CERTIFIED CONFORMITY. BINATIONAL COUPLES AND SWISS LAW

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1 Swiss naturalisation policy sees marriage between a Swiss citizen and a foreign national[1] as a vector for enhanced sociocultural integration. The jurisprudence states that:

> "*The institution of simplified naturalisation is based on the idea that the foreign spouse of a Swiss citizen (naturally on condition that he/she form with the latter a solid conjugal community as defined [in the Swiss Civil Code – CCS]) will become accustomed more quickly to the Swiss lifestyle and habits than a foreigner without a Swiss spouse, who remains subject to measures governing ordinary naturalisation.*" (Federal Administrative Court Judgement – ATAF C-410/2009)

2 From the angle of family law, simplified naturalisation through marriage is granted to foreigners who are not required to demonstrate that they have met strict criteria regarding integration, as in the case of ordinary naturalisation, because they benefit from a *presumption of successful integration* in virtue of their marriage with a Swiss citizen[2] (Gutzwiller, 2008).

3 The concept that legitimates the policy of simplified naturalisation through marriage is that of the *family's unity of nationality*: "by simplifying the naturalisation of the foreign spouse of a Swiss citizen, the federal lawmakers wished to favour unity of nationality in the perspective of a life in common that extends beyond the naturalisation decision" (ATAF C-410/2009). This extract of the jurisprudence on the subject illustrates that, from the legal point of view, "unity of nationality" is favoured within binational

"forward looking conjugal communities and establishing a 'genuine and stable' family unit" (ATAF F-6358/2016).

4 In view of these measures, in this article we intend to identify the normative measures in Switzerland for nationality and marriage in order to analyse their impact, significance and underlying normative biases. To do this, we shall examine situations where naturalisation was annulled by the Federal Administrative Court (TAF) following dissolution of a marriage[3]. The cases deemed to be problematic involve binational couples whose marriages were dissolved within twenty-three months following the foreign spouse's naturalisation[4]. Such annulments are the object of enquiries to identify rifts in the conjugal union. After a short presentation of the history of Switzerland's naturalisation policy and links with legal provisions of the Civil Code (CCS) concerning measures regarding marriage (1) we will then describe the procedure for enquiry into suspect cases (2), before analysing the arguments put forward by the Secretary of State for Migrations (SEM)[5] and the TAF to determine annulments of simplified naturalisation by virtue of marriage (3 and 4).

Methodology

5 Our analysis concerns the appeals lodged to the TAF against *annulments of simplified naturalisation.* We first made a qualitative analysis of ninety-three judgements handed down from 2007 to 2020, available in the database of TAF judgements[6] in French.[7] These discursive data were decrypted and served for making categories that were descriptive, normative (Coulter, 1994; Jayyusi, 2010) and encoded (Coffey and Atkinson, 1996; Bardin, 1997). By analysing these data we were able to place them a more general light (Becker, 2002) so that, in the form of broader tendencies, we could detect the ways the procedure was mobilised and implemented, along with the normative logics that aimed to define marriage in Switzerland. Secondly, we made a quantitative analysis of the judgements available in the database as of March 2020, once again in French: 257 judgements on the one hand, along with data from the Federal Office of Statistics (OFS) concerning simplified naturalisation through marriage for the country's French-speaking regions[8]. Our aim was to take several perspectives into account (Ivankova *et al.*, 2006; Anadón, 2019) and then to combine the data collected (Johnson *et al.*, 2007).

Naturalisation Policy in Switzerland: From Welcome to Suspicion

6 Swiss naturalisation policy shifted from a tendency to facilitate access to citizenship, from 1848 to 1910, to one tending to limit obtention. Naturalisation following marriage was covered by different regulations that largely reflected this movement, which was also depended on the status of women under Swiss law. The framework conditions set by the 1874 Federal Constitution refer to Swiss citizenship as an inalienable right. However, in the light of the patrilineal model, Swiss women were de facto placed under the supervision of their father or their husband and were not granted civil rights. When they married a foreign national they lost their nationality of origin and had no right to exercise the citizen's rights conferred by nationality (CFQF, 2001; Studer *et al.*, 2013). The requirement to respect the equal rights of both sexes, in the 1982 Federal Constitution, led to amendments in the Law on Nationality (LN): Swiss women no

longer lost their Swiss nationality through binational marriage; foreign women were no longer automatically naturalised when they married a Swiss man (Ianni, 2004). These changes led to parallel changes in the approach to foreign males: the Swiss government's view was that "in both cases [for both women and men], the foreign spouse must not be eligible for nationalisation unless he or she applies for it [...]" (Swiss Federal Council – CF, 1983: 5). These new provisions, in particular access to the simplified naturalisation procedure for foreign males married to a Swiss spouse, led to an increase in the number of naturalisations from the early 1990s (Lanzieri, 2012). Over the same period, the country's migration policies imposed measures limiting immigration, aimed at so-called "third" countries[9]. As a result naturalisation became an important way to secure one's status for nationals from countries outside Europe (Wanner and Steiner, 2012).

7 In a logic of managing the migrant population, in 2009 the government adopted measures restricting the right to marriage for foreign nationals not in possession of a residence permit. This new measure, on the one hand, introduced the duty of civil status officers to verify binational marriages and, on the other, it authorised judges to annul marriages that had already taken place (Meier and Carando, 2011). The basis of these restrictions was the parliamentary initiative to "Prevent false marriages"[10]. The political arguments were underpinned by the xenophobic and nationalist notion of "excess of foreign population"[11] and aimed for more stringent regulation of family reunification in order to limit access to naturalisation (Meury, 2004).

The Tension between Family Law and Protecting the Nation

8 When a nation establishes criteria for access to authorised residency or settlement and to the right to earn a living through family reunification, it defines the normative outlines of a family capable of (re)producing ideologically and physically the nation and citizenship (Pellander, 2014). The right to have a family, however, is then confronted with the policies to manage the migrant population, each of which is constructed in contradictory tendencies. Binational marriages are seen as a source of integration into society (Alba and Nee, 2003; Lavanchy, 2013) but also as a threat to social cohesion; some marriages are thus considered as 'inacceptable' (Wray *et al.*, 2019). A paradox in implementation of the migration policy thus resides in the simultaneous commitment "to protect the family and a restrictive application of measures concerning migration through marriage" (Satzewich, 2015: 24).

9 In Switzerland, binational marriages are subject to regulations and expectations that are stricter than those applied to marriages between Swiss nationals. Binational unions are deemed susceptible to being fraudulent and are consequently monitored by the authorities. Studies analysing policies against so-called marriages of "convenience"[12] (or "sham" marriages) have shown how state authorities produce standards for binational marriages[13]. These standards, in particular, are governed by the requisite for homogamy[14], commonly shared in the European socio-political context (Déchaux, 2009). The authorities thus start from the assumption that "like attracts like": in reference to what a couple should be, in the image of the *imagined national couple*, couples who are not alike – because of differences in age, common language, where they live, national/cultural origin, residency status, educational level, professional status or even economic power – must prove their affection publicly by demonstrating

their mutual affection (Lavanchy, 2013; Maskens, 2015; Bonjour and de Hart, 2013; Bonizzoni, 2015). Heterogamy is thus an object of suspicion, as we shall see in the next section.

Suspicion in the Simplified Naturalisation Policy

10 In the attempt to unmask any false affection, government agents are responsible for conducting enquiries regarding the nature of the marital union in order to collect material and immaterial proof of the veracity of binational marriages. The kind of proof collected is quite thorough: they ask for photographs of the couple together, speak to the couple's neighbours and friends, visit the couple's home and interview them for evidence to prove or disprove their shared life (Infantino, 2013). On the question of this moral economy of suspicion for binational couples, D'aoust (2013) highlights the normalization of affection taken into account in the state's monitoring of these marriages. Binational marriages that do not reflect standards defining a true loving relationship are considered as suspicious (Neveu Kringelbach, 2015).

11 In the face of suspicious unions, the aim of the agents responsible for naturalisation procedures is to protect Swiss nationality from potential frauds committed to unrightfully gain citizenship. Binational marriages are thus seen as a problem through the notion of *abuse*: that the foreign national spouse may have abused (or could abuse) the *naïveté* of the Swiss spouse; using the Swiss spouse as a tool to remain in the country, obtain a residence permit and take advantage of the supposed benefits of the country that were not available in the foreign spouse's country of origin (Ossipow and Waldis, 2003; Riaño, 2011). Here is the view put forward by the federal government in 1983 in the context of the first legislative reforms leading to the present legal framework:

> "*At present, a Swiss woman who marries a foreigner – and a Swiss man who marries a foreign woman – are not treated the same way in the eyes of the law. [...] There is no reason to maintain this unequal treatment, all the more so when the regime in effect can lead to cases of abuse: it happens that foreign women marry Swiss citizens solely to be able to remain in our country. In the future the foreign wives of Swiss citizens should no longer automatically become Swiss.*" (CF, 1983: 4)

12 If binational marriages are already suspicious, divorces following these unions only heighten the suspicion and incite various agencies to undertake enquiries that can lead to annulment of the foreign spouse's naturalisation. Let us first see how this procedure comes about before analysing the arguments mobilised by the authorities in decisions on annulment of simplified naturalisations through marriage.

Launching an Enquiry into Divorce Motives with a View to Annulling Simplified Naturalisation

13 When a divorce is pronounced within twenty-three months after obtention of simplified naturalisation through marriage, the canton authorities[15] inform the SEM that the marriage has been dissolved[16]. The SEM becomes involved if it there is a presumption of falsehood in the attestation regarding the stability and real nature of the marriage that enabled the spouse to acquire citizenship, a presumption based on a rapid series of events (marriage, naturalisation and divorce). Making use of a standard

legal practice, the federal administrative agency informs the naturalised person, in writing, of the intention to examine the reasons for dissolution of the marriage and invites the ex-spouses to provide remarks in writing or during a hearing. The SEM's arguments can be based on the divorce judgement.

14 During the first ascertaining step of the enquiry, the SEM's legal examination aims to verify whether the binational couple were truly in a marital situation as defined by law[17] during the simplified naturalisation procedure, and more precisely when the Statement concerning Married Life[18] was signed. The motive for separation must be clearly linked to an event occurring after simplified naturalisation to exclude any presumption of fraud. The state agencies consider divorce as a radical solution for incompatibility in the couple and thus the sign of an instable shared life[19].

15 The legal examination by the SEM is governed by the *principle of the free appreciation of proof*:

> "*Appreciation of proof is free in the sense that it does not follow legal regulations governing proof that prescribe the conditions under which the authority would be obliged to acknowledge that the proof is conclusive and [that determine] the probative value it must give to different means of proof compared to others. When the decision intervenes to the detriment of the administered (person) the administration bears the burden of proof.*" (ATAF C-250/2007)

16 The administration launches an enquiry by collecting evidence supporting the presumption of disloyal behaviour. Jurisprudence, however, underlines the difficulty in finding factual evidence, for "[...] as it is a question of a psychological fact relating to occurrences in the realm of privacy, which are often unknown to the administration or hard to prove, it appears legitimate for the authority to base itself on a presumption" (ATAF C-250/2007).[20]

17 In response to the SEM, the naturalised person, must make the case officially and materially, with supporting proofs (such as: statements by others, dated documents and photographs), that the divorce arose from a *marital problem* that appeared after the common statement of a stable union. If no proof capable of reversing the presumption of fraud can be provided, the agency proceeds to annul the naturalisation. Once the decision is handed, the naturalised spouse is granted a new right to reply.

18 In the case of a decision to annul simplified naturalisation, the person concerned can submit an appeal to the TAF. Those appealing counter the SEM decision, citing the inaccuracy of the statements collected and retained or the way they were interpreted. When the appeal is deemed to be receivable, the TAF re-examines the case.

19 The legal procedure consists in a deliberation by the TAF on whether the annulment of naturalisation is well-founded; the TAF determines whether or not there was an abuse by the SEM of the power of appreciation. In this second stage, the legal issue in question is examined at two different levels: appeals are accepted or refused on the basis of demonstration and on the temporality of the 'extraordinary event' that led to the separation (before or after naturalisation was granted).

20 When an appeal is rejected, the behaviour deemed to be disloyal does not amount to fraud in the criminal sense of the term. In these cases, the costs of the procedure must be paid by the appellant[21]. Once the authorities confirm the decision to annul the simplified naturalisation the appellant follows the statutory proceeding laid down in the Law on foreigners and integration. Out of 257 orders analysed, 88% of the appeals

were rejected: the TAF confirms the majority of SEM decisions to annul a naturalisation.

The Indissolubility of Binational Marriage

21 There is a pronounced difference in the approach to ordinary marriages (spouses both Swiss) and binational marriages when it comes to dissolving a marriage through divorce. The Swiss law on divorce was amended in 2000 with a change to the normative paradigm relating to the marital union which, hitherto, had been seen as an indissoluble union (Brown *et al.*, 2017). Before 2000, it was the duty of the civil judge to appreciate and weigh the spouses' motives in wishing to dissolve the marital union. The judge could only pronounce a divorce in cases where one of the spouses violated their "family duty" (fidelity, duty of assistance, respect of marital authority) or in the case of harm or threat to the physical, moral or economic integrity of one of the spouses (Papaux, 2002)[22]. Even though the indissoluble nature of the marital union has disappeared from marriage law, it nonetheless remains a de facto constraint for binational couples: binational unions must last over time, especially after obtaining Swiss citizenship (or at least in the twenty-three months following naturalisation) in order to be recognised, thus be considered as real and legitimate grounds for access to naturalisation[23]. In this third section, we will show that the legal authorities' arguments, on the one hand, relate to the temporality of events leading up to the divorce, and on the other, regard the behaviour of the naturalised spouse.

Defining a Rapid Chain of Events

22 The TAF judgement focuses first on temporal elements in determining a presumption of fraud. This temporality determines whether there has been a rapid chain of events, as illustrated in the 'seven months' between granting citizenship and the couple's divorce mentioned in this judgement:

> "*Because of marital problems, the spouses put a definite end to their life in common on 24 June 2011, i.e. only about seven months after the decision to grant simplified naturalisation on 18 November 2010, which, in view of the jurisprudence, is of a nature to support the presumption of fraudulent acquisition of simplified naturalisation.*" (ATAF C-2140/2015)

23 Once the presumption has been established, the object of the TAF judgements is to make the case of an untruthful statement which enabled fraudulent obtention of Swiss nationality: "there are grounds to doubt the existence of such a will when the marriage was dissolved shortly after the foreign spouse obtained simplified naturalisation [...]" (ATAF C-410/2009). In support, the authorities reaffirm the notion of *rapid chain of events* and the legal definition of marriage:

> "*Basing itself on the rapid and logical chain of events, the lower instance retained in substance that X's marriage, at the time naturalisation was pronounced, did not constitute a real and stable marital community as required by law and defined by jurisprudence*." (ATAF F-3567/2017)

24 Naturalisation policy determines that an authentic binational marriage, the only one, in its view, justifying access to simplified naturalisation, is a marital relationship in which the duration of the union is a determining factor. As such, naturalised persons who get divorced within twenty-three months become suspect and only extraordinary facts or events can justify a marriage break-up:

> "*[...] it is recognised that, according to general experience in life and the way things usually come about, any difficulties that can arise between spouses after several years of married life – in an intact and forward looking marital community (the only one deemed worthy of protection for the federal legislator) – in principle would lead to a break-up of the union only after an extended process of deteriorating marital relations, generally interspersed with attempts at reconciliation*." (ATAF F-6358/2016)

25 In cases of annulment of simplified naturalisation, the state authorities define the legitimate break-up of a marriage: according to jurisprudence[24], it must be linked to a process of gradual "deterioration" in the couple, interspersed with "attempts at reconciliation".

Determining Incorrect Behaviour

26 The TAF adopts the fault logic when it punishes a naturalised person who falsely declared marital harmony with deprivation of citizenship. Accordingly, several decisions concerning annulment of simplified naturalisation adopt the fault divorce logic that was anchored in the former law on divorce. These decisions target the individual attributes of the naturalised spouse, held to be responsible for abusive obtention of citizenship. The Swiss spouse, who also signed the Statement concerning Married Life, is also threatened with criminal pursuits although this threat is rarely applied, unlike deprivation of citizenship, which is more systematic. The law thus has concrete repercussions that are quite different for each spouse. The following extract illustrates the legal understanding of the naturalised person's act of negligence:

> "*The marital union of spouses A and B was dissolving prior to the argument that doomed their union; it arose from the behaviour of the appellant who neglected his own home in favour of that of his parents [...]. As support for its opinion, the ODM [presently the SEM] mentioned, in particular, that the appellant's wife dated the start of their marital problems already in 2007and that the person concerned had not refuted her statements regarding the motives of their final argument, that is, his lack of involvement in married life to the benefit of relations with his family*." (ATAF C-2857/2011)

27 Since the entering into effect of the new law on divorce, the conditions of a separation and its consequences no longer refer to the notion of fault. Yet for binational couples, blame is always sought, even if it is not so much as the cause of the divorce but rather as something supporting the suspicion that the foreign spouse used the simplified naturalisation procedure fraudulently. For example, in the case of binational marriages, adultery is seen not only as a breach of trust, it is also evidence for presumption of fraud:

> "*In particular, maintaining an extra-marital relationship over time, even if the other spouse is in agreement, is not compatible with the couple's will to continue forming a long-lasting community*." (ATAF F-6657/2017)

28 According to the authorities, infidelity proves the instability of the binational couple, and cheating on one's spouse is considered as a wilful action to deteriorate the marital union. This questioning of the relationship by the authorities is an incursion into the area of a couple's intimate relationship (Lavanchy, 2020). The enquiries conducted to identify blameable behaviour act as logics of control that also look into the sexuality of the appellant and the ex-spouse, as shown in this extract:

> "*These elements thus show that the matter of the couple's intimate relations was a source of disagreement and dissatisfaction, adding to other areas of discord between the spouses,*

something that the appellant must have been aware of when she signed the statement of marital community." (ATAF F-1516/2018)

29 Absence of sexual relations compounds other aspects such as disagreements between the couple, arguments over sharing household chores, lack of plans for the future or mutual affection, or even lack of interest in the spouse's culture. These are all elements taken into account when defining the couple's problems in the case of annulling naturalisation:

"*Furthermore, during her hearing on 22 February 2006, B. stated that during her marriage with the appellant, the latter regularly returned to his country of origin to visit his family, "that is, every other year for about three weeks' time", explaining that she had never come along with him. This attitude demonstrated how little interest the above-mentioned had for the appellant's socio-cultural and family environment*." (ATAF C-1100/2008)

30 The extract from the following judgement shows that good communication supposedly represents the tie between the spouses in their married life:

"*On the question of the type of problems, she mentioned that she had had disagreements with her husband about household expenses, that "their goals in the couple were not the same", that "there was no longer any dialogue between us" and that the disagreements in the couple started "mainly over the last six months of my married life*." (ATAF C-1100/2008)

31 The various judgements also reinforce a definition of marriage closely tied with having children. Refusing to have children was also seen as a defect in the marital union:

"*On the other hand, it is worth mentioning here that the question of having children together was an obstacle to their marital union because the person concerned had not given up the idea of having children, while her ex-husband was totally opposed in view of his age and financial situation. Indeed, as noted by the SEM, a disagreement between the spouses on this fundamental element is significant regarding the stability of the marriage. Furthermore, in compliance with the jurisprudence of the Federal Tribunal, it is not likely for such a question to be discussed only after several years of marriage. The spouses should have already been aware, when they signed the statement of 28 February 2011, that their family plans were incompatible*." (ATAF F-3586/2016)

32 The incompatibility of the spouses' plans can be imputed to an imagined cultural distance, which contradicts a logic of homogamy, as we shall see in the following section.

Controlling the Dissolution of Marriages Tied to a Naturalisation: Legitimating Social and National Homogamy

33 Cases of simplified naturalisation being annulled are especially telling illustrations of the interlocking of tensions between family law and policies to control migration. To begin with, in the naturalisation policy perspective, married couples must adopt the characteristics of the "modern" family identified by Burgess, in particular the companionate-family ideal-type: union of affinity, with the central (or even sole) function being personal development, with internal arrangements that are primarily contractual and equal, independent from external constraints – and especially control by kindred (Widmer *et al.*, 2004)[25]. The harmony of the marital relationship, thus absence of relational problems at the time of the naturalisation procedure, prevails in the notion of a true binational marriage.

34 Secondly, the notions of "protecting the nation" and "cultural proximity" underpin the legitimacy of European countries in denying certain foreign groups access to social, economic and political privileges (Yuval-Davis, 1997; Isin, 2002). These protectionist logics are based on an essentialist set of arguments, where the quality of being a citizen is composed of cultural characteristics that form a "national imagined community" (Anderson, 1996). Through the dynamics of "culturalization of citizenship", the culture is perceived as an unchanging element that is predetermined by national origins (Tonkens and Duyvendak, 2016).

35 In this last section, we will highlight the normative premises that can be found in deliberations on annulments of simplified naturalisation regarding the requisites of a binational marriage as well as cultural prejudices concerning foreign spouses. Taking up from the work of de Hart (2017), we will show that standards relating to love and sexuality are inherent in the measures regulating binational marriages and that they are also constructed on the basis of a culturalization that assumes different forms.

The Culturalization of Binational Marriages

36 Defining typical socio-cultural profiles established on the basis of the appellant's national origin legitimates a State legal intervention where culture is an essentializing element: it founds the notion of an essential difference among individuals based on national-based configurations, all the while turning racializing categorisations into something that can be spoken of (Guillaumin, 1992; Lavanchy, 2018). By considering the question of binational marriages under the angle of nationality, the policies render these marriages susceptible of being fraudulent, in terms of acquiring Swiss nationality. Binational marriages become culturalized in virtue of the normative injunctions that arise through the intersection of migration control policies with those governing family law. The following quote, in which the TAF perceives an incongruency between the assumed cultural injunctions and individual behaviour illustrates this culturalization of binational marriages:

> "*In this matter, the ODM [now named SEM] merely mentioned that no child had been born of this union, and this in relation to family situations typical in Algeria, a country where a childless marriage is still effectively unusual, regardless of the cause; therefore this observation cannot be qualified as arbitrary*." (ATAF C-5674/2010)

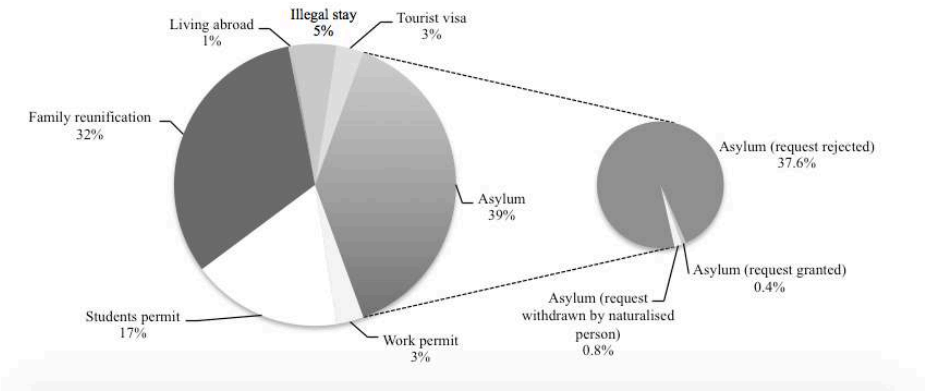
37 As we see, in the perspective of authorities applying policies, national belonging produces homogenous cultural attributes in each citizen: individual behaviour aligns with the customs and traditions of their country. For EU/EFTA nationals, cultural attributes are seen as close to those of the Swiss culture, while other cultures are more distant and thus supposedly incompatible; this produces people who are "undesirable" (Studer *et al.*, 2013). On the basis of these racializing prejudices – according to which the Swiss are culturally different from nationals of so-called "third" countries, the motives for divorce in binational marriages in which the spouse has acquired citizenship are bound to the national identity of the individuals, even if they managed to obtain Swiss citizenship and thus demonstrate their "successful integration" (Gutzwiller, 2016). The logic of homogamy transcends legal considerations regarding criteria for integration that naturalised persons must meet during the naturalisation procedure.

The Prior Status of the Appellant as Evidence Regarding Presumption of Fraud

38 The *chain of events* is systematically linked to the precarity of the spouse's residence status prior to the marriage. These two elements form the basis for the presumption of fraud because they enable accumulation of evidence that jurisprudence deems to be "troubling". Illegal stays in Switzerland, rejected asylum requests, deportation pronounced or risk of deportation as well as expired student permits or impossibility to extend a residence permit bolster the presumption and amount to evidence of abuse.

39 Figure 1 illustrates that the majority of appellants were asylum seekers whose applications had been refused (37.6%). Another 32% of those appealing came to Switzerland in order to officialise their marriage and had their status directly linked to family reunification, then 17% of them had had student permit before their marriage.

Figure 1: Status of appellants before marriage



Source: TAF judgment database, 2020.

40 For the legal authorities, the objective is not to determine whether the marriage was concluded to ensure a legal status for the foreign spouse, but rather to demonstrate that a rapid chain of events from marriage, obtaining citizenship to the divorce is tied to a dishonest behaviour, signs of planning by the naturalised person interested in becoming a Swiss citizen and achieving more sure conditions regarding settlement in the country:

> "*The SEM first pointed out that, although a precarious residence condition in Switzerland was not, in itself, reason to prejudge whether or not the concerned person was willing to enter into a real marital union, it nevertheless may constitute evidence of abuse if combined with other troubling elements.*" (ATAF F-2033/2017)

41 Our analysis of the jurisprudence shows that, for the authorities, the binational marriages targeted by the legal provisions only served the interest of the foreign national: the image of a foreign spouse conveys a potentiality for taking advantage, namely acquiring Swiss nationality. This principle legitimates the idea that nationality is to be protected from individuals who are dishonest in their statement on their common and stable married life. The state's logic holds genuine marital unions up against marriages aimed solely at the foreign spouse obtaining citizenship.

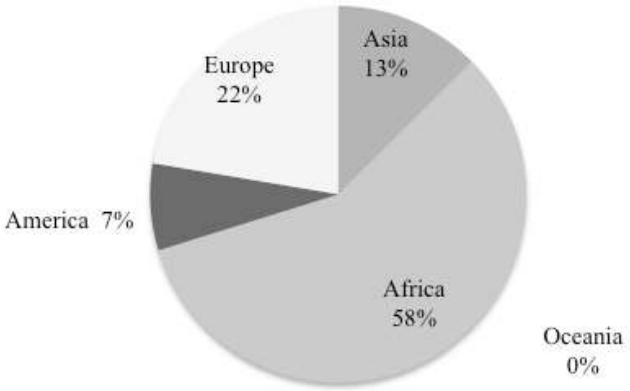
42 For policies and authorities, *interests* and *emotions* are seen as contradicting social aspects: on the basis of the imagined notion of Swiss couples, a binational marriage that is real cannot be correlated with any type of interest because the emotional aspects are seen to predominate (Andrikopoulos, 2019; Moret *et al.*, 2019). In contrast, the image of the genuine couple is seen as a relationship openly equal between two autonomous individuals who have an emotional and sexual bond, with no other motivations other than shared love and affection. The following extract of a judgement illustrates this reasoning, where binational marriage is perceived as a strategy to circumvent an individual's precarious status and therefore to overcome the legal barriers established by migration policies:

> "*[The SEM] deemed that there were grounds for presuming the concerned party's fraudulent obtention of simplified naturalisation in view of the rapid chain of events, whether a first decision refusing asylum tied with deportation from Switzerland, the concerned party's entry into clandestinity, his liaison with his future spouse while she was still married, a second asylum application sanctioned by non-consideration, marriage – enabling him to regularise his residence – concluded with a spouse eight years older than himself [...].*" (ATAF C-5674/2010)

43 Our analysis of the data concerning the naturalised person's status prior to marriage shows that people targeted by annulment of naturalisation are primarily those whose previous status was precarious – limited length of stay, asylum application rejected, residence permit expired, unable to find a job, no access to social protection measures, etc. This completes the evidence for presumption of fraud and reinforces the policy to protect the nation from "undesirables" – people who do not meet the criteria for access to the status of residency or settlement in Switzerland, a grand majority of whom are "third country" nationals.

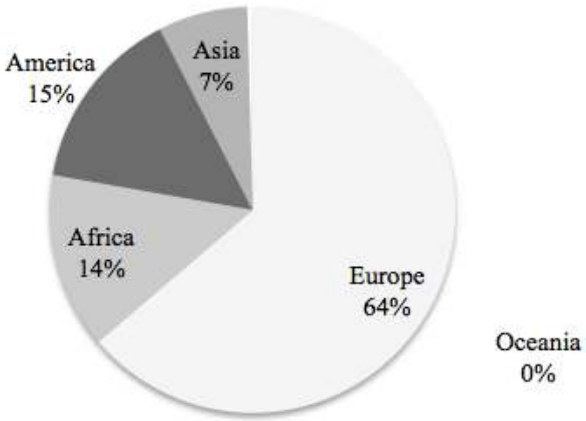
44 As shown in Figure 2, 58% of the appeals against a decision to annul simplified naturalisation through marriage are submitted by nationals of countries in the African continent[26] and 22% are from the European continent: the majority of the persons appealing are from Kosovo (15%), Algeria (13%), Morocco (9%), Cameroon (8%) and Tunisia (6%). At the same time, according to OFS data (Figure 3), the majority of people who obtained simplified naturalisation through marriage are European (64%). Some 98% of persons appealing are nationals of so-called "third" countries (Figure 4). However, from a general point of view, this path to naturalisation is, in the regions studied, generally obtained almost as often by EU/EFTA nationals as by people from so-called "third" countries (Figure 5).

Figure 2: Nationality of appellants by continent



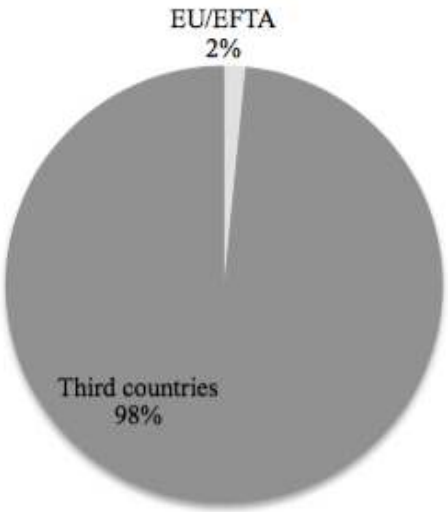
Source: TAF judgment database, 2020.

Figure 3: Nationality of spouses obtaining simplified naturalisation



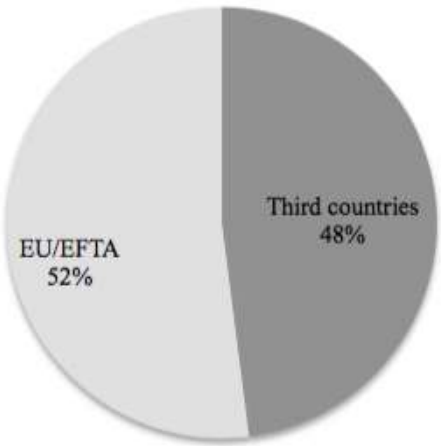
Source: OFS, Acquisition of Swiss nationality by canton, type of acquisition, sex, age and previous nationality, 2020.

Figure 4: Nationality of appellants



Source: TAF judgment database, 2020.

Figure 5: Nationality of persons naturalised (art. 21 LN)



Source: OFS, Acquisition of Swiss nationality by canton, type of acquisition, sex, age and previous nationality, 2020.

45 What is at stake in the naturalisation policy can be found in the definition of national identity (Centlivres, 1990; Frauenfelder, 2003). This policy aims symbolically and materially to (re)produce social cohesion, expressed under the standard of Swiss citizenship or the nature of people perceived as capable of integrating into the national community in virtue of their "lifestyle" especially in their family practices (CFM, 2012). They are placed in opposition to an image of the Other: "undesirable" foreigners, thought to be incapable of or even harmful for, (re)producing the nation (Tonkens and Duyvendak, 2016; Bonjour and Chauvin, 2018). These categories and identities are

produced by the law and the law reproduces an ethnicity by defining a concept of the imagined nation (Yuval-Davis, 2003; de Hart, 2015). The migration policy acts on the normative logics of binational marriage in the terms of jurisprudence: when the presumption of fraud revolves around the prior status of the appellant, this gives a negative tinge to marriages between nationals of "third" countries and Swiss citizens and a positive one to those formed with an EU/EFTA national because of foreign policies. The following section will focus on this distinction founded on the hierarchy of the image of the foreigner.

The culturalization of gender and social class

46 A phenomenon of gender culturalization is (re)produced in certain judgements: in the context of North Africa, for example, men would not be able to form a couple with women older than them, which presumes that the marriage with a Swiss woman twelve years older, as we saw in the extract above, was contracted for motives benefitting the migrant spouse:

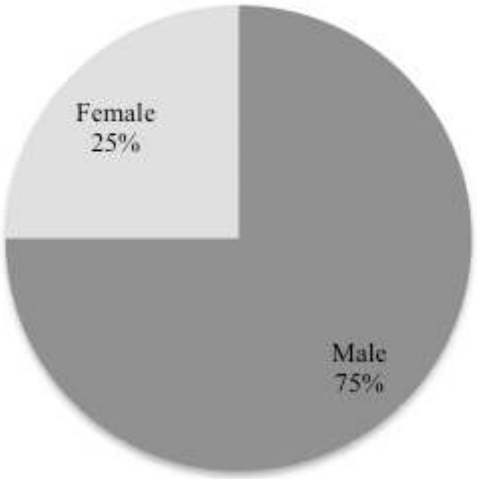
> "*Thus it cannot be excluded that the appellant's wish to settle in this country and have legal employment may have influenced him when he decided to marry a woman holding Swiss citizenship, 12 years older than him, mother of a child born of a previous marriage and of a cultural background different from his, a situation completely unusual in the socio-cultural context of his [country of] origin*." (ATAF C-53/2011)

47 Evidence relating to the age difference, seen through the prism of culture and gender, constructed by the authorities renders the incompatibility of binational couples fathomable and gives substance to the idea of fraud:

> "*There are also grounds to stress the age difference between the appellant and his first wife. Indeed, unlike his present spouse who is nine years younger than him, B. is eleven years older than him. Certainly, considered on its own, such an age difference between spouses is nothing exceptional. Nonetheless, taking into account the appellant's culture of origin – where the idea of a man marrying a woman older than him is hardly the norm, and especially considering A.'s age when he contracted this [first] marriage, in the case at hand this difference is liable to heighten the appearance of a marital union that did not meet all the required qualities*." (ATAF C-1151/2006)

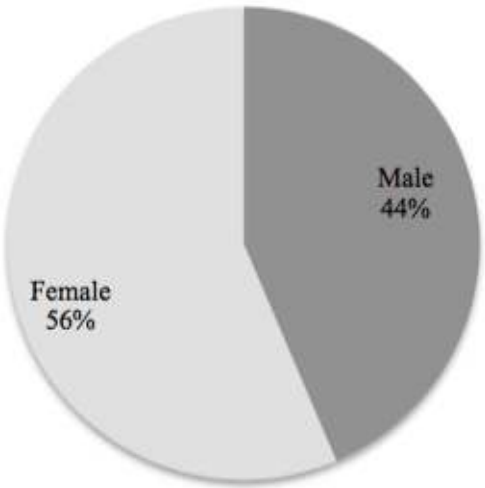
48 At this level, quantitative data can also illustrate this phenomenon of interlocking social relationships: 75% of the time, the appeals involve cases of naturalised men (Figure 6), while from a general point of view, the majority of naturalisations following a binational marriage in Switzerland (56%) concern foreign women (Figure 7).

Figure 6: Sex of appellants



Source: TAF judgment database, 2020.

Figure 7: Sex of persons naturalised (art. 21 LN)



Source: OFS, Acquisition of Swiss nationality by canton, type of acquisition, sex, age and previous nationality, 2020.

49 From a social and political point of view, the construction of cultural differences is linked to a culturalization of national identity. According to this logic, countries are essentially denoted by a specific culture, one that differs from one country to another. In comparison with Swiss citizens, the features of this differentiation create a hierarchy in the category of foreign national, which is materialised in naturalisation policy: cultural proximity confers desirability in the image of the foreigner and cultural distance defines undesirability. Swiss citizens are implicitly seen as economically

advantaged and culturally similar. Nationals of so-called 'third' countries, however, must prove they have professional capacities enabling them to meet their economic needs before applying for a residence or settlement permit in Switzerland, for their similarity is not seen as a foregone conclusion. Social class is intertwined with the construction of cultural "proximity" and "distance" (Bonjour and Duyvendak, 2017; Chauvin *et al.*, 2019). People perceived as culturally distant, in the following extract Nigerian nationals, are automatically seen as disadvantaged economically. This culturalization of social class (re)produces the logics of distance between the Swiss and 'third country' nationals, and these distances thus foster policies of suspicion. Indeed, Switzerland is imagined and constructed as a desirable country:

> "*Nigeria, his/her country of origin, was at that time in the midst of a dramatic economic and political situation, due to its governing dictatorship. Still today, more than one third of the population lives on less than one dollar a day. In view of the migratory pressure arising from such a situation, it is thus quite likely that through marriage, X. was attempting to obtain residence papers in Switzerland rather than wishing to contract a marriage as defined in art. 159 of the CCS.*" (ATAF C-285/2007)

50 Access to naturalisation for nationals of so-called 'third' countries is legitimated by the principles that underly the unity of family nationality but also, in a second phase, it is regulated by the control measures of migration policies. Under the sign of *cultural difference* interwoven with phenomena of *gender* and *social class,* the norm of *homogamy* is thus reaffirmed.

Conclusion

51 We have shown that the interlocking of family law and the migration control policy forms the groundwork for political-legal constructions of simplified naturalisation. This interlocking in turn leads to a culturalization of binational marriages. Indeed, the ideological construction of "We" represented by Swiss couples is opposed to "false" binational couples, who do not meet the norm for homogamy because they are strongly culturalized and thus defined as potential fraudulent. We have shown how jurisprudence (re)produces categories of foreigners based on a hierarchisation of cultural proximity/distance.

52 Furthermore, the cases of annulments of simplified naturalisation that we analysed clearly reflected the coercive power of the state apparatus in the name of protecting Swiss nationality. A rapid chain of events, coupled with the spouse's previous residence status, forms the legal foundation for presumption of fraudulent acquisition of citizenship. Just like a double fault, a precarious status is considered as fostering dishonest behaviour and increases the suspicions of abuse should a divorce occur within twenty-three months following the foreign spouse's naturalisation; binational marriage is thus seen as a way to circumvent a precarious status.

53 In response to protecting Swiss nationality, monitoring divorces in binational marriages that had led to naturalisation is an instrument to curb family models deemed socio-legally as heterogamous, those that would undermine the imagined national cohesion were people in these models to receive definitive access to Swiss citizenship. The normative logics that the authorities have (re)produced regarding binational marriage have given rise to another definition - that of the legitimate *dis*union: one based on an extraordinary event or on a duration of marriage that is relatively short.

The instability of the married binational couple is linked to the disloyal behaviour of the foreign spouse, which feeds the idea of abuse, motivated by the supposed advantage of becoming Swiss – an advantage placed in parallel with the desirability of Switzerland, compared to the undesirability of one's country of origin.

54 The structural dimensions that guide the policy on simplified naturalisation through marriage are thus rendered invisible in the legal deliberations, but they nevertheless remain institutionalised: they are the groundwork for categories of "genuine" or "sham" binational couples; they appear as obvious in virtue of the predispositions of normality that underpin the social order – this order that has its normative grounds in the concept of the *real family that can (re)produce the nation*. The appellants' living conditions are impacted by social relations between Switzerland, the EU/EFTA and the so-called "third" countries and they are materially expressed in interactional discriminations. Accordingly, in the end, the logics of homogamy come up against legal forms to promote "successful integration".

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NOTES

1. In this article we use the term "binational marriage" when referring to a marital union between a person of Swiss nationality and a person of foreign nationality.
2. The conditions are said to be "simplified" for the costs of the procedure and the required period of residency are reduced compared to the ordinary naturalisation procedure: a minimum of five years of residency and three years of marriage are required compared to ten years residency for the ordinary procedure. The procedure for simplified naturalisation through marriage has been in effect since 1991.
3. The TAF is the legal body that determines the legality of decisions taken by the federal administrations. It is the first instance for appeal in cases of annulment of simplified naturalisation.
4. The TAF mentions that beyond twenty-three months, the period is considered as "relatively long" and "may imply not only the occurrence of extraordinary events but also an evolution of the marital relationship" (ATAF C-6452/2011).
5. Reporting to the Federal Department for Justice and the Police, the SEM is the body that sets naturalisation criteria at the national level. Its mission also consists in regulating the conditions for the entry and stay of foreign nationals in Switzerland. In 2015, the SEM replaced the Federal Office of Migrations (ODM), in response to the rising importance of the issue of migrations. The ODM was set up in 2005 by the Federal Office for Refugees and the Federal Office for immigration, integration and emigration (Di Donato *et al.*, 2020).
6. https://www.bvger.ch/bvger/fr/home/jurisprudence/entscheiddatenbank-bvger.html
7. Our intention is not to discuss the representativity of appeal procedures with respect to annulment of simplified naturalisation but rather to propose an analysis based on cases, in order to elucidate specific situations (Passeron and Revel, 2005).
8. The OFS provides data relating to the number of simplified naturalisations through marriage were obtained based on regional location (canton) as well as the nationality and sex of persons naturalised between 2011 and 2018.
9. Starting in the 1990s, the Federal authorities, at the economics level, gave precedence to immigration of nationals of European Union (EU) and European Free Trade Association (EFTA) nations (Bolzman, 2002; Gafner and Schmidlin, 2007).
10. Enacted by a federal parliament representative of the Democratic Union of the Centre (UDC/SVP) – the country's Switzerland's majority party and promoters of various xenophobic legislative bills, the 2005 parliament initiative "Preventing false marriages" was a legislative intervention. Accepted by the Parliament, its title was

changed to "Preventing marriages in cases of irregular residency [status]" and it entered into effect on 1 January 2011.

11. This notion takes up the bases of the concept of *Überfremdung* – or '*over-foreignization*' – which legitimates both quantitative and qualitative management of the foreign population, from 1934 anchored institutionally in the Law on the stay and settlement of foreigners (Weill- Lévy *et al.*, 1999; Studer *et al.*, 2013).

12. In the law regarding foreigners, the provisions on so-called marriages of convenience (art. 97a CCS) evoke an "abuse linked to legislation on foreigners, and an action aiming primarily to elude the legal provisions, especially those regarding the right to remain in Switzerland" (Von Arx, 2016: 8).

13. In particular see various studies conducted in several national contexts: van Walsum, 2008; Lavanchy, 2013; Eggebø, 2013; Leinonen and Pellander, 2013; Mascia and Odasso, 2015; Roca Girona *et al.*, 2017; Wray *et al.*, 2019.

14. Homogamy is understood to be the relational or marital union between two people of a similar social group, in aspects such as social class, religion or even national origin (Schuft, 2010).

15. The residents' registration office of the naturalised person's place of residence.

16. Note that the statutory limitation is five years following granting of citizenship.

17. The bodies' deliberations are based on the legal definition of marriage entered in the CCS: "a union contracted with a view to forming a closely shared life (roof, table and bed) in which the spouses are willing to ensure mutual faithfulness and assistance, and which is envisaged as a lasting, namely as a shared destiny, including in the perspective of creating a family" (ATAF F-3567/2017).

18. "Since 2008, to justify a right of residence in the context of family reunification, or to extend an authorisation to stay in the country until the authorisation to settle is received, binational couples are required to reside in the same home, in so far as the foreign spouse is from a third country." (Art. 42. Of the Federal Law on Foreigners)

19. See especially ATAF C-250/2007, C-510/2013, C-4132/2013.

20. Note that in these cases the burden of proof is reversed: 'while the rapid succession of events gives support to the de facto presumption that the naturalisation had been obtained fraudulently, [the burden] is on the administered party, in virtue not only of the duty to collaborate in establishing the facts, but also in the person's own interest, to reverse this presumption' (ATAF C-250/2007).

21. Note that the TAF decisions can be challenged in second instance, at the Federal Court (TF).

22. We should point out that in Switzerland the Swiss Civil Code revision of the law on divorce was not adopted until 2000. The first legislative changes were only envisaged in the early 1980s with the revision of the Family code, led through international agreements to introduce the constitutional principle of equality of the sexes. Until the years 2000, the prevailing legal regulations defined the dissolution of marriage as one based on the logic of fault.

23. According to the Swiss divorce law, a divorce can be pronounced at any time except when one of the spouses is opposed to it. In this case, the divorce can become official as soon as the spouses have lived apart for two years.

24. See especially ATAF C-53/2011, C-94/2008, C-130/2013.

25. Since the 1980s sociology of the family has dismissed this model for this Swiss context. See especially the works of de Kellerhals *et al.* (1987) as well as Widmer *et al.* (2003) on marital interaction styles in Switzerland.

26. For ease of reading, we have chosen to categorize nationalities by continent.

ABSTRACTS

Marriage between a Swiss and a foreign national is perceived by the law as a vehicle for integration. Under this principle, naturalization policy legitimizes “facilitated” access to Swiss nationality for foreign spouses. However, these unions must follow a highly normalized matrimonial model. This paper aims to uncover the normative logic of marriage in Switzerland by analyzing what makes it suspect both legally and socially. In order to do this, we analyze the legal cases in which naturalization is annulled on the grounds of dissolution of marriage. We show that, in response to the protection of Swiss nationality, the control of naturalization facilitated by marriage represents an instrument for combating undesirable family models identified in binational couples, considered to jeopardize the imaginary of national cohesion.

Le mariage entre un·e ressortissant·e suisse et un·e ressortissant·e de nationalité étrangère est perçue par la loi comme un vecteur d’intégration. Sous ce principe, la politique de naturalisation légitime un accès « facilité » à la nationalité suisse aux conjoint·e·s étranger·ère·s. Ces unions doivent toutefois suivre un modèle matrimonial très normé. Cet article vise à mettre au jour les logiques normatives du mariage en Suisse en analysant ce qui le rend suspect à la fois juridiquement et socialement. Pour ce faire, nous analysons les cas juridiques d’annulation de la naturalisation facilitée par motif de dissolution du mariage. Nous démontrons qu’en réponse à la protection de la nationalité suisse, le contrôle de la naturalisation facilitée par voie de mariage représente un instrument de lutte contre des modèles familiaux indésirables repérés chez les couples binationaux, considérés comme mettant en péril l’imaginaire de la cohésion nationale.

El matrimonio entre un·a suizo·a y un·a extranjero·a es percibido por la ley como un vehículo de integración. En virtud de este principio, la política de naturalización legitima el acceso «facilitado» de los cónyuges extranjeros a la nacionalidad suiza. Estas uniones deben seguir un modelo matrimonial altamente normativo. Este artículo tiene por objeto descubrir la lógica normativa del matrimonio en Suiza, analizando lo que lo hace sospechoso tanto desde el punto de vista legal como social. Para ello, analizamos los casos legales en los que se anula la naturalización por motivos de disolución del matrimonio. Mostramos que, en respuesta a la protección de la nacionalidad suiza, el control de la naturalización facilitada por el matrimonio representa un instrumento para combatir los modelos familiares indeseables identificados en las parejas binacionales, considerados como poniendo en peligro el imaginario de la cohesión nacional.

INDEX

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