Germany – Balancing the right of a parliamentary commission of enquiry to access classified evidence from anti-terrorist undercover operations with the requirements of national security – "*Anis Amri Case*".

On 19 December 2016, an Islamist terrorist named Anis Amri drove an articulated lorry into a crowd on a Christmas Market in Berlin, killing eleven people and injuring many others, some of them seriously. Before the attack, Amri had shot the driver of the lorry dead. Amri had entered Germany illegally in the summer of 2015, was soon afterwards listed by the intelligence services as a violent Islamist, and in February 2016 as posing an actual and present danger. However, in September 2016, his surveillance was terminated, as he was then allegedly only involved in petty crime. This course of events triggered public concerns whether the intelligence services could have prevented the attack, whether there was a need for systemic reform and more specifically, whether undercover informants had been used in Amri's personal environment.

In order to investigate these matters, the German Federal Parliament (*Deutscher Bundestag*) established a Commission of Enquiry (*Untersuchungsausschuss*) with the terms of reference of scrutinising the intelligence services' knowledge about Amri's environment before the attack, to evaluate their work and that of the higher echelons of the administrative hierarchy, and finally to identify those politically responsible for any failures. In particular, the commission was to investigate whether, and if so how, Amri, his contact persons, potential accomplices, *hintermen* or supporters had been used as sources of information by the intelligence services and whether in light of such use no action was taken against other persons who may have been involved in the attack. The commission was to give guidance on a possible reform based on its findings.

The Commission issued a number of orders to the government to produce evidence, which were in some instances rebuffed based on arguments of operative secrecy and the acute danger to the (ongoing) intelligence operation in the extremely secretive and violent milieu of Islamist/Salafist terror groups, and the danger to any persons acting undercover in that environment. Previous media reports had mentioned that the Federal Office for the Protection of the Constitution (FOPC - *Bundesamt für Verfassungsschutz*)[1] had run (an) undercover informant(s) in the mosque frequented by Amri.

[1] On the FOPC's precise remit see www.verfassungsschutz.de/en/index-en.html.

In its Evidence Order 11 of 7 June 2018 (EO 11), the commission requested the government to furnish it with the names of the persons in the FOPC who acted as liaison officers in charge of any undercover informants in the case. This was again denied by the government, who saw this as a preparation for hearing the actual witness testimony of the liaison officer, citing the high risk of exposure of the ongoing operation and of the undercover informants, and the ensuing acute danger to life and limb to themselves, their family or friends on the one hand, and on the other hand the foreseeable loss of any and all existing and future informants who, it was alleged, would cease to cooperate with the FOPC out of fear that the unconditional assurances of confidentiality they had been given would not be honoured. Given that it was extremely difficult to infiltrate the secretive Islamist circles, who also ran their own counter-intelligence operations, the interests of national security took precedence before the task of the commission to investigate potential errors and failures of the intelligence community.

On 11 December 2018, after a period of ping-pong between the commission and the government which brought no solution, the opposition parliamentary parties *Bündnis 90/Die Grünen*, the Liberal Democratic Party (FDP) and the *Linke*, as well as their representatives on the commission, filed a motion on behalf of the Bundestag before the Federal Constitutional Court (FCC – *Bundesverfassungsgericht)* in the so-called "*Organstreit*" procedure under Article 93(1) No. 1 of the German Federal Constitution, the Basic Law (*Grundgesetz* – GG). This provision covers litigation on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body[2]. The complainants alleged that Parliament's rights under Article 44 GG had been violated, and that the blanket approach employed by the government to EO11 and the FOPC's practice of providing unconditional assurances of total secrecy to its informants made meaningful parliamentary scrutiny of the intelligence services through commissions of enquiry moot for all practical purposes.

Article 44 GG[3] states that the *Bundestag* shall have the right, and on the motion of one quarter of its members the duty, to establish a commission of inquiry, which shall take evidence at public hearings but may also sit *in camera* when necessary. The rules of criminal procedure apply *mutatis mutandis* to the taking of evidence. Courts and administrative authorities are required to provide legal and administrative assistance. Decisions of commissions of inquiry are not subject to judicial review. Courts are, however, not bound by their findings. Article 44 GG is supplemented by an

[2] See www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0518.
[3] See www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210.

Act of Parliament regulating the details of the work of such commissions[4], and the *Bundestag's* Ordinance on Classification of Documents (*Geheimschutzordnung*)[5]. These provisions together foresee a staggered array of measures to protect information up to the highest classification category.

In its decision of 16 December 2020[6], the FCC held in essence[7] that while commissions of enquiry had a crucial function in safeguarding parliamentary scrutiny of the executive and hence enjoyed the default right to access any and all information necessary for the pursuit of their tasks, that right was subject to the protection of the fundamental rights – to freedom, life and limb – of the informants and their families or friends on the one hand, and to overriding considerations of national security on the other. Both aspects could in theory also be jeopardised by the mere testimony of the liaison officer as opposed to that of the actual informant. However, the degree of risk had to be explicitly and extensively justified by the government. In so finding, the Court went beyond its prior decision from 2017[8] on the issue of parliamentary questions which were always meant to be conducted in public and where the threshold for restrictions was lower than for a commission which could conduct large and essential parts of its proceedings *in camera* and could restrict the information which would be made available to the public in its final report. The Court accepted that the risk of identification of the informants, and consequently a danger to the protection of their fundamental rights, could be virtually excluded by employing the protective measures available to the commission, and hence both limbs of the government's argument - protection of rights and national security – were moot as far as an *actual* risk was concerned. However, it found that the subjective fear of the informants that their role would not remain absolutely secret and the distrust in the German intelligence authorities engendered by such concerns would make the further cooperation and the future recruitment especially in Islamist environments extremely difficult if not impossible. The Court was of the view that the government had provided sufficiently detailed justification for its refusal and accordingly denied the motion by a majority of 6 to 1.

[4] See www.gesetze-im-internet.de/puag/ - in German only.
[5] See www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go_btg/anlage3-245182 - in German only.
[6] Docket No. 2 BvE 4/18 – online at www.bverfg.de/e/es20201216_2bve000418.html - Detailed English press release available at www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-012.html.
[7] The 49-page decision and dissent by Justice Müller address quite a number of issues which cannot be summarised in a short case note.
[8] Decision of 13 June 2017 – Docket No. 2 BvE 1/15 – online at www.bverfg.de/e/es20170613_2bve000115.html - Official gazette of the FCC citation: BVerfGE 146, 1.

Justice Müller, himself a former long-time minister-president of the state of the Saarland, filed a rather scathing dissenting opinion in which he took the majority to task for effectively giving carte blanche to the government, allowing it to evade any scrutiny worth the name of its intelligence activity, ironically even when alleged misconduct of the intelligence services themselves was the object of the scrutiny. He particularly objected to the majority's view that the government had provided a sufficient justification for an exception from the commission's default right of access based on the alleged subjective fear of the informants, which to his mind had not been explained in any detail beyond general assumptions and allegations. He also queried the unconditional assurances, comparing the situation to undercover informants in criminal investigations who always must expect that they or their liaison officer may be called to give evidence in court, and failed to understand why it should be impossible to explain this to a similar degree to the FOPC's informants, especially given that the relationship between liaison officer and informant often by necessity tends to be very close and personal.

Michael Bohlander
Durham Law School