Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

A Remark on the Temporal Dimensions of Different Legal Orders

Question(s) at stake:

Whether it is possible, when sentencing, to take into consideration the ideas of a person who has grown up in a foreign legal order.

Outcome of the ruling:

As a rule, it is possible to take into consideration the ideas of a person who has grown up in a foreign legal order in sentencing but the concrete circumstances of the individual case have to be examined.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Bodily harm
- Sentencing
- Mitigating circumstances

Tag(s):

- Infliction of bodily harm causing death

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Germany

Official citation:

Federal Court of Justice, Judgment of 27 January 2011, 2 StR 493/10 (BGH, Urteil vom 27. Januar 2011, 2 StR 493/10)

Link to the decision:

https://openjur.de/u/163681.html

ECLI:

No ECLI number / ECLI number unknown

Date:

27 January 2011

Jurisdiction / Court / Chamber:

Federal Court of Justice, Second Criminal Division

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Cologne (Landgericht Köln)

Subsequent stages:

- Regional Court Cologne (Landgericht Köln)

Branches / Areas of law:

Criminal law

Facts:

The defendant, a Ghanaian citizen, came to Germany in 2000. He married a German woman in 2004, the same year in which their daughter, L, was born. When L showed undesirable behaviour, he slapped her as he was accustomed in

his childhood. His wife did not agree with him and frequent disputes about his educational methods arose between the couple. For this reason, she even abandoned him at least twice but always came back to him. On the evening of the crime, the mother was at her work as a nurse, the defendant stayed alone with his daughter in their home. When she had wet her pyjama, he brought her to the bathroom, put her in the bathtub and took off the pyjama. When she resisted, he slapped her, causing her to lose balance and she slipped into the wet bathtub. She died after sustaining injuries.

The Regional Court punished the defendant for inflicting bodily harm causing death (section 227 German Penal Code) and applied para. 2, which provides for a penalty of one to ten years in prison in less serious cases.

Ruling:

Following the public prosecutor's appeal on points of law, the Federal Court of Justice examined whether it was correct to treat the crime as less serious. The Federal Court of Justice accepted as a mitigating circumstance the fact that the defendant himself had experienced the same use of force in his own upbringing. But it did not agree with the argument that he had internalized this method of childrearing, which may be customary in Ghana, as permissible since his earliest childhood, although he had received clear indications that it is not accepted in Germany. The Court conceded that when the ideas of a perpetrator originate from a foreign legal system, this may, as a rule, be a mitigating factor. But given the personality and individual circumstances of the defendant, who had been living in Germany for many years, was highly educated, and was socially integrated, it stated that it was not correct to recognize the presence of mitigating circumstances and to rule the crime to be a less serious case in the sense of paragraph 2 of section 227 German Penal Code.

Main quotations on cultural or religious diversity:

- "Though the Regional Court could take into consideration as mitigating circumstance the fact that the defendant himself had been educated as a

child through the use of force, which he now used against L without intending to severely hurt her, it could not issue a sentence in favour of the defendant based on the fact that he had internalized this form of child-rearing, which may be usual in Ghana as legitimate since his earliest childhood and therefore also applied it against his own child. Such ideas of a perpetrator originating from a foreign legal order may, as a rule, be regarded as mitigating […]. This is not obvious, however, in the case of the defendant, who has been living in Germany for many years, has successfully completed two degrees, is working as a software developer, and knows the German legal order. In addition, not only his wife – who had even repeatedly abandoned him for that for a short time – but also two fellow countrymen had explained to him the different ideas of child-rearing in Germany. It can be readily expected that a foreign citizen who has been living in Germany for many years accepts the commands and prohibitions of the legal order that is in force in this country and known to him, and is to this extent able to free himself from differing ideas and experiences in his home country (Heimatland).” (para. 19)

Main legal texts quoted in the decision:

- Section 227 German Penal Code

Cases cited in the decision:

- Federal Court of Justice NStZ 1996, 80 (BGH NStZ 1996, 80)

Commentary

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The Federal Court of Justice quashed the judgement of the Regional Court. One reason was that it had assessed as a mitigating circumstance the fact that the perpetrator had internalized physical punishment as a legitimate method of education that may be usual in Ghana but forbidden in Germany. The Federal Court of Justice conceded that, as a rule, ideas from a foreign legal order that

influenced the perpetrator may have a mitigating effect on sentencing but they denied it in this case. One reason was that the perpetrator had a high level of education and was well-integrated. Thus, the Federal Court of Justice (BGH NStZ 1996, 80) confirmed an older decision to which the present judgment refers. It had stated in its earlier decision that German law is applicable in Germany and that foreign citizens are also subject to it. However, according to that same decision, when sentencing, it is also admissible, depending on the individual case, for a foreign national's deeply-rooted ideas to be taken into consideration when assessing the degree of guilt because such ideas may make it much more difficult for him to respect German law.

The present case is remarkable for its confirmation of the case law of the Federal Court of Justice stating that ideas of a foreign legal order may have a mitigating effect in sentencing. But what makes it even more interesting is the fact that 60 years ago, no German court would have thought of drawing a contrast between two legal orders in such a case case. At that time, it was generally accepted also in Germany that parents are allowed to physically punish their children in the pursuit of educational goals. This condition limited chastisement to a level that was common and proportionate and barred excesses. The prohibition against physical punishment of children started to be discussed in the 1970s when it was becoming increasingly criticized. Degrading educational measures against children were prohibited in paragraph 2 of section 1631 of the German Civil Code in 1980. In 1998, the words "in particular physical and mental abuse" were explicitly added to the prohibition of degrading educational measures but only in 2000 did a further modification of section 1631 para 2 German Civil Code definitively prohibit physical punishment of children: "Children have a right to non-violent upbringing. Physical punishments, psychological injuries, and other degrading measures are inadmissible." From then on, corporal punishment, even by parents, may be prosecuted for bodily harm but it is not known how often children are actually beaten by their parents even today. This case shows that differences between legal ideas do not only have a regional or national dimension but also a temporal dimension and, as was the case with corporal punishment, this may change rather quickly.

Literature related to the main issue(s) at stake:

General legal literature on the topic that may not directly be connected with the case

- Grünewald, Anette. 2014. "§ 223", recital 50-55. In: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, and Klaus Tiedemann. *Leipziger Kommentar StGB Online*. Berlin: De Gruyter.
- Heinrich, Manfred. 2011. "Elterliche Züchtigung und Strafrecht". *Zeitschrift für Internationale Strafrechtsdogmatik* 6 (5): 431–443.

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