

THE GERMAN COURT SYSTEM IN COMBATTING STATE SECURITY MATTERS, IN PARTICULAR TERRORISM

*Dr. Manfred Dauster

I. INTRODUCTION

Since the jurisdiction of the Federal Supreme Court in state security matters was abolished in 1969, and the Federal lawmakers decided not to establish a Federal first-instance court on those matters, the competence question has become confusing, or at least, complicated. The jurisdiction in most of section 120 of the German Courts' Constitution Act (CCA) cases is clear and does not raise any dispute. However, article 120, paragraphs 1 and 2 of the CCA implies legal traps with respect to competence and jurisdiction, and respective misjudgment of the jurisdiction preconditions comprise risks as to the extent verdicts might be overruled by the Federal Supreme Court due to unlawful assessment of elements of section 120 of the CCA. Discussions on establishing a special Federal Court on State Security matters have never stopped, but such plans are not on the actual agenda of our Federal Government in Berlin. Establishing such a court would be extremely complicated and the German Constitution would need to be amended. Currently, there is an ongoing trend towards concentrating the section 120, paragraphs 1 and 2 of the CCA matters on a smaller number of Regional High Courts by treaty-making. The Regional High Courts of Hamburg and Berlin are the recent examples and others might follow.

Part I of this comment provides an overview and history of the German court system and its relation to state security matters. Part II analyzes the effects of Germany's jurisdictional scheme on state security and terrorism proceedings. Part III offers a recommendation and its consequences to simplify a just jurisdictional scheme for state security matters.

II. BACKGROUND

A. The General Court System

In general terms, Germany's court system is distinctive compared to the United States of America's (USA) system. Similar to the USA, Germany is a Federal State with the Federal Republic of Germany on top as the central entity and sixteen States (so-called Bundesländer) below. In this respect, the basic structure of both countries is similar. However, the distinctions pertain

to the distribution of powers between German States and the Federal Republic, which is not easily explained. Legislation, designed as exclusive and concurring legislation, is mostly within the authority of the Federal Republic.¹

In particular, criminal law and criminal procedure law are subject to federal legislation.² One significant difference between Germany and the USA is the Federal Criminal Code (CC) and the Federal Criminal Procedure Code (CPC) are applied in state court proceedings, as well as by the Federal Supreme Court. Executive powers are distributed the other way round.³ The State (Länder) administration implements both Federal and State laws with one further exception: whenever the German constitution, the Basic Law, explicitly enshrines executive authorities to specifically selected federal bodies or permits the Federal Republic to institute such specific federal administration bodies, those institutions administer federal legislation.⁴ Dispensation of justice is primarily a State matter, hence prosecutors and judges are State officials.⁵

Regarding the court system and based upon the German CCA, German States established a system comprising of three instances, starting with district courts.⁶ District courts may impose fines and penalties up to four years.⁷ Regional courts, the second instance, may be appellate courts revising district court verdicts or might function as trial chambers for serious crime as defined by section 74, specifically section 74c, of the CCA.⁸ The Federal Supreme Court decides appeals against regional courts trial chambers verdicts.⁹ Higher Regional Courts are the third level appellate review against district court decisions, as well as against second instance verdicts of the regional courts.¹⁰ District courts act through single professional judges,¹¹ or

* Judge at the Regional High Court of Munich/Bavaria.

1. See GRUNDGESETZ [GG][BASIC LAW], art. 70, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.
2. *Id.* at art. 74, para. 1, no. 1.
3. *Id.* at art. 30, 83.
4. *Id.* at art. 87.
5. *Id.* at art. 30, 92.
6. See GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBl I] pt. 1, p. 1077, last amended by art. 1 of the Act of Jul. 2, 2013, [BGBl I] pt. 1, p. 1938, [Jurisdiction] § 12. (Ger.).
7. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083 v. 53, § 24, last amended by BUNDESGESETZBLATT [BGBl I], July 30, 2009, at 2449, art. 9, subsec. 1 (Ger.), <https://germanlawarchive.iuscomp.org/?p=771#24> (In connection with § 25 of the CCA (single judge with penalties not more than two years' imprisonment) and with § 28 of the CCA (one professional judge and two lay judges).)
8. *Id.*, BUNDESGESETZBLATT [BGBl I] at § 73, no. 1 (appellate chamber composed of one professional and two lay judges (§ 76, no. 1 of the CCA)).
9. *Id.* at § 135, no. 1.
10. *Id.* at § 121.
11. *Id.* at § 22, no. 1.

through one professional judge and two lay judges.¹² In deciding appeals against district courts' verdicts, regional courts act through one professional judge and two lay judges.¹³ Trials chambers of regional courts are composed of three professional judges and two lay judges.¹⁴ Higher regional courts review lodged appeals by panels of three professional judges.¹⁵

B. The Court System Related to State Security Matters

Rules regarding the general court system might appear complicated. Things get even more complicated when it comes to combating against terrorism or other state security related offenses. Such matters fall under a special court regime. German States have established in total twenty-six Higher Regional Appellate Courts.¹⁶ Higher Regional Appellate Courts are those judicial bodies exclusively sitting on counterterrorism and other State Security related trial cases. Those courts are in:

- Hamburg for the territories of Hamburg, Bremen, Schleswig-Holstein and Mecklenburg-Vorpommern,¹⁷
- Berlin for the territories of Berlin, Brandenburg and Saxony-Anhalt,¹⁸
- Dresden for the territory of Saxony,¹⁹
- Jena for the territory of Thuringia,²⁰

12. *Id.* at § 28, no. 1.

13. *Id.* at § 76, no. 1.

14. *Id.*

15. *Id.* at § 122, no. 1.

16. Courts in Schleswig for the State of Schleswig-Holstein, in Hamburg for the State of Hamburg, in Bremen for the State of Bremen, in Rostock for the State of Mecklenburg-Vorpommern, in Berlin for the State of Berlin, in Brandenburg for the State of Brandenburg, in Dresden for the State of Saxony, in Naumburg for the State of Saxony-Anhalt, in Jena for the State of Thuringia, in Celle, Brunswick and Oldenburg for the State of Lower Saxony, in Hamm, the biggest Regional High Court with more than 200 judges, Düsseldorf and Cologne for the State of North Rhine-Westphalia, in Frankfurt for the State of Hesse, in Koblenz and Zweibrücken for the State of Rhineland-Palatinate, in Saarbrücken for the State of Saarland, in Karlsruhe and Stuttgart for the State of Baden-Württemberg and finally in Bamberg, Nuremberg and Munich for State of Bavaria.)

17. Hamburg and Bremen: Sec. 1 of the treaty between the States of Bremen and Hamburg on the transfer of jurisdiction of the Hanseatic Higher Regional Court of Hamburg on jurisdiction in State Security related matters (HMBGVBL. 1970, S. 271); Hamburg and Schleswig-Holstein: Art. 1 of the Treaty between the States of Schleswig-Holstein and Hamburg on the jurisdiction of the Hanseatic Higher Regional Court in Hamburg on State Security related matters (HMBGVBL. 2012, S. 196); Hamburg and Mecklenburg-Vorpommern: Art. 1 of the treaty between the States of Mecklenburg-Vorpommern and Hamburg on State Security matters (GVOBL. M-V 2012)

18. State Treaty between the States of Berlin, Brandenburg and Sachsen-Anhalt on the transfer of jurisdiction on State Security related matters of Nov. 8, 2010 (GVBL.I/11, [NR. 1])

19. *Courts and Cases Germany*, LEXADIN, <http://www.lexadin.nl/wlg/courts/nofr/eur/lxctdui.htm> (last visited Oct. 13, 2017).

20. *Courts and Cases Germany*, LEXADIN, <http://www.lexadin.nl/wlg/courts/nofr/eur/lxctdui.htm> (last visited Oct. 13, 2017).

- Koblenz for the territories of Rhineland-Palatinate and Saarland,²¹
- Düsseldorf for the territory of North Rhine-Westphalia,²²
- Celle for the territory of Lower Saxony,²³
- Frankfurt for the territory of Hesse,²⁴
- Stuttgart for the territory of Baden-Württemberg,²⁵ and
- Munich for the territory of Bavaria²⁶

The Berlin, Hamburg and Koblenz Higher Regional Appellate Courts' jurisdiction might interest American lawyers, as the phenomenon once more reveals the constitutional distinction between USA and Germany. With respect to the three courts in Hamburg, Berlin and Koblenz, the concentration of these three courts legally resulted from State Treaties concluded between the States concerned.²⁷ Section 120, paragraph 5, 2nd phrase of the CCA explicitly allows such inter-state agreements.²⁸ They are constitutionally seen as State-to-State cooperation, which is a key element of German federalism.²⁹ This concentration of jurisdiction resulted from a longer history.

C. The Development in History

The rules date back to when Germany was on its way towards unification, between the German War of 1866 and the Franco-German War in 1870–71. Article 75 of the Constitution of the North-German Confederation of June 25, 1867, and later, after the defeat of France and the unification of German States, Article 75 of the Constitution of the German Empire of April 16, 1871,³⁰ established the jurisdiction for prosecuting

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21. State Treaty between the States of Rhineland-Palatinate and Saarland on the transfer of jurisdiction on State Security related matters of Aug. 16/18, 1971 (RHPfGVBL 1971 S. 304) published on Jan. 31, 1972 (RHPfGVBL 1972 S. 106).
 22. *Courts and Cases Germany*, LEXADIN, <http://www.lexadin.nl/wlg/courts/noftr/eur/lxctdui.htm> (last visited Oct. 13, 2017).
 23. *Id.*
 24. *Id.*
 25. *Id.*
 26. *Welcome to the Bavarian State Ministry of Justice*, BAYERISHES STAATSMINISTERIUM DER JUSTIZ, <https://www.justiz.bayern.de/englisch.php> (last visited Oct. 13, 2017).
 27. *Supra* notes 18, 19, 22.
 28. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083, § 120, para. 5, last amended by BGBl I, July 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).
 29. ANDREW BLICK, THE GERMAN EXPERIENCE OF FEDERALISM, <http://fedtrust.co.uk/wp-content/uploads/2014/12/AB-Notes-from-seminar-1.pdf>.
 30. VERFASSUNG DES NORDDEUTSCHEN BUNDES [CONSTITUTION OF THE NORTH-GERMANY CONFEDERATION] BGBl at 1867, p. 1; VERFASSUNG DES DEUTSCHEN REICHES [CONSTITUTION OF THE GERMAN EMPIRE] REICHSGESETZBLATT [RGL] at 1871, p. 64 (The wording of the two articles is identical).

criminal acts of high treason and common treason within the Joined Appellate Court in Lübeck in first and final instance.³¹ At that time, the definition of high treason included murder or attempted murder on the German Emperor.³² Respective authorities of the Member States of the Empire hold the reserved prosecution power against all other criminal acts turned against the state security issues.³³ When the Courts' Constitution Act was enacted on January 27, 1877, section 136, paragraph 1 gave the Reichsgericht (Supreme Court of the German Empire) jurisdiction on appeals against verdicts of the regional courts, unless the jurisdiction of the Higher Regional Court was precedent.³⁴ In replacing the Joined Appellate Court in Lübeck, the Reichsgericht gained first and final jurisdiction as a trial court in high treason and common treason cases, only if such felonies were against the Empire or the Emperor.³⁵ All other crimes jeopardizing the security of the State or Constitution continued to fall within the jurisdiction of jury chambers of the regional courts.³⁶ This jurisdictional scheme remained *mutatis mutandis* until the end of the monarchies in Germany.³⁷

Turbulences began in the early years of the young German Republic, especially with the murder of the Minister of Foreign Affairs Rathenau on June 24, 1922, when a special judicial body (Staatsgerichtshof) was established within the Reichsgericht.³⁸ This body gained jurisdiction on state security related matters and the Reichsgericht lost its jurisdiction on high treason.³⁹ However, the Staatsgerichtshof ceased to exist on April 1, 1926, and its jurisdiction was re-transferred to the Reichsgericht.⁴⁰

Based upon the Reich Enabling Act of December 8, 1923, the Reich Government of the Weimar Republic proclaimed a Law Degree on the Courts' Constitution and Penal Procedure on January 7, 1924, which

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31. KONSTANTIN KUCHENBAUER, STRAFRECHTLICHE KONTROLLE DES AUBENWIRTSCHAFTSVERKEHRS IM SPANNUNGSFELD ZWISCHEN POLITIK UND VERFASSUNG, p. 9 (Tasechenbuch 2015) (The Joined Appellate Court in Lübeck however did not become effective as Reichstag, the parliament of the German Empire, failed to pass the necessary by-laws (Kuchenbauer, p. 9)).
 32. STRAFGESETZBUCH [STGB] [CRIMINAL CODE], § 80; THE CRIMINAL CODE OF THE GERMAN EMPIRE 205 (Geoffrey Drage trans., London: Chapman and Hall Ltd. 1885).
 33. Art. 74 of the Reich Constitution.
 34. GERICHTEVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], REICHSGESETZBLATT [RGL] at 1877, § 136, p. 41 (Ger.).
 35. THOMAS H. SHASTID, OPHTHALMIC JURISPRUDENCE: A REPRINT FROM THE AMERICAN ENCYCLOPEDIA OF OPHTHALMOLOGY 18 (Cleveland Press 1916).
 36. GERICHTEVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBL I] at 1083, §§ 73-80, last amended by BGBL I, Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).
 37. Kuchenbauer, *supra* note 32 at 10.
 38. Christian Schölzel, Rathenau, Walter, INT'L ENCYCLOPEDIA OF THE FIRST WORLD WAR (last updated Jan. 25, 2017), https://encyclopedia.1914-1918-online.net/article/rathenau_walther.
 39. [Reich Governments Decree on the Protection of the Republic] Jun. 22, 1922, RGL I 1922 at 521, § 6, par. 1 1922; Kuchenbauer, *supra* n. 32 at 13.
 40. Law of Mar. 31, 1926; RGL I, p. 190, 1926; Kuchenbauer, *supra* n. 32 at 13.

transferred the first instance jurisdiction on treason and illegal disclosure of military secrets to the higher regional courts from the Reichsgericht.⁴¹ The higher regional courts were comprised of a bench of five professional judges.⁴² However, high treason remained within the Reichsgericht's authority,⁴³ which also sat five professional judges on the bench when trying cases in first instance.⁴⁴

In the years to come, the jurisdiction scheme was amended, which resulted in manifold changes. At a certain point in the Nazi terror regime, the People's Court (Volksgerichtshof) assumed jurisdiction on state security matters.⁴⁵ The known consequences of Roland Freisler's, the court's famous President's, merciless regime of beyond legality judicial terror, became the symbol of the system. The background of the People's Court's creation stemmed from Hitler's disappointment about the Reichsgericht's acquittal of three communist functionaries in the van de Lubbe-proceeding.⁴⁶

After the German Basic Law, Germany's constitution was enacted and returned jurisdiction back to the Higher Regional Courts on state security

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41. See generally GERMANY—THE REPUBLIC IN CRISIS 1920–1923, (Oct. 1, 2017), <http://www.schudak.de/timelines/germany-therepublicincrisis1920-1923.html>.
 42. GERICHTEVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], May 15, 1975, BUNDESGESETZBLATT [BGBL I] at 1094, § 122, last amended by [BGBL I], Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).
 43. It is worthwhile to mention that the Higher Regional Courts assumed (facultative) first instance jurisdiction on (common) treason and espionage cases by Law Degree of December 12, 1923, which are limited to cases of minor significance by section 15, paragraph 1, phrase 2 and paragraph 3 of the Law Degree on the Courts' Constitution and on Penal Procedures of January 7, 1924 (RGL. 1924 I, p. 381).
 44. [Law Degree on the Courts' Constitution and Penal Procedures] January 7, 1924, RGL. I at 381, § 15 1924) (The most famous case the Reichsgericht ever tried between 1918 (the end of the monarchy) and 1945 (the unconditional surrender of Nazi-Germany) was the criminal proceeding against Marinus van der Lubbe. Immediately after Adolf Hitler seized power and assumed office of the chancellorship of the Reich on January 27, 1933, the raid on opposition members and other people suspected not to be in line with NS-ideology began. On February 27, 1933, the Parliament building in Berlin, the Reichstag, burned down. Authorities arrested Marinus van der Lubbe, a socialist worker from the Netherlands, in the burning of the Parliament building. Together with three other persons, Georgi Dimitrow, Blagoi Popow und Wassil Tanew, known as communists and Bulgarian nationals, van der Lubbe was indicted with high treason and arson before the 4th Penal Panel of the Reichsgericht. A show-trial resulting in a verdict against van der Lubbe followed, on the December 23, 1933. During the proceeding, van der Lubbe, who confessed to the arson, appeared as under the influence of drugs. After the trial, rumors arose that he might have been poisoned by bromine. The truth was never completely disclosed. While Dimitrow, Popow and Tanew were acquitted because of lack of evidence (but then transferred to protective custody in a concentration camp), van der Lubbe was sentenced to the death penalty. On January 10, 1934, Marinus van der Lubbe was beheaded in the central execution prison in Leipzig.).
 45. [Law Amending Regulations of the Criminal Code and of the Criminal Procedure Code of Apr. 24, 1934] May 2, 1934, RGL. I at 341, Art. III 1934.
 46. HANS-ULLRICH PAEFFGEN, EXPERTISE ON THE QUESTION: IS IT RECOMMENDABLE TO AMEND THE REGULATIONS ON THE JURISDICTION OF THE FEDERAL PROSECUTOR GENERAL IN THE DOMAINE OF PROSECUTORIAL INVESTIGATIONS ON STATE SECURITY RELATED MATTERS?, 10 n.19; Kuchenbauer, *supra* n. 32 at 16.

matters, but in concurrence with first instance jurisdiction of the Federal Supreme Court,⁴⁷ particularly the 1950 Federal Act on Restoration of Legal Unity in the Fields of Courts' Constitution, Civil and Penal Procedure, and of Costs Concerning Court Procedure.⁴⁸ Later it dealt with cases of high treason and breaking up the Parliament, pursuant to section 134 of the CCA, while Regional Higher Courts dealt with minor cases where the perpetrator "only" put the state security at risk.⁴⁹ The Federal Supreme Court's jurisdiction in first instance was final and no appeal was legally allowed.⁵⁰ The lack of the right to appeal caused concerns and discussions arose to institute a new first instance court on the federal level to allow appeals against the respective verdicts to the Federal Supreme Court. This required an amendment to the constitution and was ultimately dismissed. Finally, the Federal Act on Introducing a Second Instance on state security matters of September 8, 1969,⁵¹ abolished the first instance authority of the Federal Supreme Court⁵² and transferred the concerned matters to the Higher Regional Appellate Courts.⁵³

Needless to say, the prosecutor's office established on the Reich, or the Federal level (Ober-Reichsanwalt, Ober-Bundesanwalt), today the Federal Prosecutor General (Generalbundesanwalt), directed the prosecution in state security matters.⁵⁴ In the years of the People's Court, a special Reich Prosecutor's Office conducted the investigation.⁵⁵

D. The Jurisdictional Scheme from 1969 to Present

Since 1969, the Higher Regional Appellate Courts in Berlin, Dresden, Jena, Celle, Hamburg, Düsseldorf, Frankfurt, Koblenz, Stuttgart, and

47. Gerichtesverfassungsgesetz [GVG] [Courts Constitution Acts], May 9, 1975, Bundesgesetzblatt [BGBL I] at 1083, art. 143, par. 5, last amended by BGBL I, Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.) (Art. 143 of the Basic Law was a very special constitutional provision. By constitutional order high treason was criminalized. Art. 143 par. 5 declared the Supreme Court of the State competent to prosecuting such crime in case only the State Security was affected. For the rest, the Higher Regional Court residing at the seat of the first Federal Government got the authority of prosecution. The seat of the first Federal Government was Bonn, the competent Higher Regional Court was the one in Cologne. That court never became active.)

48. *Id.*

49. Kuchenbauer, *supra* n. 32 at 16–17.

50. *Id.*

51. BGBL I at 1582 (1969); [The First Law on Amending the Criminal Law of Aug. 30, 1951] BGBL I at 739, art. 3, n. 2 (1951)); Kuchenbauer, *supra* n. 32 at 18 (The level of regional courts at the seats of the Higher Regional Courts, a special chamber was instituted that had jurisdiction on cases of minor interest of the Federal Republic of Germany in state security related matters.)

52. Gerichtesverfassungsgesetz [GVG] [Courts Constitution Acts], May 9, 1975, Bundesgesetzblatt [BGBL I] at 1083, §§ 134–134a, last amended by BGBL I, Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).

53. *Id.* at §120.

54. *Id.*

55. *Id.*

Munich, have tried state security offenses, including terrorism.⁵⁶ The aforementioned courts are located in the districts in which the State Governments have their seat, unless states concerned have concluded treaties on further concentrating the jurisdiction matter pursuant to section 120, paragraph 5, phrase 2 of the CCA.⁵⁷ The matters of jurisdiction according to section 120, paragraph, 1 and 2 of the CCA increased over the years, depending on respective political circumstances.⁵⁸ For example, in implementing UN Security Council Embargo Policies reacting to 9/11 attacks in New York and Washington D.C., it enacted international criminal laws [Rome Statute]. Pursuant to section 120 of the CCA, Higher Regional Courts have jurisdiction on crimes against peace stated in section 80 of the CCA, including high treason,⁵⁹ treason and endangering external security,⁶⁰ as well as criminal offenses pursuant to section 52 subsection (2) of the Patent Law, section 9 subsection (2) of the Utility Model Act in conjunction with section 52 subsection (2) of the Patent Law, section 4 subsection (4) of the Semiconductor Protection Act in conjunction with section 9 subsection (2) of the Utility Model Act and section 52 subsection (2) of the Patent Law, an assault against organs and representatives of foreign states,⁶¹ a crime against constitutional organs,⁶² a violation of a ban of an organization pursuant to section 129a in conjunction with section 129b subsection (1) of the CCA, failure to report crimes pursuant to section 138 of the CC if the failure to report concerns a crime falling under the jurisdiction of the higher regional court, and criminal offenses pursuant to the Code of Crimes against International Law.

These Higher Regional Courts furthermore have jurisdiction for hearing and deciding cases at first instance involving the criminal offenses designated in section 74a subsection (1) of the CCA if the Federal Prosecutor General takes over the prosecution due to the special significance of the case pursuant to section 74a subsection (2) of the CCA, murder,⁶³ manslaughter,⁶⁴ and the criminal offenses designated in section 129a subsection (1) number 2. These Higher Regional Courts also have jurisdiction for hearing the cases at first instance involving the criminal offenses designated in section 129a subsection (2) of the CC, if there is a connection with the activity of an organization not or not only existing in Germany the purpose or activity of which is to commit criminal offences of this kind and the Federal Prosecutor

56. *Id.*

57. *Id.*

58. *Id.*

59. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 81–83.

60. *Id.* at §§ 94–100a.

61. *Id.* at § 102.

62. *Id.* at §§ 105–106.

63. *Id.* at § 211.

64. *Id.* at § 212.

General takes over the prosecution due to the special significance of the case for murder,⁶⁵ manslaughter,⁶⁶ abduction for the purpose of blackmail,⁶⁷ hostage taking,⁶⁸ serious arson,⁶⁹ arson resulting in death,⁷⁰ causing an explosion by nuclear power in the cases of section 307 subsection (1) and subsection (3), number 1 of the CC, causing an explosion in the cases of section 308 subsections (1) to (3) of the CC, misuse of ionizing radiation in the cases of section 309 subsections (1) to (4) of the CC, acts preparatory to causing an explosion or radiation offence in the cases of section 310 subsection (1), numbers 1 to 3 of the CC, causing a flood in the cases of the section 313 subsection (2) in conjunction with section 308 subsections (2) and (3) of the CC, poisoning dangerous to the public in the cases of section 314 subsection (2) in conjunction with section 308 subsections (2) and (3) of the CC. It has jurisdiction in cases involving assaults on air and sea traffic in the cases of section 316c subsections (1) and (3) of the CC, if under the circumstances the offense is intended to and is capable of undermining the continued existence or security of a state, destroying, invalidating, or undermining a constitutional principle of the Federal Republic of Germany, undermining the security of the troops of the North Atlantic Treaty Organization or of its non-German member states stationed in the Federal Republic of Germany or undermining the continued existence or security of an international organization and the Federal Prosecutor General takes over the prosecution due to the special significance of the case.⁷¹

Furthermore, those Higher Regional Appellate Courts adjudicate criminal offenses pursuant to the Foreign Trade and Payments Act and criminal offenses pursuant to section 19 subsection (2), number 2, and section 20 subsection (1) of the Act on the Control of Weapons of War, if under the circumstances the offense seriously endangers the external security or the foreign relations of the Federal Republic of Germany, or is intended to and is capable of disrupting the peaceful coexistence of peoples and the Federal Prosecutor General takes over the prosecution due to the special significance of the case.⁷²

The justice administration of the German States established specified panels (Staatsschutzsenate) within Higher Regional Appellate Courts dealing with article 120 CCA matters and composed of at least five judges (1

65. *Id.* at § 211.

66. *Id.* at § 212.

67. *Id.* at § 239a.

68. *Id.* at § 239b.

69. *Id.* at §§ 306a-b.

70. *Id.* at § 306c.

71. OBERLANDESGERICHT [OLGS_T] [HIGHER REGIONAL COURT], §§ 115ff.

72. *Id.*

presiding judge and 4 associate judges).⁷³ The Munich court instituted four such panels.⁷⁴ Munich's panels are busy and sit in trial at least two days a week and, if necessary, up to five days per week. Most proceedings take considerable time. One panel recently completed a murder trial after 21 months of court proceedings.⁷⁵ The trial regarded State Terrorism exercised by the Secret Service authorities of the former State of Yugoslavia.⁷⁶ These Secret Service authorities sought dissidents and other opponents living outside Yugoslavia, whom they regarded as terrorists, and they were permitted to kill by reasons of political necessity.⁷⁷ Other panels in Munich's court are comparable.

The substantive jurisdiction of these courts has been paralleled by investigative authority of the Federal Prosecutor General. Following section 142a of the CCA, the Federal Prosecutor General shall discharge the duties of the public prosecution office with respect to criminal matters falling under the jurisdiction of the Higher Regional Courts at first instance (section 120, subsections (1) and (2)) at these courts as well.⁷⁸ If the officials of the public prosecution office of a State and the Federal Prosecutor General cannot agree upon which of them should take over the prosecution in a section 120, subsection (1) case, the Federal Prosecutor General decides.⁷⁹

E. Constitutional Background of the Current Jurisdictional Scheme

The starting point of the constitutional justification of the present legal situation is article 30 of the Basic Law. This article designed the foundation of the relation between the Federal Republic and the States. It mandates the States exercise public power, unless the Basic Law explicitly stipulates otherwise.⁸⁰ This principle is also applied on dispensation of justice.⁸¹ Building off this this background, article 92 of the Basic Law, in conjunction with article 94 of the Basic Law, finally determined which obligatory⁸² or

73. GERICHTEVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], May 15, 1975, BUNDESGESETZBLATT [BGBL I] at 1094, § 122, last amended by [BGBL I], Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).

74. *Id.*

75. STAATSGERICHTSHOF [STGH] Aug. 3, 2016, File number 7 St 5/14; *see also Munich Court Convicts Ex-Yugoslav Spies in 1983 Killing*, DW (Aug. 3, 2016), <http://www.dw.com/en/munich-court-convicts-ex-yugoslav-spies-in-1983-killing/a-19446792>.

76. *Id.*

77. *Id.*

78. GERICHTEVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], May 15, 1975, BUNDESGESETZBLATT [BGBL I] at 1096, § 142a, last amended by [BGBL I], Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).

79. *Id.*

80. *See* GG [Basic Law], art. 30.

81. *Id.*

82. Hillgruber, Maunz-Dürig-Herzog, GG-Kommentar, art. 92 (2007) Rdn. 78.

optional⁸³ courts the German Federal Republic shall or may institute.⁸⁴ Due to that clause, only the States may establish new and special courts by parliamentary act. Only constitutional amendments may introduce new and special Federal Courts.⁸⁵ In state security matters, the Basic Law provides one important exception to this basic rule. Article 96, paragraph 5 of the Basic Law explicitly establishes exceptional federal jurisdiction on the therein listed matters,⁸⁶ but simultaneously empowers the Federal Republic of Germany to transfer the execution of aforesaid material jurisdiction to courts of the States.⁸⁷ When the first and final jurisdiction of the Federal Supreme Court on state security matters was abolished in 1969, article 96, paragraph 5 of the Basic Law got an elucidating function in securing the Federal jurisdiction in substance of the listed matters, and, by doing so, guaranteed the Federal Prosecutor General's investigative authority on such matters. Simultaneously, the regulation ensured the Federal President's Right to Pardon on Federation related criminal matters.⁸⁸

The described constitutional circumstances are complex, and lead to the question whether the nature of those State Higher Regional Courts exercising material jurisdiction on matters pursuant article 96, paragraph 5 of the Basic Law are in conjunction with section 120 of the CCA. The response is simple but difficult to understand. They remain State Courts, but the Federal

83. *Id.*

84. *See* GRUNDGESETZ [GG] [Basic Law], art. 92, 94.

85. Hillgruber, *ibid.*, Rdnr. 77.

86. GRUNDGESETZ [GG] [Basic Law], art. 96.

(1) The Federation may establish a federal court for matters concerning industrial property rights.

(2) The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defense or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. Their full-time judges shall be persons qualified to hold judicial office.

(3) The supreme court of review from the courts designated in paragraphs (1) and (2) of this Article shall be the Federal Court of Justice. (4) The Federation may establish federal courts for disciplinary proceedings against, and for proceedings on complaints by, persons in the federal public service. (5) With the consent of the Bundesrat, a federal law may provide that courts of the Länder shall exercise federal jurisdiction over criminal proceedings in the following matters:

1. genocide;
2. crimes against humanity under international criminal law;
3. war crimes;
4. other acts tending to and undertaken with the intent to disturb the peaceful relations between nations (paragraph (1) of Article 26);
5. state security.

87. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083, § 120, last amended by BGBl I, July 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).

88. Jachmann, Maunz-Dürig-Herzog, Grundgesetz-Kommentar, art. 95 Rdnr. 56 (2011); GG [BASIC LAW], art. 60.

Republic of Germany “borrows” those state institutions for its own sake and purpose. Such a lending of a judicial body is mirrored by section 120, paragraph 7 of the CCA.⁸⁹ The state whose Higher Regional Court is trying a Federation-related case can request the Federal Republic to reimburse all costs of proceeding to the respective the state budget.⁹⁰ Under the framework of section, 120 paragraph 7 of the CCA, it is a matter of agreement between State and Federal Republic whether further costs not directly caused by proceedings, for example security costs for special court houses with high risk standards, are included in the reimbursement.⁹¹ The state budget pays judges, who sit in section 120 of the CCA related cases, according to the pay plan that is in effect for all other state judges.⁹² Their salary is considerably lower than the payments representatives of the Federal Prosecutor General receive, who file the indictment to the Higher Regional Courts and represent the accusation authority at trial in the Higher Regional Courts.⁹³ Finally, the scenery in the Court room does make clear to the public that criminal cases pursuant to section 120 of the CCA are special. While the five sitting judges dress in their usual black robes, representatives of the Federal Prosecutor General appear in red gowns.⁹⁴ The red robes, according to German tradition, are reserved to representatives of the Federal Justice Administration.⁹⁵

F. Cautiousness in Exercising Federal Jurisdiction

Looking closer at the regulations of section 120 of the CCA reveals paragraph 1 establishes an original Federal Jurisdiction on the listed offenses. Federal jurisdiction pursuant to paragraph 2 for the listed crimes depend on additional legal requirements and could be called optional. The following cases under paragraph 2 contain additional circumstances:

- The Federal Prosecutor has taken over the investigation due to the significant importance of the case,⁹⁶
- The criminal act endangered the continued existence or security of a state,⁹⁷

89. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Bd. II, 1980 S. 394.

90. MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CIVIL PROCEDURE* (Hart Pub. 1st ed. 2012).

91. *Id.*

92. CHRISTIAN WOLF & FABIENNE KLASS, *REGULATING JUDGES* 174 (Richard Devlin & Adam Dodek eds., 2016).

93. *Id.*

94. BUNDESVERFASSUNGSGERICHT, http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Faltblatt.pdf?__blob=publicationFile (last visited Oct. 2, 2017).

95. *Id.*

96. *Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act]*, May 9, 1975, *Bundesgesetzblatt [BGBl I]*, last amended by *Gesetz [G]*, July 30, 2009, *BGBl* at 2449, art. 9, subsec. 1 (Ger.).

97. *Id.*

- The criminal act destroyed, invalidated or undermined constitutional principles of the Federal Republic of Germany,⁹⁸
- The criminal act undermined the security of the troops of the North Atlantic Treaty Organization or of its non-German member states stationed in the Federal Republic of Germany,⁹⁹
- The criminal act undermined the continued existence or security of an international organization,¹⁰⁰
- The offence was capable of seriously endangering the external security or the foreign relations of the Federal Republic of Germany,¹⁰¹ or
- The offence was intended to and was capable of disrupting the peaceful coexistence of peoples.¹⁰²

A criminal act which affects the territory of more than one state is given equal significance.¹⁰³ The Federal Prosecutor General's decision to take over a case is not legally binding and the Higher Regional Court shall review the decision to confirm the defendant's indictment.¹⁰⁴ If the Higher Regional Court determines the individual case does not show significant importance, it shall transfer the case to a competent lower instance court of the state.¹⁰⁵ The Higher Regional Court's decision to transfer the case may be appealed by the Prosecutor General to the Federal Supreme Court. Due to the fact that the jurisdiction is flexible, according to section 120, paragraph 2 of the CCA, the jurisprudence of the Federal Supreme Court requires a thorough examination of its legal preconditions.¹⁰⁶ A misjudgment in the preconditions of jurisdiction infringes the constitutional principle of *iudex naturalis* and, therefore, may be reviewed by the Federal Supreme Court ex officio upon appeal. Thus, Higher Regional Courts examine the element of "significant importance" restrictively and cautiously.

Section 142a of the CCA establishes the Federal Prosecutor General's authority over state security matters pursuant to section 120.¹⁰⁷ If there are

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], §120, (specifically (2)(4)(b)) (Ger.).

103. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], § 120 (Ger.).

104. STRAFPROZEBORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl I] at 1074, 1319 § 122, last amended by [BCBl I], Apr. 23, 2014, at 410, art. 3 (Ger.), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

105. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083, § 120, last amended by BGBl I, Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.).

106. Schmitt in Meyer-Goßner/Schmitt StPO 59. Aufl. Rdnr. 3a, 3b

107. Gerichtesverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, Bundesgesetzblatt [BGBl I] at 1083, 1096, § 142a (Ger.).

sufficient facts for its authority, the decision whether to take over is mandatory.¹⁰⁸ If such a case confronts the local prosecutor's office, the local prosecutor shall submit the file without delay to the Federal Prosecutor General for review.¹⁰⁹ Disagreements on jurisdiction are resolved by the Federal Prosecutor General.¹¹⁰

Section 142a of the CCA lists criminal offenses the Federal Prosecutor General can transfer to the State prosecutors, because such cases are *prima facie* minor significance.¹¹¹ Number 2 of section 142a, paragraph 2 of the CCA completed the transferal competence for all other cases of minor significance.¹¹² The addressee of such transferals is the Prosecutor General at the seat of the High Regional Court, having jurisdiction according to section 120 of the CCA. The transfer does not change the High Regional Court's authority and its jurisdiction remains untouched. Per section 120 of the CCA, the Prosecutor General shall file individual indictments to the High Regional Court that has jurisdiction over the matter.¹¹³ By having transferred the case to the Prosecutor General of the State, the case falls out of the Federal jurisdiction and becomes an ordinary state matter.¹¹⁴ Although in this case the High Regional Court disburses justice, it does not act anymore on behalf of the Federal Republic of Germany. Instead, it acts as an ordinary state body with a special competence. In disputes between the Federal Prosecutor General and the State Prosecutor General on their competences, the Federal

108. *Gerichtesverfassungsgesetz [GVG] [Courts Constitution Act]*, § 145 (Ger.).

109. Volker Krey, *German Criminal Procedure Law: Textbook Vol. 1* 76 (Kolhammer Verlag 2009).

110. *Id.*

111. *Gerichtesverfassungsgesetz [GVG] [Courts Constitution Act]*, May 9, 1975, *Bundesgesetzblatt [BGBl I]* at 1083, § 142a, par. 2, last amended by [BGBl I], July 30, 2009, at 2449, art. 9, subsec. 1 (Ger.). The Federal Prosecutor General shall refer the proceedings to the *Land* public prosecution office prior to filing a bill of indictment or a written application (section 440 of the Code of Criminal Procedure) 1. if the following criminal offences are the subject of the proceedings: a) criminal offences pursuant to section 82, section 83 subsection (2) or sections 98, 99 or 102 of the Criminal Code, b) criminal offences pursuant to sections 105 or 106 of the Criminal Code, if the offence is directed against an organ of a *Land* or against a member of such an organ, c) criminal offences pursuant to section 138 of the Criminal Code in conjunction with one of the provisions of the Criminal Code designated in letter a) or d) criminal offences pursuant to section 52 subsection (2) of the Patent Law, pursuant to section 9 subsection (2) of the Utility Model Act in conjunction with section 52 subsection (2) of the Patent Law, or pursuant to section 4 subsection (4) of the Semiconductor Protection Act in conjunction with section 9 subsection (2) of the Utility Model Act and section 52 subsection (2) of the Patent Law; 2. in cases of lesser importance. (3) The proceedings shall not be referred to the *Land* public prosecution office 1. if the offence affects the interests of the Federation to a considerable degree or 2. if it is advisable in the interest of legal uniformity for the Federal Prosecutor General to prosecute the offence. (4) The Federal Prosecutor General shall refer a case that he has taken over pursuant to Section 120 subsection (2), numbers 2 to 4, or pursuant to Section 74a subsection (2) back to the *Land* public prosecution office if the case is no longer of special significance.

112. *Id.*

113. *See generally* C.C.A. § 120.

114. *Id.*

Prosecutor General makes the final decision.¹¹⁵ However, such decisions are subject to legal review by the Federal Supreme Court under conditions provided in the CCA.¹¹⁶ A transfer shall not happen if the criminal act infringes the Federation interest to a particular degree or requirements of legal uniformity demand prosecution by the Federal Prosecutor General.¹¹⁷

II. ANALYSIS/RECOMMENDATION

Sect. 129b of the German Criminal Code (CC): Penalization of Membership in Foreign Terrorist Organizations—One Particular Aspect

A. History of Sect. 129b German CC

Section 129b of the German Criminal Code was enacted as an immediate consequence of the September 11, 2001, events in New York and another terrorist plot on a bus with German tourists in Djerba and Tunisia in April 2002.¹¹⁸ Originally, the lawmakers' based their concept upon a directive of the European Union Council, which aimed the Member States of the Union to introduce harmonious criminal provisions on terrorist activities in only the Member States.¹¹⁹ The New York and Djerba events constituted obvious terror activities outside the European Union and had direct impacts not only on the security of the countries inside the Union, but also on international combat on terrorism requires regulations. These regulations permit investigation and prosecution of those organizations that act, particularly outside Europe. The result of such reflections is in section 129b of the German Criminal Code, which composes a legal unit when combined with section 129a of the Criminal Code.¹²⁰

However, during the parliamentary deliberation, it became clear that Germany would never have the capacity to go after every foreign terrorist group. Such groups in third world countries neither affect Germany nor the stability of the European Union. Hence, Germany does not claim to be or aim to become the world's "police officer." Further, it should not replace foreign countries in their responsibility to prosecute terrorist organizations by being active only within their boundaries. As important as the view on combatting terrorism outside Germany and the European Union is, it is clear that limitations are necessary so far. The first limitation in sentence 2 and sentence 3 of section 129b subsection 1 of the Criminal Code states:

115. *Id.* at §120(2).

116. *Id.* at §142(1).

117. *Id.* at §120(2).

118. STRAFGESETZBUCH [STGB] [PENAL CODE] § 129 (amended Aug. 29, 2002).

119. [European Official Gazette] No L 351/1 (1998).

120. STRAFGESETZBUCH [STGB] [PENAL CODE]] § 129.

If the offence relates to an organization outside the member states of the European Union, this shall not apply unless the offence was committed by way of an activity exercised within the Federal Republic of Germany or if the offender or the victim is a German or is found within Germany. In cases which fall under the 2nd sentence above the offence shall only be prosecuted on authorization by the Federal Ministry of Justice.¹²¹

Additionally, the Criminal Code provides criteria for such individual or general authorities.¹²² The criteria is as follows:

When deciding whether to give authorization, the Federal Ministry of Justice shall take into account whether the aims of the organization 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.¹²³

B. Context of Authorizations Pursuing Section 129b subsection 1 sentence 5 of the Criminal Code

Section 129b of the Criminal Code must not be analyzed in legal isolation, but rather, the section should be viewed as presenting key elements in the overall system of criminal regulations in defending state institutions, safeguarding the Constitution itself, protecting Germany's foreign relations to third countries, and guaranteeing Germany's military defense. This is a repressive system by criminal prosecution that neighbors' politics, and must be seen as such.¹²⁴

The definition of a state secret implies preliminary political evaluations.¹²⁵ It is my view that it is naïve to believe in pure juridical interpretations methodologies. When considering the element of "foreign powers," preliminary political reflections are required. The proximity of politics and law are too obvious to be overlooked. We should not forget such proximity is historical, and in some respects, it is a bloody history.

Perhaps the best evidence for the brutal history can be found in the 1870 UK Parliament abolishment of the English Institution of Parliamentary Writs of Attainder.¹²⁶ For example, Thomas Cromwell, in 1540, or Catherine

121. STRAFGESETZBUCH [STGB] [PENAL CODE] § 129b.

122. Note that criteria for such individual or general authorizations are laid out in C.C.A. § 129(b)(1) (sentence 5).

123. *See id.*

124. Schmid in *Leipziger Kommentar STGB* 12th ed. prior to § 77, no. 15; Geerds Goldtammer's *Archive*, 237–45 (1982).

125. STRAFGESETZBUCH [STGB] [PENAL CODE] § 293.

126. George L. Bernstein, *The Myth of Decline: The Rise of Britain Since 1945* (2004).

Howard, in 1542, were less criminal than political obstacles, but nevertheless the House of Parliament charged them for treason.¹²⁷ When considering both section 102 and 104 of the German Criminal Code, the proximity between politics and law becomes clear.¹²⁸ The sections protect German relations to foreign countries, and in doing so they might be seen as an instrument of foreign policies.¹²⁹ However, German authorities will not become active in prosecuting such foreign-relations-linked offenses.¹³⁰

Prosecution depends on pre-conditions as outlined by section 104a of the Criminal Code.¹³¹ Along with existing diplomatic relations and the principle of reciprocity, prosecution will happen only if the foreign government formally demands¹³² and, more importantly, the German government authorizes it. Such requests and authorizations are common conditions of prosecuting state security related offenses.¹³³ Section 77e of the Criminal Code, dealing with such authorizations, refers to section 77 with section 77d of the CC, which are to be applied.¹³⁴ Those provisions concern regulated demands for prosecution of private persons in particular, but also of official institutions.¹³⁵ The details of such demands are outside the scope of this article. Authorizations have no statute of limitations, no format or formal content, and are revocable at any time.¹³⁶ Hence, they do not need an explanation why they are issued. Investigations and prosecutions without such authorizations are legally not possible, and if revocation occurs, any investigation and prosecution must be stopped immediately. Addressee of authorization is the prosecutor's office, which has jurisdiction on the offense

127. *Thomas Cromwell—Facts and Biography Information*, English History (Oct. 2, 2017, 5:57 PM), <https://englishhistory.net/tudor/thomas-cromwell>.

128. *See infra* Annex Nr. 3.

129. *See* C.C.A. §§ 102, 104.

130. *See id.*

131. Fischer STGB [PENAL CODE] 63rd ed., § 77e, no. 5; Lackner/Kühl StGB [Penal Code] 28th ed., § 77e, no. 2.

132. In 2016, a German TV show master Böhmermann made some satirical mockeries about the President of Turkey Recep Tayyip Erdogan. The Turkish Government formally requested the show master's prosecution and hereby caused an internal debate whether Chancellor Merkel should authorize such prosecution or not. Finally, the German Government did so. The case is not finalized yet. It is now on prosecutors and maybe courts to decide whether there is a conflict between the protection of President Erdogan and the freedom of arts, a constitutional value in Germany that was invoked in the public debate.

133. STRAFGESETZBUCH STGB [PENAL CODE], § 90, par. 4; STGB [PENAL CODE], § 90b, par. 2; STGB [PENAL CODE], § 97 par. 3; STGB [PENAL CODE], § 194, par. 4; STGB [PENAL CODE], § 353a, par. 2; STGB [PENAL CODE], § 353b, par. 4. (In case of defamation of the Federal President (Sect. 90 par. 4 CC) he/she may authorize, in case of anti-constitutional defamation of constitutional organs (Sect. 90b par 2 CC) and insult of legislative institutions (§ 194, par. 4 of the CC), the organ concerned and in case of breach of State Secrets (§ 97, par. 3 of the CC) and breach of confidentiality in foreign service (§ 353a, par. 2 of the CC) the Federal Government.).)

134. STRAFGESETZBUCH STGB [PENAL CODE], §§ 77d-e.

135. *Id.*

136. Fischer STGB [PENAL CODE] 63rd ed. § 77e, no. 5; Lackner/Kühl, STGB [PENAL CODE] 28th ed. § 77e, no. 2.

concerned. The addressee can be a state prosecutor's office, but in section 129b of the CC case, the addressee is the Federal Prosecutor General.¹³⁷ Such authorization might refer to a concrete individual or generally to terror organizations.¹³⁸

Since enacted in 2002, the authorization required in section 129b of the CC is a sensitive issue and under critical debate. The authorization, as prerequisite of prosecution,¹³⁹ is necessary factually. Otherwise, German law enforcement authorities and prosecutors cannot go after any terror organization in the world. Prosecutions of foreign terror organizations might have an impact on Germany's foreign policy and the political position of the German government. However, critics focus on the competence of the Federal Ministry of Justice and its legitimacy, wondering why that Ministry, and not the Government, decides on authorizing the prosecution. If foreign relations of Germany are the decisive factor, one may ask why the Ministry of Justice exercises its jurisdiction without any cooperation, or even consent, with the German Foreign Office. Critics also argue authorizations according to section 129b of the CC do not require any explanation, and, as a rule, the Ministry of Justice does not have to give its reasons why it authorized it or not.¹⁴⁰ A requirement that the Ministry must provide their authorization determination reasons in writing is not necessary, as such authorizations will not be subject of any judicial review.¹⁴¹ This point is another aspect of critics. The principle of legality binds German prosecutors and courts, which results in mandatory prosecution of any offense as provided for by law.¹⁴² Non-authorization results in conflicts with such principle, as it is caused by a body of the executive power, not by the Prosecutor's Office. As a rule in Germany, any executive decision that affects rights and legal positions of individuals is subject to judicial review.¹⁴³ In theory, section 1229b authorizations have not directly impacted legal positions and individual rights, as they only open the

137. GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083 v. 53, § 120, last amended by [BGBl I], Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.), <https://germanlawarchive.iuscomp.org/?p=771#120>; GERICHTESVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACTS], May 9, 1975, BUNDESGESETZBLATT [BGBl I] at 1083 v. 53, § 142a, last amended by [BGBl I], Jul. 30, 2009, at 2449, art. 9, subsec. 1 (Ger.), <https://germanlawarchive.iuscomp.org/?p=771#142a>.

138. Dr. Bernhard Kretschmer, *Criminal Involvement in Terrorist Associations – Classification and fundamental Principles of the German Criminal Code Section 129a StGB*, 13 GER. L. J. No. 9 1016, 1029 (2012), https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b29f27b6aa6091ebfae0cf/1454546728012/GLJ_Vol_13_No_09_Kretschmer.pdf.

139. Schmid in *Leipziger Kommentar* 12th ed. prior § 77, no. 15.

140. See Kretschmer, *supra* note 141.

141. *Id.*

142. INTRODUCTION TO GERMAN LAW, 431–32 (Mathias Reimann & Joachim Zekoll eds., Kluwer Law International 2d ed. 2005).

143. See 60 Years German Basic Law: The German Constitution and its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, 562, 576 (Jürgen Bröhmer et al. eds., 2d ed. 2012).

door to investigations and prosecutions. In the course of authorizations, measures might be taken which directly affect individual positions. Offenders often do not share such academic views and attack the legality of the authorization in their case.

C. A Way out? The Decision Case File 7 St 1/16 of the Higher Regional Court of Munich on September 2, 2016

Upon indictments of the Federal Prosecutor General's Office to the 7th Criminal Panel of the Higher Regional Court in Munich, ten presumed members of the Foreign Committee of the Communist Party of Turkey/Marxists-Leninists are charged with offenses under section 129b of the CC.¹⁴⁴ The Federal Ministry of Justice legally enabled the authorization. Twenty defense counsels launched a formal request to the court to decide on discontinuation of the proceeding, and alternatively, to suspend the procedure until the Ministry of Justice reviewed the authorization in the light of their arguments. The many submitted arguments referred to the political situation in Turkey, the combat of the Turkish Government against the Labor Party of Kurdistan and, in particular, the measures taken by the Turkish Government after the attempted subversion of militaries on July 15, 2016. On September 2, 2016, the 7th panel pronounced a decision rejecting the request. The court must issue a discontinuance, if the reasons which instigated the Ministry's submitted authorization are obviously wanton and violate the general principle of equality before law.¹⁴⁵ However, the 7th panel could not find such reasons for obvious arbitrariness in the concrete case. As far as timely requested suspension of the proceeding until the Ministry's reviewed its own decision, the court stated it could not find necessary legal grounds to submit a request for review to the Ministry, and remitted defendants to possibly approach the Ministry upon their own initiative. The decision did not explain concrete or individual criteria for obvious arbitrariness of ministerial authorizations, pursuant to section 129b of the CC, as the case did not contain the necessary legal motives. Future case law might produce them. However, the expectation is grounded, and in the future, the Federal Ministry will more carefully consider the facts submitted by the Federal Prosecutor General when he applies for authorizations in proceedings against foreign terrorists or terrorist organizations abroad.¹⁴⁶

144. *Germany Starts Trial of Alleged Turkish Militants*, Thomson Reuters (June 17, 2016, 6:21 AM), <http://www.reuters.com/article/us-germany-turkey-trial/germany-starts-trial-of-alleged-turkish-militants-idUSKCN0Z317H>.

145. *See generally infra* Annex Nr. 1 § 129b.

146. Schmid in *Leipziger Kommentar*, STGB 12th ed. § 77e, no. 3; Fischer, STGB 63rd ed. § 77e, no 1.

Annex**Nr. 1:****Section 129
Forming criminal organizations**

(1) Whosoever forms an organization the aims or activities of which are directed at the commission of offences or whosoever participates in such an organization as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine.

(2) Subsection (1) above shall not apply

1. if the organization is a political party which the Federal Constitutional Court has not declared to be unconstitutional;

2. if the commission of offences is of merely minor significance for the objectives or activities or

3. to the extent that the objectives or activities of the organization relate to offences under sections 84 to 87.

(3) The attempt to form an organization as indicated in subsection (1) above shall be punishable.

(4) If the offender is one of the ringleaders or hinter men or the case is otherwise especially serious the penalty shall be imprisonment from six months to five years; the penalty shall be imprisonment from six months to ten years if the aim or the activity of the criminal organization is directed at the commission of an offence set out in section 100c (2) No 1 (a), (c), (d), (e), and (g) with the exception of offences pursuant to section 239a or section 239b, (h) to (m) Nos 2 to 5 and 7 of the Code of Criminal Procedure.

(5) The court may order a discharge under subsections (1) and (3) above in the case of accomplices whose guilt is of a minor nature or whose contribution is of minor significance.

(6) The court may in its discretion mitigate the sentence (section 49(2)) or order a discharge under these provisions if the offender

1. voluntarily and earnestly makes efforts to prevent the continued existence of the organization or the commission of an offence consistent with its aims;

or

2. voluntarily discloses his knowledge to a government authority in time so that offences the planning of which he is aware of may be prevented;

if the offender succeeds in preventing the continued existence of the organization or if this is achieved without his efforts he shall not incur criminal liability.

Section 129a
Forming terrorist organizations

(1) Whosoever forms an organization whose aims or activities are directed at the commission of

1. murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law); or
2. crimes against personal liberty under section 239a or section 239b,
3. *(repealed)*

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

(2) The same penalty shall be incurred by any person who forms an organization whose aims or activities are directed at

1. causing serious physical or mental harm to another person, namely within the ambit of section 226,
2. committing offences under section 303b, section 305, section 305a or offences endangering the general public under sections 306 to 306c or section 307(1) to (3), section 308(1) to (4), section 309(1) to (5), section 313, section 314 or section 315(1), (3) or (4), section 316b(1) or (3) or section 316c (1) to (3) or section 317(1),
3. committing offences against the environment under section 330a(1) to (3),
4. committing offences under the following provisions of the Weapons of War (Control) Act: section 19 (1) to (3), section 20(1) or (2), section 20a(1) to (3), section 19 (2) No 2 or (3) No 2, section 20(1) or (2), or section 20a(1) to (3), in each case also in conjunction with section 21, or under section 22a(1) to (3) or
5. committing offences under section 51(1) to (3) of the Weapons Act;

or by any person who participates in such a group as a member, if one of the offences stipulated in Nos 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organization through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organization, and which, given the nature or consequences of such offences, may seriously damage a state or an international organization.

(3) If the aims or activities of the group are directed at threatening the commission of one of the offences listed in subsection (1) or (2) above, the penalty shall be imprisonment from six months to five years.

(4) If the offender is one of the ringleaders or hintermen the penalty shall be imprisonment of not less than three years in cases under subsections (1) and (2) above, and imprisonment from one to ten years in cases under subsection (3) above.

(5) Whosoever supports a group as described in subsections (1), (2) or (3) above shall be liable to imprisonment from six months to ten years in cases under subsections (1) and (2), and to imprisonment not exceeding five years or a fine in cases under subsection (3). Whosoever recruits members or supporters for a group as described in subsection (1) or subsection (2) above shall be liable to imprisonment from six months to five years.

(6) In the cases of accomplices whose guilt is of a minor nature and whose contribution is of minor significance, the court may, in cases under subsections (1), (2), (3) and (5) above, mitigate the sentence in its discretion (section 49(2)).

(7) Section 129(6) shall apply *mutatis mutandis*.

(8) In addition to a sentence of imprisonment of not less than six months, the court may order the loss of the ability to hold public office, to vote and be elected in public elections (section 45(2) and (5)).

(9) In cases under subsections (1), (2) and (4) above the court may make a supervision order (section 68(1)).

Section 129b

Criminal and terrorist organizations abroad; extended confiscation and deprivation

(1) Section 129 and section 129a shall apply to organizations abroad. If the offence relates to an organization outside the member states of the European Union, this shall not apply unless the offence was committed by way of an activity exercised within the Federal Republic of Germany or if the offender or the victim is a German or is found within Germany. In cases which fall under the 2nd sentence above the offence shall only be prosecuted on authorization by the Federal Ministry of Justice. Authorization may be granted for an individual case or in general for the prosecution of future offences relating to a specific organization. When deciding whether to give authorization, the Federal Ministry of Justice shall take into account whether the aims of the organization 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.

Nr. 2:

Section 93

Definition of state secret

(1) State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in

order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany.

(2) Facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements, kept secret from the treaty partners of the Federal Republic of Germany, are not state secrets.

Nr. 3:

Section 102

Attacks against organs and representatives of foreign states

(1) Whosoever commits an attack against the life or limb of a foreign head of state, a member of a foreign government or the head of a foreign diplomatic mission who is accredited in the Federal territory while the victim is in Germany in his official capacity, shall be liable to imprisonment not exceeding five years or a fine, in especially serious cases to imprisonment of not less than one year.

(2) In addition to a sentence of imprisonment of at least six months, the court may order the loss of the ability to hold public office, to vote and be elected in public elections (section 45(2) and (5)).

Section 103

Defamation of organs and representatives of foreign states

(1) Whosoever insults a foreign head of state, or, with respect to his position, a member of a foreign government who is in Germany in his official capacity, or a head of a foreign diplomatic mission who is accredited in the Federal territory shall be liable to imprisonment not exceeding three years or a fine, in case of a slanderous insult to imprisonment from three months to five years.

(2) If the offence was committed publicly, in a meeting or through the dissemination of written materials (section 11(3)) Section 200 shall apply. An application for publication of the conviction may also be filed by the prosecution service.

Section 104

Violation of flags and state symbols of foreign states

(1) Whosoever removes, destroys, damages, renders unrecognizable or insults by mischief a flag of a foreign state, which is displayed according to legal provisions or recognized custom, or a state symbol of such a state which has been publicly installed by a recognized mission of such state, shall be liable to imprisonment not exceeding two years or a fine.

(2) The attempt shall be punishable.

Nr. 4:**Section 104a
Conditions for prosecution**

Offences under this chapter shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state, reciprocity is guaranteed and was also guaranteed at the time of the offence, a request to prosecute by the foreign government exists, and the Federal Government authorizes the prosecution.

Nr. 5:**Section 152
[Indicting Authority; Principle of Mandatory Prosecution]**

- (1) The public prosecution office shall have the authority to prefer public charges.
- (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.