Articles

Criminal Involvement in Terrorist Associations – Classification and Fundamental Principles of the German Criminal Code Section 129a StGB

By Dr. Bernhard Kretschmer[*]

A. Introduction

The shock was great when a car bomb shook the Norwegian capital of Oslo on 22 July 2011 not only destroying government buildings, but also taking eight people to their deaths. However, this was only the prelude to the horrors that unfolded almost thirty kilometers away. There, on the resort island of Utøya, sixty-nine participants of a Young Socialists summer camp were shot dead. Based on our current understanding of events, all these acts can be attributed to one single person who believed himself to be fighting an ideological battle against the supposed evil. Before the attacks, the perpetrator put his convictions into writing and sent many pages around the world via the Internet.

From time to time there are obviously individual perpetrators who plan and then carry out their assassinations all by themselves. Among these individuals, their methods are largely similar. However much their ideological beliefs and doctrines differ from each other, they are all united in their fight against what they see as a misguided form of government and/or social system. This applies to *Anders Breivik* mentioned above, as well as to the so-called Unabomber (or *Ted Kaczynski*, formerly assistant professor of mathematics at Berkeley), whose letter bombs troubled the United States in the years 1978 to 1995[1]. This applies even to *Georg Elser*, whose failed bomb attack on *Hitler* on 8 November 1939 still took eight lives, including that of a thirty year-old temporary waitress who left behind a husband and two small children (not to mention the other sixty-three in part seriously

[*] Chair of criminal law and criminal procedural law, European and international criminal law, medical law, commercial criminal law and history of criminal law at Ruhr University Bochum, Germany. Email: LS-Kretschmer@rub.de.

[1] *See* for example, ALSTON CHASE, HARVARD AND THE UNABOMBER (2003); ROGER LANE, MURDER IN AMERICA 314 (1997).

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

injured people)[2] – under the circumstances, it seems unpleasant to speak of so-called collateral damage[3].

In cases such as these, not only the security authorities find it hard to believe that there is no conspiracy behind the attacks involving further accessories and accomplices. The theory of the "lone wolf" contradicts the character of the terrorist act, because ideologically motivated attackers almost always act in groups (and such individual criminals tend to be regarded as mentally ill). Without delving too deeply into group psychological or group sociological theories, it is beyond doubt that the mutual incitement within a group bent on committing violent crimes increases the probability of an attack. Sometimes, the internal interactions mean that the doubts of one member inhibit the momentum of another. However within a group inclined to violent attacks, the opposite, incitement, is more likely. In such instances peer pressure regularly results in the suppression of emerging doubts. In addition, a group acting on the basis of the division of work will expedite the attack, as each member contributes his own abilities. This applies both to the strategist who would perhaps cower in the heat of the action, and the diehard protagonist, who might be lacking in planning skills.

However, the dynamic interaction within the group does not only increase the danger that it will decide on an attack and carry it out. Due to the higher number of heads and the communication between them, the respective security authorities' chances of exposing the group and instigating appropriate investigations also increase. Indeed, although it is a truism that a gang of bank robbers has better prospects than a single perpetrator of successfully carrying out the actual attack, the more accomplices are involved in the act, the more likely it is that the police will manage to solve the crime later. And what is more: the more people are included in the organizational structure, the more often the security authorities become aware of the crime even before it is committed, and manage to prevent it. Bearing in mind that terrorist attacks are mainly perpetrated by groups, it is therefore very logical that security authorities keep an eye on ideologically inclined communities which they consider capable of committing such acts, even if there is no evidence that anything specific is planned. Moreover, it is clear that the relevant authority has an interest in breaking up any associations at all inclined to violence, so as to prevent violent scenarios from developing through group-dynamics in the first place. This also raises the question of the use and the means of criminal law.

---

[2] For more on him, *see also* LOTHAR FRITZE, LEGITIMER WIDERSTAND? DER FALL ELSER (Legitimate resistance? The Elser case, 2009); PETER STEINBACH & JOHANNES TUCHEL, GEORG ELSER (2010).

[3] Two perpetrator with radical Islamic background: *Arid Uka*, who murdered two American servicemen at Frankfurt Airport in March 2011 (sentenced to life imprisonment by Hessian High Court), and *Mohammad Merah*, who shot three French Soldiers, a Rabbi and three Jewish children in the Midi-Pyrénées-region in March 2012 (he was killed in a gunfight with the French police).

B. Offences relating to membership in or support of proscribed organizations

The history of conspiracy is probably as old as that of human coexistence[4]. No less is true when it comes to the combating of conspiratorial efforts. No system of government in any place or in any time has quietly acquiesced while such organizations form and concoct their subversive or otherwise destabilizing plans. It is therefore logical that modern-day criminal law is also concerned with associations that are contrary to the respective regime. German criminal law does not, however, recognize the offence of conspiracy, as is widespread in Anglo-Saxon common law[5]. Apart from prohibition standards for high treason against the Federation and high treason against a member state (Sections 81, 82 StGB[6]) there are – as is to be addressed below – above all, defined offences which can be used to counter the action of undesirable associations.

I. Official Court Ban on Association

In this respect, it may be noted that the German legal system sees itself as what is termed a militant democracy[7]. Although the *Grundgesetz* ("GG") – the Basic Law (the German constitution) – grants the fundamental right of freedom of association (Article 9 subsection 1 GG), it simultaneously forbids associations whose aims or activities are contrary to criminal law or which are directed against the constitutional order or the concept of

[4] *See e.g.* JOHANNES ROGALLA VON BIEBERSTEIN, DER MYTHOS VON DER VERSCHWÖRUNG (The myth of the conspiracy, 2008); MARK ZÖLLER, TERRORISMUSSTRAFRECHT 11 (Anti-terrorism criminal law, 2009).

[5] For more information on the offence of conspiracy, *see e.g.* JOHN SCHEB, CRIMINAL LAW 119 (2012); RICHARD SINGER & JOHN LA FOND, CRIMINAL LAW 339 (2010); *see also* JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (1909). Quite different the German Section 30 StGB (Attempted Participation): "whoever agrees with another to commit or incite the commission of a [concrete] serious criminal offence"; for more on this, *see* KARINA BECKER, DER STRAFTATBESTAND DER VERBRECHENSVERABREDUNG GEM. § 30 ABS. 2, 3. ALT. (2012); ULRICH FIEBER, DIE VERBRECHENSVERABREDUNG, § 30 ABS. 2, 3. ALT. STGB (2001). *See also* Christoph Safferling, *Die Strafbarkeit wegen "Conspiracy" in Nürnberg und ihre Bedeutung für die Gegenwart* (The culpability for "Conspiracy" in Nuremberg and its importance for the present), 93 KRITISCHE VIERTELJAHRESSCHRIFT 87 (2010).

[6] Strafgesetzbuch ("StGB") or the German Criminal Code.

[7] BVerfGE (Reports of the Federal Constitutional Court) 5, 85, 139; 25, 88, 100; Horst Dreier, *Grenzen demokratischer Freiheit im Verfassungsstaat* (Limits of democratic freedom in the Constitution State), 49 JURISTENZEITUNG (JZ) 741 (1994); ECKHARD JESSE, STREITBARE DEMOKRATIE (Militant Democracy, 1980); Hans-Jürgen Papier & Wolfgang Durner, *Streitbare Demokratie*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 340 (2003); MILITANT DEMOCRACY (András Sajó ed., 2004); THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES (Markus Thiel ed., 2009); on the origin of this idea, *see* Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AMERICAN POLITICAL SCIENCE REVIEW 417, 638 (1937).

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

international understanding (Article 9 subsection 2 GG)[8]. In the same way, although political parties may be freely established (Article 21 subsection 1 sentence 2 GG), they must conform to democratic principles (Article 21 subsection 1 sentence 3 GG). As such, parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are deemed unconstitutional (Article 21 subsection 2 sentence 1 GG). Associations or parties which do not meet this constitutional requirement may be banned: In case of ordinary associations, this ban is pronounced by the executive – for more details, see Section 3 subsection 2 of *Vereinsgesetz* or Act Regulating Clubs and Association ("VereinsG") –, subject only to review by the administrative court[9]. In case of parties, however, the power to ban is reserved exclusively for the Federal Constitutional Court (*Bundesverfassungsgericht*) (Article 21 subsection 2 sentence 2 GG in conjunction with Sections 43 et seq. BVerfGG[10]; product of the so-called party privilege)[11]. An effective prohibition also extends to surrogate organizations, so that the ban cannot be simply bypassed (Section 8 VereinsG, Section 33 PartG[12]). Whether the organization concerned is a substitutive association can also be established, if applicable, by the constitutional court.

In order to effectively enforce the respective prohibition, the German legal system draws on criminal law means almost as a matter of course. In this respect, consider the "contravention of bans" offence of Section 20 subsection 1 under the Act Regulating Clubs and Associations (*Vereinsgesetz*)[13]. According to this, anyone who, within the territorial scope of the Act, maintains the organizational existence of the banned association or the banned party, supports, or is active as a member of it, is sentenced by name to up to one year's imprisonment or a fine. Often, however, such behavior falls under offences defined more closely by the German Criminal Code, which is given explicit priority by the Act Regulating Clubs and Associations. This primarily concerns ringleaders and backers who, within the territorial scope of the Act, maintain the organizational existence of a banned party or the party established by the constitutional court as its surrogate organization (Section 84 subsection 1 sentence 1 StGB), a party otherwise legally established as the

[8] For further information, *see* JENS HEINRICH, VEREINIGUNGSFREIHEIT UND VEREINIGUNGSVERBOT – DOGMATIK UND PRAXIS DES ART. 97 ABS. 2 GG (Freedom of association – Dogmatics and practice of Art. 97 ABS. 2 GG, 2005).

[9] *Id.* at 105, 246.

[10] BVerfGG: *Bundesverfassungsgerichtsgesetz*, or Federal Constitutional Court Act.

[11] *See e.g*. Markus Sichert, *Das Parteiverbot in der wehrhaften Demokratie* (Party ban in defending democracy), 54 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 671 (2001); ARMIN ZIRN, DAS PARTEIENVERBOT NACH ART. 21 ABS. 2 GG IM RAHMEN DER STREITBAREN DEMOKRATIE DES GRUNDGESETZES (Party ban by Art. 21 ABS. 2 GG, under the basic law, 1981.

[12] PartG: Parteiengesetz or the Political Parties Act.

[13] *See also* MARK ZÖLLER, *supra* note 4, at 636.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

surrogate organization of a banned party (Section 85 subsection 1 sentence 1 no. 1 StGB), or an association legally established as directed against the constitutional order or the concept of international understanding, or its surrogate organization (Section 85 subsection 1 sentence 1 no 2 StGB). Such persons may be sentenced to up to five years' imprisonment[14]. Also those who are active as members in one of these associations or support their organizational existence face prison sentences of up to three years (Section 85 subsection 2 StGB), or, in case of prohibitions by the constitutional court, as much as five years (Section 84 subsection 2 StGB)[15]. The distribution of propaganda material of such associations is also a criminal offence (Section 86 StGB) as is the use of their symbols (Section 86a StGB; subsidiary Section 20 subsection 1 sentence 1 no. 5 VereinsG).

II. Criminal Law Prohibition on Association

The aforementioned criminal law provisions are directed against associations that acted openly to start with and were then banned because their aims were criminal, anti-constitutional or directed against the idea of international understanding. It would be profoundly inconsistent and illogical, if a watchful legal system were not able to defend itself particularly against secret associations with criminal objectives which, from the start, refuse to make an official appearance and create themselves a legitimate image. The penal provisions provided for this are found in Sections 129 to 129b StGB, which deal with the formation of criminal or terrorist associations, whereby these standards can, in principle, extend not only to secret associations, but also to those that appear openly[16].

[14] In the cases under Section 84 subsection 1 StGB, the minimum term of imprisonment is increased to three months. In the cases under Section 85 subsection 1 StGB, a fine may also be applied. Unlike in the case of Section 20 subsection 1 VereinsG, even the attempt is punishable (Sections 84 ss. 1, sentence 2, 85 ss. 1, sentence 2 StGB).

[15] In addition, in both cases, fines are also possible. Moreover, the other substantive decisions of the Federal Constitutional Court in the prohibition procedure according to Article 21 subsection 2 GG and Section 33 subsection 2 PartG and the enforcement of the substantive decisions passed in such a procedure are also protected by punishment: in this respect contraventions also face a prison sentence of up to five years or a fine (Section 84 subsection 3 StGB).

[16] Section 127 StGB, which threatens anyone "forming armed groups" with up to two years' imprisonment or a fine, is not taken into consideration here. According to this, it is punishable to form or command a group in possession of weapons or other dangerous instruments, to join such a group, provide it with weapons or money or otherwise support it.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

1. Section 129 Subsection 1 StGB – Basic Definition of Offence: Formation of Criminal Associations

The foundation of these offences relating to membership in, or in support of, organizations is found in Section 129 StGB, which deals generally with the "formation of criminal associations". According to this, anyone who founds an association whose aims or activities are aimed at committing offences (subsection 1 var. 1) receives a prison sentence of up to five years or a fine, whereby even the attempt is punishable by law (subsection 3). Membership of such an association is also an offence, as is recruiting members or supporters for it and supporting them (subsection 1 var. 2-4). Acting as a ringleader or backer is regarded as a particularly serious case subject to a minimum sentence of six months' imprisonment (subsection 4 ms. 1). By contrast, given minor fault and less significant involvement, the court may dispense with the sentence where appropriate (subsection 5: so-called followers clause). Moreover, the punishment can be mitigated or even discharged in cases of active repentance (subsection 6) if the offender voluntarily and earnestly endeavors to prevent the continued existence of the association or the commission of an offence consistent with its aims or voluntarily discloses his knowledge to a government authority in time for offences, the planning of which he is aware, to be prevented. The perpetrator even goes unpunished if he achieves his goal of preventing the continued existence of the association or if this is achieved without his efforts.

In principle, committing offences of any kind (whether with or without a terrorist attack) is sufficient to classify the association as criminal and thus to penalize it in accordance with the defined elements of the offence[17,18,19]. This undeniably involves the risk of excessive politicization in which the ruling group castigates and persecutes its political opponents as criminal for whatever acts of inducement. For example, it is well known that a strong expression of opinion can quickly be stylized as an insult. At rallies and demonstrations, coercion, abuse and possibly injury are always to be expected. The opposition may tear down the election posters of their opponents, in turn leading to claims of property damage. If such acts are attributed to the political association and its members, the definition of offence under Section 129 StGB can then be misused as a compliant vehicle for discrediting and criminalizing political opponents. Such tendencies of a politicized

[17] For a more detailed conceptual definition of the criminal association, *see* BGHSt (Reports of the Federal Court of Justice) 45, 26, 35; 54, 69, 107; 54, 216, 221; 56, 28, 29.

[18] *See also* THOMAS FISCHER, STRAFGESETZBUCH (Penal Code) § 129 MN 5, § 129a MN 4 (2012).

[19] *See also* Matthias Krauß, LEIPZIGER KOMMENTAR ZUM STRAFGESETZBUCH (Leipzig commentary on the penal code), 129 MN 18 (Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan & Klaus Tiedemann eds., 2008); Jürgen Schäfer, MÜNCHENER KOMMENTAR ZUM STGB (Munich commentary, SGB), § 129 MN 14 (Wolfgang Joecks & Klaus Miebach eds., 2012); Mark Zöller, *Zur Auslegung des Begriffs der kriminellen Vereinigung in § 129 StGB im europäischen Kontext* (The interpretation of the concept of criminal organization in § 129 of the Penal Code in the European context), 65 JURISTENZEITUNG 908 (2010).

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

criminal justice system are also part of modern German legal history[20,21,22]. In this manner, the constitutional requirement that the banning of parties is deliberately reserved for the Federal Constitutional Court could all too easily be bypassed - not to mention the threat to communicative human rights. It was therefore necessary to integrate a clause into Section 129 StGB stipulating that political parties not yet declared unconstitutional by the Federal Constitutional Court are excluded from the application (Section 129 subsection 2, no. 1 StGB). The same applies if the commission of offences only serves objectives or activities of minor significance (no. 2), which is also intended to prevent abuse by the authorities as the instrument of power. Ultimately, offences solely in accordance with Sections 84 to 87 StGB (no. 3) are also excluded, i.e. above all the continuation of banned parties, associations or surrogate organizations – in this respect, the specific elements of the offence continue to apply (this only changes if further elements of an offence are added).

2. Section 129 Subsection 4 StGB – Qualification: Formation of Particularly Criminal Associations

Subject to the aforementioned particularities, any kind of offence to which an organization aligns its purpose and activities is therefore sufficient to condemn the organization and its members as criminal. However, German criminal law refines this rough allocation: in this regard, it should first be noted that for ringleaders and backers (already under subsection 4 ms. 1), the maximum sentence also goes up again – specifically: to ten years – if the purpose and activities of the association are directed at certain serious offences (subsection 4 ms. 2). Here, reference is made to the criminal procedure catalogue of those particularly serious offences for which acoustic surveillance of private homes is possible (Section 100c subsection 2 StPO[23]). This especially applies when it comes to crimes against the state, counterfeiting of currency and forgery of postage stamps, certain sexual offences including child pornography, kidnapping and human trafficking, gang theft, aggravated robbery, extortion under threat of force, dealing in stolen goods and dealing in stolen goods by gangs, aggravated money laundering, aggravated official bribery, certain asylum abuses, illicit smuggling, aggravated narcotics offences, certain offences against the War Weapons Control Act and other aggravated weapons offences.

---

[20] For this, *see* the Bundestag printed paper (BT-Drs.) 4/2145, 8.

[21] *See also* Theodor Lenckner & Detlev Sternberg-Lieben, STRAFGESETZBUCH (Penal code), § 129 MN 10 (Adolf Schönke & Horst Schröder eds., 2010).

[22] *See also* Heribert Ostendorf, NOMOS KOMMENTAR ZUM STRAFGESETZBUCH (Nomos commentary on the penal code), 129 MN 3 (Urs Kindhäuser, Ulfrid Neumann & Hans-Ulrich Paeffgen eds., 2010).

[23] StPO: *Strafprozessordnung*, or German Code of Criminal Procedure.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

However, hostage taking and extortive kidnapping, murder and homicide, as well as genocide, crimes against humanity and war crimes are not included here. These exceptions should not, however, be misunderstood as privileges contrary to the system. Associations with this kind of orientation are in fact classified as terrorist organizations (Section 129a StGB) and face even harsher punishments (see below). At the same time, there is an interdependency between Section 129 StGB and Section 100c StPO. Criminal associations with the aggravated orientation specified are also among those offences in respect of which acoustic surveillance of private homes can be carried out (Section 100c subsection 2 no. 1b StPO). In accordance with constitutional court requirements,[24] such investigation measures are namely only permissible for particularly serious crimes, for which the range of sentences for the basic offence would not have sufficed. The real purpose of the aggravation under Section 129 subsection 4 StGB is therefore to be able to carry out certain investigations which would otherwise not be permitted[25]. Even if there is no prima facie evidence of a specific offence, a measure can now be instigated given no more than sufficient suspicion that a particularly criminal (or even terrorist) association is concerned.[26] More on this later.

3. Section 129a StGB – Qualification: Formation of Terrorist Associations

In the form of Section 129a StGB, German criminal law classifies the "formation of terrorist associations" as a most serious offence relating to membership in or support of proscribed organizations.[27] Under the impact of radical left-wing attacks, especially by the "Red Army Faction", the legislature already brought this offence into being in 1976 and has since then seen terrorist organizations as a particularly serious form of criminal association.[28] This provision does not, however, explicitly define what counts as terrorism. The terminology is only used in the standard header – and that in its adjectival form – while the nine subsections of the provision waive its use entirely. Given the bewildering number of attempts to define terrorism, this may be seen as coquettish modesty[29]. Only the

[24] BVerfGE 109, 279; 57 NEUE JURISTISCHE WOCHENSCHRIFT 999 (2004).

[25] Matthias Krauß, *supra* note 19, at § 129 MN 175; Theodor Lenckner, *supra* note 21, at § 129 MN 25; *see further*, Bundesrat printed paper (BR-Drs.) 359/05, 359/1/05, and Bundestag printed paper (BT-Drs.) 15/4533.

[26] Bundestag printed paper (BT-Drs.) 15/5621, 2; Theodor Lenckner, *supra* note 21, at § 129 MN 25.

[27] Martin Helm, *Die Bildung terroristischer Vereinigungen* (The formation of terrorist associations), 48 STRAFVERTEIDIGER 719 (2006).

[28] Introduced through the so-called anti-terrorism law, more precisely: Law Amending the StGB, StPO, GVG, BRAO and StVollzG of 18.8.1976 (Federal Law Gazette [BGBl.] I 2181).

[29] To multifarious efforts on defining terrorism, *see* Manuel Cancio Meliá, *Zum strafrechtlichen Begriff des Terrorismus* (The criminal concept of terrorism), 159 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 1 (2012); Thomas

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

description of the elements of the offence enable us to infer what the legislature actually sees as a terrorist organization and, given fulfillment of the requirements for the existence of the offence, this is then attested by a conviction to this effect. It is important to note that since the provision has been revamped several times since its implementation,[30] the definition of the standard and the content of the standard now only partially correspond, resulting in friction as shown below. However, despite the dispute over the conceptual containment of terrorism, a certain basic consensus should be retained[31]: i.e. firstly, in terms of motivation, that, whatever form they may take, terrorist perpetrators act on the basis of their ideological convictions, and secondly, in terms of methodology, that they commit violent acts in the widest sense (i.e. in the sense of terrorist attacks).

The current Section 129a StGB is divided into several descriptions of offences, which does not contribute to the clarity of the standard. In its subsection 1, it orders a prison sentence of one year up to ten years for anyone who forms an association whose aims or activities are directed at committing either murder, homicide, genocide, crimes against humanity, war crimes, abduction or extortive kidnapping (i.e. precisely the offences, which – as shown – are excluded in the reference to Section 129 subsection 4 StGB). Similarly, this applies to those who participate in such an association as a member. This reduced offence description with reference to the severe offences specified has at least one notable effect; acts such as a person's involvement in a murderous criminal gang or a group of money-grabbing kidnappers could lead to conviction for participation in a terrorist organization. That this is somewhat inappropriate should be obvious, as it is, in fact, a case of purely criminal organizations without political motivation, even if they are particularly dangerous. This approach of removing the ideological motivation of the perpetrators from a standard which is aimed specifically at dealing with terrorist groups seems to me fundamentally wrong.

Subsection 2 of Section 129a StGB deals with terrorist organizations, moreover the founding of or participation through membership in associations, whose purpose or activity is directed at the commission of catalogued crimes which do not quite achieve the degree of severity of those cases specified in subsection 1[32,33]. It thus concerns offences that cause other people serious physical or mental harm, a multitude of offences causing a

---

Weigend, *Terrorismus als Rechtsproblem* (Terrorism as a legal problem), STRAFRECHT UND JUSTIZGEWÄHRUNG. FESTSCHRIFT FÜR KAY NEHM 151, 153 (Rainer Griesbaum et al, eds, 2006); MARK ZÖLLER, *supra* note 4, at 99, 132 .

[30] Matthias Krauß, *supra* note 19, at § 129a before MN 1; Kai Lohse, STGB – STRAFGESETZBUCH, § 129a MN 1 (Helmut Satzger, Bertram Schmitt & Gunter Widmaier eds., 2009); Heribert Ostendorf, *supra* note 22, at § 129a MN 2.

[31] MARK ZÖLLER, *supra* note 4, at 209 .

[32] *See* Matthias Krauß, *supra* note 19, at § 129a MN 18.

[33] *See* also Kai Lohse, *supra* note 30 at § 129a MN 1.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

common danger such as arson, crimes involving explosives, disruption of rail, ship and maritime traffic, attacks on the air and sea traffic, disruption of public services and telecommunication facilities, causing a common danger by poisoning and causing a severe danger by releasing poison, various offences under the War Weapons Control Act or the Weapons Law. In addition, computer sabotage, the destruction of buildings and the destruction of important means of production, which explicitly includes motor vehicles of the police or the armed forces, are also included. Unlike in the cases in subsection 1, the alignment towards the offences specified is not, in itself, sufficient for classification as a terrorist organization, as an ideological and motivational component is also required[34]. In this respect, and in line with both European and international provisions and models[35] on top of this, it is a prerequisite that firstly, the above catalogued crimes are aimed at significantly intimidating the population, unlawfully coercing an authority or an international organization by force or threat of force, or eliminating or significantly impairing the fundamental political, constitutional, economic or social structures. A second requirement is that due to the nature of its commission or its effects, the offence is able to significantly damage a state or an international organization. Although the legislative talents for formulation here prove rather less than exemplary, the latter requirement of materiality does, mean that, in individual cases, crimes of minor importance can be excluded[36].

Accordingly, it is to be noted that the German criminal law of organization aims to differentiate in order to penalize the formation of terrorist associations and participation through membership in them. If the group concerned is directed at serious criminal offences within the meaning of subsection 1, the method expressed there should already suffice to classify the association as terrorist. However, where substantial offences that do not reach this degree of severity are concerned, in subsection 2, the law chooses a mixed approach. Added to the methodological approach – i.e. the orientation towards certain offences – are the ideological objectives, which are what actually give the offence its terrorist veneer[37]. This is linked to a certain extent to the etymological origin of the term terrorism, i.e. above all with regard to intimidation and/or elimination of the respective social order. That this remains conceptually vague seems, to some extent, inevitable which

---

[34] THOMAS FISCHER, *supra* note 18, at § 129a MN 13; Matthias Krauß, *supra* note 19, at § 129a MN 49; Kai Lohse, *supra* note 30, at § 129a MN 14.

[35] *See e.g*. Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164 at 3), amended by Council Framework Decision of 28 November 2008 (OJ L 330 at 21); for further information, *see* Eugenia Dumitriu, *The E.U.'s Defintion of Terrorism: The Council Framework Decision on Combating Terrorism*, 5 GER. L. J. 585 (2004); Thomas Weigend, *supra* note 29, at 164; MARK ZÖLLER, *supra* note 4, at 148, 168, 173.

[36] *See* the Federal Court of Justice BGH, 29 NEUE ZEITSCHRIFT FÜR STRAFRECHT 147 *et seq.* (2008); Matthias Krauß, *supra* note 19, at § 129a MN 56, 65; Theodor Lenckner, *supra* note 21, at § 129a MN 2a.

[37] Likewise THOMAS FISCHER, *supra* note 18, at § 129a MN 13.

makes it all the more appropriate to integrate a decelerating materiality threshold, as found at the end of Section 129a subsection 2 StGB. I would also like to strongly endorse the legislative effort to determine with the aid of catalogued crimes what kind of offences in principle qualify as terrorist[38]. In any case, German legal history has shown that there is little sense in leaving the determination of such issues to the criminal justice system alone[39]. For reasons of legal certainty alone, the conceptual difficulties of making terrorism comprehensible give sufficient reason to specifically designate those implementation offences, the commission of which is to be regarded as a method of terrorist action, as terrorist acts. This path is similar to that taken by the Council of Europe Convention of 16 May 2005 on the Prevention of Terrorism, which Germany has recently joined (to be precise, on 1 October 2011)[40]. Article 1 subsection 1 describes a "terrorist offence" as an offence within the scope of and as defined by one of the eleven treaties listed in the appendix[41]. As the legislative procedure for the determination of terrorist organizations, it is therefore preferable not to focus one-sidedly on the methods of terrorism or its ideological motivation, but to relate the one with the other. Putting other criticisms aside which cannot be discussed here, this is what is found in the approach of subsection 2 of Section 129a StGB, which should be merged with the failed subsection 1.

In addition, it may be added that those associations are also included that do not actually commit the offences specified, but only intend to threaten them (Section 129a subsection 3 StGB). The sentence for founding or participation through membership of such a – really just barking, not biting – association is nevertheless six months to five years, and is thus just as high as that of a ringleader or backer of a criminal association that actually intends to commit its crimes (Section 129 subsection 4 ms. 1 StGB). This severity of Section 129a

---

[38] But MARK ZÖLLER, *supra* note 4, at 213, 555, with vague proposal pleads for abolition of the catalogue.

[39] JOSEF GRÄßLER-MÜNSCHER, DER TATBESTAND DER KRIMINELLEN VEREINIGUNG (§ 129 STGB) AUS HISTORISCHER UND SYSTEMATISCHER SICHT (The conditions of criminal association for a historic and systematic review) 3 (1982); Rupert von Plottnitz, *§ 129a StGB: Ein Symbol als ewiger Hoffnungsträger*, 35 ZEITSCHRIFT FÜR RECHTSPOLITIK 351 (2002).

[40] Federal Law Gazette (BGBl.) II 1006. Ratified as a result of the approval law of 16 March 2011 (Federal Law Gazette [BGBl.] II 300).

[41] Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft; Convention of 23 September 1971 on the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention of 17 December 1979 Against the Taking of Hostages; Convention of 3 March 1980 on the Physical Protection of Nuclear Material; Protocol of 24 February 1988 on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; Convention of 10 March 1988 for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol of 10 March 1988 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; International Convention of 15 December 1997 for the Suppression of Terrorist Bombings; International Convention of 9 December 1999 for the Suppression of the Financing of Terrorism; International Convention of 13 April 2005 for the Suppression of Acts of Nuclear Terrorism.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

subsection 3 StGB may also be explained by the fact that the concept of the offence of threatening solves any problems of proof as to how seriously the founders and members concerned took their intentions.

The ringleaders and backers of the terrorist association even have to reckon with prison sentences of three to fifteen years (Section 129a subsection 4 ms. 1 StGB), and in case of associations that only threaten, they nevertheless still face prison sentences of one year to ten years (Section 129a subsection 4 ms. 2 StGB). The supporters of terrorist associations are also punishable (Section 129a subsection 5 sentence 1 StGB). If the offences are to be committed in earnest, they face prison sentences of six months to ten years, and in case of associations that merely threaten, they only face prison sentences of up to five years or even just a fine. It is also an offence to recruit members or supporters of an (active) terrorist association (Section 129a subsection 5 sentence 2 StGB), but not for associations that only threaten[42]. Except for ringleaders and backers – quite comparable to Section 129 subsection 5 StGB – for accomplices whose guilt is of a minor nature or whose contribution is of minor significance, the sentence may be mitigated at the discretion of the court (Section 129 subsection 6 StGB). Also in case of terrorist associations, the sentence may be mitigated or even fully discharged if the offender actively repents (Section 129a subsection 7 StGB with reference to Section 129 subsection 6 StGB).

4. Section 129b StGB: Extension to Criminal and Terrorist Associations Abroad

There is a current tendency to emphasize the dangers of international terrorism as if this were a novel manifestation that had only come about since the emergence of al-Qaeda and as if terrorism had previously been limited to the individual states[43]. This is a gross distortion of the facts, as becomes especially clear if we take a look at the left-wing terrorism of the 1970s in Germany, Italy and elsewhere which formed a disastrous alliance, and also teamed up with Arab terrorists of the time[44]. Given their world-revolutionary attitude, a restriction to the nation-state would, in fact, have been extremely inconsistent for these offenders. This is something that already applied to the anarchists of the 19th

[42] The law is clear; *see also* THOMAS FISCHER, *supra* note 18, at § 129a MN 21.

[43] CHRISTIAN FRÖBA, DIE REICHWEITE DES § 129 STGB BEI DER BEKÄMPFUNG DES TRANSNATIONALEN ISLAMISTISCHEN TERRORISMUS (The scope of the penal code § 129 in the fight against transnational terrorism) 13 (2009); Rainer Griesbaum, *Zum Verhältnis der Strafverfolgung und Gefahrenabwehr vor dem Hintergrund der Bedrohung durch den internationalen islamistischen Terrorismus* (On the relationship of law enforcement and security in light of the threat of international Islamic terrorism), STRAFRECHT UND JUSTIZGEWÄHRUNG. FESTSCHRIFT FÜR KAY NEHM 125 (Rainer Griesbaum *et. al.* eds., 2006).

[44] *See* KLAUS PFLEGER, DIE ROTE-ARMEE-FRAKTION (The red-army-faction) 73 (2011); MARK ZÖLLER, *supra* note 4, at 39, and in general BUTZ PETERS, RAF-TERRORISMUS IN DEUTSCHLAND (RAF terrorism in Germany, 1993); SOZIALREVOLUTIONÄRER TERRORISMUS (Revolutionary Social Terrorism, Alexander Straßner ed., 2008).

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

and early 20th Century, who rejected the fabric of the state in its entirety, and some of whom were dedicated to the terrorist act[45]. This is not, however, to dispute that modern Islamist terrorism has its own specific characteristics[46].

Although terrorism already extended beyond national boundaries earlier on, for a long time the developing German criminal law system limited itself to domestic organizations when registering and prosecuting terrorist associations. This was not extended until, under the impact of the 11 September attacks, the rather hasty introduction of Section 129b StGB was carried out, through which "criminal and terrorist organizations abroad" were included in a rather vague way in the sphere of influence of German criminal law[47]. Here, it is rather briefly stated that Sections 129 and 129a StGB also apply to associations abroad (Section 129b subsection 1 sentence 1 StGB). However, by virtue of Section 129b subsection 1, sentence 2, this applies only generally to associations within the European Union: namely, if criminal and terrorist associations outside the European Union are involved, the equality is only to apply if the offence was committed through an activity exercised within the spatial scope of this Act or if the perpetrator or the victim is German or is situated in the country[48].

How this formulation relates to the general rules of penal application in Sections 3 et seq. StGB[49] has not yet been clarified due to the clumsy formulation of the legislation[50]. The aim was, no doubt, to include all criminal and terrorist associations in the EU Member States as a whole and for this purpose, without much ado, to extend the scope of the criminal standard from Germany to the territory of the entire European Union. However, the law

[45] *See* MARK ZÖLLER, *supra* note 4, at 17. An example: the "Catechism of a Revolutionary" (1869), written by *Sergey Nechayev*, knowing only the science of destroying "the whole filthy order."

[46] For more on this CHRISTIAN FRÖBA, *supra* note 43; PETER HEINE, TERROR IN ALLAHS NAMEN (Terror in the name of Allah, 2004); Frank Neubacher, *Terrorismus – Was haben „Rote-Armee-Fraktion" und „Jihadisten" gemeinsam?* (Terrorism: What do "Red Army Faction" and "jihadists" have in common?), 32 JURA 744 (2010); JOHANNES URBAN, DIE BEKÄMPFUNG DES INTERNATIONALEN ISLAMISTISCHEN TERRORISMUS (The fight against the international Islamist terrorism, 2006); MARK ZÖLLER, *supra* note 4, at 45.

[47] *See* recently the Federal Court of Justice BGH, 65 NEUE JURISTISCHE WOCHENSCHRIFT 327, 327 *et seq.* (2012) (classification of associations as domestic or abroad) and BGHSt 56, 28, 30 *et seq.* (domestic part of an association abroad).

[48] BGHSt 56, 28 (offence abroad of a German) and BGHSt 54, 264 (defining the term victim).

[49] Namely the territorial principle (Section 3 StGB), the active personality principle (Section 7 subsection 2 StGB) and the passive personality principle (Section 7 subsection 1 StGB).

[50] For further information, *see* MARK ZÖLLER, *supra* note 4, at 331.

does not possess the necessary clarity to reliably override the general provisions[51]. Conversely, if we include the rules of penal application of Sections 3 et seq. StGB the partial restraint on the extension to criminal and terrorist associations from third countries is largely redundant, which is also unconvincing. Another disagreeable feature is that the standard does not distinguish sufficiently clearly whether "the offence" that "relates" to the association, is participation in the association, or those offences at, which the aim and activity of the association are directed at. The inclusion of victims points to the latter interpretation, as this would make no sense in case of an offence relating merely to membership in or support of an organization[52].

In order to create political leeway, the legislature has given the prosecution of criminal and terrorist associations from third countries a further corrective element. Related offences, – as a legislative innovation – may only be prosecuted with the authorization of the Federal Ministry of Justice (Section 129b subsection 1 sentence 3 StGB)[53]. This can be issued for a particular case or generally for the prosecution of future offences that relate to a specific association (Section 129b subsection 1 sentence 4 StGB). No justification is required for this discretionary decision, which is not subject to judicial review. It is therefore appellative or symbolic, the statement that the ministry is to "take into account" whether the aims of the association are directed against the fundamental values of a state order which respects human dignity or against the peaceful coexistence of nations and which appear reprehensible when weighing all the circumstances of the case[54].

This authorization clause is problematic, however, because it places prosecution at the arbitrary discretion of an executive body in a way that cannot be reviewed by the courts and without the authority itself having to have been directly affected by the offence. This is reminiscent of the dark ages when the sovereign was able to interfere in the course of justice[55] – a practice which should not necessarily be revitalized. The clause does, perhaps, seem a little less scandalous in view of the fact that, in case of offences committed abroad,

---

[51] *See* BGHSt 54, 264, 267, and THOMAS FISCHER, *supra* note 18, at § 129b MN 4; Theodor Lenckner, *supra* note 21, at § 129b MN 3; Ulrich Stein, *Kriminelle und terroristische Vereinigungen mit Auslandsbezug seit der Einführung von § 129b StGB* (Criminal and terrorist associations with an international dimension since the introduction of 129b), 152 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 433, 455 (2005).

[52] For efforts on restriction, *see* BGHSt 54, 264, 267; Brian Valerius, *Internationaler Terrorismus und nationales Strafanwendungsrecht* (International terrorism and national criminal law application), 158 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 696 (2011).

[53] *See* MARK ZÖLLER, *supra* note 4, at 543.

[54] Likewise Theodor Lenckner, *supra* note 21, at § 129b MN 8; Jürgen Schäfer, *supra* note 19, at § 129b MN 26.

[55] *See*, for example, Werner Ogris, *De sententiis ex plenitudine potestatis*, FESTSCHRIFT FÜR HERMANN KRAUSE 171 (Sten Gagnér, Hans Schlosser & Wolfgang Wiegand, eds., 1975); JÜRGEN REGGE, KABINETTSJUSTIZ IN BRANDENBURG-PREUßEN (The cabinet of justice in Brandenburg-Prussia, 1977).

the prosecution service, which is bound by instructions, nevertheless has very broad means for refraining from the prosecution of criminal offences. This is particularly so where, in the cases of Sections 129 and 129a, respectively also in conjunction with Section 129b subsection 1 of the German Criminal Code, the association is not, or not primarily based in Germany and the participatory acts are of minor significance or limited to mere membership (Section 153c subsection 1 sentence 1 no. 3 StPO). Prosecution may also be dispensed with for offences that are committed within the territorial scope of the Act but through an offence committed outside of this area if the implementation of proceedings would bring about the risk of serious detriment to the Federal Republic of Germany or if the prosecution conflicts with other overriding public interests (Section 153c subsection StPO). The Federal Public Prosecutor General is regularly authorized to decide on cases of the nature designated here (Section 153c subsection 5 StPO in conjunction with Section 120 subsection 1, no. 6 GVG[56]). The Federal Public Prosecutor General may nevertheless dispense with prosecuting such offences if the conduct of proceedings poses a risk of serious detriment to the Federal Republic of Germany, or if prosecution conflicts with other overriding public interests (Section 153d subsection 1 StPO).

Although this has the effect of assigning ample political authority to the responsible Federal Public Prosecutor General to decide whether criminal proceedings are beneficial for the German state, the Ministry's authorization to prosecute, as transferred to criminal law, obviously has further-reaching significance: However many international texts like to proclaim that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that all acts of terrorism are criminal and unjustifiable, regardless of their motivation, no matter when and by whom they are committed, and that terrorism can only be defeated through a sustained and comprehensive approach, with the active participation and cooperation of all states and international and regional organizations required to weaken, isolate and eliminate the threat of terrorism – as recently stated in the Security Council Resolution 1989 (2011) on 17 June 2011 –, depending on the political expediency, Germany still wishes to reserve the right of its respective government not to prosecute all foreign associations, even if they do employ criminal or terrorist means[57] .That this constitutes a break with the international, though, admittedly, not entirely seriously meant rhetoric, goes without saying.
This approach is comparable with the approval in the extradition procedure,[58] which is also primarily assessed on the basis of political expediency. Accordingly, the ministerial

[56] GVG: *Gerichtsverfassungsgesetz* = German Code on Court Constitution.

[57] *Cf.* THOMAS FISCHER, *supra* note 18, at § 129b MN 12; Heribert Ostendorf, *supra* note 22, at 129a/b MN 12; ULRICH STEIN, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH (Systematic commentary on the criminal code), 129b MN 7 (Jürgen Walter *et. al.*, eds., 2005).

[58] Sections 12 and 74 IRG (= Gesetz über die Rechtshilfe in Strafsachen; Act on International Cooperation in Criminal Matters).

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

authorization to prosecute under Section 129b subsection 1 sentence 3 and 4 StGB can absolutely be interpreted as the inward counterpart of the extradition permit, though not through extradition, but rather through prosecution and sentencing. This is superfluous for offences within one's own political system (Sections 129, 129a StGB), equally dispensable for the sister states of the European Union (Section 129b sentence 1 StGB), but opportune in case of the all too heterogeneous third countries in this world. A reduction to the terrorist method alone is obviously not sufficient after all to condemn the offence and the offender unconditionally. For this reason alone, in this country, someone like *Georg Elser*, who was mentioned above, can be celebrated as an anti-fascist resistance fighter – for example in Berlin through an imposing monument which was unveiled on 8 November 2011. The same can probably be found in every country in the world. The authorization clause therefore serves to keep politically differentiated assessments open for foreign associations. In this sense, Section 129b StGB proclaims itself a criminal law of sympathies (or antipathies).

C. Extension of the Scope of Criminal Liability

This view again raises the question of the legitimacy of these offences relating to membership in or support of organizations. Their original definition – albeit linguistically inept and devoid of any real meaning – is that of abstract endangerment offences (so-called *abstraktes Gefährdungsdelikt*)[59]. It is right that the criminal liability applies without violation of concrete tangible rights having to have occurred, and without these rights even having to be endangered. To prohibit participation in organizations which are directed at the commission of offences therefore includes, from a material point of view, considerable extension of the scope of criminal liability[60]. This is related to two procedural matters, which are not immediately apparent in the actual criminalization: firstly, the offences relating to membership in or support of organizations can, namely be used as a catch-all element in case the parties concerned cannot be proved to have participated in the actual reference offence[61]. And secondly, in practice, the offences relating to membership in or support of organizations predominantly serve as an enabling element to be used for criminal procedural investigation measures,[62] of which the acoustic surveillance of private

[59] *See*, for example, Jürgen Schäfer, *supra* note 19, at § 129 MN 1, § 129a MN 1.

[60] Detailed treatment of the extension of the scope of criminal liability: GRENZEN DER VORVERLAGERUNG IN EINEM TATSTRAFRECHT (Wolfgang Gropp, Ferenc Nagy & Arndt Sinn, eds, 2011); Liane Wörner, *Expanding Criminal Laws by Means of Predating Criminal Responsibility*, 13 (9) GERM. L. J. 1037-1055 (2012).

[61] Heribert Ostendorf, *supra* note 22, at § 129 MN 8.

[62] THOMAS FISCHER, *supra* note 18, at § 129 MN 4, § 129a MN 3; Theodor Lenckner, *supra* note 21, at §129a MN 1; Kai Lohse *supra* note 30, at § 129a MN 6; Heribert Ostendorf, *supra* note 22, at § 129a/b MN 5.

homes has already been mentioned, but which applies equally to telephone monitoring (Section 100a subsection 2 no. 1d StPO) and other tactics. As long as the required degree of substantiation for the suspicion of a certain offence is not reached, the offence relating to membership in or support of proscribed organizations has to suffice in order to justify the interception or other investigations[63]. The findings can be made use of, as long as they are related.

Procedural alienations or simplifications do not, in themselves, legitimate any elements of an offence. There is now constant dispute as to whether, with the aid of offences relating to membership in or support of organizations, the scope of protection afforded by the penal laws can be extended so that it is ultimately a matter of guarding the legally protected interests related to the reference offence,[64] or whether it is, instead, a matter of guarding the legally protected interest of the public peace or other state entity[65]. Battling out this dispute through one-sided partisanship is not fruitful. If it is considered necessary to make the idea of legally protected interests at all productive, this is more likely to concern a conglomerate of legally protected interests, the allocation of which the legislature seems to have given little attention to.

Certainly, these standards are also aimed at preventing offences relating to the purpose and activities of the association, which assigns criminal law a preventive role. This admittedly comes into conflict to a certain extent with the fact that the German view of criminal law is actually more reactive, whereby the committed offence provides the basis for guilt, whereas the prevention of offences is seen as the domain of police activity.[66] Why

---

[63] *Cf.* the Federal Court of Justice BGH, 28 NEUE ZEITSCHRIFT FÜR STRAFRECHT 147 (2008); Heribert Ostendorf, *supra* note 22, at § 129 MN 9.

[64] *See e.g.* High Court Munich (OLG München), 60 NEUE JURISTISCHE WOCHENSCHRIFT 2787 (2007); MARTIN FÜRST, GRUNDLAGEN UND GRENZEN DER § 129, 129A STGB (Foundations and Limitations § 129, 129 Criminal Code) 68 (1989); ROLAND HEFENDEHL, KOLLEKTIVE RECHTSGÜTER IM STRAFRECHT (Collective goods by criminal law) 287 *et seq.* (2002); Olaf Hohmann, *Zur eingeschränkten Anwendbarkeit von § 129 StGB auf Wirtschaftsdelikte* (Limited applicability of 129 of the Criminal Code on economic crimes), 11 wistra 85, 86 (1992); Heribert Ostendorf, *supra* note 22, at 129 MN 5; BERND SCHEIFF, WANN BEGINNT DER STRAFRECHTSSCHUTZ GEGEN KRIMINELLE VEREINIGUNGEN (§ 129 STGB)? (When starting criminal protection against criminal organization) 25 (1997); Hans-Joachim Rudolphi & Ulrich Stein, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH (Systematic commentary on the penal code), § 129 MN 3 (Jürgen Walter *et. al.* eds., 2005).

[65] In this respect, *e.g.* BGHSt 28, 110, 116; 30, 328, 331; 31, 202, 207; 41, 47, 51 u. 53;THOMAS FISCHER, *supra* note 18, at § 129 MN 2; Manfred Hofmann, *Anmerkung zu OLG Düsseldorf, 1997-09-15, VI 2697*, 3 NEUE ZEITSCHRIFT FÜR STRAFRECHT 249 (1998), (Note to OLG Dusseldorf, 1997-09-15, VI 2697), JURISTISCHE RUNDSCHAU 208 (1996); Christoph Krehl, *Anmerkung zu BGH, 1995-02-22, 3 StR 583/94*; Theodor Lenckner, *supra* note 21, at § 129 MN 1; Jürgen Schäfer, *supra* note 19 at § 129 MN 1.

[66] *See* HELMUT FRISTER, SCHULDPRINZIP, VERBOT DER VERDACHTSSTRAFE UND UNSCHULDVERMUTUNG ALS MATERIELLE GRUNDPRINZIPIEN DES STRAFRECHTS (Principles of faith, interdict of the punishment of suspects and presumption of innocence as basic principles of criminal law, 1988); Hans Joachim Hirsch, *Das Schuldprinzip und seine Funktion im*

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

criminal law has to join together with police law in order to prevent specific offences requires legitimation. Certainly, both the mere threat of an offence and the imposition of penalties have general and special preventive effects and functions.[67] Constitutional criminal law would, however, have failed, had it wanted to punish crime that had not yet been committed, as illustrated by *Steven Spielberg's* film "Minority Report" (USA 2002) with its punishment of *precrime*. We therefore need to warn against empty formulas, according to which criminal law would also have to make its contribution to the fight against crime or not relinquish the field to police law[68] – as if we had a constitutional problem of equality of two legal sections. The assumption that the criminalization of offences relating to associations grants the citizens concerned even greater legal protection also errs, as this brings with it a connection to the protective effects of the German Code of Criminal Procedure[69] – as if the continued preventive police activity were restricted by this. At the same time, however, it is right that the state does not have to wait until the offence is committed. To prevent this, however, police law is fundamentally sufficient. Though if an association bent on committing offences is recognized as dangerous, the constitutional means are limited. Continuous monitoring of possible perpetrators cannot be carried out in the long term. It would also be wrong to misuse the criminalization of the association to officially avoid the disreputable protective or preventive custody, only to re-label it with a seemingly harmless prison sentence.[70]

When determining what is to be considered worthy of punishment, the legislator is assigned a wide scope of discretion and constitutive freedom[71]. In this respect we refer to the estimation that associations bent on committing offences bear an increased danger, even though this need not have crystallized yet. That a community is interested in preventing these kinds of danger, and confirms this with the aid of the threat of prosecution is legitimate despite the many predictions of gloom. We do not require any

---

Strafrecht (The principle of fault and its role in the criminal justice system), 106 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 746 (1994); ARTHUR KAUFMANN, DAS SCHULDPRINZIP (The fault principle, 1976).

[67] *See e.g.* BVerfGE 45, 187, 253 *et seq.*; Henning Radtke & Mark Steinsiek, *Terrorismusbekämpfung durch Vorfeldkriminalisierung?* (Fight against terrorism by criminalizing the run), JURISTISCHE RUNDSCHAU 107, 108 (2010).

[68] KAI THORSTEN BARISCH, DIE BEKÄMPFUNG DES INTERNATIONALEN TERRORISMUS DURCH § 129b STGB (The fight against international terrorism by penal code § 129B) 41 (2009).

[69] In this respect, *see* MARK ZÖLLER, *supra* note 13, at 509.

[70] TIM NIKOLAS MÜLLER, PRÄVENTIVE FREIHEITSENTZIEHUNGEN ALS INSTRUMENT DER TERRORISMUSBEKÄMPFUNG (Preventive deprivation of freedom as a fight against the tool of terrorism) 137 (2011).

[71] *See also* BVerfGE 4, 7, 18; 30, 292, 332; 36, 321, 330; 109, 133, 157; 120, 224; IVO APPEL, VERFASSUNG UND STRAFE (Constitution and Punishment) 204 (1998); Thomas Weigend, LEIPZIGER KOMMENTAR ZUM STRAFGESETZBUCH (Leipzig commentary on the penal code), Introduction, MN 2 (Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan & Klaus Tiedemann eds., 2006).

system-theoretical musings that point out the danger of systemic entities or an appeal to *Aristotle* to show that the whole is more than the sum of its parts.[72] The criminalization of criminal and terrorist associations therefore serves the principle legitimate aim of firstly preventing the violation of legally protected interests, as would happen if the respective reference offences were committed,[73] secondly, of preserving the public peace, which can suffer when such reference offences are imminent (for which the threat can suffice, Section 129a subsection 3 StGB),[74] and thirdly, has an eye to preserving the respective legal and social order. Thus, political criminal law is addressed that is capable of being abused and therefore usually brings with it negative connotations. When we remember that criminal law is actually always an expression of political and social attitudes, it should, however, be possible to properly express emerging concerns: For a free and constitutional, though by all means militant democracy, it is a constitutive prerequisite that it leave sufficient space for the respective oppositions to express themselves and advocate their beliefs without being oppressed by the authorities.[75] Once this is achieved, the constitutional state may justifiably prohibit its citizens from getting involved in organizations which are prone to violence.

Because this nevertheless remains somewhat vague, the legislature should be advised not to overdo this kind of penalization and extension of scope. Also within the German system of criminal law there is doubt that this task has been mastered. In this regard, it may be noted that due to the threatened minimum sentence of one year, participation in a terrorist association (Section 129a StGB) counts as a crime, the attempted commission of which is punishable per se. Moreover, this means that in accordance with Section 30 StGB even the preparation of this preparation is punishable. As such even the solicitation, declaration of compliance, undertaking or concerting for reasons of founding such an association or participating in it through membership are punishable. The response to this expansion should actually be a reserved theory of participation. This too, however, is less than exemplary in its organization. Although the penalization of the founding of one of the associations specified is generally harmless, this is certainly not as tangible as the registration of the articles of association of a company.[76] What is more critical is the

---

[72] In this respect, *see* KAI THORSTEN BARISCH, *supra* note 68, at 106 (2009).

[73] *See* the High Court Munich (OLG München), 60 NEUE JURISTISCHE WOCHENSCHRIFT 2786, 2788 (2007); Hans-Joachim Rudolphi, *supra* note 64, at § 129 MN 3; MARK ZÖLLER, *supra* note 13, at 512 (2009).

[74] In this respect, *see e.g.* BGHSt 30, 228, 231; 41, 47, 51; THOMAS FISCHER, *supra* note 18, at § 129 MN 2.

[75] *See again*, *supra* note 7.

[76] On the concept of founding, *see* Federal Court of Justice BGHSt 27, 327; BGH, 59 NEUE JURISTISCHE WOCHENSCHRIFT 1603 (2006); THOMAS FISCHER, *supra* note 18, at § 129 MN 23; Matthias Krauß, *supra* note 19, at § 129 MN 101; Theodor Lenckner, *supra* note 21, at § 129 MN 12a; Hans-Joachim Rudolphi, *supra* note 64, at § 129 MN 14; BERND SCHEIFF, *supra* note 64, at 69 .

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press

somewhat vague criminalization of the activity of membership, which should obviously require more than the mere unpunishable characteristic of being a member.[77] On the basis of reformed insight, the legislature is always to ensure that merely promoting the association is no longer punished.[78] The background to this change is that the German judicial system had expanded this rather intangible term a little too far, so that professions of sympathy had come to be seen as criminal, which is unhealthy for a community based on freedom of expression.[79] In this respect, the aspect of promoting has been limited, and is now only included in the elements of an offence if members or supporters are to be recruited (Sections 129 subsection 1, 129a subsection 5 sentence 2 StGB). The support of criminal and terrorist associations remains a punishable offence (Sections 129 subsection 1, 129a subsection 5 sentence 1 StGB), which is obviously not very tangible and therefore susceptible to abuse.[80] This is, in part at least, a matter of aiding and abetting, which is raised to the level of perpetration (essentially in Section 27 StGB).[81] How this relates, firstly to the legislative decision to no longer punish the promotion of the association as such, and secondly to the general rules of aiding of abetting, which is fundamentally possible for all offences committed, remains open.[82]

The questions touched upon in this context cannot be expanded any further here. By way of warning, it should be noted that the penalization of offences relating to membership in or in support of organizations extends even beyond the punishment of the perpetrators and of aiders and abettors in whatever form. This relates, for example, to the punishability of the failure to report the planning or commission of an offence under Section 129a (also in conjunction with Section 129b subsection 1, sentence 1 and 2) at a time when the

---

[77] For a definition, *see* the BGHSt 18, 296; 29, 114; 54, 69, 111; 56, 312; Theodor Lenckner, *supra* note 21, at § 129 MN 13; Hans-Joachim Rudolphi, *supra* note 64, at § 129 MN 16. See also BGHSt 29, 121 (not merely membership) and THOMAS FISCHER, *supra* note 18, at § 129 MN 24; Wolfgang Fleischer, *Verhältnis von Dauerstraftat und Einzelstraftaten*, 32 NEUE JURISTISCHE WOCHENSCHRIFT 1337, 1338 (1979); Hans-Joachim Rudolphi, *supra* note 64, at § 129 MN 16a: more than paying member's subscription. On membership in terrorist associations abroad, *see* BGH, 16 NEUE ZEITSCHRIFT FÜR STRAFRECHT-RECHTSPRECHUNGSREPORT 372 (2011).

[78] As a result of the 34th Criminal Code Amending Law (34. StÄndG) of 22 August 2002 (Federal Law Gazette [BGBl.] I 3390).

[79] For this, *see* the Bundestag's printed paper (BT-Drs.) 14/8893, 8; SARAH BREIDENBACH, DIE STRAFRECHTLICHE BEKÄMPFUNG TERRORISTISCHER VEREINIGUNGEN (Fighting criminal terrorist associations) 35 (2009).

[80] On attempts at a definition, *see* BGHSt 29, 99, 101; 32, 243, 244 and now BGHSt 51, 345, 348; 54, 69, 116; THOMAS FISCHER, *supra* note 18, at § 129 MN 30; Matthias Krauß, *supra* note 19, at § 129 MN 132, 163; Theodor Lenckner, *supra* note 21, at § 129 MN 15; Heribert Ostendorf, *supra* note 22, at § 129 MN 20.

[81] Likewise BGHSt 20, 89; 29, 99, 101; THOMAS FISCHER, *supra* note 18, at § 129 MN 30; Matthias Krauß, *supra* note 19, at 129 MN 132, 163; Heribert Ostendorf, *supra* note 22, at § 129 MN 20; Hans-Joachim Rudolphi, *supra* note 64, at § 127 MN 14; critically Theodor Lenckner, *supra* note 21, at § 129 MN 15.

[82] On definition, *see* BGHSt 51, 345, 348 et seq.; 54, 69, 116 *et seq*.

commission can still be averted (Section 138 subsection 2 sentence 1 no. 2 StGB). It further includes offences according to Sections 129 to 129b StGB as suitable predicate offences to money laundering (Section 261 subsection 1 sentence 2 no. 5 StGB) and extends above all to the fact that, as of recently, it is even punishable to take up or maintain relationships to a terrorist association (Sections 129a/b StGB) with the intention of receiving instruction on committing a serious violent offence endangering the state (Section 89a subsection 2, no. 1 StGB) (acc. Section 89b subsection 1 StGB: up to three years imprisonment or a fine). This also applies under similar conditions to those of Section 129b StGB for offences committed abroad (Section 89b subsection 3 and 4 StGB).

Ultimately, this establishes criminal liability due to making contact with wrongful intent. That puts the definition of the offence dangerously close to the criminalization of beliefs, or the fictional cinematic *PreCrime*. The liberal constitutional state, however, should take care that it does not, in the end, abolish the very values that it intended to protect against the terrorist attackers. A constitutional state that only rhetorically claims to be such has already abolished itself. Or again, in the words of the great philosopher *Friedrich Nietzsche*:

"He who fights with monsters should look to it that he himself does not become a monster."[83]

[83] FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL IV, at no. 146.

https://doi.org/10.1017/S2071832200018022 Published online by Cambridge University Press