Disability Rights and Swiss Citizenship: The Dimensions of Inclusive and Exclusive Integration Criteria

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Abstract

International treaties guarantee 'fundamental rights' for disabled people that ensure them a dignified life. However, access to citizenship is subject to specific criteria, which can be difficult to fulfil for people with disabilities. Consequently, there exists an intersecting policy tension between the exemptions of disabled people from citizenship criteria and migration control; both of which are "neighbouring legal fields" to disability law. This study of the Swiss case compiles and examines Swiss law that pertains to foreign migrants with disabilities and focuses on the following questions: (i) How has the legal framework that regulates access to Swiss citizenship for immigrants with a disability evolved over time? (ii) Has said legal framework become inclusive over time? The main finding is the following: immigration and citizenship policies continue to value an individual's capacity to contribute to society has evolved from being directly to indirectly ableist.

Keywords: Disability, Citizenship, Ableism, Historical Analysis, Law

Introduction

In the first half of the twentieth century, discrimination against foreigners with disabilities was commonplace in immigration and nationality rules of liberal democracies. For instance, the US Immigration Act of 1917 restricted immigration for those "likely to become a public of charge", including "all idiots, imbeciles, feebleminded persons, […] persons of constitutional psychopathic inferiority, mentally or physically defective"[2] (Powell 2009: 136–137; Bromberg 2015). Such explicit eugenic terminology has disappeared, but immigration and citizenship policies

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[2] While today we differentiate between intellectual, cognitive, neurological, and psychiatric disabilities, in this paper, the phrase "mental disability" is used to identify a variety of conditions which were historically referred to as "retardation", "mental defects", etc. When specific labels or and terminology are used, this is for historical accuracy or for an example of discrimination as seen in Table 2

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continue to highlight individual capacities. This configuration reinforces able-bodied power structures in contemporary societies.

Recent scholarship has highlighted the ongoing 'restrictive turn' in immigration and naturalisation policy which increasingly emphasises 'economic self-sufficiency' (Stokke 2017; Dermaut et al. 2020). This trend reinforces performance within a neoliberal context, which places more emphasis on individuals and their abilities. However, scholars like Anderson argue that these trends have larger policy implications regarding how states view citizenship and migration in relation to what a prospective citizen should be as much as what they must be to obtain this legal status. This promotion of 'fantasy citizenship' reflects how much emphasis is placed on the economic contributions and capacity of both citizens and immigrants, disabled or otherwise (Anderson 2015).

Simultaneously, the rights of citizens with a disability have been increasingly recognised and legally enshrined, both in international law and in the domestic constitutions of liberal democracies. For example, in 2006, the United Nations (UN) adopted the Convention on the Rights of Persons with Disabilities (CRPD), which reaffirms, promotes and protects the rights of all persons with disabilities. Switzerland ratified the CRPD in 2014, ensuring these fundamental rights. Here, I inquire if this recognition has been extended to disabled foreigners. The dual movements of legal restriction and the expansion of accommodations create a policy tension between 'state interests' and disabled people (Tremain 2002; Hughes 2005; Lid 2015; Sépulchre/Lindqvist 2016; Sépulchre 2018; Jenkins 2021). However, very few studies have examined the intersection between migration, citizenship, and disability and how the current trends in naturalisation law can affect individuals at this intersection. This article explores the policy tensions between the ableist conceptions of citizenship and the recognition of the rights of disabled persons in liberal democracies.

On an empirical level, this article examines the intersection of immigration and disability in Swiss law. Switzerland has a long-standing history of immigration and an equally long-standing politicisation of immigration and fear of "overforeignisation," Überfremdung. The focus of this article is on three intersecting policy areas: immigration, or the right to immigrate into the country; residence, or the right to stay in the country; and naturalisation, or the right to acquire Swiss nationality. These policy areas overlap and are essential for an in-depth analysis using Dubber's Historical Analysis of Law method. This article will focus exclusively on the legislation at the federal level in the Swiss legal system over time, as it provides a foundational baseline for the body of law within Switzerland's consociational system by providing "general guidelines" for the cantons to follow, with the goal of promoting national cohesion while respecting cantonal autonomy.

The textual evolution of the law over time and the legitimacy of past and present legal norms will be examined and evaluated. I investigate whether the legal framework regulating Swiss citizenship and integration in its textual form has become more or less ableist over time. To that end, I examine the text of the laws to ascertain whether there is a direct or indirect recognition of disability as a ground for exemption from certain legal requirements. My dataset will consist of the various provisions concerning foreigners and naturalisation from 1931 to 2021 (see Tables 1 and Appendices 1 and 2).

Table 1: Laws Examined

Law (ENG)	**Loi (FR)**	**Recht (DE)**	**Policy Area**[3]	**Period***
The Federal Law on the Residence and Settlement of Foreigners of March 26, 1931 (RSFNA)	Loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers (LSEE)	Bundesgesetz vom 26. März 1931 über Aufenthalt und Niederlassung der Ausländer (ANAG)	Laws on Integration	1931–2006
Federal Act on the Acquisition and Loss of Swiss Nationality of September 29, 1952, (SCA 1952)	Loi fédérale du 29 septembre 1952 sur l'acquisition et la perte de la nationalité suisse (LN 1952)	Bundesgesetz vom 29. September 1952 über Erwerb und Verlust des Schweizer Bürgerrechts (BüG 1952)	Laws on Nationality	1952–2014
Agreement of 21st of June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (AFMP)	Accord entre la Confédération suisse, d'une part, et la Communauté européenne et ses États membres, d'autre part, sur la libre circulation des personnes (Conclu le 21 juin 1999) (ALCP)	Abkommen vom 21. Juni 1999 zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit (FZA)	Laws on Migration	2002 - current
Federal Act of 6th of October 2000 on General Aspects of Social Security Law (GSSLA)	Loi fédérale sur la partie générale du droit des assurances sociales (LPGA) du 6 octobre 2000	Bundesgesetz vom 6. Oktober 2000 über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG)	Laws on General Social Insurance	2000-current

[3]Another piece of legislation that can be considered in relation to this article would be Loi fédérale du 17 décembre 1976 sur les droits politiques (LPD/BPR) Art. 2 which excluded those with "incapacity or guardianship" from voting. Another text which reflects this trend is Art. 136 al. 1, which openly excludes persons with mental disability: "All Swiss citizens over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity, have political rights in federal matters. All citizens have the same political rights and duties."

Law on Foreigners of May 05, 2004 (FNIA 20044)	Loi sur les étrangers du 05 Mai 2004 (LEtr)	Bundesgesetz vom 16. Dezember 2005 über die Ausländerinnen und Ausländer und über die Integration (AIG 2004)	Laws on Integration	2006–2018
Swiss Nationality Act of June 20, 2014 (SCA 20145)	Loi sur la nationalité du 20 juin 2014 (LN 2014)	Bundesgesetz vom 20. Juni 2014 über das Schweizer Bürgerrecht (BüG 2014)	Laws on Nationality	2014–current
Ordinance on Nationality of June 17, 2016 (SCO)	Ordonnance sur la nationalité suisse (Ordonnance sur la nationalité,) du 17 juin 2016 (OLN)	Verordnung vom 17. Juni 2016 über das Schweizer Bürgerrecht (BüV)	Ordonnance on Nationality	01.01.2018–current
Federal Law on Foreigners and Integration of December 16, 2005 (FNIA 2005) 6	Loi fédérale sur les étrangers et l'intégration du 16 décembre 2005 (LEI)	Bundesgesetz vom 16. Dezember 2005 über die Ausländerinnen und Ausländer und über die Integration (AIG 2005)	Laws on Integration	2019–current
Ordinance on the Integration of Foreigners of August 15, 2018 (FNIntO)	Ordonnance sur l'intégration des étrangers du 15 août 2018 (OIE)	Verordnung vom 15. August 2018 über die Integration von Ausländerinnen und Ausländern (VIntA)	Ordonnance on Integration	01.01.2019–current

This provides us with a clear illustration of how and when the law has changed over time. Additionally, this method allows us to trace how the law has become increasingly ableist with certain criteria used or whether the Swiss legal framework has opted to counteract such forms of exclusion of foreigners with disabilities via a 'regime of exemption' provided by the principles enshrined in the CRPD.

[4]Dates were added to differentiate between the 2004 version and 2005 one, which in TERMDAT system have same acronym.

[5]Dates were added to differentiate between the 1952 version and 2014 one, which in TERMDAT system have same acronym.

[6] Dates were added to differentiate between the 2004 version and 2005 one, which in TERMDAT system have same acronym.

Conceptual Clarifications

Disability

In recent years, the increased awareness of everyday experiences of persons with disabilities has led to the re-examination of social and political norms that excluded them, de jure or de facto. This re-examination has encouraged states to adopt a human rights-based approach that focuses on inclusion and empowerment, not just on one's ability to produce social capital, as described by Bourdieu (1986). However, at the national level, states still essentially rely on conceptions of capacity and contribution instead of the international norms (Kymlicka/Donaldson 2017; Goodley/Lawthom 2019; Waldschmidt/Sépulchre 2019). Both expectations are deeply embedded into institutions and their discourse, which is reflected in the understanding of citizenship and the responsibilities tied to membership. This places citizens with disabilities in precarious situations, where the expectation is that citizens will contribute to the community, despite their limitations. The tension between these elements is highlighted clearly in the 'Social Contract' described by John Locke, especially as it pertains to persons with disabilities. (Vorhaus 2005; Degener 2016; Shyman 2016; Lawson 2020; Lawson/Beckett 2021). Locke famously highlighted disability as symbols of "both shared human vulnerability and the outer skirts of personhood due to the doubt over human capacity, thus invoking both solidarity and exclusion" (Locke 1690; Goldie 1997; Phemister 1975; Simplican 2014: 97-99; Simplican 2015: 27).

Exclusion can be seen in what Locke calls the capacity contract, which emphasises an individual's ability to be autonomous. This emphasis on one's capacity has led to both direct and indirect forms of exclusionary treatment of disabled individuals (Locke 1690; Goldie 1997; Phemister 1975; Goodley 2014; Oliver/Barnes 2012). The rationale for such exclusion finds its roots in historical biopolitical prejudices perpetuated by eugenic movements which assert that disabled persons do not fit with able-bodied expectations and thus are lesser persons (Beckett 2006; Halvorsen et al.2018; Lid 2015; Sépulchre 2016; Beckmann 2017; Dermaut et al. 2020). Over time, these prejudices have diminished, but still remain embedded in societal fabric via specific expectations when it comes to forms of participation and contributions to the state (Carey 2003; Oliver/Barnes 2010; Layte 2012; Rowe 2015; Schandelmaier et al. 2015; Halvorsen et al. 2017; Sépulchre 2018; Goodley/Lawthom 2019; Jenkins 2021). This is key for understanding the field of studies, especially Critical Disability Studies, which highlight the social prejudices and forms of discrimination, such as ableism, which assert that disabled persons are inferior since their abilities do not conform to 'normal' standards (Campbell 2009; Goodley 2014). Ableist conceptions remain an everyday challenge for disabled persons in all aspects of their life, since ableism is usually 'wrapped up' in commodified ideals that provide the environment in which ableism can prosper (Goodley 2014a; Goodley/Lawthom 2019). While legal recognition and protection for disabled persons has been gradual via anti-discrimination legislation and international treaties, states can limit the rights of disabled persons in the forms of guardianship or conservatorship[7], which prevent disabled persons from participating in society and politics (Sépulchre 2018; Waldschmidt/Sépulchre 2019; Sépulchre 2020). This is where disability and citizenship overlap and have mixed results in terms of what 'principles' apply (Hughes 2017; Schalk 2017).

[7]Guardianship prevents disabled people from making day-to-day decisions.

Citizenship

Marshall (1950) highlighted the social dimension of citizenship and the privileges within the welfare state; in particular, the paradigm shifts away from the human rights-based principles that emerged after World War II towards ideas that became embedded in market-focused neoliberal principles and welfare retrenchment. Such principles have reshaped how states create membership criteria and who 'deserves' citizenship, which are based on an immigrant's ability to contribute to the host society. This 'market fundamentalism' leads to what Shachar calls the "marketization of citizenship" (Shachar 2018: 4). This dual transformation has reduced citizenship to a 'commodity,' and 'belonging' is no longer about a shared culture or language but about market logic (Shachar/Hirschl 2014; Shachar 2018).

Examples of this shift to an emphasis on the 'economic value' of an individual can be seen in the emergence of Olympic and human-capital based citizenships (Shachar/Hirschl 2014). Both conceptualizations of citizenship highlight the burden that is placed upon the individual by the state: an individual can gain rights and privileges if they offer a specific talent that benefits the state and enables them to be self-sustainable. (Ellermann 2020). According to Ellermann, such policies are deeply rooted in neoliberal market fundamentalism that not only blurs the distinctions between economic and cultural attributes but also accommodates an 'axis of exclusion,' which facilitates the commodification of a person's traits; thus, transforming individuals into human capital rather than beings with dignity. In certain areas of immigration policy, economic immigration is seen as a discretionary policy that is not hindered by legal or moral obligations in the way that humanitarian and family immigration policies are (Ellermann 2020: 6-7). Thus, the combination of the marketization of citizenship and the discretionary powers of the state to regulate economic immigration results in a convergence in the logic of how institutions create differentiated immigration flows, creating different pathways to citizenship that individuals can only earn if they are deemed deserving by the state. It is this conceptualisation of citizenship that Joppke calls 'earned citizenship.' (Ellermann 2020; Joppke 2021).

In his previous work, Joppke describes citizenship as a "combination of status, rights and identity." Status implies formal membership and the rules that regulate access to it; rights speak to the capacities and privileges that come with status; identity can be translated as behavioural and cultural expectations that come with membership (Joppke 2007). This makes citizenship an ever-evolving concept that sits alongside the rules concerning how to earn citizenship, indicating a sharp turn away from previous rules governing citizenship to a more restrictive understanding of it (Joppke 2021). These changes can be encapsulated under the umbrella of 'earned citizenship,' given that the value of citizenship has changed from being a protective form to one of reform. However, these reformist aspects have been accompanied by various logics of deservingness that have made citizenship more difficult to obtain than to lose (Meuleman/Roosma/Abts 2020; Joppke 2021: 3; Borrelli et al. 2021; Knotz et al. 2021). This is in clear contrast to the Marshallian understanding of citizenship, where certain rights are granted at the 'origin' and cannot be given to a privileged class (Marshall 1950). The concept of citizenship as an 'earned' privilege, according to Joppke, is caused by attributes of both neoliberalism and nationalism, converging to create instances of neoliberal nationalism, which is "neither ethnic nor civic but is including on the basis of merit and desert" (Joppke 2021: 2 & 30). Such conceptualisations of citizenship hold true, especially for newcomers when they are attempting

to 'earn' citizenship; it can only be earned by fulfilling specific criteria (Stadlmair 2018; Joppke 2021). Failure to fulfil these criteria can increase an individual's 'deportability' because of the state's perceptions on the lack of deservingness (Lafleur/Mescoli 2018: 484-486). As a result of this principle, states have negatively discriminated against foreign immigrants (Dahinden/Anderson 2021). However, what happens when an individual who is seeking social rights or citizenship is an immigrant with a disability? How does the state address these two categories when they exist simultaneously? Our study seeks to answer these questions by examining how disability, migration and citizenship overlap in a historical perspective.

The Swiss position on the Rights of Persons with Disabilities

Switzerland is a unique case, given its ability to balance various challenges ranging from its geographical and linguistic complexities to its consociational democracy. One example is the legislation regarding migration and citizenship, which has a history of being politicised by a right-wing populist party, resulting in the emergence of differentiated legislation on immigration since WWI (D'Amato et al. 2009; Skenderovic 2009a; Achermann et al. 2013; Carrel/Wichmann 2013; Wichmann 2013; Ruedin et al. 2015; Bitschnau et al. 2021). This also seems to be the case with the laws that regulate accessing the benefits of the first pillar of Swiss Social Insurance, which includes Disability Insurance (DI), among others, and its corresponding body of legislation, the Law on General Part Social Insurance (GSSLA). Each of these bodies of legislation acts as contingency planning at federal level and regulates who is entitled to pensions, especially in regard to disability.[8] DI has been revised multiple times since 1990, with the fourth (2003), fifth (2008) and sixth (2012) revisions of the law (Probst et. al. 2015; Fernández/Abbiate 2018). The Law on the Elimination of Inequalities Affecting Persons with Disabilities (DDA) is a complementary legislation to the new Swiss Constitution (SC) that came into force in January of 2004 and aims to ensure non-discrimination based on disability, sharing similar provisions found in the CPRD.[9] The CRPD itself is a culmination of the multi-level advocacy efforts since the 1970s. This resulted in multidimensional protections currently enshrined in the CRPD's principles of respect for inherent human dignity, individual autonomy, reasonable accommodation, and non-discrimination. Switzerland signed and ratified this convention in 2014 (Degener 2016). However, the current version of the Swiss Constitution still retains Article 136 al. 1 which states that

> *All Swiss citizens over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity, have political rights in federal matters. All citizens have the same political rights and duties. (RO 1999 2556: 258, Wyss 2024).*

Therefore, Switzerland is a rich case study for examining the policy tension, especially since the 'neoliberal turn', between the norms of protecting those with disabilities and ableist expectations from 'earned citizenship' that focus on the individual's capacity to demonstrate their

[8]We did not include the various legal definitions of disability or the history of social insurance legislation since it lies outside the scope of this article.

[9]There are similar definitions of disability in the LHand and the CRPD that follow the social, or human rights, model of disability, whereas the DI differs in that it uses the medical model of disability.

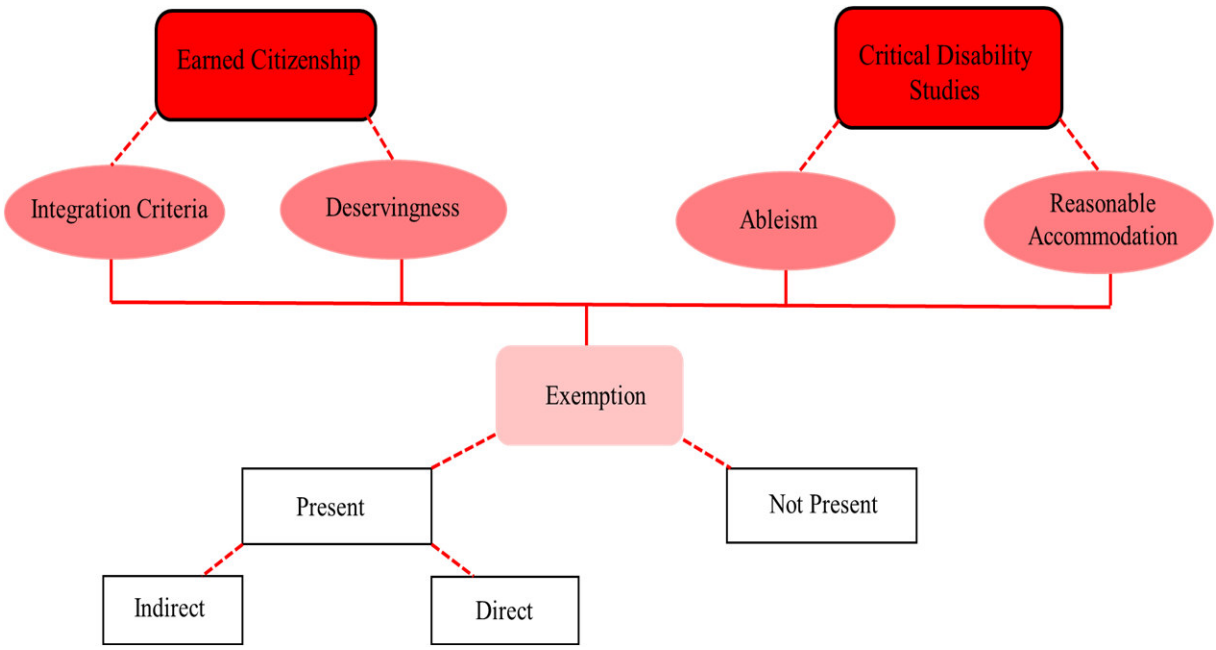
deservingness by contributing to the host society and not becoming a burden on the state. This places more pressure on immigrants, especially those with a disability. Therefore, it is important to understand to what extent the legal structure of Swiss citizenship has become more or less ableist over time and whether the Swiss legal framework recognises disability as a ground for exemption – directly or indirectly – to be applied in the laws on foreigners and naturalisation.

Methodology: The Historical Analysis of Law

To answer our research questions, we will utilise and operationalise the above-mentioned theories of Earned Citizenship and Critical Disability to examine the overlap of legal categories caused by the influence of biopolitics and its impact on public policy.

First, we will link the conceptual elements of each of these theories, such as capacity, deservingness, and integration criteria, to Critical Disability's *Reasonable Accommodation* and the prohibition of ableism and other types of discrimination (see Figure 1).

Figure 1: Conceptualisation and Operationalisation



Each of these elements helps us find legal exemptions in Swiss law at the federal level. Exemptions are a key part of our study since they will be the main component that is assessed if present, thus resulting in a direct or indirect form of discrimination. Direct discrimination occurs "when someone is treated less favourably than another person in a comparable situation on grounds of prohibited criteria or are unlawful. It is clearly visible, even displayed or claimed" (Naguib 2008, Naguib 2010). Indirect discrimination refers to "practices, policies or legal rules which appear to be neutral but nevertheless still lead to certain or disadvantaged people compared to other unless, objectively justified" (Naguib, 2008; Naguib, 2010; Naguib, 2018). Discrimination can be positive or negative. Negative discrimination works against the disabled individual (i.e., it

involves ableist expectations or requirements), whereas positive discrimination comes in the form of an exemption from meeting specific criteria or conditions that are required to obtain the right to reside in Switzerland or to acquire Swiss nationality (see Table 2).

Such exemptions, if present and implemented, are in line with the legal obligations of states that have signed and ratified the CRPD to provide reasonable accommodation, as stated in Article 2 of the Convention (UN DESA 2006; Motz 2015). This contrasts with the reinforcement of ableist conceptions and institutional structures, which only value individuals who have the capacity to contribute to their host society (Linton 1998). Therefore, it is imperative to continuously re-evaluate previous norms and legal practices and their legitimacy. This is why this study will utilise the historical analysis of law method conceived by Markus Dubber (Dubber 1998; Dubber 2016) and Robert Gordon (Gordon 1984).

According to Dubber, the point of the Historical Analysis of Law is to critique the legitimacy of a past or present legal practice. In the case of our study, practice comes in the form of legislation and its interpretation by the judicial system. The goal of the Historical Analysis of the 'law' is to monitor the emergence and development of legal practices, their legitimation, and their processes. For the purpose of the critical analysis of law, legal practice can be defined as attitudes, behaviours, and principles of generality. In this view, these practices and norms are distinguished from 'legitimating principles.' Therefore, it is necessary to have an additional evaluative framework that provides the normative context (Dubber 2016: 13).

Historical analysis draws this prescriptive theory from the field of history, and its critical perspective is immanently historical as it considers the recovery of previous legitimacy problems and their principled solutions (Gordon 1984). The point of the historical analysis of law is to critique, not to reform or to make 'critical history,' as is the case in this study, where we examine past and present practices applied to historically marginalised groups within a legal context that provides a critique. Combining our theoretical apparatuses will help us to assess our data, which will consist of the laws regulating citizenship and the legal residence of foreigners such as the Federal Act on the Acquisition and Loss of Swiss Nationality of September 29, 1952 (SCA 1952), the Swiss Nationality Act of June 20, 2014 (SCA 2014) and the Law on the Residence and Settlement of Foreigners of March 26, 1931 (RSFNA), among others. (see Tables 1 and 2). We review the text of each of these bodies of law and examine when and how the subject of disability emerges and what requirements are tied to it. This will help us assess whether the legal provision is either direct or indirect regarding how it involves the subject of disability and whether the provision could have a positive or a negative impact on an individual who is both an immigrant and disabled.

Table 2: Operational Terminology

Content-related questions	**Determinant** (helps determine whether a provision is weak or strong)
Does disability serve as a ground for exemption?	○ Does an exemption exist in primary legislation (i.e., constitution and treaties) or secondary legislation (i.e., ordinances)? ○ What are the criteria when or does it apply?
Reasonable Accommodation	The necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, were needed in a particular case, to ensure to people with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms (Article 2 CPRD/CPDH/ BRK)
Positive discrimination	A form of discrimination that favors someone by treating them differently in a positive way based on a specific trait.[10] Example: An organization or institution appointing a disabled person into a role without considering whether they have right skills for the post. This can also come in the forms of an "exemption" because X is having this trait X does not have to fulfill certain criteria due to that specific trait.
Negative discrimination	When a person is judged based on their individual attributes, skills, and capabilities. This can also include stereotypes, prejudice, or assumptions.[11] Example: X has a psychosocial disability and was denied a job because X was deemed to "too retarded or slow" for the job.
Direct discrimination:	"Occurs when someone is treated less favourably than another person in a comparable situation on grounds of prohibited criteria or are unlawful."[12] Example: Due to Y's disability or retardation, they would not be capable of learning a language
Indirect discrimination:	"Practices, policies or legal rules which appear to be neutral but nevertheless still lead to certain or disadvantaged people compared to other unless, objectively justified."[13] Example: Individuals who have a disability are prohibited from entering the territory because it takes resources to accommodate them.

[10] Definitions set out by the author of the 2018 Centre to Combat Racism Report. Citation Naguib 2008; 2010; 2018

[11] Ibid.

[12] Ibid.

[13] Ibid.

Data Collection and Data

Our data consists of laws relevant to immigrants with disabilities who are seeking to naturalise in Switzerland from 1930 to 2021, which we obtained via the Recueil systématique from the Swiss Fedlex database.[14] We were particularly interested in the legal provisions that focus or define integration criteria and their exemptions, if present within the law, which consists of, but is not limited to cultural/moral, economic, linguistic, and duration of residence (Oliver/Barnes 2012; Achermann et al. 2013; Sépulchre/Lindqvist 2016; Tabin/Ader 2022). For each of these laws, we searched for specific provisions that either explicitly mention 'disabled persons' or ones that are intertextual or can be tied to such provisions via the keywords[15] used to describe disability. The identified provisions were recorded and tracked to find and determine the development of the exemptions which can be found within the law. Examining the law over time allowed us to gain a holistic understanding of the evolution of the legal framework and whether it has become more inclusive or exclusive over time for foreigners with disabilities.

Analysis

Evolutions in Immigration and Citizenship Laws

Initially, we found very few direct mentions of disability in the Citizenship Law; however, the opposite was true for the earliest version of the Federal Law on the Residence and Settlement of Foreigners (RSFNA), which explicitly mentions disability as it pertains to the grounds for the expulsion of foreigners. It specifically connects mental illness to criminality and a lack of economic self-efficiency or financial dependence on social assistance in Art 10 al.1 letr (s). b-c:

> *"A foreigner may only be expelled from Switzerland or a canton: (b) if he or she, as a result of mental illness, compromises public order; (c) if he or she, as a person to whose needs is required to provide have already fallen or are certainly on the verge of falling under the charge of public or private assistance" (FF_1929 I_929).*

However, such direct and indirect negative language about disability is not uncommon during the inter-war period, given the commonly accepted eugenic understanding of disability. This, intertwined with Swiss fears of *Überfremdung*, make an illustrative example of the discriminatory prejudices of the period manifesting itself in the question of naturalisation and integration of foreigners; which was not to integrate them in a meaningful way but based on a perception of 'cultural closeness' and their capacity to assimilate, a concept that acts as a 'cornerstone' to Swiss naturalisation policy that has continued to this day (Achermann/Gass 2003). This policy focus can be seen clearly in the law on the Residence and Settlement of Foreigners (RSFNA), which makes specific references to the criteria that foreigners who intend to settle in Switzerland must meet, even those with disabilities (Wecker 2012; Goodley 2014). It is this connection made

[14] https://www.fedlex.admin.ch (Accessed at 20.12.2024)

[15] Keywords used within the text of the law (to help our search): Disability / naturalisation / disablement /handicap/ invalidité/capacité, autonomie/mental, retardé/maladie mentale.

between mental illness, security and the use of social assistance that has remained in the law. Few minor but significant changes were made to the RSFNA and its various revisions until the start of the post-war period.

Citizenship, Immigration, and Indirect Protections

The changes made to the RSFNA in the post-war period happened alongside the revival of neighbouring countries and the economic balancing of guest workers, state interests and human rights (D'Amato 2009). The evidence that this delicate balancing was taking place can be seen in the changes made to the RSFNA and the passage of the 1952 Federal Act on the Acquisition and Loss of Swiss nationality (SCA 1952). Certain clauses that reinforced the concept of social cohesion via the assimilation of foreigners were being completed in a 'proportional manner,' including in relation to social assistance and disability. In the case of the RSFNA, one minor but telling change to the law was made to Art. 10 al. 1 letr. c[16]: it changed from saying "have already fallen or are certainly on the verge of falling under the charge of public or private assistance" to reading "for whom he or she is responsible, is continuously and substantially dependent on public assistance" (RO 1949 225: 17 & 227)[17].

This slight change in wording hints at a change in attitude about the type of and the duration of those using social assistance, given that there is no explicit or implicit exemption present. However, this version of the law yielded another change: an indirect exemption from deportation for foreigners with disabilities in Art.10 al. 2 that states: "The expulsion provided for in article 1, letter c or d, may only be ordered if the return of the expelled to his country of origin is possible and can be reasonably required" (RO 1949 225: 227). This provision indirectly provides a thin line of protection that could be interpreted as one of the first exemptions in that any expulsion of a foreigner must be reasonably required. This shifts the burden of proof from the individual to the state when it comes to deportations.

Similar provisions can be found in the law on Swiss citizenship and the 1952 Federal Act on the Acquisition and Loss of Swiss Nationality (SCA 1952), such as in Article 14 al. 2 of the SCA 1952: "The investigation must provide as complete a picture as possible of the applicant's personality and that of his or her family members" (RO 1952 1115: 1118). This provision can also provide an indirect form of protection for those seeking citizenship by placing the burden on the relevant decision-making institutions to do their due diligence when assessing an applicant. Furthermore, this principle is reinforced by Article 37 al. 3, which states, "Decisions of the federal authorities refusing naturalisation or reintegration must be substantiated" (RO 1952 1115: 1123). Both provisions are indirect but positively discriminatory since they can act as safeguarding mechanisms to protect candidates from arbitrary decisions by any decision-making body (L'Assemblée fédérale de la Confédération suisse 1952; Secrétariat d'État à la migration SEM 2010). These changes in both bodies of law provided a form of protection for foreigners in general but particularly for foreigners with disabilities. However, these new protections would

[16]Art. 10 al.1 letr.c changed to Art. 10 al. 1 letr.d.

[17] This modification of RSFNA can also be found in Loi fédérale modifiant et complétant la loi sur le séjour et l'établissement des étrangers.

continue to encounter various challenges because of internal and external challenges that the Swiss state was facing.

The Balancing Act: Humanitarianism vs. Security

During the 1990s and the early 2000s, large migratory flows provoked questions about how to balance humanitarianism and security. For Switzerland, this meant trying to manage migration and economic stability whilst ensuring the rights of immigrants arriving in the country. The way the Swiss state approached this balancing act was twofold. First, it updated the legal frameworks to reflect new legal norms, resulting in the acceptance of the SC of 1999, Switzerland's membership of the UN in 2002, and the ratification of the Free Movement of Persons Switzerland Agreement in 1999 (AFMP) and EU enlargement (Mahnig/Wimmer 2003; Ruedin et al., 2015). Second, it emphasised the reinforcement of social cohesion by promoting the integration of foreigners into Swiss society. We can see this in the recent changes made to both bodies of law, particularly regarding foreigners with disabilities, who faced various forms of discrimination simultaneously. Although both laws provided forms of protection or exemption that were indirectly positive, they also contained various integration requirements which contradicted these exemptions. These requirements may cause negative discrimination against foreigners with disabilities. The law would soon become caught between two poles of logic: the pressure to implement humanitarian principles versus the increasing demand for protection from immigrants 'abusing' the system. This legal dilemma can be seen in the variety of changes made to the RSFNA and its replacement with the FNIA 2004 in 2006, as well as in the creation of the SCA 1952 in 1991.

One of the main goals of the FNIA 2004 was to promote social cohesion via the integration of foreigners, but it also aimed to address various concerns about public security, limiting the admission and integration of foreigners (Secrétariat d'État aux migrations 2013). These policy aims are clearly reflected in this version of the law, specifically in relation to promoting the integration of foreigners, as seen in Art. 53 al (s). 1-3:

> *"(1) In the accomplishment of their tasks, the Confederation, the cantons and the municipalities should take into account the objectives of the integration of foreigners (2) create conditions conducive to equal opportunities and the participation of foreigners in public life (3) In particular, they encourage language learning, professional promotion and preventive health measures; they support the efforts made to promote mutual understanding between Swiss and foreign populations and to facilitate coexistence" (L'Assemblée fédérale de la Confédération suisse, 2008; Secrétariat d'État aux migrations, 2013).*

It is worth noting that these provisions place the burden of promoting integration on the state, not the individual, which was an innovation, especially in cases involving those who would have more difficulty in fulling this expectation, such as foreigners with disabilities. Another original aspect is the declaration of intent to promote mutual understanding and coexistence between foreigners and citizens, but this has its limits, as seen in Art. 67 al. 1 letr. b: "The office [of migration control] can forbid the entry of a foreigner into Switzerland in the following cases: […] (b) He/she has incurred costs in social welfare" (L'Assemblée fédérale de la Confédération suisse

2008). It is here we see the concerns over the lack of economic self-efficiency or financial dependence upon social assistance by foreigners come back into the law, therefore indirectly stating 'preferred traits' of a foreigner, namely that they are economically self-sufficient and will not cause a 'burden to the state.' The phrases 'burden' and "incurring costs in social assistance" within this provision is suggestive in that it can exclusively apply to certain groups. This is the case for foreign nationals with disabilities, who are more likely to be receiving social assistance and welfare benefits because of institutional or economics-related prejudices; they are deemed not 'able-bodied' enough to earn a living. This approach reflects the neoliberal understanding of migration, which can reinforce ableist prejudices and contradict exemptions in the law. This tension between the concerns of the Swiss population and Switzerland's international obligations to protect human rights started to emerge and would grow over time.

Additionally, the introduction and emphasis on the concept of integration in the acquisition of citizenship can raise an institutional barrier for those who are not deemed able-bodied (Achermann/Gass 2003; Achermann et al. 2013; Wichmann 2013). This can be observed by examining the new provisions made to the SCA 1952, such as the removal of rejection safeguards stated in Art. 37 in the 1991 law, which only reappear in 2009 as Art. 15b al.1-2, with similar wording: "(i) Reasons must be given for any rejection of an application for naturalisation (ii) An application for naturalisation may not be rejected by the voters unless a proposal for rejection has been made with reasons" (L'Assemblée fédérale de la Confédération suisse 2009; Le Conseil fédéral suisse 2005; Secrétariat d'État aux migrations 2005). This is followed by an additional layer of protection under Article 15c al.1: "The cantons shall ensure that cantonal and communal naturalisation procedures do not infringe on the private sphere." Both provisions were introduced in 2009 to function as safeguards for candidates during the naturalisation process, in which decision-making bodies have discretionary power regarding how they evaluate candidates in relation to certain criteria, as dictated under Art. 14 letr (s). a-d:

> *Before the permit is granted, the applicant's suitability for naturalisation will be checked. In particular, it will be examined whether the applicant: (a) has integrated into the Swiss community, (b) has become accustomed to the Swiss way of life and customs (c) conforms to the Swiss legal system; and (d) does not compromise the internal or external security of Switzerland (Loi Sur La Nationalité, Modification 1992).*

This key provision had already appeared in 1991, and began the gradual process of legally outlining the concept of integration and what it means, as well as providing decision-making bodies with guidelines regarding what criteria individuals must meet during the naturalisation process (L'Assemblée fédérale de la Confédération suisse, 2009; Le Conseil fédéral suisse 2005; Secrétariat d'État aux migrations, 2005; Secrétariat d'ÉEtat aux migrations, 2007). These specific criteria would become the focal point of political tension, since the way in which 'integration,' was to be interpreted was still vague, especially when it came to examining foreigners with disabilities.

Exemptions and Caveats

The onset of the reforming of the RSFNA/ FNIA 2004 and the SCA 1952 also saw the beginning of an exemption regime when goals concerning integration and social cohesion were focused

on. However, we begin to see how, during this period, these policy goals came into conflict with the adoption of international treaties, such as the CRPD in 2014, and bilateral treaties (Secrétariat d'État aux migrations 2011). One such contentious policy area was that of integration and its interpretation, as mentioned before. It is thus in this period that there were clarifications of what 'integration' means, and the expectations attached to it, as this concept is found in the law on nationality and in those regulating immigration. In tandem with these policy shifts, numerous changes were made to these bodies of law during this period. These changes were partly tied to the referendums or popular initiatives that politicised these policy areas.[18] All of these initiatives placed more pressure on institutions to find a balance between human rights principles via exemptions and the maintenance of security from unwanted migration, which is reflected in the new 2014 Citizenship Law (SCA 2014) and the revisions of the FNIA 2004 and its eventual evolution into the Law on the Integration of Foreigners (FNIA 2005) and its ordinances. In the case of both the FNIA 2005 and the SCA 2014, previous 'conditions' of integration were alluded to as underlying expectations, but they were not written into the law as formal requirements. This was an attempt to harmonise the national laws, which manifested itself in certain formalised expectations in the shape of specific legal requirements that were accepted at both cantonal and federal levels.

The purpose of the FNIA 2005 was to achieve 'social cohesion' via the integration of foreigners; a legal definition of integration was refined and clarified via specific criteria. These criteria are listed in Art. 58a al. 1 letr (s). a-c: "1. To assess integration, the competent authority shall take into account the following criteria: (a) Respect for security and public order; (b) respect for the values of the Constitution; (c) language skills; (d) participation in economic life or the acquisition of training" (Secrétariat d'État aux migrations, 2018). The element of economic sustainability has become an area of contention, particularly how it can indirectly and negatively discriminate against foreigners with disabilities. However, two key exemptions can be made on the basis of disability, as seen in Article 49a al.2:

> *Exception to the requirement to prove language skills: […] (2) Major reasons include a disability, illness, or other incapacity that severely impairs the ability to learn a language", and in Article 58a al.2, "The situation of people who, due to a disability or illness or for other major personal reasons, do not meet or hardly meet the integration criteria provided for in al. 1, let. c and d, is taken into account appropriately. (Secrétariat d'État aux migrations 2018)*

Both provisions outline the scope of disability-based exemptions where it is acceptable. An additional body of evidence can be found in the law's ordinance, more specifically in Article 8 para 2. of the Ordinances on the Application of the Law on Foreigners (FNIntO), which reiterates the need for reasonable accommodation:

> *Exemptions for immigrants with special integration needs: […] 2. For persons with special integration needs, the cantons shall provide for appropriate*

[18]Such as The Expulsion of Foreigners (2010), Against Mass Immigration campaigns (2010& 2014), and the more recent Self Determination Initiative (2018)

> *integration measures within the regular structures or within the framework of specific integration promotion. (Le Conseil fédéral suisse, 2019)*

However, such exemptions are difficult to implement, because other provisions within the same law indirectly undermine them. This is the case for the entry bans listed under Article, 67 al.2 letr. b: "2. The SEM may prohibit a foreigner from entering Switzerland when: […] (b) caused costs in terms of social assistance." This coincides with Art. 67 para 3: "The entry ban is imposed for a maximum period of five years. It may be pronounced for a longer period when the person concerned poses a serious threat to security and public order."
In addition, para 5 states:

> *For humanitarian or other important reasons, the authority responsible for the decision may exceptionally refrain from issuing an entry ban or temporarily or permanently suspend an entry ban. In doing so, the reasons for the entry ban and the protection of public security and order or the maintenance of Switzerland's internal and external security must be taken into account, and these must be weighed against the private interests of the person concerned in the decision to lift the ban. (Secrétariat d'État aux migrations 2011).*

Para 5 retains the possibility of indirect and positive discrimination given that the ban can be lifted on certain grounds which include humanitarian reasons but at the same time balancing state interests. This in contrast to the provisions in FNIA 2005 Article, 67 al.2 letr. b and Art. 67 para 3. Both of which equate "incurring costs in terms of social assistance" to "threats to the public order" which can be interpreted as indirect discrimination with this linkage.

In a way, this is a continuation of the provisions set by the FNIA 2004 linking direct discrimination to welfare dependency with the clause of Art. 67 al. 1 letr. b "He/she has incurred costs in social welfare." In sum, these provisions in the law show that although exemptions do exist, other provisions undermine them.

There are provisions that are aimed at granting exemptions. However, the same cannot be said for the 2014 Citizenship Law (SCA 2014) and its ordinance, the Ordinance on Nationality (SCO). The SCA 2014 provides a clear definition of what successful integration means and what criteria must be fulfilled to achieve it, as stated in Art. 12 al.1 letr (s). c – d:

> *Successful integration is manifested in particular by: […] (c) the ability to communicate in everyday life in a national language, both orally and in writing, (d) participation in economic life or the acquisition of an education.*

There is however an exemption from the requirement to meet these criteria on the basis of disability under Art. 12 al. 2:

> *Appropriate account must be taken of the situation of persons who, due to disability or illness or other significant personal circumstances, are unable or only able with difficulty to meet the criteria for integration set out in paragraph 1 letters c and d.*

A parallel exemption can be found in Art. 9 let. a-c of the SCO:

> *The competent authority shall take appropriate account of the particular situation of the applicant when assessing the criteria listed in Articles 6, 7 and 11, paragraph 1, and. b. Thus, it is possible to derogate from these criteria[…]. These criteria may be waived, for example, if the applicant cannot meet them or can only meet them with difficulty:(a) because of a physical, mental or psychological disability; (b) because of a serious or long-term illness (c) for other major personal reasons, such as: 1. major difficulties in learning, reading and writing, 2. poverty despite employment, 3. family care responsibilities, 4. dependence on social assistance resulting from a first formal education in Switzerland, provided that the dependence was not caused by the applicant's behaviour (Secrétariat d'État aux migrations 2016).*

Both provisions provide a clear and explicit exemption on the basis of disability in 2016. However, there is a potential caveat to both of these provisions that comes in the guise of 'local autonomy' that is noted in Art. 12 al.3: "The cantons may provide for other integration criteria" (L'Assemblée fédérale de la Confédération suisse, 2018). We begin to see, at least in the text of the law, an emerging exemption regime that mirrors the reasonable accommodation principle, which should be universally applied. On the other hand, this accommodation is conditional, due to the 'built-in' contradictions within the law, which have been put back into the law indirectly over time. This fragile balance between human rights via the existence of an exemption regime and the political pressures of Swiss direct democracy illustrate legal contradictions between a formalized exemption regime and their limitations. These results in a rich body of data which shows that reasonable accommodation is present but is conditional and only given when it is 'earned' by fulfilling specific criteria.

Conclusion

After examining the various versions of the Law on Foreigners and Citizenship, we could observe how the law has changed over time. More specifically, we analysed the text of the laws to see whether they have become more or less ableist over time and whether they directly or indirectly discriminate against foreigners with disabilities in a negative or positive manner. To that end, we investigated (i) the development of the various Swiss laws on foreigners and (ii) the laws on citizenship over time as they relate to foreigners with disabilities. Specifically, we combined the theories of Earned Citizenship and Critical Disability's conceptualisation of ableism and reasonable accommodation with the historical analysis of the law methodologies, which have never been used before to examine the overlaps between migration and disability.

Our main findings are as follows: (i) immigration and citizenship policies have placed and still place value on an individual's capacities to contribute to society, thus forming a capacity–contribution heuristic which lays out ableist power structures in text form that can be used by a variety of state actors (ii) the law from the very beginning in the case of the Law on Foreigners was directly ableist, but over time it has become indirectly ableist with the additions of specific integration criteria that place value on capacity and contribution, whilst at the same time it has developed an exemption regime with limited legal application; (iii) the opposite can be said

about the laws on citizenship, for although there was no explicit exemption regime in the original forms of the law, over time they developed indirectly ableist characteristics via the addition of integration criteria. However, in the more recent versions of the law we can also observe the emergence of an explicit exemptions regime, as well as the potential to cause inherent legal tensions between conflicting principles. In this context, the Swiss legal system is selectively applying international laws it has ratified within its monist legal system in including vulnerable populations: on the one hand, they offer reasonable accommodation for naturalisation (SCA 2014 Art.12 al.2), but the Swiss Constitution (Art.136 al.1) undermines these accommodations by excluding "persons without capacity" (Wyss 2024) thus reinforcing the contribution-capacity nexus (Ader 2023). In this way, Swiss political legitimacy is potentially undermined, as this selective implementation of international norms raises questions about its commitment to upholding human rights by applying the international conventions within national laws.

It is this aspect that should be examined further in future academic literature provided that it illustrates the possible difference between the text of the law and its practice. This study and its findings not only contribute to the literature of Critical Disability Studies and Citizenship, but also to those of Migration Studies and Legal Studies. It is imperative for future studies to not only continue to evaluate and monitor the implementation of the CRPD and its principles by nation states but also to continue to investigate and examine the legal rationale behind judicial decisions found in case law, particularly regarding how they apply to intersectional groups. Additionally, future research should also pay attention or highlight cantonal variations, given that it could provide a more comprehensive overview of the Swiss legal system and its inclusion of intersectional groups.

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Appendices

Appendix 1: Laws on Citizenship (1952-2021)

Law	Period	Provisions	Text of Provision
Federal Law on the Acquisition and Loss of Swiss Nationality of September 29, 1952 (SCA 1952)	1952–1991	Article 14 al. 2	The investigation must provide as complete a picture as possible of the applicant's personality and that of his or her family members.
	1952–1985	Article 37 al. 3	Decisions of the federal authorities refusing naturalisation or reintegration must be substantiated.
	1991–2013	Art. 14 letr (s). a, b, c, d	Before the permit is granted, the applicant's suitability for naturalisation will be checked. In particular, it will be examined whether the applicant: a) has integrated into the Swiss community, b) has become accustomed to the Swiss way of life and customs c) conforms to the Swiss legal system; and, d) does not compromise the internal or external security of Switzerland.
	2009–2013	Art. 15b al.1-2	1. Reasons must be given for any rejection of an application for naturalisation. 2. An application for naturalisation may not be rejected by the voters unless a proposal for rejection has been made with reasons.
	2009–2013	Art. 15c al. 1	"The cantons shall ensure that cantonal and communal naturalisation procedures do not infringe on the private sphere."
Swiss Nationality Act of June 20, 2014 (SCA 2014)	2016–current	Art. 12 al.1 letr (s). c & d	Successful integration is manifested in particular by: c) the ability to communicate in everyday life in a national language, both orally and in writing d) participation in economic life or the acquisition of an education
	2016–current	Art. 12 al. 2	2. Appropriate account must be taken of the situation of persons who, due to disability or illness or other significant personal circumstances, are unable or only able with difficulty to meet the criteria for integration set out in paragraph 1 letters c and d.
	2016–current	Art. 12 al. 3	"The cantons may provide for other integration criteria."
Ordinance on Nationality of June	2016–current	Art. 9 let. a-c	The competent authority shall take appropriate account of the particular situation of the applicant when assessing the criteria listed in Articles 6, 7 and 11,

17, 2016 (SCO)			paragraph 1, and. b. Thus, it is possible to derogate from these criteria in particular when the applicant b. These criteria may be waived, for example, if the applicant cannot meet them or can only meet them with difficulty: a) because of a physical, mental, or psychological disability. b) because of a serious or long-term illness c) for other major personal reasons, such as: 1. major difficulties in learning, reading, and writing, 2. poverty despite employment, 3. family care responsibilities, 4. dependence on social assistance resulting from a first formal education in Switzerland, provided that the dependence was not caused by the applicant's behaviour.

Appendix 2: Laws on Integration (1931-2021)

Law	Period	Provisions	Text of Provision
The Federal Law on the Residence and Settlement of Foreigners of 26 March 1931 (RSFNA)	1931–1948	Art 10 al.1 letr (s). b-c	1. A foreigner may only be expelled from Switzerland or a canton for the following reasons: b) if, as a result of mental illness, it compromises public order. c) if he, or a person to whose needs he is required to provide have already fallen or are certainly on the verge of to fall under the charge of public or private assistance.
	1948–2007	Art. 10 al. 1 letr (s).c-d	1. A foreigner may only be expelled from Switzerland or a canton on the following grounds: c) If, as a result of mental illness, he or she endangers public order. d) If he or she, or a person for whom he or she is responsible, is continuously and substantially dependent on public assistance.
	1948–2007	Art.10 al. 2	2. The expulsion provided for in article 1, letter c or d, may only be ordered if the return of the expelled to his country of origin is possible and can be reasonably required.
Law on Foreigners of 05 May 2004 (FNIA 2004)	2008–2019	Art. 53 al (s). 1-3	1. In the accomplishment of their tasks, the Confederation, the cantons and the municipalities should take into account the objectives of the integration of foreigners. 2. They create conditions conducive to equal opportunities and the participation of foreigners in public life. 3. In particular, they encourage language learning, professional promotion, and preventive health measures; they support the efforts made to promote mutual understanding between Swiss and foreign populations and to facilitate coexistence.
	2008–2018	*Art. 67 al. 1 letr. b	1. The office [of migration control] can forbid the entry of a foreigner into Switzerland in the following cases: b) He/she has incurred costs in social welfare
Federal Law on Foreigners and Integration of 16	2019–current	Art. 49a al.2	Exception to the requirement to prove language skills: 2. Major reasons include a disability, illness, or other incapacity that severely impairs the ability to learn a language.
	2019–current	Article 58a al (s).1-2	1. To assess integration, the competent authority shall take into account the following criteria:

December 2005 (FNIA 2005)			a) Respect for security and public order. b) respect for the values of the Constitution. c) language skills. d) participation in economic life or the acquisition of training. 2. The situation of people who, due to a disability or illness or for other major personal reasons, do not meet or hardly meet the integration criteria provided for in para. 1, let. c and d, is taken into account appropriately.
	2019–current	Art. 67 al.2 letr. b	2. The SEM may prohibit a foreigner from entering Switzerland when the latter: b) caused costs in terms of social assistance
	2019–current	Art. 67 al (s).3 & 5	3. The entry ban is imposed for a maximum period of five years. She may be pronounced for a longer period when the person concerned poses a serious threat to security and public order. 5. For humanitarian or other important reasons, the authority responsible for the decision may exceptionally refrain from issuing an entry ban or temporarily or permanently suspend an entry ban. In doing so, the reasons for the entry ban and the protection of public security and order or the maintenance of Switzerland's internal and external security must be taken into account, and these must be weighed against the private interests of the person concerned in the decision to lift the ban.
Ordinance on the Integration of Foreigners of August 15, 2018 (FNIntO)	2018–current	Article 8 al. 2	Exemptions for immigrant with special integration needs: 2. For persons with special integration needs, the cantons shall provide for appropriate integration measures within the regular structures or within the framework of specific integration promotion.