



## Analysis

### Almost suspicious: the unbearable lightness of legislation

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*The lorry attack on the Berlin Christmas Market on 19 December 2016 was the perfect reason for the German government to demand even stricter laws on counter-terrorism. With 12 people killed and 55 hurt it was the most severe individual attack since the neo-Nazi assault at the Oktoberfest in 1980.*

“The more that is published about Anis Amri the more absurd it seems that he was not deported,” the German newspaper *Welt* said two days after the attack. Three weeks after the attack *Der Spiegel* was wondering why security authorities did not remove the radical who was earmarked for deportation. [1]

Numerous similar expressions can be found in the German media since the end of December. And indeed, in contrast to the young Afghan refugee who attacked passengers with an axe on a train on 18 July in Würzburg or the Syrian who lit a backpack bomb on 24 July in Ansbach, Anis Amri was not unknown to police, justice, and secret services. Regional Criminal Investigation Offices, regional Offices for the Protection of the Constitution (domestic intelligence), and the Public Prosecutor’s Offices in North Rhine-Westphalia and Berlin were aware of him, as were the Federal Criminal Investigation Office, the Federal Prosecutor’s Office, the Federal Police Force, the Federal Office for the Protection of the Constitution, and the Federal Intelligence Service (external intelligence).

The man had been a topic at meetings of the Joint Terrorism Defence Centre (GTAZ) 11 times, including seven times in the working group ‘operational information exchange’ and twice in the working group on ‘legal status accompanying actions’ where the police, intelligence services, and the Federal Agency of Migration and Refugees (BAMF) discuss whether and how to act against ‘threatening individuals’, by using instruments of the law on aliens. The security conference, the North Rhine-Westphalian counterpart of the working group on legal status, discussed Amri seven times.

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[1] *Welt.de* (21.12.2016); *Der Spiegel* No. 3 (14.01.2017)

After an informant for the North Rhine-Westphalia criminal investigation office announced that the then-identified Anis had proclaimed he would 'do something here' he was classified as a contact person (someone who is in touch with identified targets) and, since February 2016, as a potential threat. In October 2016 he was finally classified as a foreign fighter in the police information system INPOL.

The informant repeatedly reported on Anis Amri and even drove him to Berlin in February. Amri supposedly said that he would be able to organise the acquisition of arms from abroad, is accused of having said he would approve of the killing of non-believers and of threatening an attack using an explosive belt. The police led various other undercover investigations concerning Amri: in 2015 he ended up under telecommunications surveillance as a 'mediator', a person who is monitored because the actual target uses his network connection or receives information from him. He was put under preventive police observation.

From an overview about the authorities' actions concerning Anis Amri that was published by the Federal Ministries for the Interior and Justice [2] it can be seen that there was not sufficient evidence to prove "the preparation of a serious act of violent subversion" (§89a *Strafgesetzbuch*, Penal Code). Therefore, the Berlin General Prosecution Office initiated a proceeding accusing Amri of murder. The murder of whom exactly is not mentioned in the overview.

Since 4 April 2016 Amri was again under telecommunications surveillance. The Police even used an IMSI catcher to "recognise unknown communication devices". Surveillance was occasional rather than permanent and this time under the guise of criminal procedural and not preventive observation. Here, Amri did attract attention due to dealing and taking drugs but not, however, because of preparations for an attack. By 21 September the authorisations for surveillance had expired.

The evidence against Amri was not even sufficient for a 'return order'. After the refusal of his asylum application the preparations for his return were in progress but they were delayed because Tunisia did not initially want to issue documents. It was not until 21 December 2016, two days after the attack, that the Tunisian Consulate-General confirmed Amri's nationality.

No doubt: an investigation about what really happened in the case of Amri is more than necessary. However, German politicians are already in the middle of election campaign. A serious analysis cannot be expected at the moment. The consideration that even with total surveillance – if that would have even been possible – it probably would not have been possible to identify Amri's intentions is apparently off-limits.

Since the attack, the governing parties in particular have tried to outbid one another with new demands. The consequent mingling of the topics of terrorism and migration was predictable. The Christian Social Union (CSU) did not even wait 24 hours before requesting a comprehensive review of the security and migration policy – including the usual demand for transit zones [3] and the like. Everything needs to go on "the test bench". [4] The Federal

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[2] [www.bmji.de/SharedDocs/Artikel/DE/2017/01162017\\_Chronologie.html](http://www.bmji.de/SharedDocs/Artikel/DE/2017/01162017_Chronologie.html) (last seen February 2017), BT-Drs. 18/11027 (27.01.2017)

[3] A transit zone for refugees refers to the airport procedure but is planned to be applied at the external land borders as well. The aim is to stop directly at the border those people coming from countries deemed as safe.

[4] FAZ (21.12.2016)

Minister for the Interior of the CSU's sister party, the Christian Democratic Union (CDU), chose a similar tone.

In a guest contribution in the German newspaper *Frankfurter Allgemeine* of 3 January the minister talked about “guidelines for a strong state in difficult times”, thus pleading for massive centralisation: “control competence” for the Federal Criminal Police Office, elimination of the regional Offices for the Protection of the Constitution, even more stop and search powers for the Federal Police, “decision competences” for the Federal Government when it comes to “national catastrophes” – whatever they may be – “armed facility protection” by the Federal Armed Forces, “execution responsibilities” for the Federal Government when it comes to “terminations of residence”, grounds for detention concerning the “detention of dangerous illegal residencies”, and so on. [5]

The retiring head of the Social Democrats declared on the same day that security was originally a social democratic topic, which is true insofar as the Social Democratic Party encountered state security in the 19th century with the Anti-Socialist Laws – but that was not what Sigmar Gabriel meant. Gabriel did at least object to the false solution of transit zones and explained that citizens' expectations would be disappointed if politics concentrated exclusively on the tightening of laws. However, he instantly forgot this idea and called for several intensifications: “standardisation of data systems of the security authorities on all levels”, a “reform of data protection”, more CCTV in public places, “houses of youth law” and “youth cops” to counteract the radicalisation of (Muslim) teenagers and detention for “potentially threatening individuals who do not have a residence permit in Germany”. [6]

On 10 January the interior and justice ministers faced the press and declared the legislative measures that they agreed would represent the programme of the ‘Grand Coalition’ (made up of the CSU, CDU and SPD) until the end of the legislative period in September 2017. [7] The main focus was on police and legal action against “threatening individuals”. We do know that Anis Amri was classified as one of them, but what does “threatening individual” mean?

### **Police Newspeak**

In 2010 the journalist Kai Biermann included the term “threatening individual” in his dictionary for ‘Newspeak’. A “threatening individual” is here:

*“[S]omeone who is potentially dangerous for the state, especially in a terrorist way. Sounds terrifying. However, the term actually describes someone against whom there exists no court-tested evidence, who therefore cannot be brought before a court, and who therefore cannot be sentenced and as the law stands should be considered innocent. What exactly ‘threatening individuals’ actually are nobody says – probably quasi-suspects. In any case they are people worth being kept under surveillance.” [8]*

Even in police jargon “threatening individuals” is a new linguistic term. Legally the police are concerned with only two groups of people. One group is made up of the suspected or the accused. The relevant investigation powers that the prosecution authorities and the police

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[5] [www.faz.net](http://www.faz.net) (03.01.2017) p.4; [www.bmi.bund.de](http://www.bmi.bund.de) (03.01.2017)

[6] Gabriel, S.: Zeit für mehr Sicherheit in Zeiten wachsender Unsicherheit, [www.spd.de/fileadmin/Dokumente/Sonstiges\\_Papiere\\_et\\_al/Sigmar\\_Gabriel\\_Sozialdemokratie\\_und\\_innere\\_Sicherheit.pdf](http://www.spd.de/fileadmin/Dokumente/Sonstiges_Papiere_et_al/Sigmar_Gabriel_Sozialdemokratie_und_innere_Sicherheit.pdf)

[7] [www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2017/01/statement-bmi-bmjv.html](http://www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2017/01/statement-bmi-bmjv.html)

[8] <https://neusprech.org/gefaehrder>

have are defined in the criminal procedure code. The second group is made up of the troublemakers, which are these days considered persons responsible for a threat to public order and security. This used to mean a concrete threat: “a situation, which unhindered, would lead in an individual case with sufficient probability to a violation of a police-protected good in the foreseeable future.” Which measures the police are allowed to use against troublemakers is defined in the law. The link between police action, a concrete suspicion, and a concrete threat was supposed to prevent random suspicion by the police.

The new group of “threatening individuals” was introduced just two decades ago – first where the police took action against football fans. Before important games, people who were supposedly about to make trouble received a visit from the police, either at work or at home, to let them know it would be better if they watched the match at home and not at the stadium. To receive this kind of visit the insights of police spotters were considered sufficient.

It was just a matter of time before “threatening individuals” appeared in the field of state protection. To improve nationwide information exchange and the feeding of the Federal Criminal Police Office (BKA) files on “threatening individuals”, the heads of the regional Criminal Police Offices and the BKA, united in the Working Group Criminal Police (AG Kripo), decided on a definition in 2004:

*“A threatening individual is a person about whom the knowledge of certain facts legitimates the assumption that politically motivated criminal acts of importance, especially those listed in §100a of the Criminal Procedure Code (StPO, Strafprozessordnung), could be committed.”*

With reference to the catalogue of §100a StPO (telecommunications surveillance) the whole mountain of political criminal law was included, which applies long before any particular criminal act has occurred. Even more important was that that the definition included potential criminal acts that “threatening individuals” could potentially commit on the basis of police prognosis. Thus, “threatening individuals” can come to the attention of the police long before any prohibited act has been committed. In 2006, when Wolfgang Neskovic, a former Left Party (*Die Linke*) representative in the *Bundestag*, asked for the legal basis of this definition of “threatening individuals”, he was informed that such a definition would not be necessary. [9]

More than a decade later a legal definition seemed to be in sight, in a proposed new police law. In April 2016 the Federal Constitution Court found out that a significant number of powers the BKA had been awarded in 2009 for the “prevention of threats from international terrorism” went too far, because they did not only prevent concrete threats in the classical sense but instead they allowed an almost unrestricted prevention of criminal offences. [10] The court responded quite mildly: it did not exclude in principle surveillance measures in the run-up to a concrete threat, but “certain facts needed to be proved which in an individual case would support the prognosis of an event that could lead to a violation of the relevant protected goods”. General experiences are not sufficient.

The Federal Ministry has copied-and-pasted the formulation of the court into their proposal for a 'law on the restructuring of the Federal Criminal Police Office Act' and has thus delivered a

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[9] BT-Drs. 16/3570 (24.11.2006) p. 6, questions 9-11

[10] BVerfG: sentence (20.04.2016), Az.: 1 BvR 966/09

definition of “threatening individuals”. [11] According to the proposal a threatening individual is someone to whom:

*“certain facts apply which justify the assumption of threat, or whose individual behaviour justifies the concrete probability that in the foreseeable future a terrorist crime is going to be committed.”*

Against these individuals a whole host of measures will be permitted – from the use of informants and undercover officers to long-term observation and telecommunications surveillance, up to bugging operations and the use of trojans. There is also going to be the option of residency prohibitions and restriction orders and their enforcement via ankle monitors (§55 and 56 of the proposal).

Ronen Steinke pointed out in the newspaper *Süddeutsche Zeitung* that orders for these measures will be based on mere presumptions, which the accused cannot disprove. The definition does not give any exact indication on what legal basis such a presumption about a potential threat would have to be based in the future and there is no definition what period of time “in the foreseeable future” would be – the drawing up of standards is left to the courts. [12] So it is likely that the Federal Court will have to comment on the BKA act again in a few years’ time. (The new act was passed at the end of April).

Until then the BKA is going to apply strict surveillance methods and enforce restrictions of liberty against people without having valid proof, with the help of permits issued by the investigating magistrate of the District Court of Wiesbaden. In February 2017 the BKA assumed there were more than 570 potentially threatening Islamists in Europe of which about half are situated in Germany. They also registered 360 “relevant individuals”. [13] To identify the really dangerous threats and to differentiate between moderate, conspicuous and high risk the office is going to introduce new software that has been designed in cooperation with the forensic psychology working group of the University of Konstanz. [14] It will be interesting to see how many of the threatening individuals will be provided with ankle monitors.

Most of the “threatening individuals” have been reported by the German Federal States and are under observation by the regional Criminal Investigation Offices, but the Federal Minister of the Interior would like the states to follow the Federal Government. On 21 February the Bavarian Minister for the Interior presented a proposal for the “effective surveillance of dangerous individuals,” according to which electronic monitoring is brought under police responsibility – but not only that. The state government of the Christian Social Union (CSU) wants to submit “threatening individuals” to preventive detention – indefinitely. [15]

### **Law concerning foreigners: easy enforcement measures**

The Law Concerning Foreigners (*Ausländerrecht*) traditionally allows for special measures against politically unpopular foreigners. These were further reinforced after 11 September 2001 with the 'Otto-Catalogue' and the Immigration Act which took effect on 1 January 2005.

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[11] BT-Drs. 18/11163 (14.02.2017)

[12] [www.sueddeutsche.de](http://www.sueddeutsche.de) (01.02.2017)

[13] BKA: press release 01.02.2017); [www.zeit.de](http://www.zeit.de) (12.01.2017)

[14] BKA: press release (01.02.2017)

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[www.innenministerium.bayern.de/assets/stmi/ser/gesetzentwurf/gesetzentwurf\\_gesetz\\_zur\\_effektiven\\_9Cberwachung\\_gef%C3%A4hrlicher\\_personen.pdf](http://www.innenministerium.bayern.de/assets/stmi/ser/gesetzentwurf/gesetzentwurf_gesetz_zur_effektiven_9Cberwachung_gef%C3%A4hrlicher_personen.pdf); [www.sueddeutsche.de](http://www.sueddeutsche.de) (27.02.2017)

The recent Residence Act introduced the possibility of a high “expulsion interest” concerning foreigners who “endanger the free democratic order and security of the Federal Republic of Germany”. Such a danger exists when “certain facts lead to the assumption that an individual is or was part of a group that supports terrorism, or supports/supported a group which supports terrorism or committed or prepared a serious act of violent subversion following §89a paragraph 1 and 2 of the Criminal Code” (§54 paragraph 1 No. 2 of the Residence Act). On the basis of such conclusions surveillance measures can be imposed: regular reporting obligations, communication bans and restrictions on freedom of movement (§56). Even without prior notice a return (deportation) order can be put into effect (article 58a). Finally, detention is possible for up to three months – and extendable for up to 18 months (§62 paragraph 3 No. 1a).

Preventive detention had previously not been possible when the expulsion could not have been carried out within the next three months because of reasons for which the “threatening individual” was not responsible – for example third party delays with the embassy of the country of origin failing to a *laissez-passer*. In October 2016 the Federal Minister for the Interior had at hand a legislative proposal to introduce a new basis for detention and the possibility to detain “threatening individuals” for up to 18 months. After the Berlin attack this path was clear. On 22 February the federal cabinet ratified a proposal for a better implementation of the return process. [16] It does not only include the new basis for detention of foreigners from whom there “originates a substantial danger to life for third persons or important legal assets of inner security” (new §62 paragraph 3), but also a return custody of up to 10 days and electronic monitoring by the Immigration Department – on the basis of a purely administrative decision (new §56a).

The political impetus after the attack allows a whole series of new measures, which do not have a lot to do with counter-terrorism – from the extraction and examination of mobile phone data for identification to residency obligations for migrants who do not cooperate in their return. [17]

### **Anything else?**

The merry-go-round of counter-terrorism measures is set to continue even after the adoption of new regulations against “threatening individuals”. In August 2016, after the attacks in Ansbach and Würzburg and the shooting in a Munich mall, the Federal Minister of the Interior presented quite a long wish list [18] seeking increased staff and financial resources for the BKA, the Federal Police, and the Federal Office for the Protection of the Constitution. The Minister was even thinking about how to evade medical confidentiality “in the case of a serious risk for the national security of Germany emanating from a single individual.”

He also asked for more control of, and undercover investigations on, the internet, especially on social media. A 'central department for information technology in the security sector' (ZITiS) ought to be established to develop and provide “products and strategies for the fight against criminality and terrorism on the internet”, to develop new methods to decode or evade

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[16] BMI: press release (22.02.2017, [www.bmi.bund.de](http://www.bmi.bund.de))

[17] [www.proasyl.de](http://www.proasyl.de) (22.02.2017)

[18] BMI: press release and handout (11.08.2016)

encrypted communication and to promote digital forensics. [19] ZITiS started operating in January at the University of the Federal Armed Forces.

Furthermore, according to the wish list, the Federal Police should use automatic number plate recognition (ANPR) at the borders. In public places, especially train stations and shopping malls, smart video surveillance with face recognition technology should be deployed. On both issues the Federal Ministry of the Interior presented legislative proposals on 21 December, two days after the Christmas market attack. The measures became law at the end of March. The Berlin Südkreuz station is hosting a pilot project that began in April. [20] The Minister also repeatedly talked about a plan to run large-scale operations for joint police and armed forces training, the first of which took place from 7-9 March 2017. [21]

German nationals “who sign up for terrorist operations abroad and hold a second nationality” are to be repatriated, according to the Minister. Finally, it ought to be “the right time to start criminalising sympathy for recruitment to terrorist causes”. What the Minister forgot to mention was that relevant regulations have been in force once before. The criminal act of “recruitment for terrorist groups” according to §129a StGB (penal code) of the version that was introduced in 1976 and valid until 2002 already made it possible to start extensive investigation with full state security programmes because of five-pointed stars painted on motorway walls. §88a StGB – anticonstitutional support of criminal actions – was also introduced in 1976 and repealed in 1981 – after only one conviction. And that affected *Agitdruck*, the former printers of this magazine (*CILIP*).

It is rather unlikely that these measures will prevent terrorist attacks, but they will certainly prove to the electorate that the government is doing something.

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[19] See p.94 in *CILIP* no. 112, <https://www.cilip.de/2017/03/05/112-maerz-2017-alles-anti-terror/>

[20] BMI: press release (21.12.2016); BT-Drs. 18/10939 and 18/10941 (23.01.2017); Neues Deutschland (21.02.2017)

[21] BMI: press release (03.03.2017)



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