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

Foreign conceptions of law as grounds for mitigation of punishment?

Question(s) at stake:

Whether and under what conditions behavioural patterns, ideas, and views rooted in a foreign legal system can be taken into account in the mitigation of punishment.

Outcome of the ruling:

The court quashed the verdict due to a grossly erroneous assessment of the evidence; additionally, in its referral of the case back to the first-instance court, it gave the instruction that behavioural patterns, ideas, and views rooted in a foreign legal system can as a rule only be taken into account in the mitigation of punishment if they are in harmony with that foreign (state) legal system.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Honour crimes
- Mitigating circumstances

Tag(s):

- Foreign legal system

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Country:

Germany

Official citation:

Federal Court of Justice, 1st Criminal Division, Judgment of 7 November 2006, 307/06 (BGH Urteil vom 7. November 2006, 1 StR 307/06)

Link to the decision:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=38182&pos=0&anz=1

ECLI:

No ECLI number / ECLI number unknown

Date:

07 November 2006

Jurisdiction / Court / Chamber:

Federal Court of Justice

Remedy / Procedural stage:

Appeal on points of law

Previous stages:

- Regional Court Stuttgart, Judgment of 23 January 2006

Subsequent stages:

- Regional Court Stuttgart

Branches / Areas of law:

Criminal Law

Facts:

The perpetrator's marriage had been in crisis for some time. During a holiday with his wife in Istanbul, the two argued repeatedly. This culminated in the perpetrator stabbing his wife while on a car trip with relatives. The man driving the car managed to reach a petrol station, where the wife could flee into the petrol station office, and was able to disarm the perpetrator. The German court of first instance convicted the perpetrator of an attempt to cause bodily harm by dangerous means (section 224 German Penal Code). The victim, as a private accessory prosecutor according to section 395 of the German Code of Criminal Procedure, appealed against this decision.

Ruling:

The Federal Court of Justice quashed the verdict and referred the case back to the Stuttgart Regional Court. The ruling of the Federal Court of Justice first focused on the flaws in the first instance's assessment of the evidence that led it to quash the verdict. What makes this judgment important for CUREDI is that, at the end, the Federal Court of Justice gave an instruction for how to proceed with the case, namely that ideas and values rooted in a foreign system may as a rule only be taken into account as mitigating factors if they are in harmony with that foreign legal system.

Main quotations on cultural or religious diversity:

- "For the new trial, however, the Criminal Division of the Federal Court of Justice notes that there are legal reservations about the assumption of the Criminal Division of the Regional Court, namely that the defendant's 'attachment to an attitude and value system about the role of men in the family that reflected his original cultural sphere' had a mitigating effect -- even to a considerable degree." In any case, apart from the fact that the accused has lived in Germany without interruption since 1981 and has been a German citizen for several years, behavioural patterns, ideas, and views rooted in a foreign legal system could as a rule only be taken into account as

mitigating factors if they are in harmony with that foreign legal system [...]. This is not the case here." (para 15)

Main legal texts quoted in the decision:

None

Cases cited in the decision:

None

Commentary

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The Federal Court of Justice overturns the judgment of the lower court due to serious deficiencies in the assessment of evidence. Additionally, at the end of its judgement, the court makes use of the possibility to make a statement, here in the form of a note addressed to the lower court that has to hear the case once more. .

In this case, the note is short, but it is important because it is cited again and again in case law (see for instance Federal Court of Justice, 1st Criminal Division, Order of 18 August 2009 -- 1 StR 351/09 (BGH 1. Strafsenat, Beschluss vom 18. August 2009 -- 1 StR 351/09, CUREDI33DE017)). It states that "behavioural patterns, ideas, and opinions rooted in a foreign legal system could as a rule only be taken into account as mitigating factors if they are in harmony with that foreign legal system". Although in the present case it is likely that a further judgment will come to the conclusion that the act constitutes an attempt at murder under specific aggravating circumstances, the court's note does not aim to comment specifically upon the much-discussed "base motives" criterion for the charge of murder under specific aggravating circumstances but in general to set an important prerequisite for mitigating sentences because of the influence of a different culture of origin. It is striking that the text makes reference to "foreign legal order" two times, and one wonders whether behavioural patterns, ideas, and views that are rooted in a legal order are not automatically in harmony with that order. Here, however, the Federal Court of Justice probably had something else in

mind. In some countries of origin, there are groups of people (e.g. tribes) who either do not accept or are unaware of state law, and who subscribe to legal concepts that are by no means approved by state law. Under state law in Turkey, for example, blood revenge or honour killings, while in line with the legal views of certain groups, are characteristics that can make a homicide a "murder under specific aggravating circumstances". One might therefore take the statement of the Federal Court of Justice to mean that circumstances that are not regarded as mitigating factors under the *state* law of the state of origin cannot be regarded as mitigating factors in Germany either.

In the literature, it is sometimes argued that if there is a discrepancy between state and traditional law in the offender's country of origin, a mitigation of the sentence should be all the more possible if the offender's thinking is rooted in traditional ideas (Saliger 2003: 24; Kasselt 2016: 48). Particularly in the case of Turkish honour killers, it is pointed out that honour killing has only been punished more severely and not more leniently than murder since the Turkish criminal law reform of 2005, and that it will still take some time for traditional views on honour killing to change (Kasselt 2016: 48). It is true that the principle of guilt must take into account the individual possibility of the perpetrator to recognize the wrong. However, two things must be considered in this regard: firstly, it is sufficient for a perpetrator to be able to comprehend the wrongfulness of the act according to the standards of German or Turkish state law; it is not necessary that he shares this assessment. Secondly, at the time of the reform, honour killings were discussed so extensively in the media in Turkey that it can only be assumed in extreme cases, which must be examined very carefully, that the perpetrator was not sufficiently aware of the re-evaluation of this act by state law. As a rule, it is to be assumed with the Federal Court of Justice that if the state law of the country of origin does not regard a circumstance as a mitigating factor, it cannot be regarded as such in Germany either.

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

General Legal Literature on the Topic

Kasselt, Julia. 2016. *Ehre im Spiegel der Justiz -- eine Untersuchung zur Praxis der deutschen Schwurgerichte im Umgang mit dem Phänomen der Ehrenmorde*. Berlin/Freiburg: Duncker & Humblot/Max-Planck-Institut für ausländisches und internationales Strafrecht.

Saliger, Frank. 2003. "Anmerkung zu BGH, Urteil v. 20.2.2002 -- 5 StR 538/01 (LG Bremen)". *Strafverteidiger (StV)* 23: 22--25.

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