

Course:

At the heart of the state? Anthropological approaches to detention, containment and imprisonment

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Essay:

The good and the bad asylum seeker

“Renitenz” as a new category in the Swiss migration regime

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1. Introduction

SR 142.31 Asylgesetz (AsylG), Änderung vom 25. September 2015

Artikel 26 Empfangs- und Verfahrenszentren, Vorbereitungsphase

1 Der Bund errichtet Empfangs- und Verfahrenszentren, die vom SEM geführt werden.

1bis Das SEM kann Asylsuchende, die die öffentliche Sicherheit und Ordnung gefährden oder die durch ihr Verhalten den ordentlichen Betrieb der Empfangs- und Verfahrenszentren erheblich stören, in besonderen Zentren unterbringen, die durch das SEM oder durch kantonale Behörden errichtet und geführt werden. In diesen Zentren können unter den gleichen Voraussetzungen Asylsuchende untergebracht werden, die einem Kanton zugewiesen wurden. Bund und Kantone beteiligen sich im Umfang der Nutzung anteilmässig an den Kosten der Zentren.

1ter In Zentren nach Absatz 1bis können die gleichen Verfahren durchgeführt werden wie in den Empfangs- und Verfahrenszentren; ausgenommen ist die Einreichung eines Asylgesuchs.¹

This legal text, taken from the current Swiss asylum law, seals the legal ground for the entry of a new category into the Swiss migration regime. The term used for this category is “renitente Asylsuchende”, which can be translated as “refractory” or “defiant asylum seekers”. The “special centres” (“besondere Zentren”), which “defiant” asylum seekers according to new law should be placed into are currently in the planning process. Nevertheless, the discursive figure of the defiant asylum seeker has been floating around in politics, media articles and the minds of the population for several years now. Therefore, the planning of “special centres” and the rise of the figure of the “defiant” already have an impact on the public perception of asylum seekers.²

Given the hypothetical nature of the centres, no anthropological text has yet been written about this new institution. Even the more important it seems, to examine from a theoretical anthropological perspective, what logics the rise of this phenomenon is embedded into.

¹ For the entire current Swiss asylum law, see <https://www.admin.ch/opc/de/classified-compilation/19995092/201610010000/142.31.pdf>

² E. g. through a vote campaign in 2013 for a referendum against an “urgent” amendment of asylum law. For further information on the campaign, see <http://www.asyl.ch/darum-gehts/lager/>

This essay seeks to understand the underpinning modes of governmentality of such new centres. What logics give rise to the idea of “special centres”? And what are the effects of the creation of this new political and legal category of people?

I argue in this essay, that these centres are embedded into a specific mode of governmentality that Didier Bigo (2007) calls the Banopticon. I will further try to grasp the specifics of the future special centres and analyze the implications and effects they will have in terms of state power.

2.1 Political and Historical Background

To understand what phenomenon we have to deal with, I will first explain the evolution of the special centres.

The idea of special centres originates from the Canton of Ticino in the year 2012, where a “Standesinitiative” (cantonal initiative) was initiated which asked for special centres.³ This demand was simultaneous with the demand for so called “Bundeszentren”, where all asylum seekers should be housed and their cases processed. The argument for the initiation of such new centres was, that asylum seekers from Maghrebian states would trouble the orderly running of centres with their “defiant” behaviour. Therefore, they should be separated from the “well behaving” and cooperating asylum seekers and their freedom of movement should be limited.

The cantonal initiative was rejected. Instead, its claims were integrated into an urgent amendment of asylum law. This amendment contained the start of a test-phase for “Bundeszentren”, as well as the possibility to build special centres for defiant asylum seekers.

³ For a political chronology of the initiative, see <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20120305>

These changes were contested by a referendum and approved by the voters on the 9th of June 2013.⁴ The test-phase of the “urgent” amendment of asylum law was further developed into a compromising amendment of asylum law, which was put to vote and again was affirmed on the 5th of July 2016. The cited article 26 of the asylum law now definitely sets the legal ground for the introduction of special centres for “defiant” asylum seekers into the Swiss migration regime. In November of 2016 the SEM (Staatssekretariat für Migration) announced the location of the first special centre, which will be opened in Les Verrières in the Canton of Neuchâtel. The SEM announced that there are two centres planned: One in the German-speaking part of Switzerland and the other in the French-speaking part. The location of the centre in the German-speaking part, as well as the opening date of these centres are not yet defined.⁵

Important to note is that the demand for special centres was first made not the by the administration, but by cantonal politics. Also important to note is, that the canton of Ticino is in the special position of being the canton where most asylum seekers enter the border to Switzerland. Populist right-wing parties and their political claims seem to have a high acceptance in Ticino.

2.2. Organisation of the Centres and Juridical Peculiarities

The specific organisation of the special centres is not clear yet. The SEM explains in the last media release that asylum law asks for an *enclosure* of the asylum seekers *into* a certain terri-

⁴ For a political chronology of the “urgent” amendment of asylum law, see <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20100052>

⁵ For the media release, see <https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-080.html>

tory, or an *exclusion from* certain territory (Ein- oder Ausgrenzung). However, the special centres are not closed institutions.⁶ The fact that they are not closed institutions is less due to ethic considerations by politicians, than to legal restrictions. By law, imprisonment into a closed institution (“Freiheitsentzug”) is conditioned by a judicial decision. However, limitation of freedom (“Freiheitsbeschränkung”) is much easier for the state to assert and does not need a judicial inquiry.⁷ The question that the state is confronted with is therefore: What counts “only” as limitation of freedom (“Freiheitsbeschränkung”) and what counts as imprisonment (“Freiheitsentzug”)? To find out how far the state can go in the limitation of the freedom of movement without getting into conflict with the European Convention on Human Rights, the SKMR (Schweizerisches Kompetenzzentrum für Menschenrechte), which is a human rights research-institution on behalf of the administration, is currently conducting research.⁸

2.3. The Banopticon and Special Centres for Defiant Asylum Seekers

Let us now turn to the analytical part of this Essay. What do these centres have to do with state power and governmentality?

The special centres did not appear out of nowhere. Rather, they are embedded into a politic of a continuous toughening of the living conditions of asylum seekers in Switzerland. Asylum law is one of the most changed branches of law in Switzerland. The amendments it has

⁶ „Gemäss dem revidierten Asylgesetz sieht die Unterbringung in einem besonderen Zentrum eine Ein- oder Ausgrenzung vor, die besonderen Zentren sind jedoch keine geschlossenen Anlagen.“ SEM, 8.11.2016 <https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-080.html>

⁷ For more details, see <http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/index.html>

⁸ For more details on the research project, see <http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/teilprojekt1/teilprojekt1.html>

seen over the last decades were all in a restrictive manner, with only the most recent one also including some eventual improvement in favour of asylum seekers.⁹

In his article “Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon” Didier Bigo (2007: 3, 6) argues that the predominant mode of governmentality of western European Societies might be the banopticon rather than Michel Foucaults panopticon. What the prison is for Foucaults panopticon, the detention camp for foreigners is for the banopticon of Bigo (2007: 4). The banopticon is a dispositif which “[...]concentrates and articulates heterogeneous lines of power diffracted into society” (Bigo 2007: 3). Consequently, the dispositif is not limited to detention camps for foreigners. Much more, detention camps are only the most visible part of the ban, the tip of an iceberg whose biggest part is not recognizable on first sight (see Bigo 2007: 27). According to Bigo, the governmentality of the ban does not even necessitate locatable closed spaces, but is present and influential across open and closed spaces (Bigo 2007: 25). Given these definitions of the banopticon, it seems clear that special centres for “defiant” asylum seekers can be analysed as embedded into the logic of the ban. In Switzerland, the most pure form of the ban can be found in the institution of the “Ausschaffungsgefängnis” (deportation prisons or administrative prisons). These few prisons are built especially for foreigners who, according to the Swiss administration, are obliged to leave the country. The state is able to imprison foreigners there or in other prisons up to 18 months until they are deported.¹⁰ The airport prisons in Switzerland are an equally pure form of the ban.

⁹ At least, this was an argument of left-wing parties and NGO’s which argued in favour of the amendment. The implementation of the amendment will show whether the changes actually are an improvement for asylum seekers. For details about the latest amendment and the vote from the perspective of the state administration, see <https://www.admin.ch/gov/de/start/dokumentation/abstimmungen/20160605/Aenderung-des-Asylgesetzes.html>

¹⁰ For further details, see <https://www.sem.admin.ch/dam/data/sem/asyl/verfahren/hb/g/hb-g5-d.pdf>

The new special centres will fit into the logic of the ban in a way almost as clear as the deportation prisons and the airport prisons. Most obvious is the fact that the special centres are institutions that will try to be as close to the workings of a prison as possible, while at the same time not being recognizable from the public and courts as prisons. A further point is that the requests for asylum in these centres will be treated prior to the requests in the “normal” centres.¹¹ The underlying intention is that people detained in the special centres can be expelled as fast as possible.¹²

Theoretically speaking, the special centres will be situated between deportation prisons/airport prisons and the “normal” camps for asylum seekers (“Bundeszentren”). Whereas the deportation prison’s and the airport-prison’s goal is clearly the quickest possible deportation of foreigners, the normal “Bundeszentren” act as a sort of waiting zone of a gateway with a restrictive entry-policy. The special centres however are segregated waiting zones for those who are seen as not even worthy to wait in the normal waiting zone. Therefore, they have to be put into a separate waiting zone and after the administration has decided about their request be deported faster than anyone else.

Now the question is: What is this for? What are the benefits of a segregated waiting zone for the administration and what are its effects on the dispositif of the banopticon?

On one hand, the creation of the category of the defiant asylum seekers fits neatly into what Bigo calls *management of unease* (see Bigo 2007: 21). Through the creation of a new category of people and of new special centres, there is a whole new complex of people, texts and buildings occupied with creating defiant asylum seekers. This is exactly a part of what Bigo

¹¹ For the media release of the SEM, see <https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-080.html>

¹² “What is important to understand is the dialectical movement between the speed with which the detainees are sent back and the desire to deter them from attempting reentry, which is sometimes correlated with punishment and arbitrary conditions of detention.” (Bigo 2007: 23)

(2007: 21) describes as a “continuum of insecurity created by processes of (in)securitization, of fear, and of unease by management professionals.” Through the whole process of the realization of these centres, through political discussions, referendums, media coverage and finally the building of these centres, the figure of the defiant asylum seeker enters the minds and therefore the perceptions of people. The “idea of an insecurity continuum between criminality and illegality, between illegality and foreignness” (Bigo 2007: 25) has a long history not only in Switzerland. What is new with the creation of the “defiant asylum seeker” is that there are new legal grounds implemented, which allow the state to define behavior which must be punished by the ban if conducted by foreigners, but for which no sanction exists if conducted by Swiss citizens. Thus, the criminalization of these asylum seekers is not only taking place in a discursive manner, but in a very real and materialized way. If the foreseen enclosure or exclusion from certain territory is not complied by the detained, it will have penal consequences. This means that the people concerned can become criminals only by entering certain public spaces. The boundary between being under administrative law and being under penal law now becomes very thin (or thinner than it already is)¹³ for people detained in special centres. We might interpret this move of the law as an attempt to prove to the public, the administration and the lawyers, that the defiant “would be criminals” turn out to be “real criminals”. The “de-judicialization of punishment” Bigo (2007: 4) observes, takes another turn at this point. By a clever exhaustion of the possibilities the state has, these asylum seekers finally *are* put under penal law, which again proves that they *are* criminals.

What seems to be an interesting question is whether the criminalization of the “defiant asylum seeker” (without having committed any crime) fuels a further criminalization of *all* asylum

¹³ Remark: given the diverse forms of institutionalised racism foreigners are confronted with

seekers, thus also the ones detained in the “Bundeszentren”. On the one hand, it seems clear that the creation of the defiant asylum seeker will make all asylum seekers to potentially defiant ones. Therefore, creating a so-far inexistent category of people and measuring the conduct of foreigners and Swiss citizens by different standards surely does encourage a public belief in an insecurity continuum between criminality and foreignness (see Bigo 2007: 21). To strengthen this public perception of foreigners was also clearly the goal of many right-wing promoters of the idea of special centres.¹⁴ On the other hand, I think it would be too short-sighted to see the new centres as only another stage of an ever-increasing criminalization of foreigners. Rather, we should also look at other effects of this new institution. The argument in favour of special centres of many politicians, administrative secretaries and other personnel in the migration business is of an interesting nature: They state that the minority of the defiant asylum seekers disturb not only the orderly running of the centres, but also the majority of “the good asylum seekers” and the public perception of all asylum seekers.¹⁵ According to them, the segregation of the defiant from the good-behaving asylum seekers would even be in favour of the majority of asylum seekers. What speaks out of interviews with representatives of this argument is the idea that special centres will strengthen the acceptance of “normal” centres in the population. They use their approval of special centres to emphasize the good behaviour of the majority of asylum seekers, and therefore as a mean to gain acceptance for and legitimize the “Bundeszentren”. While it is the general dangerousness of immigrants that makes special centres necessary for the right-wing parties, it is the necessity to separate

¹⁴ Many of the promoters and supporters of the idea stem from the Swiss right-wing populist party SVP. For an example of a position paper on the topic of foreigners and criminality of this party, see <http://www.svp.ch/tasks/render/file/?method=inline&fileID=45A96057-16E1-4D68-B5D6E2F2BB38FDED>

¹⁵ See diverse interviews with the state secretary of the SEM, Mario Gattiker. Example: <http://www.aargauerzeitung.ch/aargau/bfm-chef-gattiker-der-kanton-aargau-hat-uns-bettwil-angeboten-117169665>

the bad from the good asylum seeker for the political centre, economic-liberals and the administration.

How can we now grasp the special centres in terms of governmentality? As already developed earlier, special centres fit very well into the logic of Bigos banopticon. The special centres *are* the ban. An important part that distinguishes the banopticon from the panopticon is its goal. As Bigo (2007: 23) puts it, “The aim of the centres is not to jail persons to correct behaviour or to defend society against them. The purpose is not disciplinary, even if in some countries the two ideas (discipline and removal) are merged and work together upon the same populations and in the same sites.” Even though the purpose of the special centres does not seem disciplinary to me (once someone is detained in a special centre, there doesn’t seem to be any possibility for him/her to leave), it definitely does have disciplinary effects on the body of *all* asylum seekers. It seems very probable to me, that the threat of being put into a special centre, will act as a sword of Damocles, floating over the daily routine of the Bundeszentren. This threat might serve the personnel of the Bundeszentren as a disciplinary tool, used to govern the accommodated asylum seekers. This tool will be flexibly applicable, since the criteria for an adjudgement to a special centre are held very vague.¹⁶ In a further sense, the separation

¹⁶ See Art. 16b1 Zuweisung in ein besonderes Zentrum, <https://www.admin.ch/opc/de/classified-compilation/19994776/index.html>

Text:

(Art. 26 Abs. 1bis und 1ter AsylG)

1 Das SEM kann eine asylsuchende Person, die sich in einem Empfangs- und Verfahrenszentrum befindet und die öffentliche Sicherheit und Ordnung gefährdet oder durch ihr Verhalten den ordentlichen Betrieb des Empfangs- und Verfahrenszentrums erheblich stört, einem besonderen Zentrum zuweisen. Es berücksichtigt dabei den Grundsatz der Einheit der Familie.

2 Eine Gefährdung der öffentlichen Sicherheit und Ordnung liegt vor, wenn konkrete Anhaltspunkte dafür bestehen, dass das Verhalten der asylsuchenden Person mit erheblicher Wahrscheinlichkeit zu einem Verstoß gegen die öffentliche Sicherheit und Ordnung führt.

3 Eine erhebliche Störung des Betriebs eines Empfangs- und Verfahrenszentrums liegt insbesondere vor, wenn die asylsuchende Person:

a. die Hausordnung des Empfangs- und Verfahrenszentrums grob verletzt, insbesondere weil sie Waffen oder Betäubungsmittel besitzt oder aufbewahrt, oder ein Ausgangsverbot wiederholt missachtet;

of the bad from the good asylum seeker seems to have disciplinary implications in terms of bonds of solidarity, both among asylum seekers and among asylum seekers and Swiss citizens. If you have to prove your membership to the “good ones”, you better renounce the “bad ones”. So far, this already showed up for politicians and high administrative personnel.¹⁷ If this effect will be seen as well between civilians and asylum seekers and among asylum seekers can only be found out after the special centres are realised. Since “Othering” is a known social phenomenon, it seems very probable that this mechanism will take place in this case as well.

3. Conclusion

What results out of these considerations? Special centres and the general new politics of “Bundeszentren” in Switzerland clearly work in the ways of the banopticon Bigo (2007) describes. However, I am convinced that the ban of the special centres does have a disciplinary side as well. Against Bigo's belief that the purpose of camps is not disciplinary, I don't think that the disciplinary side of special centres (even if this side doesn't show *inside* the special centres) is a mere accidental side-effect. Much more, I would argue that the governmentalities of the banopticon and the panopticon work together in the Swiss migration regime. Beyond

b. sich den Verhaltensanweisungen des Leiters oder der Leiterin des Empfangs- und Verfahrenszentrums oder der Stellvertretung widersetzt und dadurch insbesondere das Personal oder andere Asylsuchende wiederholt belästigt, bedroht oder gefährdet; oder

c. wiederholt den ordentlichen Betrieb des Empfangs- und Verfahrenszentrums behindert, insbesondere durch die Verweigerung von Hausarbeiten oder die Missachtung der Nachtruhe.

4 Das SEM informiert die für die Anordnung einer Ein- oder Ausgrenzung nach Artikel 74 AuG2 zuständige kantonale Behörde unverzüglich über die Gründe der Zuweisung in ein besonderes Zentrum.³

5 Das SEM ist verpflichtet, der zuständigen kantonalen Behörde unverzüglich mitzuteilen, wenn nach seiner Auffassung die Voraussetzungen für die Anordnung einer Ein- oder Ausgrenzung nach Artikel 74 AuG erfüllt sein könnten.

6 Der Entscheid über die Zuweisung in ein besonderes Zentrum kann nur durch Beschwerde gegen die Endverfügung angefochten werden.

¹⁷ For example state secretary of the SEM Mario Gattikers, see <https://www.sem.admin.ch/sem/de/home/aktuell/reden-interviews/2012/2012-03-09.html>

special centres, the expulsion of “criminal foreigners” in new Swiss foreigner law or racial profiling clearly do have a strong disciplinary component along with following the logic of the ban. It seems important to me to further examine the interplay of the governmentalities of the banopticon and the panopticon rather than trying to refuse one for the other.

What effects the special centres will have on the lives of people can only be said after they are implemented and running. Anthropological work on this, but also on the general politics of camps in Switzerland, seems very important to me. Even more, since currently a big reform is taking place and all asylum seekers will soon be housed in centrally organised “Bundeszentren”.

As Agamben (1998: 99) puts it: “The camp as dislocating localization is the hidden matrix of the politics in which we are still living, and it is this structure of the camp that we must learn to recognize in all its metamorphoses into the zones d’attentes of our airports and certain outskirts of our cities.”. We should not take camps as natural as politics have made them.

Literature

Scientific:

Agamben, Giorgio. 1998. "Homo Sacer: Sovereign Power and Bare Life." Stanford: Stanford University Press.

Bigo, Didier. 2007. "Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon." In *Borderscapes : Hidden Geographies and Politics at Territory's Edge*, edited by Prem Kumar Rajaram and Carl Grundy-Warr, 3–33. Minneapolis: University of Minnesota Press.

Other resources:

Aargauer Zeitung: Interview mit BFM-Chef Gattiker, 04.02.2012 <http://www.aargauerzeitung.ch/aargau/bfm-chef-gattiker-der-kanton-aargau-hat-uns-bettwil-angeboten-117169665> [15.01.2017]

Asylgesetz (AsylG), 1.10.2016 <https://www.admin.ch/opc/de/classified-compilation/19995092/201610010000/142.31.pdf> [15.01.2017]

Curia Vista: Geschäft 10.052 <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20100052> [15.01.2017]

Curia Vista: Geschäft 12.305 <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20120305> [15.01.2017]

Das Portal der Schweizer Regierung: Änderung des Asylgesetzes <https://www.admin.ch/gov/de/start/dokumentation/abstimmungen/20160605/Aenderung-des-Asylgesetzes.html> [15.01.2017]

Das Portal der Schweizer Regierung: Asylverordnung 1 über Verfahrensfragen, 29.09.2015 <https://www.admin.ch/opc/de/classified-compilation/19994776/index.html> [15.01.2017]

Komitee Nein zur Asylgesetzrevision vom 9. Juni: Lager für „Renitente“ <http://www.asyl.ch/darum-gehts/lager/> [15.01.2017]

Staatssekretariat für Migration SEM: Die Zwangsmassnahmen im Ausländerrecht, 01.05.2015 <https://www.sem.admin.ch/dam/data/sem/asyl/verfahren/hb/g/hb-g5-d.pdf> [15.01.2017]

Staatssekretariat für Migration SEM: Interview Tageswoche, 09.03.2012

<https://www.sem.admin.ch/sem/de/home/aktuell/reden-interviews/2012/2012-03-09.html>

[15.01.2017]

Staatssekretariat für Migration SEM: Medienmitteilung besonderes Bundeszentrum,

08.11.2016 [https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-](https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-080.html)

[080.html](https://www.sem.admin.ch/sem/de/home/aktuell/news/2016/2016-11-080.html) [15.01.2017]

SVP: Positionspapier zur Asyl- und Ausländerpolitik, 03.2006

[http://www.svp.ch/tasks/render/file/?method=inline&fileID=45A96057-16E1-4D68-](http://www.svp.ch/tasks/render/file/?method=inline&fileID=45A96057-16E1-4D68-B5D6E2F2BB38FDED)

[B5D6E2F2BB38FDED](http://www.svp.ch/tasks/render/file/?method=inline&fileID=45A96057-16E1-4D68-B5D6E2F2BB38FDED) [15.01.2017]

Schweizerisches Kompetenzzentrum für Menschenrechte SKMR: Schwerpunkt Freiheitsbeschränkung und Freiheitsentzug <http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/index.html>

[15.01.2017]

Schweizerisches Kompetenzzentrum für Menschenrechte SKMR: Teilprojekt Freiheitsbeschränkende Massnahmen bei ausländischen Staatsangehörigen

[http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/teilprojekt1/teilpro-](http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/teilprojekt1/teilprojekt1.html)

[jekt1.html](http://www.skmr.ch/de/schwerpunkte/freiheitsbeschaenkungen/teilprojekt1/teilprojekt1.html) [15.01.2017]