq.

¹⁵³ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 39.

¹⁵⁴ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 8, p. 36.

¹⁵⁵ Cf. [art. 27 of the Vienna Convention on the Law of Treaties](#) or [art. 5 para. 4](#) and [art. 190 BV](#).

However, according to the *schubert-practice*, more recent federal laws take precedence over older international treaties when the contradiction has been consciously accepted. But as this exception does not hold for international legal norms with human rights character (so-called *PKK judicial practice*), internationally anchored human rights generally take precedence over national laws; cf. PETERS (fn. 68), p. 208 et seqq.

¹⁵⁶ EFIONAYI-MÄDER/SCHÖNENBERGER/STEINER (fn. 1), p. 61.

¹⁵⁷ Whereby the constitution supersedes laws, which in turn supersede ordinances (*lex superior derogat legi inferiori*).

B. Challenges regarding access to justice

Apart from these general challenges in claiming the rights and benefits of irregular migrants, there are specific hurdles regarding their right of access to justice. Hereby, access to the police when filing criminal charges stands in the focus. This presents an initial and fundamental step in the much greater framework of accessing justice, which further encompasses aspects such as access to criminal, civil and administrative proceedings in court.¹⁶⁰

1. Filing criminal charges with the police

Filing criminal charges refers to «the procedure by which a person (usually the victim or a witness) brings to the attention of public authorities information on a crime, which generally initiates criminal proceedings against the offender».¹⁶¹ This procedure represents a crucial step in preventing the reoccurrence of crimes. Also, it allows for their envisaged prosecution according to the rule of law, while also «guaranteeing the rights and the protection of victims and to break the cycle of repeated victimisation».¹⁶² In the broader sense of filing a criminal charge, Swiss criminal law differentiates between a report of a criminal offense ([art. 301 StPO](#))

and a criminal complaint ([art. 30 StGB](#)).¹⁶³ The first states in [art. 301 para. 1 StPO](#) that every person is entitled to report a criminal offense without any preconditions.¹⁶⁴ This is mere information about the occurrence of an offense to the criminal justice authority. As a next step, this authority is only obliged to start preliminary proceedings in cases of offenses that are prosecuted *ex officio*.¹⁶⁵ In the case of offenses that are prosecuted only on complaint or with official authorization, preliminary proceedings are only commenced if a criminal complaint has been made within three months of the day on which the person entitled to make the complaint becomes aware of the offender.¹⁶⁶ A criminal complaint can be filed both verbally or in writing. It can be submitted to any police station, directly to the public prosecutor's office, or to the authority responsible for prosecuting contraventions.¹⁶⁷ As most people follow the first option, the police enjoy a *de facto* monopoly over the reception and processing of criminal charges.¹⁶⁸ Consequently, this option stands in the focus of this paper.

Insight into the processes of how victims file criminal charges in practice is scarce. Only little research has been done so far into the reality of how the police deal with individuals who want to file criminal charges.¹⁶⁹ Knowledge about these processes is crucial if one wants to assess the quality of the rule of law and the accessibility of justice.

¹⁵⁸ With newer standards taking precedence over older ones (*lex posterior derogat legi priori*).

¹⁵⁹ According to which special laws supersede general laws (*lex specialis derogat legi generali*); cf. HÄFELIN ULRICH/HALLER WALTER/KELLER HELEN/TRUNHERR DANIELA, Schweizerisches Bundesstaatsrecht, 10th edition, Zurich/Basel/Geneva 2020, p. 373 et seqq.; BIAGGINI GIOVANNI/GÄCHTER THOMAS/KIENER REGINA, Staatsrecht, 2nd edition, Zurich 2015, p. 112 et seqq.

¹⁶⁰ See e.g. KIENER/BREITENBÜCHER (fn. 4), p. 12 et seqq.

¹⁶¹ TAVERRITI SARA, Safe Reporting of Crime for Victims and Witnesses with Irregular Migration Status in Italy, Global Exchange on Migration and Diversity, Centre on Migration, Policy and Society (COMPAS), Oxford 2019, p. 1.

¹⁶² TAVERRITI (fn. 161), p. 1.

¹⁶³ KELLER LÄUBLI LUCI, Zum Einfluss der Opferhilfe-Beratungsstellen auf das Anzeigeverhalten der Opfer von Straftaten, Bern 2012, p. 13.

¹⁶⁴ KIENER/BREITENBÜCHER (fn. 5), p. 16.

¹⁶⁵ KELLER LÄUBLI (fn. 163), p. 13.

¹⁶⁶ RIKLIN FRANZ, StPO Kommentar: Schweizerische Strafprozessordnung mit JStPO, StBOG und weiteren Erlassen, Zurich 2014, p. 503 et seqq.; [art. 303 para. 1 StPO](#) and [art. 31 StGB](#).

¹⁶⁷ RIKLIN (fn. 166), p. 503 et seqq.

¹⁶⁸ WALTHER SUSANNE, Subjektiv-öffentliche Rechte auf Erstattung von Strafanzeige und Durchführung strafrechtlicher Ermittlungen, in: Britz Guido et al. (eds.), Festschrift für Heike Jung, Baden-Baden 2007, p. 1045.

¹⁶⁹ WALTHER (fn. 168), p. 1046.

2. Specific challenges when filing criminal charges with the police

In some cases, the fear of being deported is so immense that migrants avoid any contact with official authorities, notably with the police. Therefore, they mostly refrain from filing criminal charges even if they have become witnesses or victims of a crime.¹⁷⁰ But does the current legal situation really make it impossible for irregular migrants to file criminal charges without the police having to report them to the migration authorities?

In general, the police have an obligation to notify the migration authorities about criminal investigations, arrests and discharges, along with civil and criminal convictions, as far as foreigners are concerned.¹⁷¹ Furthermore, they are bound to notify the migration authorities if they have gained knowledge about the irregularity of a residence status.¹⁷² The first regulation,¹⁷³ however, is formulated vaguely. It does not specify whether foreigners «are concerned» only if they are being accused of something or also if they have become the victim of a crime. According to KIENER and BREITENBÜCHER, this vagueness argues in favor of the interpretation that, in individual cases, the police have a margin of discretion. The authors argue that the police have scope for weighing up the interests involved, and that they must not inform the migration authorities in every case.¹⁷⁴ While the second provision obliges the police to inform the migration authorities if they have gained knowledge about the

irregularity of a residence status, it does not compel them to ask people about the residence status in the first place. Hence, the question arises whether the police need to know the residence status when somebody wants to report a crime. As already mentioned, [art. 301 para. 1 StPO](#) states that every person is entitled to report a criminal offense without any preconditions. This includes persons without a regular residence status.¹⁷⁵ Also, the principle of legality in criminal proceedings enshrined in [art. 7 StPO](#) requires that, generally, every criminal report must be received and processed. Therefore, people reporting a criminal offense are not obliged to prove their identity and can also do so anonymously.¹⁷⁶ But reporting a criminal offense anonymously is often of little use, as it rarely allows criminal proceedings to be pursued.¹⁷⁷ In the case of a criminal complaint, on the other hand, the plaintiffs are obliged to provide information on their identity, in order to be able to check their eligibility.¹⁷⁸

Certain personal data is thus important when filing criminal charges. But does this include information about the residence status? Knowledge about the residence status is primarily required in cases where a breach of the Foreigners' Act is suspected. However, KIENER and BREITENBÜCHER argue that the residence status is rarely significant to the police when a victim wants to file a criminal charge.¹⁷⁹ The authors elaborate that in most cases of handling criminal charges, the police do not require information about the residence status and should refrain from ascertaining this data.¹⁸⁰ Thereby, the police

¹⁷⁰ KIENER/BREITENBÜCHER (fn. 4), p. 357.

¹⁷¹ CARONI/SCHNEIDER/PREISIG/ZOETEWELJ-TURHAN (fn. 26), p. 526; [Art. 82 para. 1 VZAE](#).

¹⁷² KIENER/BREITENBÜCHER (fn. 4), p. 367 et seq.; [art. 82 para. 2 VZAE](#).

¹⁷³ [Art. 82 para. 1 VZAE](#) (translated): The police and judicial authorities as well as the criminal investigation authorities shall report to the cantonal migration authority, without being asked to do so, the raising and dropping of criminal investigations, arrests and dismissals where foreign nationals are concerned, as well as corresponding civil and criminal judgments.

¹⁷⁴ KIENER/BREITENBÜCHER (fn. 4), p. 369.

¹⁷⁵ KIENER/BREITENBÜCHER (fn. 5), p. 16.

¹⁷⁶ KIENER/BREITENBÜCHER (fn. 4), p. 366.

¹⁷⁷ Cf. VAN DEN DURPEL ANJA, Safe Reporting of Crime for Victims and Witnesses with Irregular Migration Status in Belgium, Global Exchange on Migration and Diversity, Centre on Migration, Policy and Society (COMPAS), Oxford 2019, p. 25.

¹⁷⁸ KIENER/BREITENBÜCHER (fn. 5), p. 17.

¹⁷⁹ KIENER/BREITENBÜCHER (fn. 4), p. 369.

¹⁸⁰ KIENER/BREITENBÜCHER (fn. 4), p. 374.

should also prevent an indirect collection of the data on the residence status by checking the register of residents, or by requesting an official Swiss identity document. There is no legal obligation for the police to do so and also foreign – and possibly no longer valid – identity documents fulfill the general identification purpose.¹⁸¹ The argumentation that the police should refrain from collecting data on the residence status is further sustained from a constitutional perspective: According to [art. 35 para. 2 BV](#), everybody who carries out state tasks is bound by fundamental rights and obliged to contribute to their realization.¹⁸² This is why the police must respect and facilitate the irregular migrants' fundamental right of access to justice.

In Switzerland, this practice is not yet established. In the city of Bern for example, the police regularly check the residence status when handling criminal charges.¹⁸³ This stands in contrast to the police's practice in other cities, such as in Amsterdam. There, the police have adapted the so-called «free in, free out strategy». According to this rule, police officers are explicitly instructed not to ask about the immigration status of individuals reporting a crime.¹⁸⁴ A further option to increase the irregular migrants' access to justice can be found in the «firewall strategy». This stipulates that no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes.¹⁸⁵ The Swiss legislator has multiplied the legal bases requiring the exchange of information between authorities, counting on a better data exchange between authorities to combat irregular migration.¹⁸⁶ But while there is no indication that the number of foreigners

without residence permits has actually decreased,¹⁸⁷ recent research confirms that the risk of denunciation has resulted in an increase in the number of persons renouncing their rights.¹⁸⁸

Consequently, irregular migrants are confronted with an indirect restriction of their fundamental right of access to justice. Furthermore, their other substantive rights remain ineffective if infringements cannot be effectively prosecuted.¹⁸⁹ This is particularly problematic since it puts irregular migrants in a highly vulnerable position, where their rights are more easily violated in the first place.¹⁹⁰ As NICOLA DELVINO and SARAH SPENCER state: «Irregular migrants are particularly vulnerable to exploitation and crime including labour exploitation, trafficking and domestic violence, because of their limited ability to obtain support from law enforcement authorities.»¹⁹¹ At the same time, the lacking enforcement of their rights also poses a considerable problem for nation states. First, normatively speaking it is of little use to provide a population group with formal rights while at the same time making it impossible to enforce them in practice.¹⁹² Second, ineffective access to justice represents a fundamental problem with regard to the rule of law. If legal infringements are not prosecuted, a legal vacuum emerges which poses a great problem for the entire legal system and negatively affects the national security situation.¹⁹³ Thirdly, irregular migrants' lack of trust towards law enforcement agencies decreases the police's ability to gather important information to tackle crime.¹⁹⁴ Final-

¹⁸¹ KIENER/BREITENBÜCHER (fn. 5), p. 23.

¹⁸² KIENER/BREITENBÜCHER (fn. 4), p. 360.

¹⁸³ INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

¹⁸⁴ DELVINO/SPENCER (fn. 15), p. 46.

¹⁸⁵ CARENS (fn. 23), p. 167.

¹⁸⁶ PETRY (fn. 36), p. 270.

¹⁸⁷ PETRY (fn. 36), p. 270.

¹⁸⁸ PETRY (fn. 36), p. 270.

¹⁸⁹ KIENER REGINA, Das Recht auf effektiven Rechtsschutz, in: Kaufmann Claudia/Hausammann Christina (eds.), Zugang zum Recht: Vom Grundrecht auf einen wirksamen Rechtsschutz, Basel 2017, p. 23 et seqq.

¹⁹⁰ KIENER (fn. 189), p. 27.

¹⁹¹ DELVINO/SPENCER (fn. 15), p. 43.

¹⁹² CARENS (fn. 23), p. 167.

¹⁹³ KIENER/BREITENBÜCHER (fn. 5), p. 2.

¹⁹⁴ DELVINO/SPENCER (fn. 15), p. 44.

ly, effective access to justice represents a basic precondition for social inclusion and constitutes a crucial form of participation in society.¹⁹⁵ Enhancing irregular migrants' access to the police when filing criminal charges would thus not only benefit the particular population group of irregular migrants, but the entire Swiss society.

VI. The approach of Urban Citizenship

As this analysis has demonstrated, there is a severe lack of access to justice for migrants with irregular status in Switzerland. In the following it is analyzed whether the approach of urban citizenship and the introduction of city ID cards could serve as a remedy in this regard.

A. Theoretical foundation

Conventionally, citizenship is oriented towards the sovereign nation state. It is understood as a formal legal status that defines membership to a national community and determines certain legal rights and obligations.¹⁹⁶ This traditional understanding of citizenship has been increasingly challenged. Different alternatives have emerged, including the approach of urban citizenship.¹⁹⁷ According to this concept, belonging to society and having access to (social) rights is no longer merely based on legal aspects such as nationality or residence status. In contrast, they should rest on factual aspects such as place of residence and participation in public life.¹⁹⁸ In this sense, membership to a society and social belonging would no longer de-

pend upon an official consent from state authorities, but instead upon the mere reality of residence in a place. Accordingly, citizenship is no longer viewed as a purely formal legal status, but as an institution and political practice that is always in flux.¹⁹⁹

Advocates of urban citizenship see the necessity of the approach in the growing cleavage between formal citizenship policies that establish membership to a territorial nation state, and the rising number of noncitizens in the same territory.²⁰⁰ It is against this background that proponents of this concept argue that «all urban residents, regardless of their immigration or citizenship status, should be recognized as full members of the community with equal access to local resources».²⁰¹ Having no regular residence status, irregular migrants are most affected by this cleavage and have gained specific attention in the discourse on urban citizenship.²⁰²

B. City ID cards as a prominent urban citizenship policy

Based on this theoretical foundation, several urban citizenship policies and practices have recently evolved in various cities around the world.²⁰³ These include regularization programs, the building of sanctuary and solidarity cities, or municipal ID cards. The latter are in the focus of this analysis, and it is examined whether they could serve as a tool to improve access to justice for irregular migrants.

The so-called «city ID cards» are locally issued identification cards which are available

¹⁹⁵ KNÖPFEL CARLO, Schlusskommentar, in: Kaufmann Claudia/Hausammann Christina (eds.), *Zugang zum Recht: Vom Grundrecht auf einen wirksamen Rechtsschutz*, Basel 2017, p. 101 et seqq.

¹⁹⁶ SCHILLIGER (fn. 33), p. 17.

¹⁹⁷ GONZALES/SIGONA/Franco/Papoutsis (fn. 10), p. 47.

¹⁹⁸ SCHILLIGER (Fn. 33), p. 17.

¹⁹⁹ VARSANYI MONICA, Interrogating «urban citizenship» vis-à-vis undocumented migration, in: *Citizenship studies* 2006/10(2), p. 237.

²⁰⁰ VARSANYI (fn. 199), p. 229.

²⁰¹ DE GRAAUW (fn. 6), p. 310.

²⁰² VARSANYI (fn. 199), p. 231.

²⁰³ Cf. WENKE CHRISTOPH/KRON STEFANIE, *Solidarische Städte in Europa. Urbane Politik zwischen Charity und Citizenship*, in: Wenke Christoph/Kron Stefanie (eds.), *Solidarische Städte in Europa*, 2019; DELVINO/SPENCER (fn. 15), p. 17 et seqq.

to all residents of a city, regardless of their residence status. They are only valid in the city in which they are issued and can be used for identification with local actors such as the police, schools, hospitals, or other local officials and service providers. They do, however, not confer a regular residence status on the holder.²⁰⁴ The main goal, therefore, is not to regularize the status of irregular migrants or to expand their political or social rights. The aim is to facilitate irregular migrants' access to basic city services and to encourage them to make use of the benefits and rights to which they are already entitled.²⁰⁵

Several cities have already introduced such local ID cards. One of the most prominent examples is the IDNYC, the local ID card introduced in 2014 in the City of New York.²⁰⁶ Other cities such as San Francisco, Los Angeles, Madrid or Barcelona issue local cards of identification.²⁰⁷ Berlin and Hamburg are currently evaluating the implications and the potential of introducing a city ID card.²⁰⁸ In Switzerland, there is currently no city that offers a local ID card. However, in Bern, Zurich and St. Gallen efforts are made in order to develop such cards. In Bern, the municipal competence center for integration is currently developing a strategy for the introduction of the city ID card. On their behalf, a study was conducted that analyzed the functionality and feasibility of a local ID card. Based on this study, the «Gemeinderat», the local executive, will soon

decide on the realization of the city ID card.²⁰⁹

VII. City ID cards as a remedy to lacking access to justice?

In order to assess the potential which a city ID card might bring in improving access to justice in the city of Bern, it is crucial to know how criminal charges are usually filed in this specific context. Therefore, this chapter first provides an overview of how criminal charges can be filed in the city of Bern, based on which it is discussed whether a local ID card could tackle the challenges that irregular migrants face when filing criminal charges with the police.

1. Filing criminal charges with the police in the city of Bern

With the amendment of the Cantonal Police Act (PolG) in 2007 in Bern, the municipal police was abolished and integrated into the cantonal police.²¹⁰ Since then, everything that has to do with filing criminal charges is in the responsibility of the cantonal police.²¹¹ Nevertheless, the city of Bern still enjoys certain competencies when it comes to police matters. It purchases the services from the cantonal police, controlling the extent to which police services are provided at the

²⁰⁴ KAUFMANN DAVID, Comparing Urban Citizenship, Sanctuary Cities, Local Bureaucratic Membership, and Regularizations, in: *Public Administration Review* 2017, p. 444.

²⁰⁵ DE GRAAUW (fn. 6), p. 314.

²⁰⁶ SCHILLIGER (fn. 33), p. 25.

²⁰⁷ DELVINO/SPENCER (fn. 15), p. 67 et seqq.; KAUFMANN (fn. 204), p. 445.

²⁰⁸ HEUSER HELENE/AUSTERMANN NELE/GELHAAR JULIA, [Rechtsgutachten zur Einführung einer City-ID in Hamburg und Berlin](#), Hamburg 2020.

²⁰⁹ Cf. internal documents of the study that was carried out on behalf of the local competence center for integration.

²¹⁰ This shows how Switzerland is structured in multiple levels of government: the municipalities (the lowest level), the cantons, and the confederation (the highest level). Hereby, the three levels share tasks according to the principle of subsidiarity; the upper level is to take on a task only if it exceeds the resources and capabilities of the lower one; cf. LINDER WOLF, *Schweizerische Demokratie. Institutionen, Prozesse, Perspektiven*, 3rd edition, Bern 2012, p. 156.

²¹¹ GRAND COUNCIL OF THE CANTON OF BERN, Message on the amendment of the Police Act of 11 March 2007, p. 5; art. 7 PolG (in the version of 1 June 2016).

local level.²¹² Overall, there is a total of five police stations in the city of Bern, of which four have a specific criminal complaint office.²¹³ If a city resident wants to report a crime, he or she will most likely turn to one of these places.

Insights into the exact process of how the police deal with individuals who seek to file criminal charges in practice are scarce. The conducted interviews have enhanced this understanding to some extent. They have shown that the cantonal police always assert data on the residence status when receiving criminal charges. It has been found that if a person does not provide the police with an official Swiss identity document, the respective police officer contacts the municipal Office for Residents' Services, Migration and Alien police. There it is examined whether a person is residing regularly in Switzerland or whether there has been a violation of the [Foreigners' Act](#).²¹⁴ This means that under current practice, it is not possible to file a criminal charge without disclosing one's residence status. If an irregular migrant wishes to file a criminal report or complaint in the city of Bern, the cantonal police will most likely deal with the charges and start criminal proceedings. But the identity will be transmitted to the local office responsible for enforcing foreigners' law. This could then lead to the expulsion of the person in question.²¹⁵ In practice, it is mostly the irreg-

ular migrants whose identities are already known to the local alien police who can make use of their option to file criminal charges.²¹⁶ Thereby, a representative of the alien police stated that they actively encourage irregular migrants to file criminal charges, if there is a pending residence procedure and if this office has gained knowledge that an irregular migrant had become the victim of a crime.²¹⁷ However, for irregular migrants for whom contact with this institution would most likely lead to deportation from the country, the path to criminal charges is currently restricted by the police's practice of obtaining information on the residence status.

The interplay between the police – a cantonal actor – and the Office for Residents' Services, Migration and Alien Police – a municipal institution – fundamentally determines the irregular migrants' chances to file criminal charges in the specific context of Bern. This also affects the potential of a local ID card within the scope of accessing justice.

2. The city ID card as a tool to enhance effective access to justice?

For many interviewees, the possibility that irregular migrants might be able to file criminal charges with the police without the risk of deportation was considered one of the core advantages of a potential city ID card.²¹⁸ A representative of the support organization for irregular migrants in the city of Bern emphasized that «[f]or us, or rather for me, the city card is precisely the central

²¹² GRAND COUNCIL OF THE CANTON OF BERN, Message on the amendment of the Police Act of 11 March 2007, p. 5 et seqq.; art. 12a PolG (in the version of 1 June 2016).

²¹³ CANTONAL POLICE BERN, [Police stations](#).

²¹⁴ INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²¹⁵ The fact that in Bern, a local office is responsible for verifying the residence status and deciding on the legal consequences of an irregular residence is quite unique compared to other cities, where these competences are often anchored at the cantonal level. Cf. INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²¹⁶ INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²¹⁷ INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²¹⁸ INTERVIEW 1, representative of the Support Organization for Irregular Migrants in Bern; INTERVIEW 2, representative of the Women's Shelter in Bern; INTERVIEW 3, representative of the Support Organization for Victims of Sexualized Violence.

instrument as one can then dare to file a complaint».²¹⁹

Thereby, the potential of the city ID card most substantially depends on whether the cantonal police recognize the card as a valid means of identification.²²⁰ The current practice could be changed if the cantonal police accepted the city ID card as an identification document and refrained from gathering further information on the residence status. Also, it could be changed if the Alien police's scope for action increased through the local ID card. In these scenarios, the card could effectively decrease the risk of deportation for irregular migrants when filing criminal charges.²²¹ The fact that the police is a cantonal institution has been found to pose a fundamental challenge. Since the local police was abolished, the municipal council no longer has the direct mandate to control the police's operation units.²²² Consequently, the crucial question arises as to whether the police as a cantonal institution can be obliged by the city to accept the local ID card as a valid means of identification on the city's territory. This question addresses the applicability of the card within the interplay between local and cantonal actors, and the compatibility of the card with existing municipal and cantonal law. Discussing these challenges requires extensive analyses into the feasibility and compliance of a city ID card in Bern. Future research first needs to address the question of whether the cantonal police can be obliged by the city to accept the local ID card as a valid means of identification in order to conclusively assess the

potential of a city ID card in the field of accessing justice.

Finally, it is important to note that filing criminal charges only represents an initial step in the much greater framework of accessing justice. Access to criminal, civil and administrative proceedings in court further determines whether irregular migrants can effectively claim their rights in practice. In this regard it has been found that there are specific challenges for irregular migrants.²²³ It is crucial to consider what benefits a city ID card could bring during the steps that succeed the first hurdle of filing criminal charges in order to conclusively discuss the city ID card's potential regarding accessing justice.

It can be concluded that evaluating the city ID card's potential in terms of accessing justice raises several new queries rather than providing an explicit conclusion on the research question. Many interviewees emphasized that the irregular migrants' lacking possibility to file criminal charges without the risk of deportation represents a fundamental problem in today's approach to irregular migration. Also, the interviewees argued that enabling irregular migrants to do so would represent a core advantage of a city ID card. However, it first needs to be determined whether such a local ID card could be used in the specific interplay with the cantonal police. Both legal aspects regarding the compliance with cantonal law as well as political questions regarding the support for urban citizenship practices at the cantonal level need to be further examined.

VIII. Conclusion

This analysis demonstrated that Switzerland is facing fundamental challenges with regard to its migration policies. Although irregular migrants are legally entitled to numerous

²¹⁹ INTERVIEW 1, representative of the Support Organization for Irregular Migrants in Bern, translated.

²²⁰ INTERVIEW 3, representative of the Support Organization for Victims of Sexualized Violence.

²²¹ INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²²² INTERVIEW 5, Representative of the municipal Office for Residents' Services, Migration and Alien Police in the city of Bern.

²²³ Cf. KIENER/BREITENBÜCHER (fn. 4), p. 12 et seqq.

rights and benefits, practice shows that they are rarely able to enforce them. There are several reasons, such as the lack of knowledge regarding their rights, inhibitions to turn to official authorities or support organizations, as well as legal conflicts in the interpretation of their rights. Finally, restricted access to the law enforcement authorities and structural barriers to filing criminal charges represent key factors.

The legal analysis of this paper confirmed that irregular migrants have a constitutional and human right of equal access to justice and that no procedural rules explicitly exclude them from enforcing this right.²²⁴ The reasons why irregular migrants still refrain from taking legal actions against infringements of their rights are to be found in the sociological analysis. Based on the example of Bern, the analysis revealed that the police constantly ascertain data on the residence status if people contact them to file criminal charges. For irregular migrants, this represents an indirect restriction of their right of access to justice, as the contact with the police goes along with constant risks.

While the current state regarding access to justice shows fundamental challenges and inequalities for irregular migrants, the analysis has also demonstrated that there is some room for maneuver. Several interpretative approaches argue that the police have room for discretion in dealing with criminal charges. Recent legal reports²²⁵ clearly indicate that information on the residence status neither must nor should be collected when handling criminal charges. A local ID card in the city of Bern represents one possible option of how this room for maneuver could be made use of. Thereby, however, the interviews evinced that the local ID card can only realize its full potential if the cantonal police was to accept the card as a sufficient identity document and refrained from gath-

ering information on the residence status. Accordingly, the question of whether the police as a cantonal actor could be obliged to do so needs to be addressed in further research.

But even though the potential of a city ID card cannot yet be conclusively evaluated, this analysis has identified structural obstacles regarding access to justice for migrants residing irregularly in Switzerland. So even if the provisioned city ID might not serve as a perfect remedy, a need for action independent of the introduction of a city ID card has been demonstrated; namely that irregular migrants are restricted in their fundamental human rights and that responsibility must be assumed – regardless of whether it is in the city, at the cantonal level, or finally at the federal level.

²²⁴ KIENER/BREITENBÜCHER (fn. 4), p. 45.

²²⁵ KIENER/BREITENBÜCHER (fn. 4), p. 23;
KIENER/BREITENBÜCHER (fn. 5), p. 374.