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## **Hanno Balz**

**The Undeclared State of Emergency  
during the 'German Autumn' 1977**

# State of Exception – An Overview

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Matthias Lemke, Ece Göztepe, Maureen T. Duffy and Olivier Cahn

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5 On June second, 1972 the inner city of Stuttgart was evacuated by  
6 West German police in anticipation of a state of emergency.

7 The New York Times reported:

8 „Seconds ticked away to the midday deadline in the deserted streets and  
9 avenues of this beautiful city in the Swabian hills. Street life came to a  
10 virtual standstill just before 1 P.M. Under instructions from the police, parks  
11 closed their gates and taxi drivers refused all fares until 2 o'clock. Most  
12 department stores closed for the day at 11 A.M. and the city's 140 schools  
13 dismissed their students in time to get home before 1 o'clock. Thousands of  
14 policemen combed streets, parks and parking lots for an hour today,  
15 seeking cars loaded with explosives that anarchists had threatened to set  
16 off between 1 and 2 P.M.”

17 What had happened here?

18 A day before, someone had called the authorities and announced that  
19 some bombs would explode in the inner city of Stuttgart. It would happen at  
20 the fifth anniversary of the killing of the Berlin student Benno Ohnesorg by a  
21 police officer which was seen as a radicalizing incident for the West  
22 German student movement and especially for its militant offshoots like the  
23 Red Army Faction that came into the open in 1970. Just a month before the  
24 RAF had launched their first major bombing campaign in West Germany,  
25 but it appeared that by early June 1972 their leading cadres were all being  
26 caught by the authorities. However, the Red Army Faction had never  
27 announced any of their attacks beforehand so the dubious phone call threat

28 must have raised considerable doubt in the first place. But it didn't for the  
29 Federal and local executive branches.

30 What happened instead became one of the largest police operations in a  
31 major West German city until then. Eventually, though, it became clear that  
32 no bombs were planted nor that anyone had actually come up with any plan  
33 to do so.

34 This episode then quickly became forgotten, the brief staging of a local  
35 state of exception became a mere episode in a confrontation that kept West  
36 Germany in suspense for the greater part of the 1970s and found its  
37 escalation in what is now known as the "German Autumn" of 1977.

38 Let me briefly recapture this escalation here:

39 During 1977, the Red Army Faction's first-generation cadres, Andreas  
40 Baader, Gudrun Ensslin and Jan-Carl Raspe, were imprisoned at the  
41 Stammheim high security prison. Police had already arrested them in 1972  
42 after a series of bomb attacks on US Army facilities in Frankfurt and  
43 Heidelberg, as well as on Augsburg police headquarters and the Hamburg  
44 branch of the Springer Publishing Company. In April 1977, the remaining  
45 three accused—Ulrike Meinhof had committed suicide in 1976—were  
46 sentenced to life imprisonment after a two-year long trial which was held in  
47 a newly erected "bunker" courtroom on the grounds of the Stammheim  
48 prison. Shortly before the end of the "trial of the century," as it was known in  
49 the press, a new RAF commando killed the federal attorney general  
50 Siegfried Buback and his escort on an open street in April 1977. This was  
51 the first targeted assassination of a leading "representative of the system",  
52 as the RAF called them, in West Germany. During the following "offensive  
53 of 1977", the plan was to pressure the federal government to release the  
54 imprisoned RAF cadres. The first attempt to kidnap an representative of the  
55 German economic elite failed: in July 1977, the chairman of the Dresdner  
56 Bank's board of directors, Jürgen Ponto, was shot when he resisted his  
57 kidnappers.

58 But just a few weeks later on September 4th, the RAF succeeded with their  
59 plans when they kidnapped Hanns-Martin Schleyer, killing his escort of  
60 three bodyguards and a driver on the spot. Schleyer at that time had been  
61 the most influential, but also most controversial, economic leader in West

62 Germany. In 1977 he was head of the Confederation of German  
63 Employers' Associations, which made him the "boss of the bosses". Not  
64 much more than 30 years before he also served as SS-Untersturmführer in  
65 the administration of occupied Prague, which made him a perfect target in  
66 the eyes of the RAF.

67 The six weeks that followed are still considered to be the worst existential  
68 crisis of the Federal Republic of Germany. The federal government, and  
69 especially Chancellor Helmut Schmidt, was adamant in not giving in to the  
70 kidnapper's demands to release the Stammheim prisoners. During these  
71 weeks, an extralegal administration was established, where all affairs were  
72 handled by a special crisis management team led by former Wehrmacht  
73 officer Schmidt. A news ban was called into immediate effect and even the  
74 reintroduction of the death penalty was discussed in the crisis team  
75 meetings. To take the escalation even further, a Palestinian commando  
76 hijacked a Lufthansa airplane with German tourists on October 13<sup>th</sup> to  
77 support the RAF's demands. When, four days later, all hostages were freed  
78 by the new paramilitary German GSG 9 squad, it became clear that the  
79 RAF's "77 offensive" was in tatters. The next morning, on October 17<sup>th</sup>,  
80 Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe were found dead in  
81 their high-security cells. Schleyer was found shot dead in the trunk of a car  
82 a day later.

83 While the so-called German autumn was the most referred-to phase of the  
84 RAF's attack on the state, it must be seen as a culmination of what had  
85 happened in the years before. In the 1970s, the conflict between the RAF  
86 and the West German state proved to be a paradigm for the growing  
87 political polarization within German society. It can be said that the terrorism  
88 debate was the struggle over the state of the nation, and so the discursive,  
89 political and moral boundaries were heavily disputed.

90 In 1977 the West German state's reaction to the terrorist threat amounted  
91 to an undeclared state of emergency that became a rather clandestine  
92 state of exception.

93 At the center of this unofficial state of exception were the two crisis  
94 management teams, the so called "Großer Krisenstab" and a smaller  
95 version, which in fact came up with most of the decisions during these 44  
96 days where politics happened in the situation room, not in parliament. From

97 the beginning the guiding principles of the crisis team were clear, but not  
98 open to the public: There would be no prisoner exchange, but a massive  
99 manhunt to find the kidnapers and their hostage. Officially negotiations  
100 with the kidnapers continued but only as a diversionary tactic.

101 The crisis management team consisted of the leading representatives of  
102 the governing coalition parties as well as those of the Christian Democratic  
103 opposition, some ministry officials and heads of German states as well as  
104 the heads of the executive branches. Hence, all executive power was  
105 concentrated in the situation room. Politics by now were all about crisis  
106 management - party politics and parliamentary strife had come to an end,  
107 as speakers of the crisis team declared, since the focus during this  
108 emergency situation would lie on the commonalities of democrats standing  
109 together as one. Thus politics became management, being dominated by  
110 guidelines of pragmatism and feasibility beyond the constraints of the  
111 constitution. The crisis team meetings were closed to the public, their  
112 members were obliged to keep everything which was discussed in the  
113 situation room a secret. Not even their own parties were to be informed, the  
114 consequence being that by now there didn't exist any parliamentary control  
115 over what was decided.

116 Above all stood crisis manager Helmut Schmidt, as chief of staff, who was  
117 determined to solve the situation not in a humanitarian, but in a soldierly  
118 fashion as it was commented repeatedly in the media – and this was  
119 actually meant as a praise.

120 He had personally gained experiences with emergency situations which  
121 served as a blueprint for how he handled the state of exception in the Fall  
122 of 1977, as the chancellor stated later. The first and foremost experienc he  
123 gained as a crisis manager was during the catastrophic flood that hit  
124 Hamburg in February 1962, killing 315 people. Schmidt back then was the  
125 interior minister of the state of Hamburg and immediately set up a crisis  
126 management team under his leadership. Furthermore, before the mayor of  
127 Hamburg actually got back to the city from his vacation, Schmidt became  
128 the man of decision: He called Bundeswehr and NATO commanders and  
129 asked for military support to the rescue missions. This was, as Schmidt  
130 himself had acknowledged, a break with the Federal constitution, which  
131 was adamant about banning the West German army from being deployed  
132 for domestic issues. Schmidt, being celebrated as a crisis solving hero in



133 1962, admitted that he had “knowingly and willingly” violated the  
134 constitution during this emergency and never regretted it. 40 years later he  
135 reconfirmed this attitude when he stated in an interview: “We saved human  
136 lives. It didn’t interfere with the spirit of the constitution, but it probably  
137 contravened with its wording.” Schmidt’s decision to act beyond the law has  
138 never been dealt with either in the courts or in the political arena. Following  
139 the old German proverb „Not kennt kein Gebot“ („Necessity knows no law“),  
140 that had been famously used by chancellor Bethmann Hollweg as an  
141 excuse for the invasion of Belgium in 1914, we can see this early example  
142 within a tradition of what the constitutional law scholar Julius Hatschek in  
143 1923 had introduced as the “theory of a subjective state of emergency”,  
144 which receives its legitimation out of custom and natural law. Hatschek  
145 wrote: “The emergency act is being legally privileged to the same act by  
146 normal citizens. Especially, good faith in that one had been in a state of  
147 emergency is sufficient to exonerate the government for its acting in all  
148 aspects.”

149 But while the catastrophic events in 1962 were caused by nature, the states  
150 of crises in the 1970s were of a different nature: During the 1972 attack on  
151 Israeli athletes at the Olympic games in Munich a crisis management team  
152 came together for the first time to handle a terrorist attack. It was only short  
153 lived and chaotic and ended in a disaster when all eleven Israeli hostages  
154 were killed after the West German police had tried to free them. By now the  
155 state was concerned the impact of a violent challenge to the social order,  
156 namely in the face of terrorism. Walter Benjamin, in his 1920 “Critique of  
157 Violence” had pointed to the challenge of violence: “The state, however,  
158 fears this violence simply for its lawmaking character, being obliged to  
159 acknowledge it as lawmaking whenever external powers force it to concede  
160 them the right to conduct warfare“.

161 Most influential for Schmidt’s approach during the German autumn was the  
162 kidnapping of the conservative Berlin mayoral candidate Peter Lorenz by  
163 members of the “June 2<sup>nd</sup> movement” militant group in February 1975,  
164 which lasted for five days. Schmidt again, now as Federal chancellor,  
165 formed a crisis management team bringing together members of all parties  
166 and the executive branch, although there still were different and sometimes  
167 competing teams. Eventually, under pressure from the Christian Democrats  
168 who feared about the life of their head of the party in Berlin and suffering a

169 severe flu, Schmidt and the crisis team gave in to the demands of the  
170 kidnappers. Five imprisoned members of the 2<sup>nd</sup> June movement and the  
171 RAF were released and taken on a plane to take them to the people's  
172 Republic of Yemen. More than that, the kidnappers demanded that the  
173 release of the kidnappers had to be broadcasted live on TV. And so it  
174 happened: for several hours West German television also got hijacked by  
175 the militants. One executive TV director stated afterwards: "We lost the  
176 control over our own media." Helmut Schmidt agreed. This was nothing but  
177 a loss of control for the West German state, especially since some of the  
178 freed prisoners later joined the RAF again. Following Carl Schmitt's well  
179 known dictum „*Sovereign* is he who decides on the exception“ - this time it  
180 wasn't the state. As a result, the chancellor vowed to not give in to any  
181 terrorists demands in the future and didn't want to make himself susceptible  
182 to blackmail. He would take the risk to sacrifice the lives of political friends  
183 and members of the elite. In this the theories of the state of exception and  
184 what Ulrich Beck called the "risk society" complement each other. The risk  
185 society is characterized, in other terms, by a stream of emergencies and  
186 would-be emergencies.

187 Beck stressed the "political potential of catastrophes" and further explained:  
188 "averting and managing these [catastrophes] can include a reorganization  
189 of power and authority. Risk society is a catastrophic society. In it the  
190 exceptional condition threatens to become the norm."

191 The Fall of 1977 sees the return of the authoritarian state – at least for a  
192 certain time. In the confrontation with a terrorist threat, Carl Schmitt's notion  
193 holds, that in the case of emergency the true dualism of friend and enemy  
194 becomes apparent. The decision makes might. The decision maker is  
195 sovereign – this then had to be demonstrated by the crisis team and its  
196 manager, the chancellor. The existential character of this conflict in which a  
197 decision had to be made between normality and exception was about  
198 proving that the decisive would be victorious over the indecisive. To quell  
199 any critique of this procedure, the crisis team also imposed a news ban,  
200 which was not enforced by law but demanded cooperation by the media,  
201 which the news outlets agreed to follow. Besides missing parliamentary  
202 control now the media as a watch dog in a democratic society was willing to  
203 put on the muzzle.

204 For the legal justification of the factual state of exception, paragraph 34 of  
205 the federal German criminal code, dealing with „rechtfertigender  
206 Notstand“/“Necessity“ was being used in 1977. However, any hypothetical  
207 law of a „Staatsnotstand“, the state of emergency, is not being covered by  
208 this paragraph that was meant to clarify the impact of a supralegal reason  
209 for exculpating an *individual* not a governing body or institution. Paragraph  
210 34 had only been introduced two years before, with the great law reform in  
211 1975, it reads: “A person who, faced with an imminent danger to life, limb,  
212 freedom, honor, property or another legal interest which cannot otherwise  
213 be averted, commits an act to avert the danger from himself or another,  
214 does not act unlawfully, if, upon weighing the conflicting interests, in  
215 particular the affected legal interests and the degree of the danger facing  
216 them, the protected interest substantially outweighs the one interfered  
217 with.”

218 The justifying necessity of the state had already been used as a legal  
219 argument in earlier trials against protesters but remained controversial. It  
220 was a more than questionable legal construct that granted the state a law  
221 against its citizens, although this very law had been designed solely as a  
222 ground of justification for the citizen.

223 It was §34 that was used for the ad hoc Contact Ban Law (taking effect on  
224 Oct 2<sup>nd</sup> 1977), which was introduced in September 1977 after a merely 8  
225 day discussion to retrospectively legalize the prevented communication  
226 between the imprisoned RAF-members but also to prohibit any contact  
227 between the prisoners (who were still not finally convicted) and their  
228 lawyers. The Federal Supreme Court approved the law and declared in its  
229 verdict from September 23, 1977 that this decision was based on “the  
230 general policy of the law, that a violation of a law has to be accepted, if only  
231 through this it seems feasible to save a higher legally protected right”. This  
232 verdict implicitly postulated that the *raison d’etat* was superior to the  
233 constitution. Chancellor Schmidt soon after the contact ban and the news  
234 ban have been established called the measures an “irrefutable necessity”.

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

237 More than just tightening the law, the clandestine state of exception also  
238 included illegal executive practices. Most notably the federal constitution

239 was violated with the bugging of the residence of the nuclear scientist Klaus  
240 Traube, who had falsely been accused of supporting terrorists. Also, in the  
241 Stammheim prison, conversations between the defense attorneys and their  
242 clients were secretly recorded by order of the Minister for Justice, Hans-  
243 Jochen Vogel. Vogel after the first meeting of the crisis team had  
244 emphasized that the decisions of what he called the “advisory committee”  
245 would be “orientated to the constitution”. A rather lukewarm statement,  
246 indeed.

247 To make use of the new and much contested Emergency Laws of 1968  
248 (Article 80a and Article 115a of the Federal Republic’s Basic Law) would  
249 have meant to officially declare a state of emergency, which wasn’t in the  
250 interest of the Federal government and which also would have been grossly  
251 overrating the threat situation in the year 1977. Furthermore, the  
252 Emergency Laws were a product of the Cold War and therefore were not  
253 aimed to contain domestic unrest in the first place but to counter an attack  
254 from the outside. It appeared relatively reluctant in this regard, especially if  
255 compared to the infamous emergency § 48 of the Weimar constitution that  
256 was born out of an unstable political situation of a threatening civil war  
257 when it came into effect.

258 However, with the escalation of this perceived emergency in 1977 we could  
259 speak of emerging parallels to Ernst Fraenkels Analysis of the “Dual State”,  
260 which was published in 1941. Here Fraenkel stated that it was Martial Law  
261 that provided the constitution of the Third Reich. Following up on this, it  
262 could be argued, although there is no direct comparison between the Nazi  
263 Dual State and the Federal Republic, that under the undeclared state of  
264 exception the constitutional state for the moment turns into a “prerogative  
265 state”. In this situation of a delimitation of boundaries the politics of the  
266 crisis management team are, as Fraenkel had put it, “missing the norms  
267 and the measures are governing.” Fraenkel as well as Carl Schmitt agreed  
268 upon the fact that the transformation from judicial decision to measure is  
269 characterizing the spirit of martial law. Federal minister of Justice Vogel,  
270 accordingly declared after the crisis team came together for the first time,  
271 that negotiating about the release of prisoners was not about “a normative  
272 decision, but about a purely de facto measure.” There was a paradigm shift  
273 now: in political discourse “the state” replaced democracy while in the  
274 juridical sense the acts of the state of exception replaced the norms. Or, as

275 the influential Weimar-era Jurist Hermann Heller has analyzed it: “Everyday  
276 history shows us examples of the “normative power of the factual,” by  
277 means of which a power that, while for a time existing merely as a fact and  
278 though experienced as unjust, succeeds in winning, bit by bit, recognition of  
279 its justification.”

280 Here Carl Schmitt’s model of political decisionism becomes all too clear.  
281 And it is almost ironic that by now it was the state who adopted the century  
282 old terrorist’s credo of the “primacy of practice” accompanied by a  
283 “propaganda of the deed”. Following up on Ulrich Preuß’s contemporary  
284 analysis, that the „free democratic order“ as a cipher for the state per se  
285 became substancialized to an „ethical world order“ and therefore to the  
286 *raison d’etat*.

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

297 By now the state had transformed into a different entity, it became an actor,  
298 almost becoming personalized. „The state has to learn to use all its  
299 instruments of power“, demanded CSU leader Franz Josef Strauß, while  
300 Helmut Schmidt insisted: “The state is not helpless”. Here again we can  
301 observe a parallel to the works of Carl Schmitt, and older jurists like Samuel  
302 von Pufendorf, in whose political philosophy the state was actually seen as  
303 a person.

304 Helmut Schmidt’s whimsical comment after the German Autumn was that it  
305 could be learned that “a democratic state doesn’t have to be a  
306 ‘Scheißstaat’, that has to put up with everything.”

307 It became obvious in the fall of 1977 that at least for a moment the national  
308 community showed nearly unreserved loyalty. Thus, I would argue, the  
309 undeclared state of exception does not manufacture a more “effective”

310 executive authority, which can also be seen when we look at the range of  
311 mishaps during the search for Schleyer's kidnappers. But by demonstrating  
312 unconditional unity it created a feeling of community and finally: national  
313 identity. Thus, in several media commentaries the crisis team was seen as  
314 a potential model for governing by consent.

315 After the impromptu state of emergency in Stuttgart that I have mentioned  
316 earlier, the executive branch had to admit that there hadn't been a real  
317 threat. In fact, the threat was used as a way to demonstrate the ability to  
318 act in times of an ongoing perceived terrorist threat. And this I would argue,  
319 is one of the fundamental qualities of state of exception executive  
320 measures: They are a demonstration, or as one Federal judge in that time  
321 described it as "offensive information of the public" by the Federal attorney  
322 and Federal police. Accordingly, Helmut Schmidt after the end of the  
323 German Autumn declared that one of the main motivations for the way the  
324 crisis had been handled was to "prevent an erosion of trust in the state at  
325 home and abroad".

326 What I would like to call the "Staging of exception" was based on the  
327 dialectics of a moral panic and politics of fear, in which fears are articulated  
328 and amplified, only to prove that the state will be in control of the situation  
329 and combat the perceived threat. This is what Giorgio Agamben among  
330 others has described as the "fictitious state of emergency".

331 The capacity to act is best demonstrated in such a symbolic area of a  
332 friend/foe dichotomy as is manifested by terrorism. In this regard  
333 guaranteeing security happens as interpellation and performance, in which  
334 fighting abstract threats is becoming foregrounded. As Frank Furedi  
335 described it: "The objective of the politics of fear is to gain consensus and  
336 to forge a measure of unity around an otherwise disconnected elite. But  
337 whatever the intentions of its authors, *its main effect is to enforce the idea*  
338 *that there is no alternative.*"

339 Let me come to a brief conclusion now:

340 After 1977 the state of exception did not become the rule in West Germany,  
341 but it's selective implementation became a practiced way of dealing with a  
342 crisis. It could be recalled any time. Therefore, what had started in the  
343 Federal Republic of the 1970s was the practice of an implementability of an  
344 ad hoc state of exception which consisted of extra-legal practices as well as

345 of a tightening of the law and public demonstrations of sovereignty and  
346 control. Helmut Schmidt later stated: "I can only thank the German jurists  
347 that they didn't start an investigation on how constitutional this all has  
348 been."

349 However, the state of exception unlike Benjamin's and Agamben's notion,  
350 hadn't become the rule – but the tools and practices of a political  
351 heterotopia were becoming a reality and were ready to use. This has cast  
352 doubts about the binding and enduring power of the Federal constitution as  
353 after 1977 more and more West Germans asked themselves whether the  
354 German Basic law represented a mere fair-weather constitution. Eventually,  
355 right after the German Autumn has ended, civic society started to put such  
356 emergency measures under greater scrutiny to prevent that the state of  
357 emergency actually becomes the rule.

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# The Author

Hanno Balz, Ph.D., Visiting Assistant Professor for “Contemporary German History”  
at the John Hopkins University.

E-Mail: [hbalz1@jhu.edu](mailto:hbalz1@jhu.edu)