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The Undeclared State of Emergency during the ‘German Autumn’ 1977
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On June second, 1972 the inner city of Stuttgart was evacuated by West German police in anticipation of a 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.”

What had happened here?

A day before, someone had called the authorities and announced that some bombs would explode in the inner city of Stuttgart. It would happen at the fifth anniversary of the killing of the Berlin student Benno Ohnesorg by a police officer which was seen as a radicalizing incident for the West German student movement and especially for its militant offshoots like the Red Army Faction that came into the open in 1970. Just a month before the RAF had launched their first major bombing campaign in West Germany, but it appeared that by early June 1972 their leading cadres were all being caught by the authorities. However, the Red Army Faction had never announced any of their attacks beforehand so the dubious phone call threat
must have raised considerable doubt in the first place. But it didn’t for the Federal and local executive branches.

What happened instead became one of the largest police operations in a major 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 quickly became 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.

Let me briefly recapture this escalation here:

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

But just a few weeks later on September 4th, the RAF succeeded with their plans when they kidnapped Hanns-Martin Schleyer, killing his escort of three bodyguards and a driver on the spot. Schleyer at that time had been the most influential, but also most controversial, economic leader in West
Germany. In 1977 he was head of the Confederation of German Employers’ Associations, which made him the “boss of the bosses”. Not much more than 30 years before he also served as SS-Untersturmführer in the administration of occupied Prague, which made him a perfect target in the eyes of the RAF.

The six weeks that followed are still considered to be the worst existential crisis of the Federal Republic of Germany. The federal government, and especially Chancellor Helmut Schmidt, was adamant in not giving in to the kidnapper’s demands to release the Stammheim prisoners. During these weeks, an extralegal administration was established, where all affairs were handled by a special crisis management team led by former Wehrmacht officer Schmidt. A news ban was called into immediate effect and even the reintroduction of the death penalty was discussed in the crisis team meetings. To take the escalation even further, a Palestinian commando hijacked a Lufthansa airplane with German tourists on October 13th to support the RAF’s demands. When, four days later, all hostages were freed by the new paramilitary German GSG 9 squad, it became clear that the RAF’s “77 offensive” was in tatters. The next morning, on October 17th, Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe were found dead in their high-security cells. Schleyer was found shot dead in the trunk of a car 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 was the struggle over the state of the nation, and so the discursive, political and moral boundaries were heavily disputed.

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

At the center of this unofficial state of exception were the two crisis management teams, the so called “Großer Krisenstab” and a smaller version, 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.

The crisis management team consisted of the leading representatives of
the governing coalition parties as well as those of the Christian Democratic
opposition, some ministry officials and heads of German states as well as
the heads of the executive branches. Hence, all executive power was
concentrated in the situation room. 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 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, 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 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.

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 experienc he
gained as a crisis manager was during the catastrophic flood that 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 mayor of
Hamburg actually got back 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. 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, being celebrated as a crisis solving hero in
1962, admitted that he had “knowingly and willingly” violated the
constitution during this emergency and never regretted it. 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.” Schmidt’s decision to act beyond the law has
never been dealt with either in the courts or in the political arena. Following
the old German proverb „Not kennt kein Gebot“ („Necessity knows no law“),
that had been famously used by chancellor Bethmann Hollweg as an
excuse for the invasion of Belgium in 1914, we can see this early example
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 out of custom and natural law. Hatschek
wrote: “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.”

But while the catastrophic events in 1962 were caused by nature, the states
of crises 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 handle a terrorist attack. It was only short
lived and chaotic and ended in a disaster when all eleven Israeli hostages
were killed after the West German police had tried to free them. By now the
state was concerned the impact of a violent challenge to the social order,
namely in the face of terrorism. Walter Benjamin, in his 1920 “Critique of
Violence” had pointed to the challenge 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”.

Most influential for Schmidt’s approach during the German autumn was the
kidnapping of the conservative Berlin mayoral candidate Peter Lorenz by
members of the “June 2nd movement” militant group in February 1975,
which lasted for five days. Schmidt again, now as Federal chancellor,
formed a crisis management team bringing together members of all parties
and the executive branch, although there still were different and sometimes
competing teams. Eventually, under pressure from the Christian Democrats
who feared about the life of their head of the party in Berlin and suffering a
severe flu, Schmidt and the crisis team gave in to the demands of the
kidnappers. Five imprisoned members of the 2nd June movement and the
RAF were released and taken on a plane to take them to the people's
Republic of Yemen. More than that, the kidnappers demanded that the
release of the kidnappers 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.” Helmut Schmidt agreed. This was nothing but
a loss of control for the West German state, especially since some of the
freed prisoners later joined the RAF again. Following Carl Schmitt’s well
known dictum „Sovereign is he who decides on the exception“ - this time it
wasn’t the state. As a result, the chancellor vowed to not give in to any
terrorists demands in the future and 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. In this the theories of the state of exception and
what Ulrich Beck called the “risk society” complement each other. The risk
society is characterized, in other terms, by a stream of emergencies and
would-be emergencies.

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."

The Fall of 1977 sees the return of the authoritarian state – at least for a
certain time. 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. The decision maker is
sovereign – this then had to be demonstrated by the crisis 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 about
proving that the decisive would be victorious over the indecisive. 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 now the media as a watch dog in a democratic society was willing to
put on the muzzle.
For the legal justification of the factual state of exception, paragraph 34 of the federal German criminal code, dealing with „rechtfertigender Notstand“/“Necessity” was being used in 1977. 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 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.”

The justifying necessity of the state had already been used as a legal argument in earlier trials against protesters 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 citizen.

It was §34 that was used for the ad hoc Contact Ban Law (taking effect on Oct 2nd 1977), which was introduced in September 1977 after a merely 8 day discussion to retrospectively legalize the prevented communication between the imprisoned RAF-members but also to prohibit any contact between the prisoners (who were still not finally convicted) and their lawyers. The Federal Supreme Court approved the law and declared in its verdict from September 23, 1977 that this decision was based on “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”. This verdict implicitly postulated that the raison d'état was superior to the constitution. Chancellor Schmidt soon after the contact ban and the news ban have been established called the measures an “irrefutable necessity”.

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

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. 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”. 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 meant 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.

However, with the escalation of this perceived emergency in 1977 we could speak of emerging parallels to Ernst Fraenkels 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 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”. In this situation of a delimitation of boundaries the politics of the crisis management team are, as Fraenkel had put it, “missing the norms and the measures are governing.” Fraenkel as well as Carl Schmitt agreed upon the fact that the transformation from judicial decision to measure is characterizing the spirit of martial law. Federal minister of Justice Vogel, accordingly declared after the crisis team came together for the first time, that negotiating about the release of prisoners was not about “a normative decision, but about a purely de facto measure.” There was 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.”

Here 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”. Following up on Ulrich Preuß’s contemporary
analysis, that the „free democratic order“ as a cipher for the state per se
became substancialized to an „ethical world order“ and therefore to the
raison d’etat.

According to this mindset which dominated the confrontation during the
German Autumn, the state as an entity positioned itself before society. The
social-democratic project of an open society has therefore 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.”

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, while
Helmut Schmidt insisted: “The state is not helpless”. Here again we can
observe a parallel to the works of Carl Schmitt, and older jurists like Samuel
von Pufendorf, in whose political philosophy the state was actually seen as
a person.

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.”

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 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 it created a feeling of community and finally: national
identity. Thus, in several media commentaries the crisis team was seen as
a potential model for governing by consent.

After the impromptu state of emergency in Stuttgart that I have mentioned
earlier, 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. And this I would argue,
is one of the fundamental qualities of state of exception executive
measures: They are a demonstration, or as one Federal judge in that time
described it as “offensive information of the public” by the Federal attorney
and Federal police. 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”.

What I would like to call 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”.

The capacity to act is best demonstrated in such a symbolic area of a
friend/foe dichotomy as is manifested by terrorism. In this regard
guaranteeing security happens as interpellation and performance, in which
fighting abstract threats is becoming foregrounded. As Frank Furedi
described it: “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.”

Let me come to a brief conclusion now:

After 1977 the state of exception did not become the rule in West Germany,
but its selective implementation became a practiced way of dealing with a
 crisis. 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 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.”

However, the state of exception unlike Benjamin’s and Agamben’s notion,
hadn’t become the rule – but the tools and practices of a political
heterotopia were becoming a reality and were ready to use. This has cast
doubts about 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. Eventually,
right after the German Autumn has ended, civic society started to put such
emergency measures under greater scrutiny to prevent that the state of
emergency actually becomes the rule.
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