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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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Table of Contents

Introduction4

The emergency shelter in Berlin Tempelhof6

Regulation8

Conflict solving 10

Legal integration.....11

Conclusion 15

The Author 16

1 Anne-Marlen Engler

2 **The emergency shelter at Berlin** 3 **Tempelhof as an exemplary** 4 **case of the permanent state of** 5 **exception?**

6 **A legal sociological analysis**

7 *Introduction*

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

1 cf. Anna Kaiser, *Ausnahmeverfassungsrecht* (manuscript), 2017; Günther Frankenberg, *Staatstechnik: Perspektiven auf Rechtsstaat und Ausnahmezustand*, Suhrkamp 2010.

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.

22 who shared the fascination for the exceptional.³ For Agamben, the
23 place where the state of exception evolves into a *permanent state of*
24 *exception* and forces its inhabitants to become individuals without
25 rights, *homo sacer*, is the camp.⁴ To find out whether Agamben's
26 analysis of the *permanent state of exception* in the camp can explain
27 the legal situation in German refugee camps, we need to translate
28 Agamben's concept of the *state of exception* as well as his idea of
29 the *homo sacer* into legal sociological terms. We will soon come to
30 realise that even though Agamben includes legal forms of the *state of*
31 *exception* in his work,⁵ to grasp his concept, it will by no means be
32 enough to look out for the actual use of exceptions from law or
33 codified exceptional measures as written into the German
34 constitution by the so called "Notstandsverfassung"⁶.

35

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

43

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

3 cf. Carl Schmitt, *Politische Theologie*, Duncker&Humboldt 2015; Carl Schmitt, *Dictatorship*, Polity Press 2014.

4 Giorgio Agamben, *homo sacer – sovereign power and bare life*, Suhrkamp 2004, p. 179f.

5 Giorgio Agamben, *state of exception*, p. 19 ff.

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).

50 functions of law.⁷ In researching the legal regulation of, the conflict
51 solving within and the legal integration of the inhabitants in the
52 refugee camp, I hope to be able to answer the question whether or
53 not the German refugee camp can be seen as an exemplary case of
54 Agamben's idea of the camp.

55

56 *The emergency shelter in Berlin Tempelhof*

57 The first and so far only of three research fields was the emergency
58 shelter in the former airport in Berlin Tempelhof. It was opened on
59 24th October 2015 and at its peak housed 2500 people which makes
60 it the biggest refugee camp in Berlin. Due to its size, the emergency
61 shelter received a lot of medial focus and was at the centre of many
62 public debates about refugee accommodation in Germany.⁸ The
63 emergency shelter itself was erected in the former hangars of the
64 airport. At the moment, 200 people live in the emergency shelter, all
65 of whom are to move to the nearby container village within this year.

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

7 cf. Susanne Baer, *Rechtssoziologie*, Nomos 2015; Thomas Raiser, *Grundlagen der Rechtssoziologie*, Mohr Siebeck 2013, pp. 186ff.

8 cf. <http://www.sueddeutsche.de/politik/tempelhofer-feld-warum-deutschlands-groesste-fluechtlingsunterkunft-so-umstritten-ist-1.2839170>, lastly visited October, 30th 2017.

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

91

92 With regard to the legal regulation of the German emergency shelter,
93 § 47 German Asylum Law states, that foreigners who apply for
94 asylum have to stay in the emergency shelter up to six weeks, for a
95 maximum of up to six months. Passage four of § 47 states, that the
96 management of the shelter has to inform the asylum seeker within 15
97 days about his duties and rights according to the Asylum Seeker
98 Payment Law in a language he or she can understand and most
99 suitably in written form. Financial support by the state during the stay
100 in the emergency shelter is regulated by the Asylum Seeker Payment
101 Law, at the moment it amounts to 135 Euros per month.¹⁰ Even
102 though there are no national legal quality standards for refugee
103 shelters in Germany¹¹, the shelters have to meet federal legal
104 regulations. In Berlin, the quality standards are determined by an
105 appendix of the business contracts Berlin concludes with the private
106 companies who run the shelters. To build and run a refugee camp
107 there are standards in Building Law as well as other Public Law
108 regulations that need to be met.¹² Besides these “top-down”

9 Susan Wright/ Sue Reinhold, *Studying Through: A Strategy for studying Political Transformation. Or Sex, Lies and British Politics*, in: Cris Shore/ Susan Wright/ Davide Però (ed), *Policy Worlds*, Berghahn Books 2011, p.86 ff.

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.

109 regulations, Human Rights, European Law as well as German
110 Constitutional Law also frame the requirements for refugee
111 accommodation politics and are supposed to defend the asylum
112 seekers against ill-treatment that, for example, violates human
113 dignity¹³. And of course, in case of physical violence or violation of
114 property rights, Criminal Law comes into force.

115

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

120

121 *Regulation*

122 Agamben states in *State of Exception* that the modern national state
123 is based on a new biopolitical paradigm that uses the *permanent*
124 *state of exception* as a technique of ruling over the population with
125 the camp as the institutionalised space beyond legal normativity.¹⁴
126 Consequently, in my Interviews, I was interested in the way the
127 emergency shelter is governed and how or if law is put into practice.
128 My interviews show that at the peak of the so-called “refugee crisis”,
129 the Berlin state office took all sorts of exceptional measures to build
130 refugee shelters in Berlin, such as the more or less spontaneous
131 requisitioning of gyms for refugee accommodation. Also, the running
132 of the shelter within a historical building like the former airport leads
133 to the fact, that the accommodation of people inside is legally
134 tolerated but never entirely permitted. Even though exceptional
135 measure were taken, however, the emergency shelter at Tempelhof
136 Airport is by no means a lawless space. My two interviews with the
137 mayor of the district Berlin Tempelhof-Schöneberg, as well as the
138 two interviews with the public managers of Tamaja Limited and of the
139 Berlin State Office for Refugee Affairs (LAF) have shown that the
140 shelter is regulated by a tight network of public and private actors.

13 BverfGE 132, 134, Rn. 159ff.

14 Agamben, *homo sacer – sovereign power and bare life*, Suhrkamp 2002, p.
178.

141 Whereas the district office works as the authorising administration
142 concerning legal requirements in building law, hygiene and fire
143 precautions, the LAF together with Tamaja Limited are responsible
144 for the living conditions in the shelter. Since Tamaja Limited has to
145 stick to the business contract's quality standards, the LAF is
146 supervising the quality standards regularly. Whereas the beginning of
147 the refugee shelter in the airport hangars was described as chaotic,
148 the company's public managers as well as the LAF's public
149 managers told me, that by now the quality standards were met
150 completely, which is also a result of "a learning curve, that we (the
151 LAF) went through"¹⁵. In case the quality standards aren't met, the
152 LAF can sanction the company by firstly reducing the amount paid for
153 the accommodation of the refugees and as a last resort terminate the
154 contracts. This governance network in which crucial tasks are
155 performed by public as well as private actors in constant
156 readjustment is classical feature of the activating state.¹⁶

157

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

173

15 #00:08:11-0#, Interview LAF employee 1.

16 cf. Susanne Baer, *Der Bürger im Verwaltungsrecht*, Mohr Siebeck 2006.

174 *Conflict solving*

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

182

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

189

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

199

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

17 Giorgio Agamben, *state of exeption*, Suhrkamp 2004, p. 51.

18 Giorgio Agamben, *homo sacer – sovereign state and bare life*, Suhrkamp 2002,
p. 179.

19 Interview Inhabitant 3.

205 and Arabic people. Since the whole area of the shelter, a former
206 hangar, is easily visible for the security staff, and due to the fact that
207 events such as a mass brawl are, in times of smartphones,
208 immediately filmed by the inhabitants, conflicts between inhabitants
209 seldomly go unnoticed. When the shelter was set up, the company
210 even asked the police to patrol through the hangars to give the
211 inhabitants a sense of the German “legal state”²⁰.

212

213 To solve conflicts between the inhabitants and the company, Tamaja
214 Limited installed a complain system including a complaint office,
215 which according to the company's public manager is used frequently.
216 Also, the LAF has its own complaint service, which isn't used. The
217 public relations manager of the LAF however stressed the fact, that
218 complains reach the state officials through various ways including the
219 press or direct phone calls. Additionally, since a lot of external
220 employees work at the shelter, the situation within the camp draws a
221 lot of public attention. However, the interviewed inhabitants as well
222 as the external employee drew a different picture. According to them
223 “everyone was complaining but nobody was hearing us.”²¹ Moreover,
224 the external employee reported cases in which the company fired
225 people who complained and disagreed with the company's policies
226 so that the constant fear of losing their job influenced the willingness
227 to openly criticise the situation in the camp.

228

229 *Legal integration*

230 The question of legal integration is directly related to the question in
231 how far the inhabitants of the emergency shelter are reduced to bare
232 life. Since Agamben's *homo sacer* is rather a philosophical metaphor,
233 a lot of open questions remain for empirical research. This is why,
234 rather than asking my interview partners for characteristics of the
235 *homo sacer*, I tried to trace back their personal perspectives on law.
236 Focusing on sociological parameters for the mobilization of law,²² I

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.

237 asked my interview partners for subjective parameters such as the
238 knowledge of law, or the knowledge about having rights as well as
239 objective parameters such as costs, language and other external
240 factors that enhance or hinder the use of legal aid.

241

242 The free legal counselling by the volunteers of the refugee law clinic
243 was highly frequented for questions in the asylum cases. The legal
244 team gave free counselling once a week in hangar 2. Since up to
245 2500 people lived in over 3 different hangars and an area of one
246 square kilometre, none of the interviewed inhabitants knew about the
247 presence of the student legal team. All of them remembered another
248 legal counsel, however, whom they unfortunately didn't find helpful or
249 in one case didn't trust because of his rather old age. The state of
250 Berlin doesn't offer a free legal aid. Being asked why, the public
251 officer of the LAF said "We are not a counter office to the BAMF
252 (National Office for Migration and Refugees)".²³ The National Office
253 for Migration and Refugees decides about the asylum cases,
254 whereas the Federal Berlin Office for Refugee Affairs is responsible
255 for accommodation and social welfare matters. The shared migration
256 policy of the National Office for Migration and Refugees and the
257 federal Berlin Office for Refugee Affairs seem make legal
258 empowerment insofar impossible as it might question legal decisions
259 made in the asylum process.

260

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

23 Interview LAF public manager.

270 payments of 135 Euros according to the Asylumseeker Payment
271 Law. Being asked why they didn't chose to take a lawyer they stated
272 that they couldn't afford a lawyer. Others said they didn't know what a
273 lawyer is, that they were new in this country, that coming from a war
274 zone, they weren't used to having rights and because of the
275 language barrier and the fear about consequences for the asylum
276 case, they weren't able to talk to the police. Moreover, all the
277 interview partners expressed a deep mistrust in the state
278 administration as well as the camp management which they counted
279 into the same authority. Because of the fact that they were promised
280 that they would have to stay in the emergency shelter for only six
281 months or because of the very slow change in their living conditions,
282 they felt frustrated and disappointed by the authorities. What followed
283 was the feeling of helplessness, and different strategies to escape
284 daily life in the camp. The one aim all of the interview partners
285 pursued, was of course to move out as fast as possible. Legal
286 sociology has shown, that the mobilization of law depends on the
287 manner of the conflict (is physical violence involved?), the place
288 where it happens (most violence happens at home with no law being
289 mobilized) and who is concerned (among others gender, class and
290 race and the experiences made with state officials matter).²⁴
291 However, my interviews showed that at the emergency shelter at
292 Tempelhof airport all of these factors accumulated into a situation in
293 which the camp is no lawless space, but law seems to only function
294 top-down and is hardly accessible to defend the inhabitants against
295 ill-treatments. Due to legal regulations and the arrival in a foreign
296 country, language, money and legal knowledge were at the lowest
297 levels.

298

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

24 Erhard Blankenburg, *Mobilisierung des Rechts*, Springer 1995, p. 39ff.

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

316

317 " I talked to all the people that work at Tamaja. The boss, he
318 always says yes, ok, next week there will be other food. He
319 always lies, always lies. After a month, all the people in
320 Tempelhof didn't eat. The boss came, hello why? Hello, the
321 food is very bad, I cant eat this. I have to eat better. Also,
322 Jobcenter and LAF pays you. 700 Euros." #00:10:16-5#²⁵

323

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

329

330 **B:** I'm not thinking about that. Because I have like a little
331 money, If I will get a lawyer, I will give to him a lot of money
332 and all my money like 135. So it's not a lot. I can't buy a
333 lawyer. And this money for like one year and a half.
334 #00:15:42-6#²⁶

335

25 Interview Inhabitant 2.

26 Interview Inhabitant 3.

336 *Conclusion*

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

361

362

27 Berman, *Legal Subjectivity and the Refugee*, in: *International Journal of Refugee Law* 2014, Vol. 1, p. 21.

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