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# Report Preliminary Findings Workshop IEC on Administrative Detention

This is a documentation of the public preliminary findings workshop of the IEC on 18 January 2017. The English summaries presented in this document are translations of the original German or French texts.

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## Session C – Implications of Administrative Detention Procedures for the Decisions of Public Authorities

Panel moderator: Dr. Nadja Ramsauer and Dr. Sara Galle, IEC Research Coordinators

Comments: Prof. Dr. Lukas Gschwend, Member of the IEC

Comments and discussion report: Emmanuel Neuhaus

### Guest presentation

Dr. Tanja Rietmann, ICFG, University of Bern:

*Navigating between federal law, cantonal law and tradition: On administrative detention practices in the regional welfare context of the Canton of Grisons*

It was during a period where poverty had reached oppressive levels that the Canton of Grisons opened in 1840 one of the first forced labour facilities in Switzerland, the «Fürstenau Forced Labour Facility». In comparison with other cantons, the introduction of the new legal instrument of administrative detention took place very early in Grisons and the use of it was uncharted territory. It was viewed as a means of dealing with the severe poverty that had not only reduced large portions of the population to lives of destitution, but was also viewed by social reformers and the political class as a threat that could erode the very foundations of society and jeopardize social progress. Administrative detention in the Fürstenau facility – and, from 1855 on in the juvenile correctional labour facility «Realta» – was only one of a wide range of measures available to the police for dealing with the poor, all of which proceeded from the assumption that poverty was largely the result of leading a «dissolute» or «indolent» life, for which the poor themselves were to blame.

The presentation focuses on the ways in which the early cantonal laws on poverty created the structural foundations of the institutional and legal conditions on which compulsory welfare measures in the 20th century were based. The Swiss Civil Code (CC) widened the possibilities for ordering compulsory welfare measures throughout all of Switzerland, beginning in 1912; in the Canton of Grisons, a new Welfare Law, adopted in 1920, allowed the administrative detention of «drunks», the «dissolute» and «vagrants». Up to well into the

second half of the 20th century, it was primarily members of the lower social classes that the public authorities had in their sights. The example of Grisons shows how the number of laws in this area multiplied and the possibilities for administrative intervention were extended. At the same time, the guardianship authorities that were responsible for ordering such measures were often overwhelmed by the task, the scope of which had been significantly expanded. Experts criticised the insufficient statements of grounds in decisions depriving people of legal capacity, the denial of due legal process, and the protracted delays in administrative detention proceedings. The guardianship authority had traditionally been staffed by officials serving on a voluntary basis, and the Canton of Grisons was slow in taking steps to provide them with professional training and greater financial resources. Although the improvements that eventually were made did theoretically offer administrative detainees increased legal certainty, the actual practice of the various local authorities continued to be marked by large differences.

The presentation is based on the findings of a study on the use of compulsory welfare measures in Grisons, commissioned by the Canton of Grisons. The study will be published in the spring of 2017.

## IEC presentation

Flavia Grossmann, IEC researcher:

*The roads to detention are many. Procedures, categorisation and the logic of administrative detention in the Canton of Schwyz*

«Your legal guardian has filed an application for your detention in the Kaltbach facility. What do you have to say about that? *I don't think it's right for me to be put in detention in the Kaltbach facility, I haven't committed any crime. Even if people say it's not a prison, that's what it is. I haven't committed any crime that I should deserve to be put in that prison*» (Extract from the transcript of a hearing with Anna B. at the District Office of Schwyz, 20 July 1966: StASZ Akten 3/14\_861/170 RRB 2338). The central focus of this presentation was on the administrative detention of Anna B. in Kaltbach, in 1966, in the Canton of Schwyz. Following a brief introduction on research area C, which is concerned with the practical implementation of the regulations on administrative detention as an element in the evolution of the modern welfare state between 1935 and 1981, a chart illustrating the wide array of

actors involved in the procedures was presented. Those included not only public officials and the detainees themselves, but also private and church institutions, and other people connected with the procedure – such as relatives or neighbours, for example, who may have filed a complaint with the authorities. In addition to the Swiss Civil Code, there were two other laws and ordinances governing the procedure, which played a central role in the Canton of Schwyz between 1935 and 1970: the police ordinance supplementing the Poor Laws of 1882 and the Act on the Establishment of the Kaltbach Forced Labour Facility of 1896, under which Anna B. was placed in detention in Kaltbach.

The following statements focused on the said law analysing its terms and the categories of people it affected. In this way it was possible to demonstrate that the Act on Forced Labour Facilities created a large number of categories of people (such as minors who «stubbornly resist» the authority of their parents or the supervisory authorities, or persons who are «perpetually disposed to indolence, drunkenness or to some other dissolute way of live» and are consequently unemployed or dependent on assistance) and that the legal terminology was assimilated into the language used in actual practice to justify the ordering of administrative detention. Often it is not clear from the text of the decisions whether it was, for example, «drunkenness» or a «dissolute way of life» that was the decisive factor that led to the administrative detention order. In such cases it may be surmised that the individual in question was the object of a more generalised stigmatisation. A second finding was that in the case of the Canton of Schwyz's Act on Forced Labour Facilities priority had been given to the factors of usefulness and physical productivity. In this sense, it is entirely possible that administrative detention could also take on the aspect of a criminal punishment.

## Comments

In commenting on the presentation, Prof. Dr. Lukas Gschwend points out that administrative autonomy even of a limited scope can have negative consequences for the practical implementation of laws. The purpose of the juvenile correctional labour facility Realta is very reminiscent of older conceptions of forced labour as a means of education. The question arises, he notes, as to whether profit motives also played a role for the authorities. Gschwend further calls attention to the mixed use of Realta as both a prison facility and as a correctional labour facility. This, he suggests, is one of the biggest problems connected with the use of administrative detention, since it undermines the claim that it was purely a welfare

measure. The appeals process, he maintains, was complex even for legal experts. Gschwend finds it surprising that many appeals were granted by the canton's Government Council, in its capacity as supervisory authority.

Speaking of Grosmann's presentation, Gschwend stresses the importance of case files as sources, which must be analysed critically, as it is possible to construe stigmatisations and imputations out of them. Notable in Schwyz, he points out, is the fact that the ordering of forced labour was permitted as early as at the age of 16, which would appear to be questionable in terms of the use of such measures for ostensibly welfare purposes. The proceedings, he recalls, were carried out without any involvement of the courts. The reference to the need for «strict discipline» is indeed one of the arguments that were invoked in the 19th century to justify criminal laws.

Finally, Gschwend proposes various hypotheses, here listed in abbreviated form:

1. As a result of the global financial crisis and the Second World War, considerations of law and order were given higher priority.
2. Personal liberty was not specifically mentioned in the Federal Constitution of 1874 and was long considered, and with great reluctance, as an unwritten constitutional right.
3. Despite the fact that as early as 1950, with the adoption of the European Convention on Human Rights (ECHR), the use of administrative detention was considered in legal circles as being problematic from a human rights point of view, there was almost no awareness of the problem in political circles.
4. The use made of institutions that were designed for purposes of penal correction constitutes a departure from the opinions of contemporary legal experts, which can be explained only by economic considerations.
5. The question of administrative procedures was largely neglected by legislators in Switzerland until well into the 1960s and the legal protection offered by the administrative laws of the cantons was inadequate.
6. The cognisance of the Federal Supreme Court was limited. Because of this, review of the facts of the case was not permitted in constitutional appeals.
7. The absence of legal provisions on free legal assistance and the costs of seeking legal counsel constituted a major barrier for the individuals concerned and thus imposed severe limits on the legal protection available in cases of administrative detention.
8. Because of the shortcomings in the applicable legislation, social welfare authorities had a tendency to prefer the use of administrative detention over other possible measures.

9. In terms of procedural law, it was particularly problematic that denunciations and witness statements often came from people who had a conflict of interests.

10. Until well into the 1960s, administrative law was still far removed from today's understanding of what is to be considered proportionate in the restriction of constitutional rights, in particular in the weighing of private and public interests.

## Discussion

A member of the public asks for the floor. She says that all of this could have been prevented if the government had listened to Carl Albert Loosli or other detainees. The wilful attitude of the authorities, she claims, has not been given enough attention in the presentations. The federal government failed to exercise control over the cantonal and municipal governments, and the victims have to live with their suffering to the end of their lives. In her opinion, we owe it to coming generations to make sure this doesn't happen again. Another participant joins the discussion. She says that in 1936 Switzerland aligned with the German National Socialists with regards to the education of minors, which led to the establishment of a brutal system of education in Switzerland. In her view, Switzerland should be brought before the Human Rights Court.

A third participant adds that, as a teacher, she was disappointed that presentations did not include the children's voices. Today, she notes, even in divorce cases, the children are heard, which did not use to be the case. This was something she saw regularly in her profession. It is important, she concludes, that the children be given a voice. Sara Galle responds to these remarks by pointing out that it is difficult to hear the voice of the children when studying the written records. The IEC, she explains, is researching the subject from different perspectives using various approaches. She notes that in the interviews the victims were also heard, but that the IEC must also consider the point of view of the authorities.

Another participant points out that the government had very large financial interests. Tanja Rietmann responds that the government was very authoritarian and patriarchal. An important element of that attitude was that it had full authority to do as it pleased with the children, so that there was no reason to consult them. This was one reason that a disproportionate number of children born out of wedlock suffered. Another participant draws attention to the role of the schools. She claims that the schools were responsible for the «primary stigmatisation». Source studies, she notes, have since investigated more thoroughly the role of the educational establishment, teachers, etc., and have revealed many blind spots. The records only rarely include any references to diagnoses or character reports submitted by

schools. Another member of the public asks whether administrative detention was used mainly for people from the lower social strata. He is told that in the 19th century it was primarily poor families that were touched by such measures. Rich children were normally packed off to schools abroad. It also depended very much on which region the family lived in. Flavia Grossmann points out in this connection that there are also other research projects working on the subject, such as, for example, the Sinergia Project on children who were separated from their families, «Placing Children in Care».

Another member of the public takes the floor and talks about her experiences. She pointed out that she had been detained in Kalchrain and never had a chance to make her complaints known. Whenever she wrote to her guardian, she says, her letters were opened. She was then given a harsh beating and put in solitary confinement, she recalls, saying that this also ruined her health. Sara Galle responds that the remark that complaints were never delivered is an important point for the IEC's research. Another participant tells about her experience with a psychiatrist. She had thought that she could tell him the truth. But he had immediately reported what she told him so that she had to suffer another beating.

Another participant criticises the fact that some of the terminology used in the presentations was very outdated. The remarks of another member of the public stress the importance for Research Area C of taking into account the fact that the rights that were officially available to administrative detainees (right to be heard, etc.), insofar as they were even formally recognized, could not in practice be exercised in most cases (censorship; pressure from the authorities; punishment when such rights were asserted). It was absolutely essential, the speaker argued, that this be studied in detail; to fail to do so would lead to a distortion of the truth. The mere fact that certain rights were provided for in writing was not by any means a guarantee that it would be possible to exercise them. The last person to take the floor told about the difficulties she encountered in trying to gain access to her case file and about the terrible experiences she went through in detention facilities. She expressed her hope that something will finally be done about the injustice that was inflicted on her and other administrative detainees.