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Is the Implementation of the Naturalization Procedure Discriminatory?

in a nutshell #14, December 2019



SWISS NATIONAL SCIENCE FOUNDATION

The National Centres of Competence in Research (NCCR)
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Messages for Decision-Makers

The leeway in the naturalization procedure leaves room for prejudices when treating applications.

The Swiss Nationality Act discriminates against homosexuals living in a registered partnership; they do not have access to the facilitated procedure.

The lack of statistical data on applications submitted, withdrawn, accepted, rejected or deemed to require no further action is problematic for assessing discrimination in naturalization decisions.

What is meant by ...

... naturalization as a meritocratic system

In Switzerland, naturalization is never automatic. A foreigner wishing to become a Swiss citizen must lodge an application, whose merit is decided based on a list of criteria set down in law, focusing mainly on the person's integration into Swiss society.

... room for maneuver

A room for maneuver is neither positive nor negative in itself. Such a margin exists where certain concepts or procedures are not precisely set down in law. In the naturalization context, those responsible for applying the law have considerable leeway, since some concepts, such as integration, have to be assessed partly on a case-by-case basis.

... prejudice

A prejudice is a prior judgement, an opinion formed before considering the facts. Prejudices are often based on stereotypes and generalizations. The purpose here is to show how prejudice may influence the attitude adopted by those in charge of the naturalization procedure.

The issue of discrimination in naturalization procedures is not a new one. Changes made in the legislation and procedures provide the basis for fairer and more objective practices. This policy brief looks at the issue of discrimination in the Citizenship Act and its implementation in Switzerland. Based on a study conducted in 2017, it shows how the leeway permitted in the treatment of naturalization applications leaves room for prejudices.

There is no right to naturalization in Switzerland. Anyone wishing to become a Swiss national must lodge an application, which is then assessed, and either accepted or rejected. There are two types of naturalization procedures. The ordinary procedure currently applies for all foreigners holding a C permit, who have resided for at least ten years in Switzerland. The facilitated procedure is reserved for spouses and children of Swiss nationals, and for members of the third generation with at least one grandparent having lived legally in Switzerland.

In both cases, the decision to grant naturalization is made at the discretion of the relevant authority – naturalization may be granted if the criteria are met. The leeway available to the officials employed by the naturalization services and members of the naturalization commissions is, therefore, at the heart of the process of deciding on the applications received.

This room for maneuver primarily applies to the assessment of the criterion of individual integration. This criterion is an indeterminate legal concept, in that the legislation does not define in specific detail the threshold required for a person to be “integrated”, even though the new Citizenship Act, that came into force on 1 January 2018, is more precise than its predecessor in this area. Some aspects can be proven with documents and provide a clear threshold to be met, such as not having a criminal record and being up to date with tax obligations. Other aspects require an element of interpretation, such as the criterion of involvement in social and cultural life. The legislation does not specify the types of activities that fall within this category and does not provide any indication of the required level of involvement in quantitative terms. The law, therefore, leaves a margin of discretion for those responsible for assessing the applications.

Those responsible for the naturalization process also have a certain room for maneuver in terms of the procedure followed. In practice, this is manifested primarily in the degree of freedom in how the evaluation of the application is carried out. For example, while there are some standard formats for assessment reports, in most cases there is no fixed list of questions to be asked during the hearing. Those in charge of the procedure are therefore able to decide on the questions to be asked and they are able to determine the extent of the assessment, for example by requesting additional documents, or deciding whether to contact the applicant's personal and work associates.

What Is the Legal Definition of Discrimination?

It is generally agreed that the law and its application should not be discriminatory. Hence, there should not be any differences in how people are treated under the law or in the application of the law based on immutable personal characteristics that are in Switzerland specified in Article 8 paragraph 2 of the Federal Constitution.

“In an egalitarian system, anyone who wishes to do so, should eventually be able to fulfil the criteria for obtaining nationality.”

The central premise of a non-discriminatory naturalization procedure would, therefore, be that it must be based on an egalitarian, meritocratic principle. Anyone who wishes to do so, should eventually be able to fulfil the criteria for obtaining nationality.

Is the Citizenship Act Discriminatory?

In the past, the law foresaw differences in treatment based on personal characteristics. Up until 1992, for example, a Swiss woman who married a foreigner could lose her Swiss nationality, whereas a foreign woman marrying a Swiss man received Swiss nationality on the day of her marriage, with no further conditions required. Hence, the law treated foreigners marrying a Swiss national differently based on their gender. The introduction of the facilitated process of naturalization by marriage has put an end to that situation of inequality.

But there is still a form of discrimination in the Citizenship Act. Foreign partners in registered partnerships with Swiss citizens respectively do not qualify for the facilitated naturalization procedure in the same way as the heterosexual spouses of Swiss citizens. So, by making the facilitated procedure available only to married couples, the nationality act is treating people differently based on their sexual orientation. Allowing the marriage of same-sex partners would be one way to end this form of discrimination.

Is There Discrimination in the Implementation of Naturalization Processes?

The potential for discrimination in naturalization practices has been raised in the past. In 2003, the Swiss Federal Administrative Court issued a judgment sentencing the naturalization practices of the municipality of Emmen as discriminatory. In a popular vote taken in March 2000, 23 applicants for naturalization had been nominated. The 8 Italian applicants were naturalized, whereas the other applicants, all originating from the former Yugoslavia, were rejected. Since the popular vote did not allow reasons to be given for the rejection, the court ruled that the process of naturalization by popular vote gave rise to discrimination based on ethnic origin.

Accordingly, naturalization applications can now be rejected by popular vote only based on a rejection motion citing the reasons for the decision. This case highlights the fact that discrimination in the implementation of naturalization processes is normally assessed based on the supporting arguments for the decision.

However, our research shows that focusing solely on the supporting arguments for these naturalization decisions does not allow for a comprehensive assessment of potential discrimination in naturalization procedures. Some prejudices are brought to bear by those in charge of the procedures, and this has an impact on how the applications are assessed. These prejudices are reflected in how the naturalization officials use their room for maneuver.

Our study focused on understanding how naturalization applications are assessed, and how the decisions on the applications are then made. We were able to attend naturalization interviews in cantonal administrations and to interview the officials conducting the hearings. These hearings are an essential component of the naturalization procedure since the hearing record makes up a big part of the assessment report that will then be used throughout the procedure, as it provides the basis for the decisions made.

Our analyses showed that during the assessment process, applicants are rated on a scale of merit for becoming a Swiss national based on the information in their application file and the naturalization hearing. This rating is based particularly on several personal characteristics of the applicant: nationality, ethnic origin, sex, and social class. The categorization process reflects prevailing ideas of who “we” are, and stereotypes about “others”. Our observations further showed that it also directly influences how those in charge of the procedure make use of their room for maneuver in terms of procedural matters.

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“In practice, the room for maneuver in the naturalization process mainly corresponds to a degree of freedom in how the assessment of the application for naturalization is carried out.”
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The first example from our data showed a difference in treatment based on the sex of applicants and their spouses in the facilitated naturalization process. Naturalization is granted on condition that the marriage is assessed as “genuine”. We found that marriages between a non-European male and a Swiss female were more likely to be suspected of being a sham, prompting a more extensive investigation. This difference can be attributed to the fact that in Switzerland, even though men and women are equal before the law, the citizen is by default still seen as a male. The legitimacy of his marriage is therefore less likely to be questioned, and he is seen as intrinsically more entitled to pass on his nationality. There is also a stereotype whereby non-European men marrying Swiss women have supposedly more often done so purely for migration-related purposes, casting a doubt on the legitimacy of their marriages.

We also found that a knowledge of Switzerland and its history, geography and political system is sometimes tested less strictly for applicants part of an economic elite. The financial contribution they were making to the Swiss society was then cited as the reason for lower expectations for their knowledge of Switzerland. Thus, categorization as part of a high social class does sometimes enable an applicant to be placed at the top of the merit scale, and therefore to receive favorable treatment.

While these differences in treatment are evident, it is difficult to say based on our data, whether categorizations of this kind have a direct impact on naturalization decisions. We are, therefore, not able to state categorically that these differences in treatment constitute discrimination. As stated above, in an appeal situation the presence of discrimination is tested in law based on the formal decisions taken. Since these formal decisions are subject to appeal, negative decisions are backed up with supporting arguments, their basis in law, and in many cases past precedents. The types of prejudice identified by us are therefore unlikely to be directly invoked as arguments in favor of a negative decision.

How to Counter These Differences in Treatment at the Procedural Level?

The Swiss legislation on nationality has changed considerably over the last thirty years or so, with a clear trend towards more objective and less discriminatory procedures. This has led to the introduction of naturalization tests in some cantons. These general knowledge tests have the undeniable advantage of being standardized, objective and the same for all applicants.

While the legislation provides for exceptions in certain situations, such as illiteracy or handicap, the tests can still represent an insurmountable barrier for some socially or economically vulnerable individuals, who do not fall within the exceptions. Such individuals lack the resources required to prepare for and pass the tests. Under an appearance of equality, the tests can therefore have an indirectly discriminatory impact on certain categories of applicants. Furthermore, the exemptions are granted on a case-by-case basis, and it is hard to know to what extent these options are being applied in naturalization procedures. Finally, these tests highlight the limits of the meritocratic system for access to Swiss citizenship. This is not an egalitarian system since it favors individuals of a high social class, who are better able to mobilize the resources required to meet the criteria and pass the tests. To reduce these inequalities, it would be important to clarify the mechanisms for granting exemptions for

the tests or to routinely offer alternatives, such as taking the test orally, or proving integration with practical modules, as is already the case in some cantons.

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“There are differences in how cases are treated, but it is difficult to say how these directly impact the naturalization decisions.”
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Moreover, it is difficult at present to assess whether naturalization decisions are discriminatory since in Switzerland no statistics are kept on the processing of applications. We do not know how many applications are submitted each year, how many of them are accepted, rejected, suspended or deemed to require no further action, and for what reasons. The ongoing collection of this data would provide the basis for assessing the potential discrimination in procedures and decision-making, and the discrimination resulting from the naturalization criteria themselves, which specifically affect certain population groups.

Further Reading

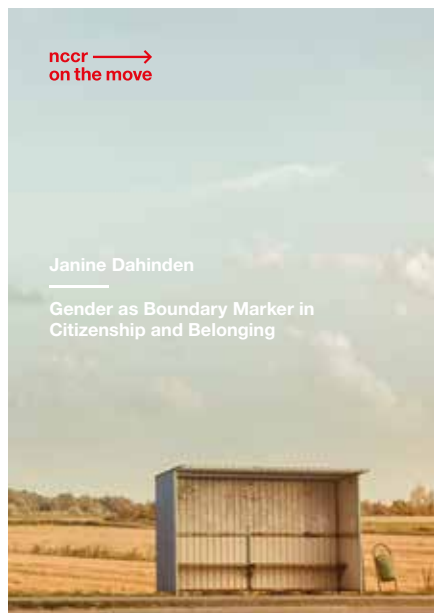
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Gender as Boundary Marker in Citizenship and Belonging

**A project of the «nccr – on the move»
Janine Dahinden, University of Neuchâtel**

In this project, we examine how gender affects durable constructions of migrant “others” and promotes particular realities of exclusion. The central question asks: how has gender been shaping politics of migration, citizenship regimes and experiences of being stigmatized as a migrant other? To address this overarching puzzle, the project encompasses three main fields of inquiry: a critical review of Swiss immigration history, an ethnographic analysis of naturalization processes and a multi-sited study on experiences of discrimination and positioning strategies of descendants of migrant.

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The nccr – on the move is the National Center of Competence in Research (NCCR) for migration and mobility studies and aims to enhance the understanding of contemporary phenomena related to migration and mobility in Switzerland and beyond. Connecting disciplines, the NCCR brings together research from the social sciences, economics and law. Managed from the University of Neuchâtel, the network comprises fourteen research projects at ten universities in Switzerland: The Universities of Basel, Geneva, Lausanne, Lucerne, Neuchâtel, Zurich, ETH Zurich, the Graduate Institute Geneva, the University of Applied Sciences and Arts of Western Switzerland, and the University of Applied Sciences and Arts of Northwestern Switzerland.

“in a nutshell” provides answers to current questions on migration and mobility – based on research findings, which have been elaborated within the nccr – on the move. The authors assume responsibility for their analyses and arguments.

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