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The emergency shelter at Berlin Tempelhof as an exemplary case of the permanent state of exception? A legal sociological analysis
State of Exception – An Overview

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A legal sociological analysis

Introduction

When at the end of 2015 migration to Germany increased heavily (a phenomenon known as “the refugee crisis”), the term state of exception found its way into numerous debates about migration and “the refugee”. The state of exception is in no way new to legal debates in Germany. Especially concerning the dilemma between security and freedom, the state of exception has strongly been debated in Public Law and constitutional discussions.\(^1\) Whereas the idea of a permanent state of exception as promoted by the Italian philosopher Giorgio Agamben was used by critical scholars to describe the increase in executive powers, conservative academics mourned over the constitutional state during “the refugee crises” and referred to Carl Schmitt's idea of the political.\(^2\) Agamben's concept of a permanent state of exception and its role at the centre of the structure of the modern state is rooted in the works of Carl Schmitt.

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\(^2\) The critical German Law Journal *Kritische Justiz* published an edition about the exceptional state just shortly after the conservative Constitutional Law scholars Otto Depenheuer and Christoph Grabenwarter published the book *the state in the refugee crisis*. In its foreword, they argue that Germany has experienced a state of exception due to the chaotic migration to Germany in late 2015.
who shared the fascination for the exceptional.\(^3\) For Agamben, the place where the state of exception evolves into a *permanent state of exception* and forces its inhabitants to become individuals without rights, *homo sacer*, is the camp.\(^4\) To find out whether Agamben's analysis of the *permanent state of exception* in the camp can explain the legal situation in German refugee camps, we need to translate Agamben's concept of the *state of exception* as well as his idea of the *homo sacer* into legal sociological terms. We will soon come to realise that even though Agamben includes legal forms of the *state of exception* in his work,\(^5\) to grasp his concept, it will by no means be enough to look out for the actual use of exceptions from law or codified exceptional measures as written into the German constitution by the so called “Notstandsverfassung”\(^6\).

The study I would like to present today is part of the early empirical research of my PhD thesis on Agamben's *state of exception* and refugee camps in Germany from a legal sociological perspective. Therefore, part of my research is the attempt of a translation of Agamben's work into legal concepts, to find a theoretical and methodological fundament. Thus, I would like the paper at hand to be understood as a rather early working report.

The way I read Agamben, his idea of the state of exception rests on three major pillars: biopolitical rule with the help of a *permanent state of exception*, pure violence within the *state of exception* and the concept of the *homo sacer*, an individual reduced to bare life. I see these three levels as counterparts to the important legal sociological questions of regulation, conflict solving and legal integration as

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6 Whether the “Notstandsverfassung” can be seen as the German Constitutional state of exception or rather a set of emergency measures is currently discussed: Whereas Jens Kersten argues that the German Constitution doesn’t know a state of exception (*Ausnahmezustand?*, in: JuS 2016, Vol 3, p. 202), Anna Kaiser disagrees with this idea (*Ausnahmezustand*, in: Ad Legendum 2017, Vol.3, p 203).
functions of law. In researching the legal regulation of, the conflict solving within and the legal integration of the inhabitants in the refugee camp, I hope to be able to answer the question whether or not the German refugee camp can be seen as an exemplary case of Agamben's idea of the camp.

*The emergency shelter in Berlin Tempelhof*

The first and so far only of three research fields was the emergency shelter in the former airport in Berlin Tempelhof. It was opened on 24th October 2015 and at its peak housed 2500 people which makes it the biggest refugee camp in Berlin. Due to its size, the emergency shelter received a lot of medial focus and was at the centre of many public debates about refugee accommodation in Germany. The emergency shelter itself was erected in the former hangars of the airport. At the moment, 200 people live in the emergency shelter, all of whom are to move to the nearby container village within this year.

To find out whether the emergency shelter at Tempelhof Airport can be seen as an exemplary case of Agamben's *permanent state of exception*, I examined the three mentioned levels of regulation, conflict solving and legal integration by means of interviews and field visits. To do so, I interviewed members of different status groups around the emergency shelter. I did semi-structured interviews with three state officials, two public speakers of Tamaja Limited the private company that runs the shelter, an external employee who works in the shelter, a lawyer, a law student who is part of a group which does free legal counselling, and most importantly 5 refugees, of whom one has never lived at the shelter but was part of a protest group which fought against being moved to the shelter at Tempelhof Airport. Additionally, I did oral unstructured interviews with an Afghan family, a security guard as well as several inhabitants outside the camp. With the help of the interviews and the field visits, I want to

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follow law through different levels in the camp and thus employ the methodological idea of studying through as promoted by Susan Wright and Sue Reinholds.\(^9\) For the compilation of the interview questions, I followed three major questions: For the question of regulation, I asked: In the refugee shelter at Tempelhof Airport, is the legal exception used as a method of ruling? For the question of violence and conflict solving, I asked: How are conflicts solved in the emergency shelter? For the question of legal integration, I asked: How do the inhabitants of the shelter position themselves towards law?

With regard to the legal regulation of the German emergency shelter, § 47 German Asylum Law states, that foreigners who apply for asylum have to stay in the emergency shelter up to six weeks, for a maximum of up to six months. Passage four of § 47 states, that the management of the shelter has to inform the asylum seeker within 15 days about his duties and rights according to the Asylum Seeker Payment Law in a language he or she can understand and most suitably in written form. Financial support by the state during the stay in the emergency shelter is regulated by the Asylum Seeker Payment Law, at the moment it amounts to 135 Euros per month.\(^10\) Even though there are no national legal quality standards for refugee shelters in Germany\(^11\), the shelters have to meet federal legal regulations. In Berlin, the quality standards are determined by an appendix of the business contracts Berlin concludes with the private companies who run the shelters. To build and run a refugee camp there are standards in Building Law as well as other Public Law regulations that need to be met.\(^12\) Besides these “top-down”

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\(^10\) § 3 Abs.1 S.1 Nr. 1, AsylBL

\(^11\) The German Asylum Law merely names the two different types of refugee accommodation Initial Reception Centres (§47) and Shared Accommodation Housing (§53) without giving further notice of their quality standards.

\(^12\) §14 BauO Bln (fire precaution measures), § 51 BauO Bln (accessibility measures) as examples from Building Law and the Denkmalschutzgesetz (DschG Bln) for the use of historical buildings.
regulations, Human Rights, European Law as well as German Constitutional Law also frame the requirements for refugee accommodation politics and are supposed to defend the asylum seekers against ill-treatment that, for example, violates human dignity. And of course, in case of physical violence or violation of property rights, Criminal Law comes into force.

I would now like to present first empirical findings by starting to take a look at the three levels of law in the refugee shelter at Tempelhof Airport and then continue with two concrete examples which should help us understand how Tempelhof Airport works as a legal space.

**Regulation**

Agamben states in *State of Exception* that the modern national state is based on a new biopolitical paradigm that uses the *permanent state of exception* as a technique of ruling over the population with the camp as the institutionalised space beyond legal normativity. Consequently, in my Interviews, I was interested in the way the emergency shelter is governed and how or if law is put into practice. My interviews show that at the peak of the so-called “refugee crisis”, the Berlin state office took all sorts of exceptional measures to build refugee shelters in Berlin, such as the more or less spontaneous requisitioning of gyms for refugee accommodation. Also, the running of the shelter within a historical building like the former airport leads to the fact, that the accommodation of people inside is legally tolerated but never entirely permitted. Even though exceptional measure were taken, however, the emergency shelter at Tempelhof Airport is by no means a lawless space. My two interviews with the mayor of the district Berlin Tempelhof-Schöneberg, as well as the two interviews with the public managers of Tamaja Limited and of the Berlin State Office for Refugee Affairs (LAF) have shown that the shelter is regulated by a tight network of public and private actors.

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13 BverfGE 132, 134, Rn. 159ff.
Whereas the district office works as the authorising administration concerning legal requirements in building law, hygiene and fire precautions, the LAF together with Tamaja Limited are responsible for the living conditions in the shelter. Since Tamaja Limited has to stick to the business contract’s quality standards, the LAF is supervising the quality standards regularly. Whereas the beginning of the refugee shelter in the airport hangars was described as chaotic, the company’s public managers as well as the LAF’s public managers told me, that by now the quality standards were met completely, which is also a result of “a learning curve, that we (the LAF) went through”\(^\text{15}\). In case the quality standards aren’t met, the LAF can sanction the company by firstly reducing the amount paid for the accommodation of the refugees and as a last resort terminate the contracts. This governance network in which crucial tasks are performed by public as well as private actors in constant readjustment is classical feature of the activating state.\(^\text{16}\)

Apart from characteristics of the activating state, however, we can also find the effects of the welfare state, in which the state administration confines the autonomy of the individual while providing them with financial benefits. This is especially important, since the forced accommodation in camps combines ideas of welfare and migration policies. Additionally, in Berlin, refugee accommodation is mostly carried out by private companies. At the emergency shelter at Tempelhof Airport, apart from the management by Tamaja Limited, security and food are both provided by sub-companies which are commissioned by Tamaja Limited. The view of the state officials that the two major problems in the emergency shelter are the prohibition of cooking and lack of privacy which can both be solved by transferring the inhabitants to Collective Accommodation Centres miss viral problems that are results of the size of the shelter and the complex system of public and private authorities.

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\(15\) #00:08:11-0#, Interview LAF employee 1.
Conflict solving

In the camp as the prime site of the permanent state of exception, its inhabitants are exposed to pure violence.\textsuperscript{17} Conflicts aren't solved by law, the individual becomes a victim of the authorities' decisions.\textsuperscript{18} Thus, I asked my interview partners about conflict solving in the shelter. I was interested in the conflicts with the security personnel, conflicts among inhabitants and conflicts between the inhabitants and the company.

Whereas the state officials and the company declared in the latest interviews that the atmosphere in the emergency shelter has calmed down and conflicts among the inhabitants or between the inhabitants and the security staff are very rare, the interviewed inhabitants as well as the external employee stated, that the atmosphere is still dominated by aggression and frustration.

\textbf{B:} There is a lot of problems. When you live with like 700 person and everyone like angry about this life. Its not easy. Everyone has a problem. We are refugees. From another country. Like my country now terrible. I have a lot of, all my family in my country and I have a lot of memory, my psychology is so bad. And where I live here, like, nothing happens. Nothings nice happened. I came to Europe because it was my dream. And when I see my dream, it was in the camp. Like animals. How I can feel it? #00:22:49-4#\textsuperscript{19}

As a matter of fact, the beginning of the shelter was overshadowed by several instances of massive physical conflicts between inhabitants and the security staff, which had to be solved by the police. Besides, the different countries of origins resulted in numerous conflicts among the inhabitants especially between Afghan

\textsuperscript{17} Giorgio Agamben, state of expeption, Suhrkamp 2004, p. 51.
\textsuperscript{18} Giorgio Agamben, homo sacer – sovereign state and bare life, Suhrkamp 2002, p. 179.
\textsuperscript{19} Interview Inhabitant 3.
and Arabic people. Since the whole area of the shelter, a former hangar, is easily visible for the security staff, and due to the fact that events such as a mass brawl are, in times of smartphones, immediately filmed by the inhabitants, conflicts between inhabitants seldomly go unnoticed. When the shelter was set up, the company even asked the police to patrol through the hangars to give the inhabitants a sense of the German “legal state”.

To solve conflicts between the inhabitants and the company, Tamaja Limited installed a complain system including a complaint office, which according to the company’s public manager is used frequently. Also, the LAF has its own complaint service, which isn’t used. The public relations manager of the LAF however stressed the fact, that complains reach the state officials through various ways including the press or direct phone calls. Additionally, since a lot of external employees work at the shelter, the situation within the camp draws a lot of public attention. However, the interviewed inhabitants as well as the external employee drew a different picture. According to them “everyone was complaining but nobody was hearing us.” Moreover, the external employee reported cases in which the company fired people who complained and disagreed with the company’s policies so that the constant fear of losing their job influenced the willingness to openly criticise the situation in the camp.

Legal integration

The question of legal integration is directly related to the question in how far the inhabitants of the emergency shelter are reduced to bare life. Since Agamben's homo sacer is rather a philosophical metaphor, a lot of open questions remain for empirical research. This is why, rather than asking my interview partners for characteristics of the homo sacer, I tried to trace back their personal perspectives on law. Focusing on sociological parameters for the mobilization of law, I

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20 #00:04:55-8#, Interview Tamaja Public Manager 1.
21 #00:11:27-3#, Interview Inhabitant 1.
22 Baer, Rechtssoziologie, Nomos 2015, p. 217 ff.
asked my interview partners for subjective parameters such as the knowledge of law, or the knowledge about having rights as well as objective parameters such as costs, language and other external factors that enhance or hinder the use of legal aid.

The free legal counselling by the volunteers of the refugee law clinic was highly frequented for questions in the asylum cases. The legal team gave free counselling once a week in hangar 2. Since up to 2500 people lived in over 3 different hangars and an area of one square kilometre, none of the interviewed inhabitants knew about the presence of the student legal team. All of them remembered another legal counsel, however, whom they unfortunately didn't find helpful or in one case didn't trust because of his rather old age. The state of Berlin doesn't offer a free legal aid. Being asked why, the public officer of the LAF said "We are not a counter office to the BAMF (National Office for Migration and Refugees)". The National Office for Migration and Refugees decides about the asylum cases, whereas the Federal Berlin Office for Refugee Affairs is responsible for accommodation and social welfare matters. The shared migration policy of the National Office for Migration and Refugees and the federal Berlin Office for Refugee Affairs seem make legal empowerment insofar impossible as it might question legal decisions made in the asylum process.

Concerning the living conditions in the camp, one of Tamaja's public managers told me that a group of Afghan refugees thought about going to court because of the bad quality of the food. In the end, however, there never was a lawsuit concerning the food and all of the interviewed refugees stated that instead of going to court, they chose political activism or resignation. When asked why, I was given many answers, which all indicated that the subjective as well as objective factors to mobilize law in the refugee camp, are supposedly bad. In the Initial Reception Centres, the inhabitants receive monthly

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23 Interview LAF public manager.
payments of 135 Euros according to the Asylumseeker Payment Law. Being asked why they didn't chose to take a lawyer they stated that they couldn't afford a lawyer. Others said they didn't know what a lawyer is, that they were new in this country, that coming from a war zone, they weren't used to having rights and because of the language barrier and the fear about consequences for the asylum case, they weren't able to talk to the police. Moreover, all the interview partners expressed a deep mistrust in the state administration as well as the camp management which they counted into the same authority. Because of the fact that they were promised that they would have to stay in the emergency shelter for only six months or because of the very slow change in their living conditions, they felt frustrated and disappointed by the authorities. What followed was the feeling of helplessness, and different strategies to escape daily life in the camp. The one aim all of the interview partners pursued, was of course to move out as fast as possible. Legal sociology has shown, that the mobilization of law depends on the manner of the conflict (is physical violence involved?), the place where it happens (most violence happens at home with no law being mobilized) and who is concerned (among others gender, class and race and the experiences made with state officials matter).\textsuperscript{24}

However, my interviews showed that at the emergency shelter at Tempelhof airport all of these factors accumulated into a situation in which the camp is no lawless space, but law seems to only function top-down and is hardly accessible to defend the inhabitants against ill-treatments. Due to legal regulations and the arrival in a foreign country, language, money and legal knowledge were at the lowest levels.

Thus, the inhabitants as well as the external employee emphasised the security staff's power and the dependency on the private caterer. All inhabitants told me about religious or ethnic discrimination by the security staff. Additionally, the external employee told me about the

social pressure put on women in the shelter. In the interview, the
external employee explained that even though there was a women’s
representative at the shelter, she couldn’t empower the women. As
“the official women’s representative”, she was no contact person to
most women who suffered from daily gender bias and sexual
assaults by the security as well as male inhabitants. Apart from that,
the bad quality of the food as well as the restrictive handle of the
catering company which at times denied the inhabitants a second
portion led to hunger. I was told by the external employee that a lot of
people lost weight during their stay at the emergency shelter. Even
though there were a lot complaints by the inhabitants about this, they
felt the food remained bad or only improved a little until the end with
no real change, leading even to an eating strike:

“I talked to all the people that work at Tamaja. The boss, he
always says yes, ok, next week there will be other food. He
always lies, always lies. After a month, all the people in
Tempelhof didn’t eat. The boss came, hello why? Hello, the
food is very bad, I cant eat this. I have to eat better. Also,
Jobcenter and LAF pays you. 700 Euros.” #00:10:16-5#

Two interview partners mentioned the fact that the company receives
money for the food, so there was knowledge about the administration
at hand. When asked, however, if they thought of suing the company,
several interview partners said that they didn’t have enough money to
pay a lawyer.

B: I’m not thinking about that. Because I have like a little
money, If I will get a lawyer, I will give to him a lot of money
and all my money like 135. So it’s not a lot. I can’t buy a
lawyer. And this money for like one year and a half.
#00:15:42-6#

25 Interview Inhabitant 2.
26 Interview Inhabitant 3.
Conclusion

To find out whether Agamben’s concept of the *permanent state of exception* in the camp can explain the legal space in German refugee camps, I examined the three levels of regulation, conflict solving and legal integration in the emergency shelter at Berlin Tempelhof. My research has shown that the question of the German refugee camp as an exemplary case of the state of exception misconceives the inhabitants’ problems in so far as they don’t root in the absence of law. The emergency shelter is legally regulated and has an institutionalised complaint system. However, the inhabitants’ access to legal help that could defend them against deficits in the refugee accommodation is hindered by numerous factors. A lot of times, this is a consequence of German Migration Law itself: the fear in the asylum case, the forced living in camps, the missing legal consultation by the state as well as financial standards. In other words: “violence to the refugee is a problem immanent to the legal form.”\(^\text{27}\) Thus, following questions should rather focus on human rights standards and the relation between law and justice. Only when the question about the existence of a *permanent state of exception* in German refugee camps evolves into general questions about current German Migration Law, we can understand the refugees’ situation. As a consequence, I would argue that current debates on the state of exception often function as placeholders for the question about the nature of law itself, meaning the dispute between legal positivism and natural law.

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