
CULTURAL AND RELIGIOUS DIFFERENCES AND THEIR EVENTUAL SIGNIFICANCE FOR CRIMINAL PROSECUTION IN GERMANY

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Abstract

Cultural, religious and social traditions (hereafter we will talk only about ‘culture’) greatly influence the behaviour of everyone. In this article we analyze conflicts that evolved because of different cultural and religious background of Germans and Turkish immigrants coming to Germany. We try to explain some aspects of possible cultural influences concerning Turkish immigrants on the base of linguistic and ethnological research. Special attention in this sense is devoted to the question of honour killings and the applicable case law of the Federal Court of Justice, formed over the issue of cultural differences.

Keywords: cultural defence, Germany, honour killings, Turkish immigrants

1. Introduction

Cultural, religious and social traditions (hereafter we will talk only about ‘culture’) greatly influence the behaviour of everyone. Nowadays, we have increasingly the opportunity to interact with cultures often significantly different from our normal everyday experience. Linked to the fact that the world has become one big place, transfers to remote areas are relatively simple. So, increasing numbers of people who migrate for various reasons bring with them from their country of origin their civilization, gained in the process of their own socialization [1].

Despite the relative tolerance which forms the attitude of the population, especially in Western European countries, immigrant communities are still perceived by the majority of society as an alien element in the traditional environment. Problems concerning assimilation of immigrants and their low flexibility in the direction of respecting cultural patterns and social rules of the majority of society, have led many politicians, sociologists, and increasingly also lawyers to discuss the topic of cultural and religious differences [2].

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If we analyze the issue of cultural and religious differences in its full scope, we have to include not only migrants residing in that country for only a short period of time, but also immigrants who, after a certain period of residence acquired the citizenship of their new country, and also their children who were born in the new state. In other words, it is necessary to deal with both new and traditional minorities.

2. Cultural and religious differences and conflicts

Cultural and religious conflicts are reflected either in the public sector (privately confronting people with different manifestations of state power, for example during military service, as participants on trial, or in prison); in the public domain (there is a major aspect of the balance of different interests, for example in school or the workplace); or in the private sector (this is a place of close interpersonal relationships within the autonomy of individuals, for example family ties, friendship and social processes within ethnic and religious communities) [3]

Regarding public law, consideration must be made for publicly visible activities. Cultural and religious conflicts arise at the intersection between religious freedom on one hand, and different human rights on the other. Mathias Rohe correctly points out that the balance between conflicting principles of law is a dynamic process. While Muslim – mostly Turkish – migrants in Germany were originally considered only as guest (temporary) workers, their status changed as a consequence of gaining permanent residence in Germany. The interests and values of permanent immigrants are an essential part of societal interests and values, and thus they alter the balance of the religious freedom of culturally different communities and state responsibilities in areas such as public education and the construction of religious buildings [4].

In criminal law, which expresses the minimum standard respecting the heart of social values and guarantees of legality, there is little room for religiously motivated differences. Although the Jewish and Muslim practice of the boys' circumcision, concerning the facts of the case, constitutes a crime of bodily harm, the German courts have generally tolerated this practice [*Circumcision remains legal in Germany*, <http://www.dw.de/circumcision-remains-legal-in-germany/a-16399336>]. However, female circumcision, which has a much greater interference with the physical and mental integrity of girls, is considered socially unacceptable and legally a crime. Possible exceptions in criminal law are particularly problematic when considering crimes committed in the name of honour [5].

An approach that is oriented according to the interests of potential victims, however, rigorously refuses the benevolence of criminal courts, because the opposite relegates a specific part of the immigrant community (i.e. women in particular) to the role of people with less legal protection (*vis-à-vis* criminal matters) [4, p. 343].

Prohibitions of anti-discrimination law play an important role in private law. Basic religious freedom may be accommodated because of non-discrimination in private relations. Particularly, the context of employment is to be taken into account, e.g. religious freedom in accommodating participation at regular prayers and ceremonies or a traditional way of dress [4, p. 343-349].

A relatively wide range of cultural differences appear in the plane of international private law (conflict of laws), which deal with relations between private individuals in cases with an international element. The application of foreign law (in countries with culturally different jurisdictions) may be found objectionable to *ordre public*. Cultural conflicts are typical in the application of Islamic family and inheritance law.

The described differentiated classification corresponds in particular to the situation of Muslim communities in European countries, since they are based not only on cultural differences in the broadest meaning, but also on a different legal system. In the case of Muslims, of course, we talk about cultural and religious differences in the broadest sense, including their legal system in which rules are clearly a part of the Muslim culture and religion. Concerning mostly other communities, such an approach does not seem necessary.

3. Cultural and religious differences in German jurisprudence

In German criminal law, the issue of cultural and religious differences is most dramatically connected with the question of honour killings, i.e. the killing of a member of one's own family to restore family honour. In this respect, it should be clearly differentiated between blood feud (vendetta) and honour killing. Vendetta means killing another family member in retaliation for the previous murder of another family member or other defamation. While honour killings have mostly female victims, a blood feud is directed generally against male members of a rival family, which is according to the ideas of the stakeholders met with great respect.

In Germany, the perpetrators and victims of honour killings were mostly Turkish citizens (which do not necessarily mean that they were Turks, e.g. in many cases the perpetrators and victims of honour killings were of Kurdish origin). For our purposes, it is important to understand whether these acts are culturally determined or perhaps a consequence of the religion of such people (in this context we need to distinguish between religion and culture). As Brian Valerius stated, it is tricky to believe that honour killings are related to the religion of the parties and are distributed solely among members of the Muslim faith. The phenomenon of honour killings was already known in the eastern Mediterranean since pre-Islamic times. Moreover, such acts were also committed among Jews and Christians, for instance in Lebanon and Syria, as well as in south-eastern Europe. Valerius writes: "*The decisive prerequisite for an honour killing, however, is a traditional patriarchal society – preferably in a rural area – to the image and reputation of the family and gives great importance to the life and honour of a man's higher rank than the life of a*

woman. ... The reason for such an act, for example, is that female family members will not fit into the traditional world view, but rather concentrate on the western lifestyle, they encountered at their school or at their educational institution." [6]

3.1. The case of Hatun Sürücü

To illustrate how looks a typical case of honour killing, we have chosen the homicide of Hatun Sürücü, which happened in 2005, and which resulted in an enormous response in media, in public and among politicians.

Hatun Sürücü was the daughter of the assistant gardener Kerem Sürücü and his wife Hanım. Her parents were Sunni Kurds from the eastern Anatolian province of Erzurum in Turkey. They settled at the beginning of the 1970s in Berlin. Eight of their nine children were born there. Hatun Sürücü grew up with five brothers and three sisters in the Berlin district of Kreuzberg. She was the family's fifth child and the first daughter. After she rebelled in puberty more and more against the family, her father removed her from the Robert-Koch-Gymnasium in Kreuzberg after the 8th grade. At the age of 16, Hatun was forced to marry a cousin in Turkey, by whom she became pregnant in 1999. Her husband and his family were strict believers and she did not get on well with them. So even before the end of pregnancy she went back to Germany and gave birth to her son Can.

In October 1999, Hatun Sürücü moved away from her parents' apartment in Kreuzberg, stopped wearing the Muslim headscarf, and found a temporary home in a boarding house for refugee teenage mothers. There she completed her primary school exams. Later she moved into an apartment in Berlin-Tempelhof, began an apprenticeship as an electrician, and tried to repair her damaged relationships with her family.

On 7 February 2005, Hatun was killed outside of her apartment at a bus stop via three gunshots to the head. The police arrested her three brothers, who were suspected of committing the murder on 14 February 2005. The act was presumably classified as an 'honour killing' because Hatun Sürücü left her husband and family and decided to live an independent life. The police had been notified about several threats prior to Hatun's murder.

In July 2005, Berlin prosecutors brought charges against the three brothers of the dead woman committed with base motivation (*niedrige Beweggründe*) and stealth approach (*heimtückische Vorgehensweise*). The motive was, according to the investigation, an offence of family honour, suggesting that the brothers were ashamed for their sister who lived independently and was not wearing a headscarf. The brothers also feared she would not raise her son according to Muslim traditions. The oldest defendant, Mutlu (born 1980), was responsible for having procured the gun, and the middle brother, Alpaslan (born 1981), acted as an intellectual accomplice providing 'moral support' in the preparation and commission of the offense. The murder was committed by the

youngest brother, Ayhan (born 1986), who confessed the killing on 14 September 2005.

On 13 April 2006, the Berlin District Court sentenced the youngest defendant, Ayhan Sürücü, to a youth sentence of nine years and three months, and acquitted the two co-accused older brothers, Alpaslan and Mutlu Sürücü, because the lack of evidence. The prosecution filed an immediate appeal against the verdict.

On 28 August 2007, the decision of the Berlin District Court concerning the release of the two older brothers was repealed by the Federal Court of Justice (BGH) in Leipzig. The Supreme Court objected to the evidence as legally flawed. The district court concerning the evaluation of the evidence in part relied on incorrect requirements for the formation of belief. The district court had based its assessment mainly on information provided by the former girlfriend of Ayhan Sürücü, as a so-called hearsay witness and was not sufficiently concerned that this information was confirmed by Ayhan Sürücü himself, though he might have stated this was not true. So the central issue of whether Ayhan Sürücü's former girlfriend, whom he trusted fully, had told the truth remained incomplete. Not all circumstances that would have otherwise been required were discussed by the district court. In addition, the evidence indicated gaps, as for example a short text message sent by Ayhan Sürücü to his brother Alpaslan a few minutes after the act, was not taken into consideration.

After the decision of the Federal Court of Justice, the case was transferred to another chamber of the Berlin District Court for a new trial. The two brothers who were originally acquitted were by this time already in the territory of Turkey. To initiate a new procedure for them required the issuance of an international arrest warrant. The extradition of Alpaslan Sürücü was not possible because he was a Turkish citizen. Therefore, the only option to be considered was that the proceedings against him would take place in front the Turkish courts. Mutlu Sürücü had German citizenship, so his extradition was possible. Turkish authorities, however, in both cases ultimately rejected the German demand. As a result, in 2008, further proceedings before the German authorities were stopped.

3.2. The code of honour

To understand the importance of honour in the everyday actions of a Muslim, further explanation is necessary. One of the best ways to analyze a problem concerning human action is to focus on the language semantics. In this case, an analysis will be performed on the concept of honour in the Turkish language.

The Turkish language is rich in terms concerning the meaning of honour. One Turkish word for honour is 'şeref'. Şeref is the recognition that a person has acquired. This may be due to their origin, character, performance, or possible effects. Şeref can be reduced over life under certain circumstances, but it may also increase. One respondent of Ingrid Pfluger-Schindlbeck defined şeref as

follows: “(...) when a man, a human being, compared to its environment is of great use, for example helps them in times of need, is thus increasing the reputation of this man. Such virtuous men are called *şerefli kişiler* (men with honour, esteem) ... There are also people who do not respect the property of other people, hurt their *namus*, lie, steal and denigrate them. We call these *şerefsiz insanlar* (people without honour, reputation).” [7]

The respondent is speaking here of *şeref* concerning men, but in another passage, he stressed that *şeref* has the same significance for women: “(...) there are among men those who have *şeref*, women who have *şeref*, that is, these offenses are committed by men and women” [7].

Men and women are therefore alike in *şeref*, and this is related to their *namus*. To summarize, it can be said that *şeref* and *namus* must be developed laboriously through good deeds. *Namus* (from the Arabic: *el-Namus el-ekber الناموس الأكبر* - who is in possession of absolute virtues, possibly originally from the Greek *nomos* = law) is the honour that is largely based on the virtue of a woman (particularly with regard to her sexuality). Werner Schiffauer has divided *namus* into two different kinds, inside and outside: “*The value of honour (namus) is subject to the idea of a clear boundary that separates the ‘inside’ sphere of the family, from the ‘outside’ concerning male behaviour in public of the village or town. The honour of a man is dirty, if this border is crossed, when someone from outside offends a member of the family; possibly one of the women is harassed or attacked. As ‘dishonourable’ (namussuz) is considered a man who will not immediately and decisively defend the family member.*” [8]

Honour (*namus*) does not only regulate the relationship inside and outside, it determines the character of relationships between men and women. When we talk about *namus*, it means something different for men and for women. From women it is expected that they retain their virginity until marriage, and remain faithful during marriage. Talking about men, their *namus* depends primarily on the behaviour of their wives. Honour within the meaning of *namus* implies that men control the sexuality of their wives, daughters, and sisters, and that this control has been recognized and socially justified. Ingrid Pfluger-Schindlbeck describes this relationship as follows: “*According to the women namus there is expected proper clothing, proper behaviour while dealing with strangers, no pre- or extramarital relations, etc. If they act against this, men have to restore their own honour.*” [7, p. 63-64]

Ahmet Toprak indicates that a man can lose his honour as well because of his own negligence. For example, if he looks at other (married) women, although he has a wife and children [9].

In Turkish society, the verdict of relatives, friends or neighbours is of great importance, therefore, the relationship between family and the social environment has to be taken into account when defining the concept of honour. This is reflected by the term *saygı*. *Saygı* means the honour manifested to a person, reverence, respect. The following explanation of Werner Schiffauer is in this sense very instructive: “*The son owes respect to the father, the wife to the man, the younger brother to the older. It can be expressed in different ways: The*

superior one can not be addressed by his first name, he may not be contradicted, in his presence in public quiet has to be kept, no smoking is allowed in his presence or drinking, etc.” [8, p. 67]

With the triad of şeref, namus and saygı, the concept of honour according to Turkish tradition, is more or less clarified. Such a view is, however, preserved mainly in rural areas; in cities it is less commonly preserved [10].

3.3. Cultural and religious differences as a factor in criminal defence

The decision in the case of Hatun Sürücü reflects the applicable case law opinion of the Federal Court of Justice, formed over the issue of cultural differences. Concerning the development of the rule, there are three phases to be distinguished in which the Federal Court upheld a different view [6].

The first decisions were issued several decades ago. Though these did not concern homicide ‘in the name of honour’, the motive for the act of killing was rather insulting or humiliation of the later offender in connection with his cultural values [E. g. Holtz MDR 1977, 807 (810)] (‘Sicilian way of thought’ – in this case a 22-year old Sicilian killed his 16-year old girlfriend and her three partners shortly after she ended their relationship and her companions had offended him); [BGH StV 1981, 399 (400)] (‘southern Italian rural mentality’) and [BGH StV 1997, 565 (566)] (the offender ‘grew up in a family living according to Iranian habits and customs’). The native views of the perpetrator played an important role and should be considered in the treatment of honour killings. In these first decisions, the Court was still quite undecided on how cultural perspectives affect the motivation of the offender. On the one hand, the native character of the offender, according to the court, reflects the moral evaluation assessment of his actions, as the baseness of his motives is measured by all circumstances of the case, including the personality of the offender [BGH GA 1967, 244 (244); BGH NJW 1954, 565 (565)]. On the other hand, the Federal Court of Justice reviews *mens rea*: though it is not necessary that the offender himself considered his motivation as low, if such an offender is due to his personality not capable to make a self-evaluation, he acted concerning the baseness of his motives without intent [BGH NJW 1967, 1140 (1141); Dallinger MDR 1969, 722 (723); Holtz MDR 1977, 807 (810)]. The Federal Court of Justice stated this, however, without taking into account the criminality of the offender concerning acts implying ‘cross-cultural tensions’.

A clear position on the other hand, was stated by the Federal Court of Justice in a decision from 1979. Possibly this was the first decision on an act of killing that should have restored the family honour. A Turkish student impregnated a young woman native of Turkey, but refused to marry her. The father of the spurned woman felt denigrated to his people and pressed his eldest son, who at the time of the crime was 18-years-old, to kill the student.

In the reasons for the decision, the court explained, that the particular beliefs of the offender, caused by his binding to a foreign culture, should not remain out of necessity overall assessment in the judicial consideration. Indeed it

is necessary to take into account the individual circumstances of the act, such as the specific concept of honour in the social environment of the offender, which could indicate that the motivation does not appear as base. The failure of the offender, during his long stay in Germany, to get acquainted with the values prevailing in German society, determined the baseness of his motives as little as his knowledge of the local legal qualification of his offence [BGH NJW 1980, 537].

This case-law was maintained up to a decision in 1994, which began the third and the most recent phase of the consideration of cultural values of the offender concerning the baseness of his killing motivation. The Federal Court of Justice changed its course and stated that *“the standard for the evaluation of a motive ... should be based on values of the legal community in the Federal Republic of Germany, before which court the defendant is tried, and not the views of an ethnic group, that does not recognize moral and legal values of this legal community”* [BGH NJW 1995, 602; BGH NSTz 2002, 369 (370); NJW 2004, 1466 (1467); NSTz 2005, 35 (36); NJW 2006, 1008 (1011); NSTz 2006, 284 (285)].

4. Conclusions

There are more than thirty years now since the German justice system had to deal with honour killings, a period that appears at first glance, long enough to win a generally accepted opinion. In contemporary situations determined by the case law of the Federal Court of Justice, perpetrations of honour killings are considered and constituted as a crime of murder.

Faced with an archaic rooted phenomenon and a value system that classifies the factor ‘honour’ differently from its ‘western’ assessment, lawyers stand before the task to act appropriately, i.e. to include also foreign cultural and religious standards into their overall evaluation of facts and thereby do justice to the perpetrators. This is all very difficult, because the social characteristics, under which people live in the eligible areas, play a major role [11]. However, they often have a significant impact concerning the commitment of such an act.

It is easier to be limited in cases of delinquency in question to justify a conviction that each individual must control his/her passions, and that exceptions are possible only within the narrow limits of Sections 17, 20, 21 of the German Criminal Code, that the individual should have known about the criminalization of such customs and traditions that are here in force. (Section 17 - Mistake of law: If at the time of the commission of the offence the offender lacks the awareness that he/she is acting unlawfully, he/she shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated pursuant to section 49 (1). Section 20 - Insanity: Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall

be deemed to act without guilt. Section 21 - Diminished responsibility: If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in section 20, the sentence may be mitigated pursuant to section 49 (1)).

However, authoritative to any criminal judgment should be German applicable laws and values with respect to all weaknesses of the offender, if they are relevant to be included in the overall evaluation of the act, though they may also be based on foreign views. Only then can the perpetrator get the justice he/she deserves.

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