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## **Head of State of Exception.**

### **Federal German chancellor Helmut Schmidt and the supralegal crisis management during the 1970s**

#### *Abstract:*

*During the escalation of the “German Autumn” in 1977 the Federal German government resorted to a specific form of crisis management that had been described as an undeclared state of exception. It was Federal chancellor Helmut Schmidt in the first place who oversaw the anti-terrorist measures in the situation room where the executive branch ruled for six weeks beyond any parliamentary control.*

*This article examines the role that Helmut Schmidt had played for the creation of a “subjective state of exception” (Julius Hatschek) and how this could be seen as stemming from Schmidt’s earlier experiences and handling of crisis situations dating back to the 1960s. In this regard it has to be asked with Giorgio Agamben, if in the West German case, the state of exception had become the rule.*

*Im Laufe der Eskalation während des “Deutschen Herbstes” 1977 griff die Bundesregierung mit der Einrichtung zweier Krisenstäbe auf eine spezifische Form der Krisenbekämpfung zurück, die später als unerklärter Ausnahmezustand charakterisiert wurde. In erster Linie war es Bundeskanzler Helmut Schmidt, der die Maßnahmen zur Terrorismusbekämpfung in den Krisenstäben koordinierte, in welchen die Exekutive für sechs Wochen die Politik jenseits parlamentarischer Kontrolle bestimmte.*

*In diesem Beitrag wird die Rolle Helmut Schmidts in diesem “subjektiven Ausnahmezustand” (Julius Hatschek) untersucht und inwiefern diese beeinflusst war von Schmidts früheren Erfahrungen mit Krisensituationen, die bis in die 1960er Jahre zurückreichen. In diesem Zusammenhang wird mit Giorgio Agamben gefragt, ob in der Bundesrepublik damals der Ausnahmezustand zur Regel wurde.*

*Keywords: Helmut Schmidt, German Autumn, Red Army Faction, Necessity Law, Crisis Management.*

On June 2nd, 1972 the inner city of Stuttgart was evacuated by West German police in what was obviously an anticipated state of emergency. The *New York Times* reported: „Seconds ticked away to the midday deadline in the deserted streets and avenues of this beautiful city in the Swabian hills. Street life came to a virtual standstill just before 1 P.M. Under instructions from the police, parks closed their gates and taxi drivers refused all fares until 2 o'clock. Most department stores closed for the day at 11 A.M. and the city's 140 schools dismissed their students in time to get home before 1 o'clock. Thousands of policemen combed streets, parks and parking lots for an hour today, seeking cars loaded with explosives that anarchists had threatened to set off between 1 and 2 P.M.”<sup>1</sup>

Five days before, an unknown person had sent an express mail letter to the local *Stuttgarter Zeitung* announcing the detonation of three car bombs in the inner city of Stuttgart on Friday the 2nd.<sup>2</sup> The date had been no coincidence: The alleged attack would happen on the fifth anniversary of the killing of the Berlin student Benno Ohnesorg by a police officer in Berlin. The violent death of an unarmed protester during the tumultuous year 1968 was seen as a radicalizing incident for the West German student movement and especially for its militant offshoots like the Red Army Faction (RAF) that came into the open in 1970 and especially the “June 2<sup>nd</sup> Movement”. Just a month before the RAF had launched its first major bombing campaign in West Germany but by early June 1972 their leading cadres have all been caught by the authorities. However, the Red Army Faction had never before and after announced any of their attacks so the dubious threat (a newspaper letter collage) must have raised

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<sup>1</sup> „Bomb Threat Empties Streets of Stuttgart at Midday“, *New York Times*, June 3, 1972, p. 8.

<sup>2</sup> „Drei Bombenexplosionen in Stuttgart angedroht“, *Stuttgarter Zeitung*, 29. 5. 1972.

considerable doubt in the first place. But it didn't for the Federal and local executive branches.<sup>3</sup>

What happened instead became one of the largest police operations in a West German city until then. Eventually, though, it became clear that no bombs were planted nor that anyone had actually come up with any plan to do so. This episode then was quickly forgotten, the brief staging of a local state of exception became a mere episode in a confrontation that kept West Germany in suspense for the greater part of the 1970s and found its escalation in what is now known as the "German Autumn" of 1977.<sup>4</sup>

### **The escalation during the "German Autumn" 1977**

During 1977 the Red Army Faction's first generation cadres, among them Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe were held imprisoned at Stammheim high security prison. Police had arrested them as early as June 1972 after a series of bombings, which hit US Army facilities in Frankfurt and Heidelberg as well as Augsburg Police headquarters and the Hamburg branch of the Springer Publishing Company. In April 1977 the remaining three accused, since Meinhof had committed suicide in 1976, have been sentenced for life after a two year long, highly controversial trial, that was held in a newly erected "bunker"-courtroom on the grounds of the Stuttgart-Stammheim prison. Shortly before the end of the "trial of the century", as it was named in the press, a new RAF commando killed the federal attorney general Siegfried Buback and his escort on open street. This was the first assassination of a leading "representative of the system" in Western Germany. During the following "'77 offensive", as the RAF's second generation called it, the federal government was to be pressured to release the RAF-prisoners. A successful example was the "June 2<sup>nd</sup>" movement's kidnapping of the conservative mayoral candidate of Berlin in 1975, which led to the release of five militants. The first attempt to kidnap an important representative of the German

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<sup>3</sup> In more detail: Hanno Balz, *Von Terroristen, Sympathisanten und dem starken Staat. Die öffentliche Debatte über die RAF in den 1970er Jahren* (Frankfurt am Main, 2008), p. 178 – 197.

<sup>4</sup> Wolfgang Kraushaar (Ed.): *Die RAF und der linke Terrorismus*. 2 Vol. (Hamburg, 2006); Stefan Aust, *Baader-Meinhof: The Inside Story of the R.A.F.* (London, 2008); J. Smith and A. Moncourt, *The Red Army Faction, a Documentary History: Volume 1: Projectiles for the People* (Oakland, 2009); Kathleen Hanshaw, *Terror and Democracy in West Germany* (Cambridge, 2012).

economic elite failed: In July 1977 the chairman of the Dresdner Bank's management, Jürgen Ponto, was shot when he resisted his kidnapping.

Still, just a few weeks later on September 4<sup>th</sup>, the RAF succeeded with their plans when they kidnapped Hanns-Martin Schleyer and killed his escort of three bodyguards and a driver. Schleyer was then the most influential, yet controversial economic leader in West Germany. He used to be manager for Mercedes-Benz and in 1977 was Head of German Employers, which made him the "Boss of the Bosses", but also held the rank of SS-Hauptsturmführer and served in Czechoslovakia under Reinhard Heydrich.<sup>5</sup>

The six weeks to follow are still being considered of being the most existential crisis of the Federal Republic. The Federal government and especially Chancellor Helmut Schmidt were adamant in not giving in to the kidnapper's demands to release the Stammheim prisoners. During these weeks an extra-legislative administration was established beyond any parliamentary control when all affairs were handled by a special crisis management team lead by the former Wehrmacht-officer Schmidt. Immediately a news-ban was called into effect and even reintroducing the death-penalty was on discussion.<sup>6</sup> To take the escalation even further, a Palestinian commando hijacked a Lufthansa plane with German tourists on 13 October 1977 to support the RAF's demands. When four days later all hostages were freed by the new para-military German GSG9-squad it became clear that the RAF's "'77 offensive" was a shipwreck. The next morning, on 17 October, Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe were found dead in their high-security cells. Schleyer's body was discovered in the trunk of a car at the French-German border a day later.

While the so-called German autumn was the most referred-to phase of the RAF's attack on the state, it must be seen as a culmination of what had happened in the years before. In the 1970s, the conflict between the RAF and the West German state proved to be a paradigm for the growing political polarization within German society. It can be said that the terrorism debate and its legislative repercussions were the struggle over the state of

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<sup>5</sup> Jeremy Varon, *Bringing the War Home. The Weather Underground, the Red Army Faction and Revolutionary Violence in the Sixties and Seventies* (Berkeley, 2004), p. 197.

<sup>6</sup> Anne Ameri-Siemens, *Ein Tag im Herbst. Die RAF, der Staat und der Fall Schleyer* (Reinbek, 2017); Wolfgang Kraushaar, „Der nicht erklärte Ausnahmezustand“, in: Wolfgang Kraushaar (Ed.): *Die RAF und der linke Terrorismus* (Hamburg, 2007), pp. 1011 - 1025; „Exotische Lösung“, *Der Spiegel*, 7/1980, p. 27.

the nation, and so the discursive, political and moral boundaries were heavily disputed.

### **An undeclared state of emergency?**

By 1977, the West German state's reaction to the terrorist threat eventually amounted to an *undeclared state of emergency* (Wolfgang Kraushaar) that turned into a rather clandestine state of exception. At the center of this were the two crisis management teams, the so called "Großer Krisenstab" and a smaller version ("Kleine Lage"), which in fact came up with most of the decisions during these 44 days where politics happened in the situation room, not in parliament. From the beginning the guiding principles of the crisis team were clear, but not open to the public: There would be no prisoner exchange, but a massive manhunt to find the kidnappers and their hostage. Officially negotiations with the kidnappers continued but only as a diversionary tactic.<sup>7</sup>

The crisis management team consisted of the heads of the three parties in Parliament, the minister for the interior and the foreign minister, the parliamentary faction leaders, the heads of state of the four West German states where members of the RAF were imprisoned, the minister of justice, the chancellery minister, the government speaker, the head of the Federal police, and the Federal general attorney. Hence, all executive power was concentrated in the situation room.<sup>8</sup> Politics by now were all about crisis management - party politics and parliamentary strife had come to an end, as speakers of the crisis team declared, since the focus during this emergency situation would lie on the commonalities of democrats standing together as one. Thus politics became management, being dominated by guidelines of pragmatism and feasibility – in cases of doubt even beyond the constraints of the constitution. The crisis team meetings were closed to the public, their members were obliged to keep everything which was discussed in the situation room a secret. Not even their own parties were to be informed,

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<sup>7</sup> See chancellor Schmidt's recollection on the crisis management in his address to the Federal Parliament after the „German Autumn“: „Abgabe einer Erklärung der Bundesregierung zur aktuellen Situation“, in: *Deutscher Bundestag. Stenographischer Bericht*. 50. Sitzung, Bonn, Donnerstag, den 20. Oktober 1977, p. 3756.

<sup>8</sup> Wolfgang Kraushaar, „Der Kanzler und seine Krisenstäbe. Der nicht erklärte Ausnahmezustand während der Schleyer-Entführung“, in: Tatjana Botzat et. al., *Ein Deutscher Herbst. Zustände 1977* (Frankfurt am Main, 1978), pp. 170 – 184.

the consequence being that by now there didn't exist any parliamentary control over what was decided.

Above all stood crisis manager Helmut Schmidt, as chancellor and chief of staff, who was determined to solve the situation not in a humanitarian, but in a soldierly fashion as it was commented repeatedly in the media – and this was actually meant as a praise.<sup>9</sup> He had personally gained experiences with emergency situations which served as a blueprint for how he handled the state of exception in the Fall of 1977, as the chancellor stated later. The first and foremost experience he gained as a crisis manager was during the catastrophic flood that had hit Hamburg in February 1962, killing 315 people. Schmidt back then was the interior minister of the state of Hamburg and immediately set up a crisis management team under his leadership. Furthermore, before the Hamburg mayor Nevermann was able to return to the city from his vacation, Schmidt became the man of decision: He called Bundeswehr and NATO commanders and asked for military support to the rescue missions.<sup>10</sup> This was, as Schmidt himself had acknowledged, a break with the Federal constitution, which was adamant about banning the West German army from being deployed for domestic issues. Schmidt, afterwards being celebrated as a crisis solving hero, admitted that he had “knowingly and willingly” violated the constitution during this emergency and never regretted it.<sup>11</sup> 40 years later he reconfirmed this attitude when he stated in an interview: “We saved human lives. It didn't interfere with the spirit of the constitution, but it probably contravened with its wording.”<sup>12</sup> Schmidt's decision to act beyond the law has never been dealt with either in the courts or in the political arena,<sup>13</sup> although it served as an example for changing §34 the Federal constitution with the implementation of the highly controversial “Notstandsgesetze” (Emergency Laws) in 1968. Basically, these aimed at defining a “state of internal

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<sup>9</sup> „... denn ich suche deine Befehle“, *Der Spiegel*, 47/1977, pp. 36-38; „Schmidt will nicht kapitulieren“, *Die Welt*, 18.10. 1977, p. 4.

<sup>10</sup> Martin Rupps, *Helmut Schmidt. Eine politische Biographie* (Stuttgart/Leipzig, 2002), p. 82; Hartmut Soell, *Helmut Schmidt. 1918 – 1969: Vernunft und Leidenschaft* (München, 2003), p. 384.

<sup>11</sup> „Leistung liegt im Deutschen drin“, *Der Spiegel*, 3/1979, p. 42.

<sup>12</sup> „Sturmflut 1962: ‚Der Ausdruck Held ist abwegig!‘“, *Spiegel-Online*, 17.2.2008.

<sup>13</sup> Schmidt himself has acknowledged this later when he stated: „We were ultimately lucky, that no one has brought up charges against us – a German miracle.“; Helmut Schmidt, „Gewissen und Verantwortung des Politikers“, in: Helmut Schmidt et. al., *Die Verantwortung des Politikers* (München, 2008), pp. 49-77, p. 64.

necessity” while defending the “freiheitlich-demokratische Grundordnung” and even transcending this very order into the supralegal sphere.<sup>14</sup> Giorgio Agamben in this regard has put the implementation of the West German emergency laws within a global trend: “By this point, protected democracy had become the rule.”<sup>15</sup>

Ultimately, this was nothing less than a revival of the old maxim *Necessitas non habet legem* („Necessity knows no law“), that had infamously been used by chancellor Bethmann Hollweg as an excuse for breaking international law with the invasion of Belgium in 1914. This earlier example can be seen within a tradition of what the constitutional law scholar Julius Hatschek in 1923 had introduced as the “theory of a subjective state of emergency”, which receives its legitimation from customary and natural law (and actually differed from the British law traditions).<sup>16</sup> Hatschek emphasized: “The emergency act is being legally privileged to the same act by normal citizens. Especially, good faith in that one had been in a state of emergency is sufficient to exonerate the government for its acting in all aspects.”<sup>17</sup> Hatschek’s arguments are well within the legal developments that dated back to the 17<sup>th</sup> century. Even before, it was Machiavelli who had already tried to define the growing power of the ruler that was, however, increasingly linked, and probably already subordinated, to the ruling state. For Machiavelli it was the “majesty of the state” that became the ultimate moral and political backing for the ruler (here: the prince).<sup>18</sup> The reason of the state as the *ultima ratio* of the ruler’s moral politics was born. Therefore, the power of the ruler in the following centuries grew considerably out of the notion of the reason of state, specifically through the evolving *jura extraordinaria*.

While the catastrophic events in 1962 were caused by nature, the states of emergency in the 1970s were of a different nature: During the 1972 attack on Israeli athletes at the Olympic games in Munich a crisis management team came together for the first time to

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<sup>14</sup> See: Ulrich K. Preuß, „'Freiheitlich-demokratische Grundordnung' als Superlegalität“, in: Ulrich K. Preuß, *Legalität und Pluralismus. Beiträge zum Verfassungsrecht der Bundesrepublik Deutschland* (Frankfurt am Main, 1973), pp. 17-30.

<sup>15</sup> Giorgio Agamben, *State of Exception* (Chicago, 2005), p. 16.

<sup>16</sup> See also: Françoise Saint-Bonnet, *L'état d'exception* (Paris, 2001), p. 160.

<sup>17</sup> Julius Hatschek, *Deutsches und Preussisches Staatsrecht* (Berlin, 1923), p. 159.

<sup>18</sup> Niccolò Machiavelli, *The Prince* (London, 2003), p. 58.

handle a terrorist attack in West Germany. It was only short lived and chaotic and ended in a disaster when all eleven Israeli hostages were killed after the West German police, that seemed ill equipped for such a task, had tried to free them.<sup>19</sup> By now the state was concerned with what impact a violent challenge had on the social order, namely in the face of terrorism. In this regard it was Walter Benjamin, who in his 1920 “Critique of Violence” had pointed to the challenges of violence: “The state, however, fears this violence simply for its lawmaking character, being obliged to acknowledge it as lawmaking whenever external powers force it to concede them the right to conduct warfare“.<sup>20</sup>

However, for Helmut Schmidt’s later handling of the crisis during the German autumn it was the kidnapping of the Berlin Christian-Democratic mayoral candidate Peter Lorenz by members of the “June 2<sup>nd</sup> movement” militant group that proved to be most defining. Lorenz was held hostage for five days in February 1975. Once again, this time as Federal chancellor, Schmidt formed a crisis management team bringing together members of all parties and the executive branch, although different and sometimes competing teams were still existing at that time on local and federal levels. Eventually, under pressure from the Christian Democrats who feared about the life of their head of the party in Berlin and also suffering a severe flu, Schmidt gave in to the demands of the kidnapers. Five imprisoned members of the June 2<sup>nd</sup> movement and the RAF were released and taken on a plane to fly them out to the people’s Republic of Yemen. More than that, the kidnapers demanded that the release of the prisoners had to be broadcasted live on TV. And so it happened: for several hours West German television also got hijacked by the militants. One executive TV director stated afterwards: “We lost the control over our own media for 72 hours.”<sup>21</sup> Helmut Schmidt grimly agreed. This was nothing but a loss of control for the West German state, especially since some of the freed prisoners later joined the Red Army Faction. This episode proved Carl Schmitt’s well known dictum „*Sovereign* is he who decides on the exception“ to be all too true. However, this time it wasn’t the state who made the decision.

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<sup>19</sup> Matthias Dahlke, *Demokratischer Staat und transnationaler Terrorismus* (München, 2011), p. 63.

<sup>20</sup> Walter Benjamin, *Selected Writings: 1913-1926* (Cambridge/London, 1996), p. 241.

<sup>21</sup> Balz, p. 72.



As a result, the chancellor vowed to not give in to any terrorist demands in the future and declared that he didn't want to make himself susceptible to blackmail. He would take the risk to sacrifice the lives of political friends and members of the elite. Schmidt later revealed that in 1975 he and his wife Loki had sent a statement to the head of the chancellery in which they declared that they would not want to be part in a prisoner exchange in case of a kidnapping. Schmidt explained he felt to take these risks as a statesmanlike duty since he "was bearing responsibility for other people."<sup>22</sup>

### **Risk, catastrophe, and exception**

Taking this into account, we can observe how the theories of the state of exception and what Ulrich Beck called the "risk society" complement each other. Therefore, as Sheldon Ungar has argued, the "risk society is characterized by a stream of emergencies and would-be emergencies".<sup>23</sup> Beck stressed the "political potential of catastrophes" and further explained: "averting and managing these [catastrophes] can include a reorganization of power and authority. Risk society is a catastrophic society. In it the exceptional condition threatens to become the norm."<sup>24</sup>

For chancellor Schmidt, risks had to be taken again in 1977. Eventually, the escalations of the "German Autumn" for a short time brought the return of the authoritarian state. In the confrontation with a terrorist threat, Carl Schmitt's notion holds, that in the case of emergency the true dualism of friend and enemy becomes apparent. The decision makes might. Schmitt accordingly stated: "The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element – the decision in absolute purity."<sup>25</sup> Schmitt had also pointed at the influential exponent of the Counter-Enlightenment, Joseph de Maistre. Already a century before Schmitt, de Maistre had repeatedly emphasized the issue of sovereignty, which in his opinion meant the decision. De Maistre therefore raised a rhetorical question: „In the judiciary order, which is nothing else than a portion of the Government, is it not obvious

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<sup>22</sup> Giovanni di Lorenzo, „'Ich bin in Schuld verstrickt', Interview with Helmut Schmidt", *Die Zeit*, 36/2007, pp. 17-19, p. 18.

<sup>23</sup> Sheldon Ungar, „Moral panic versus the risk society: the implications of the changing sites of social anxiety", *British Journal of Sociology*, Vol. 52, Issue 2 (2001), pp. 271–291, p. 276.

<sup>24</sup> Ulrich Beck, *Risk Society. Towards a New Modernity* (London, 1992), p. 24.

<sup>25</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago, 2005), p. 13.

that we must acknowledge a power which judges, and is not judged (...)?<sup>26</sup> Schmitt then stated with regard to de Maistre: “The value of the State lies in the fact that it makes a decision”.<sup>27</sup>

The decision maker is sovereign – this then had to be demonstrated by the crisis management team and its manager, the chancellor. The existential character of this conflict in which a decision had to be made between normality and exception was essentially about proving that the decisive would be victorious over the indecisive. Helmut Schmidt saw the political decision as ultimately relying on the politician’s conscience, when he talked about the crisis during the German Autumn: “The basic law, again, offered no help on the decision (“Entscheidungshilfe”). But one could also find no help on the decision in the bible or in philosophy. Once again we solely had to rely on the power of our own reason and our inner morale.”<sup>28</sup>

To quell any critique of this procedure, the crisis team also imposed a news ban, which was not enforced by law but demanded cooperation by the media, which the news outlets agreed to follow. Besides missing parliamentary control during the 44 days in which the crisis team was in operation, now the media as a watchdog in a democratic society was willing to put on the muzzle.<sup>29</sup>

For the legal justification of the factual state of exception, §34 of the federal German criminal code, dealing with „rechtfertigender Notstand“/“Necessity as Justification“ was providing a legal basis in 1977.<sup>30</sup> However, any hypothetical law of a „Staatsnotstand“, the state of emergency, is not being covered by this paragraph that was meant to clarify the impact of a supralegal reason for exculpating an *individual* not a governing body or institution. Paragraph 34 had only been introduced two years before, with the great law

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<sup>26</sup> Joseph de Maistre, *The Pope* (London, 1850), p. 2.

<sup>27</sup> Schmitt, p. 50. On the importance of de Maistre’s anti-revolutionary thought for Schmitt, see: Graeme Garrard, „Joseph de Maistre and Carl Schmitt“, in: Richard A. Lebrun (Ed.), *Joseph de Maistre’s Life, Thought, and Influence* (Montreal & Kingston, 2001), pp. 220-238.

<sup>28</sup> Schmidt, p. 67.

<sup>29</sup> Balz, pp. 261 – 269; Wolfgang Kraushaar, „44 Tage ohne Opposition. Die Schleyer Entführung“, in: Klaus Hartung (et. al.), *Der blinde Fleck. Die Linke, die RAF und der Staat* (Frankfurt am Main, 1987), pp. 9-24.

<sup>30</sup> Ernst-Wolfgang Böckenförde, „Der verdrängte Ausnahmezustand. Zum Handeln des Staates in außergewöhnlichen Lagen“, in: *Neue Juristische Wochenschrift* 1978, pp. 1881 – 1890; English translation: Ernst-Wolfgang Böckenförde, „The Repressed State of Emergency“, in: Id., *Constitutional and Political Theory. Selected Writings* (Oxford, 2017), pp. 108 – 132.

reform in 1975, it reads: “A person who, faced with an imminent danger to life, limb, freedom, honor, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with.”<sup>31</sup>

Justifying a necessity of the state had already been used as a legal argument in trials against protesters from the late 1960s onwards but remained controversial. It was a more than questionable legal construct that granted the state a law against its citizens, although this very law had been designed solely as a ground of justification for the individual citizen. Furthermore, necessity of the state as a juridical term has been used inconsistently, although it’s premise is a situation of clear and present danger.<sup>32</sup>

It was §34 that was used for the ad hoc Contact Ban Law (“Kontaktsperregesetz”, taking effect on Oct 2<sup>nd</sup> 1977), which was introduced in September 1977 after a merely eight day-discussion to retrospectively legalize the prevention of any communication between the imprisoned RAF-members but also to prohibit any contact between the prisoners (who were still not finally convicted) and their lawyers.<sup>33</sup> This rather precipitous procedure to pass the law had been justified by invoking the state of emergency.<sup>34</sup> The Federal Court of Justice approved the law and declared in its verdict from September 23, 1977 that this decision was based on the above mentioned §34 and “the general policy of the law, that a violation of a law has to be accepted, if only through this it seems feasible to save a higher legally protected right”.<sup>35</sup> Thus, the verdict implicitly postulated that the state of reason was superior to the constitution. Chancellor Schmidt,

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<sup>31</sup> <https://germanlawarchive.iuscomp.org/?p=752#34>, March 3, 2018.

<sup>32</sup> Dirk Freudenberg, *Theorie des Irregulären. Partisanen, Guerillas und Terroristen im modernen Kleinkrieg* (Wiesbaden, 2008), p. 410.

<sup>33</sup> Karrin Hanshew, *Terror and Democracy in West Germany* (Cambridge, 2012), p. 220-221; Max Putzer, *Gerichte, Terror und Verfahren: Eine rechtsvergleichende Untersuchung zur Gewährleistung justizieller Grundrechte anhand verfassungsgerichtlicher und höchstrichterlicher Rechtsprechung in Deutschland und Israel* (Tübingen, 2015), pp. 108 – 131.

<sup>34</sup> Böckenförde, „State of Emergency“, p. 111.

<sup>35</sup> BGHSt 27, p. 260.

soon after the contact ban and the news ban have been established, called the measures an “irrefutable necessity”.<sup>36</sup>

After October 1977 §34 has never been applied again. Recently Minister of Justice Heiko Maass declared to abolish this law.

### **The supralegal exception under scrutiny**

On the other side the perceived state of exception drew criticism from civil rights organizations and left-wing activists. After the contact-ban law had been approved a group of attorneys, one of them Baader-defendant Hans-Heinz Heldmann, protested in a public petition. Here they claimed that this provision would pose “an infraction by the executive powers in an area that used to be solely under the control of the judiciary”. Therefore it would be “the introduction of a law of exception regarding the detention conditions of a specific group of prisoners – such a law would not comply with the constitution nor human rights.”<sup>37</sup>

For those who were critical about the in-promptu tightening of the law and about the way the Federal government dealt with the crisis in general, the well-known words of Walter Benjamin served as an ideological backbone. Benjamin in 1940 wrote: “The tradition of the oppressed teaches us that the ‘state of exception’ in which we live is not the exception but the rule. We must attain to a conception of history with this insight. Then we will clearly see that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against fascism.”<sup>38</sup>

Fighting a perceived form of fascism that allegedly materialized in a „state of exception“ had also been at the core of the RAF’s ideology. Recurringly in their communiqués and court statements RAF members would refer to a “state of exception” that they were fighting against. Andreas Baader for example in his “Letter to the prisoners” (1976)

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<sup>36</sup> Kraushaar, „Ausnahmezustand“, p. 1016.

<sup>37</sup> Kraushaar, „Ausnahmezustand“, p. 1016-1017.

<sup>38</sup> Walter Benjamin, „On the concept of history“, in: Walter Benjamin, *Selected Writings, Vol. 4, 1938 – 1940* (Cambridge (MA), 2006), p. 392. Benjamin had put „state of exception“ in quotes since he was referring to Schmitt’s notion here on the fictitious quality of the state of exception. See: Agamben, p. 58-59; See also: Horst Bredekamp, „Walter Benjamin’s Esteem for Carl Schmitt“, in: Jens Meierhenrich and Oliver Simons (Eds.), *The Oxford Handbook of Carl Schmitt* (Oxford, 2017), p. 679 – 704.

referred to Benjamin's "concept of history".<sup>39</sup> And in 1984 RAF-prisoner Christian Klar in his "Statement regarding '77" concluded: "The SPD wanted to handle it as a state of emergency, without actually declaring such a thing."<sup>40</sup>

More than just tightening the law, the clandestine state of exception also included illegal executive practices. Most notably the federal constitution was violated with the bugging of the residence of the nuclear scientist Klaus Traube, who had falsely been accused of supporting terrorists.<sup>41</sup> Also, in the Stammheim prison, conversations between the defense attorneys and their clients were secretly recorded by order of the Minister for Justice, Hans-Jochen Vogel. Vogel after the first meeting of the crisis team had emphasized that the decisions of what he called the "advisory committee" would be "orientated to the constitution".<sup>42</sup> A rather lukewarm statement, indeed.

To make use of the new and much contested Emergency Laws of 1968 (Article 80a and Article 115a of the Federal Republic's Basic Law) would have implied to officially declare a state of emergency, which wasn't in the interest of the Federal government and which also would have been grossly overrating the threat situation in the year 1977.

Furthermore, the Emergency Laws were a product of the Cold War and therefore were not aimed to contain domestic unrest in the first place but to counter an attack from the outside. It appeared relatively reluctant in this regard, especially if compared to the infamous emergency § 48 of the Weimar constitution that was born out of an unstable political situation of a threatening civil war when it came into effect in 1919. Already Thomas Hobbes had pointed out the inherent difficulties for the strong state in general: "For he that hath strength enough to protect all, wants no sufficiency to oppress all."<sup>43</sup>

Here lay the dilemma of the modern constitutional democracy when it came to defining the extent of an exception. It had been famously described in 1967 by legal scholar and former constitutional court judge Ernst-Wolfgang Böckenförde:

„The liberal secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom's sake. (...) On the other hand, it

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<sup>39</sup> N.N., *Texte: der RAF* (Malmö, 1977), p. 184.

<sup>40</sup> J. Smith and André Moncourt, *The Red Army Faction. A Documentary History. Volume 2: Dancing with Imperialism* (Montreal, 2013), p. 299.

<sup>41</sup> Hanshew, p. 166-167.

<sup>42</sup> Kraushaar, „Der Kanzler und seine Krisenstäbe“, p. 173.

<sup>43</sup> Thomas Hobbes, *Man and Citizen (De Homine and De Cive)* (Indianapolis/Cambridge, 1991), p. 181.

cannot by itself procure these interior forces of regulation, that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars.<sup>44</sup>

This dilemma rested heavily on the crisis management team, which by coming up with *decisions* that would indeed match what Böckenförde feared would resemble an “authoritative decree”, tried to overcome it. Thus, the reason of the state became paramount and executive feasibility trumped over the liberal interpretation of constitutional conduct.

### **The rule through prerogatives?**

However, with the escalation of this perceived emergency in 1977 we could speak of emerging parallels to Ernst Fraenkel's Analysis of the “Dual State”, which was published in 1941. Here Fraenkel stated that it was Martial Law that provided the constitution of the Third Reich. Following up on this, it could be argued, although there is no direct level of comparison between the Nazi Dual State and the Federal Republic, that under the undeclared state of exception the constitutional state for the moment turns into a “prerogative state” (with reference to Locke). In this situation of a delimitation of boundaries the politics of the crisis management team transforms into its own micro-political sphere. As Fraenkel had put it, then “it is regulated by arbitrary measures (*Massnahmen*), in which the dominant officials exercise their discretionary prerogatives.”<sup>45</sup>

Fraenkel as well as Carl Schmitt (and Walter Benjamin) understood the Nazi Regime as a state of exception.<sup>46</sup> They also agreed upon the fact that the transformation from judicial decision to measure is characterizing the spirit of martial law. Federal minister of Justice, Hans-Jochen Vogel, accordingly declared after the crisis team came together for the first time, that negotiating about the release of prisoners was not about “a

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<sup>44</sup> Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit* (Frankfurt am Main, 1976), p. 60.

<sup>45</sup> Ernst Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship* (New Jersey, 2006), p. 3.

<sup>46</sup> Michael Wildt, „Die Transformation des Ausnahmezustands. Ernst Fraenkel's Analyse der NS-Herrschaft und ihre politische Aktualität“, in: Jürgen Danyel/Jan-Holger Kirsch/Martin Sabrow (Hg.), *50 Klassiker der Zeitgeschichte* (Göttingen, 2007), pp. 19-23, p. 20.

normative decision, but about a purely de facto measure.”<sup>47</sup> There happened to be a paradigm shift now: in political discourse “the state” replaced democracy while in the juridical sense the acts of the state of exception replaced the norms. Or, as the influential Weimar-era Jurist Hermann Heller has analyzed it: “Everyday history shows us examples of the ‘normative power of the factual,’ by means of which a power that, while for a time existing merely as a fact and though experienced as unjust, succeeds in winning, bit by bit, recognition of its justification.”<sup>48</sup>

With this, Carl Schmitt’s model of political decisionism becomes all too clear. And it is almost ironic that by now it was the state who adopted the century old terrorist’s credo of the “primacy of practice” accompanied by a “propaganda of the deed”: In his parliamentary address in October 1977 Helmut Schmidt praised the freeing of the “Landshut”-hostages as “the liberating deed in Somalia”.<sup>49</sup>

Following up on Ulrich K. Preuß’ contemporary analysis, the „liberal democratic order“ (“Freiheitlich-demokratische Grundordnung”) as a cipher for the state per se became essentialised into an „ethical world order“ and therefore to the reason of state.<sup>50</sup>

According to this mindset which dominated the confrontation during the German Autumn, the state as an entity positioned itself before society. Thus, the social-democratic project of an open society has been pushed into the background. Eventually the crisis management of chancellor Schmidt symbolized the victory of the strong state over Willy Brandt’s 1969 program of taking a chance on more democracy. Conservative voices in West Germany were thrilled. The daily *Die Welt* newspaper for example wrote in admiration: “The Germans have witnessed after years of an ideological mingling of state and society that now the state, finding itself in direst need, steps before society in the sharpest contrast.”<sup>51</sup>

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<sup>47</sup> Kraushaar, „Ausnahmezustand“, p. 1017.

<sup>48</sup> Hermann Heller, „Political Democracy and Social Homogeneity“, in: Arthur J. Jacobson and Bernhard Schlink (Eds.), *Weimar. A Jurisprudence of Crisis* (Berkeley, 2000), pp. 265 – 279, p. 273. Heller here refers to Georg Jellinek’s original notion of the „normative Kraft des Faktischen“.

<sup>49</sup> „Abgabe einer Erklärung der Bundesregierung“, p. 3757.

<sup>50</sup> Cit. In: Otto Kallscheuer and Michael Sontheimer, „Kriegsbericht“, in: Otto Kallscheuer and Michael Sontheimer, *Einschüsse. Besichtigung eines Frontverlaufs zehn Jahre nach dem Deutschen Herbst* (Berlin, 1987), pp. 8-31, p. 27.

<sup>51</sup> Wilfried Hertz-Eichenrode, „Schuld und Schutzpflicht“, *Die Welt*, 21.10.1977, p. 6.

By now the state had transformed into a different entity, it became an actor, almost becoming personalized. „The state has to learn to use all its instruments of power“, demanded CSU leader Franz Josef Strauß,<sup>52</sup> while Helmut Schmidt insisted: “This state is anything but helpless”.<sup>53</sup> Here again we can observe a parallel to the works of Carl Schmitt, and older jurists like Samuel von Pufendorf, or political philosophers like Adam Müller, in whose political philosophy the state was actually seen as a person. In traditional conservative thought the tendency towards a personalization of the social collective aimed at a transference which would legitimize the authority of the ruler – the “head” of the state-body.

In this regard Helmut Schmidt’s whimsical comment after the German Autumn was, that it could be learned that “a democratic state doesn’t have to be a ‘Scheißstaat’, that has to put up with everything.”<sup>54</sup>

It became obvious in the fall of 1977 that at least for a moment the national community showed nearly unreserved loyalty. Thus, I would argue, the undeclared state of exception does not necessarily manufacture a more “effective” executive authority, which can also be seen when we look at the range of mishaps during the search for Schleyer’s kidnappers. But by demonstrating unconditional unity and the spirit of feasibility during a state of emergency it created a feeling of community and finally: national identity. Not surprisingly, several media commentaries portrayed the crisis team as a potential model for governing by consent.<sup>55</sup>

After the impromptu state of emergency in Stuttgart that was mentioned above, the executive branch had to admit that there hadn’t been a real threat. In fact, the threat was used as a way to demonstrate the ability to act in times of an ongoing perceived terrorist threat. The RAF released a communiqué rejecting any notion that they were behind such an attack “against working people”. In their view it was the police themselves that

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<sup>52</sup> Peter R. Hofstätter, „Wir stehen im Kampf mit Partisanen“, *Die Welt*, 19.9.1977, p. 3.

<sup>53</sup> „Fall Schleyer: ‚Die Dramatik muß raus‘“, *Der Spiegel*, 39/1977, p. 21–24.

<sup>54</sup> Hermann Schreiber, „... denn ich suche deine Befehle“, *Der Spiegel*, 47/1977, pp.. 36–38.

<sup>55</sup> Balz, p. 306.



were staging the state of emergency in Stuttgart “to drive the war of nerves to the extreme”.<sup>56</sup>

### **The implementability of the state of exception**

In conclusion I would argue, that this is one of the fundamental qualities of state of exception executive measures: They are a demonstration, or as one Federal judge during that time described it as “aggressive information of the public” by the Federal attorney and Federal police.<sup>57</sup> Accordingly, Helmut Schmidt after the end of the German Autumn declared that one of the main motivations for the way the crisis had been handled was to “prevent an erosion of trust in the state at home and abroad”.<sup>58</sup>

What can be called the “staging of exception” was based on the dialectics of a moral panic and politics of fear, in which fears are articulated and amplified, only to prove that the state will be in control of the situation and combat the perceived threat. This is what Giorgio Agamben among others has described as the “fictitious state of emergency”.<sup>59</sup> The capacity to act is best demonstrated in such a symbolic area of a friend/enemy dichotomy as is being manifested through terrorism. In this regard guaranteeing security happens as interpellation and performance, in which fighting abstract threats is becoming foregrounded. The arena for this performance of security would then be the state of emergency. Frank Furedi had described this as the politics of fear: “The objective of the politics of fear is to gain consensus and to forge a measure of unity around an otherwise disconnected elite. But whatever the intentions of its authors, *its main effect is to enforce the idea that there is no alternative.*”<sup>60</sup>

After 1977 the state of exception did not become the rule in West Germany, but it's selective implementation became a practiced way of dealing with a crisis and therefore established a repertoire for future emergencies. It could be recalled any time. Therefore, what had started in the Federal Republic of the 1970s was the practice of an implementability of an ad hoc state of exception which consisted of extra-legal practices

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<sup>56</sup> Red Army Faction, „Regarding the Fascist Bomb Threats in Stuttgart“, in: Smith/Moncourt, p. 181.

<sup>57</sup> Balz, p. 31.

<sup>58</sup> „Erklärung der Bundesregierung“, p. 3756.

<sup>59</sup> Agamben, p. 3.

<sup>60</sup> Frank Furedi, *Politics of Fear. Beyond left and right* (London, 2005), p. 132-133.

as well as of a tightening of the law and public demonstrations of sovereignty and control. Helmut Schmidt later stated: "I can only thank the German jurists that they didn't start an investigation on how constitutional this all has been."<sup>61</sup>

However, the state of exception, unlike Benjamin's and Agamben's observation, hadn't become the rule – but the tools and practices of a political heterotopia were becoming a reality for the executive authority and were ready to use. Regarding this heterotopia in a Foucauldian sense, Agamben summarized: "*Being-outside, and yet belonging*: this is the topological structure of the state of exception, and only because the sovereign, who decides on the exception, is, in truth, logically defined in his being the exception, can he too be defined by the oxymoron ecstasy-belonging."<sup>62</sup>

In the end these developments have cast doubts on the binding and enduring power of the Federal constitution as after 1977 more and more West Germans asked themselves whether the German Basic law represented a mere fair-weather constitution. *Der SPIEGEL* magazine for example asked on its cover in December 1977: "Is the constitutional state being dismantled?"<sup>63</sup>

Eventually, right after the German Autumn had ended, civic society started to put such emergency measures and further attempts to naturalize their use in political discourse under greater scrutiny. So it had been a liberal, critical public that in the end had prevented that the state of exception actually became the rule.

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<sup>61</sup> „Leistung liegt im Deutschen drin“, *Der Spiegel*, 3/1979, p. 42.

<sup>62</sup> Agamben, p. 35. Regarding the connection between heterotopia and states of exemption: Stephan Günzel, „Politischer Raum. Öffentlichkeit und Ausnahmezustand“, in: Stephan Günzel, *Raum: Ein interdisziplinäres Handbuch* (Stuttgart/Weimar, 2010), p. 134-144, p. 142.

<sup>63</sup> „Wird der Rechtsstaat abgebaut?“, *Der Spiegel*, 50/1977, p. 1.

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