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

An Unpunished Forced Marriage

Question(s) at stake:

Whether a traditional religious marriage in Turkey (Imam marriage) fulfills the requirements of a marriage within the meaning of section 237 German Penal Code.

Outcome of the ruling:

A traditional religious marriage in Turkey (Imam marriage) does not fulfil the requirements of a marriage within the meaning of section 237 of the German Penal Code

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Civil marriage
- Forced marriage
- Gender related violence

Tag(s):

- Imam marriage

Author(s):

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Country:

Germany

Official citation:

Regional Court Kaiserslautern, Judgment of 26 January 2017, 6042 Js 217/13 – 4 KLs (LG Kaiserslautern, Urteil vom 26.01.2017, 6042 Js 217/13 – 4 KLs)

Link to the decision:

http://www.landesrecht.rlp.de/j-portal/portal/t/7qe/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&doc.id=JURE180005525&doc.part=L

ECLI:

ECLI:DE:LGKAISE:2017:0126.6042JS217.134KLS.0A

Date:

26 January 2017

Jurisdiction / Court / Chamber:

Kaiserslautern Regional Court, 4. Criminal Division

Remedy / Procedural stage:

First Stage

Previous stages:

- None

Subsequent stages:

- Federal Court of Justice, 4. Criminal Panel, Decision of 27 September 2017, 4 StZ 235/17 (BGH, 4. Strafsenat, 4 StR 235/17).

Branches / Areas of law:

Criminal law

Facts:

In 2008, the defendant, HO, agreed with his brother that the son of his brother, the defendant NO, should marry the daughter of the defendant HO in order to become entitled to come to Germany for family reunification purposes. The 16-year-old daughter was informed about this agreement sometime later. She opposed this plan but her father insisted. About two years later, in September 2010, the family went on holiday to southeast Turkey and only when they were there the daughter was informed that she should now marry her cousin. As she had no possibility to resist, she had to endure both the marriage ceremony before an Imam and the wedding celebrations. After the holidays, the whole family returned to Germany. In the summer of 2011, the father told his daughter that she had to go to Turkey again to conclude a civil marriage with her cousin. He organized the travel, handed the flight tickets over to his daughter, accompanied her to the airport, and checked on her by calling her mobile phone to see if she had really travelled to Cyprus – where her cousin was working – and then to Turkey to marry him. In the end, she did indeed travel to Turkey. After her return, she filed the necessary applications so that her husband could come to Germany. About two months after his arrival, there was a violent conflict between the young woman and her family, which ended with the intervention of the police. As a result, charges of forced marriage, causing bodily harm by dangerous means, and other crimes were brought against the father and the husband of the victim. The following remarks are limited to the charge of forced marriage.

Ruling:

The court acquitted the defendants of the charge of forced marriage for reasons of law. As regards the Imam marriage in 2011, according to established case law, a religious marriage between foreigners is only covered by the protection of art 6. Para 1 Basic Law (special protection of marriage and the family) if their home state recognizes the religious marriage as a valid This means, also, that only a valid marriage is a protected interest within the meaning of art. 237German Penal Code. As both partners were Turkish citizens at the time of the marriage and an Imam marriage is not regarded as a valid marriage in Turkey, it is not a marriage according tosection 237 German Penal Code. As regards the civil marriage in

2012, the court stated that the marriage was not caused by force or threat of serious harm as required in section 237 para 1 and 2. Furthermore, the father did not cause his daughter to travel to Turkey by deception as required in section 237 para 2 but had informed her that she should travel to Turkey to marry her cousin also in a civil marriage. Therefore, the legal elements of section 237 German Penal Code were not fulfilled and the defendants had to be acquitted. The Federal Supreme Court later ruled on an appeal by the accused, which, however, did not concern the issue of forced marriage.

Main quotations on cultural or religious diversity:

- “Having obtained expert advice, the court assumes that the assessment of witness R cannot be followed as it does not take into account sociocultural aspects […] Regarding the acceptance of the wedding dress and wedding presents, G.O. had no alternative because this is required by the sociocultural customs of Eastern Turkey”. (para. 82)
- “As concerns the Imam marriage in summer 2010, it is not punishable under section 237, 25 para 2 German Penal Code , because this type of marital union does not fall within the protection of the norm.” (para. 99)
- “According to settled case law, religious marriages of foreigners do not fall within the protection of art. 6 para 1 Basic Law if their home state does not recognize them as valid marriages” (para. 101)
- “An Imam marriage is a religious marriage that is not recognized in Turkey as a valid marriage (see ECHR judgment of 02-11-2010, Serife Y v. Turkey, no 3975/05, see Yerlikaya/Cakir-Ceylan, ZIS 2011, 205,210).” (para. 102).

Main legal texts quoted in the decision:

- Sections 237, 239 para. 1, 240 paras. 1 -3, 241 para. 1, German Penal Code, art. 6 para. 1 Basic Law

Cases cited in the decision:

Commentary

An Unpunished Forced Marriage

In recent years, forced marriages have become known as a phenomenon that could be found within immigrant communities, particularly those from Turkey. It can be said that the victims of this crime are mostly young women, many of them still underage. And it can also be said that there are different situations in which forced marriages take place. Four main situations can be distinguished: Firstly, young women living in Germany who are brought to Turkey to marry during their holidays ("holiday marriage" or "*Ferienverheiratung*") and often have to remain there; secondly, young women from Turkey who are married to men living in Germany ("imported brides"); thirdly, women living in Germany who are forced to marry a partner living in Turkey in order to enable him to enter Germany; finally, forced marriages between partners who both live in Germany (see for details Haas 2013: 74-75; Elyafi-Schulz 2012: 39-40).

In 2005, the crime of forced marriage was introduced into the German Penal Code as an especially serious case of using threats or force to cause a person to do, suffer, or omit an act (*Nötigung*) as provided in section 240German Penal Code. But in the following years, it was discussed whether this provision would be sufficient. Many voices demanded the punishment of forced marriages in a special article to show, in a clearer way, that society reproaches this conduct severely. Finally, in 2011, an amendment of the Penal Code introduced a special provision regarding the prohibition of forced marriages (section 237). It contains two types of criminal conduct. According to subsection 1, a person that "unlawfully, by force or threat of serious harm causes a person to enter into a marriage, incurs a penalty of imprisonment for a term of between six months and five years. A conduct is defined as unlawful if the use of force or the threat of harm is deemed reprehensible in respect of the desired objective". This definition shows that this crime remains closely related to section 240 German Penal Code. Subsection 2 criminalizes preparatory acts towards a forced marriage as an independent crime and punishes a person who "for the purposes of committing

an offence under subsection (1), by force or threat of serious harm or through deception takes that person or causes that person to travel to a territory outside the territorial scope of this statute or prevents that person from returning from there".

Forced marriages are rarely brought before German courts. As far as can be seen, the present judgement is the only published judgement of a criminal court on section 237 German Penal Code. Various reasons may be given to explain this fact. In many cases, women have not concluded a civil marriage but only a religious marriage (Imam marriage). However, in the immigrant community which the victim is associated with, it is the religious marriage that has a bearing on social life. But if a religious marriage is not valid within a civil law jurisdiction – e.g., Turkey – it is not regarded as a marriage within the meaning ofsection 237 German Penal Code (as in the present case) and the perpetrators cannot be punished according to this article. A second problem lies in the requirement that the crime must be committed by the means provided in the penal code, namely force or threat. Of course, there are cases in which domestic violence can be found, but there are also many other means by which young women can be forced to enter into marriage against their will even though these means do not always fulfil the requirements ofsection 237, for instance, psychological pressure such as continuously trying to persuade the victim to enter into the marriage or warning her of the negative consequences of her refusal. After all, many of the victims do not file a complaint before the authorities. Normally, the perpetrators are their closest family members, such as their parents, and the women know that if they lodge a complaint, they would in the end be rejected by their families, a price that seems too high to many victims. As a result, though the German legislature passed a provision that punishes forced marriage, there are many doubts in the literature as to whether such a provision is helpful to protect girls and young women. Many authors regard the work of teachers and social workers as more effective to help potential victims (see, e.g., Valerius 2011: 430-434; Yerlikaya and Çakır Ceylan 2011: 205-213). Also, this case shows that the law does not achieve the goal of the legislature, namely to protect young women against forced marriages.

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

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

- Elyafi-Schulz, Senan. 2012. *Das Phänomen des "Ehrenmordes" – Eine rechtliche Untersuchung unter Berücksichtigung der Täter- und Opferperspektive.* Marburg: Tectum.
- Haas, Volker. 2013. "Der neue Straftatbestand der Zwangsheirat (§ 237 StGB) — eine kriminalpolitische Bewertung". *JuristenZeitung* 68 (2): 72–81.
- Sütcü, Filiz. 2009. *Zwangsheirat und Zwangsehe: Falllagen, rechtliche Beurteilung und Prävention*. Frankfurt am Main: Peter Lang.
- Valerius, Brian. 2011. "Gedanken zum Straftatbestand der Zwangsheirat (§ 237 StGB)". *Juristische Rundschau* 2011 (10): 430–434.
- Yerlikaya. Hayriye. 2012. *Zwangsehen – eine kriminologisch-strafrechtliche Untersuchung.* Baden-Baden: Nomos.
- Yerlikaya, Hayriye and Esma Çakır-Ceylan. 2011. "Zwangs-und Scheinehen im Fokus staatlicher Kontrolle. Eine Betrachtung des jüngsten Gesetzentwurfes zur Bekämpfung der Zwangsheirat und Verhinderung von Scheinehen im Lichte des Opferschutzes". *Zeitschrift für Internationale Strafrechtsdogmatik* 6 (4), 205–213.

General literature on the topic from other disciplines

- Bundesministerium für Familie, Senioren, Frauen und Jugend. 2007. *Zwangsverheiratung in Deutschland*. Baden-Baden:Nomos.
- Mirbach, Thomas, Torsten Schaak, and Katrin Triebl. 2011. *Zwangsverheiratungen in Deutschland: Anzahl und Analyse von Beratungsfällen*. Opladen: B. Budrich.
- Hildebrandt, Antje. 2019. "Es kommt vor, dass 13-Jährige per Skype verheiratet werden". *Cicero Online*, available at <https://www.cicero.de/innenpolitik/zwangsheirat-zwangsehe-maedchen-papatya-berlin-beratung-maedchen>, accessed 31 January 2022.

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Suggested citation of this case-law comment:

Tellenbach, Silvia (2023): An Unpunished Forced Marriage, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI033DE009, https://doi.org/10.48509/CUREDI033DE009.