

Culture-Based Violence Against Immigrant Women in German Federal Court of Justice (BGH) Decisions

Pohlreich, Erol Rudolf

Veröffentlichungsversion / Published Version

Sammelwerksbeitrag / collection article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

Verlag Barbara Budrich

Empfohlene Zitierung / Suggested Citation:

Pohlreich, E. R. (2011). Culture-Based Violence Against Immigrant Women in German Federal Court of Justice (BGH) Decisions. In R. K. Thiara, S. A. Condon, & M. Schrötle (Eds.), *Violence against Women and Ethnicity: Commonalities and Differences across Europe* (pp. 383-398). Opladen: Verlag Barbara Budrich. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-63407-3>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY-SA Lizenz (Namensnennung-Weitergabe unter gleichen Bedingungen) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier: <https://creativecommons.org/licenses/by-sa/4.0/deed.de>

Terms of use:

This document is made available under a CC BY-SA Licence (Attribution-ShareAlike). For more information see: <https://creativecommons.org/licenses/by-sa/4.0>

Culture-Based Violence Against Immigrant Women in German Federal Court of Justice (BGH) Decisions

Erol Rudolf Pohlreich

In this paper I will show the material problems of judicial assessments of violence based on foreign culture.¹ These are elaborated from a sample of the Federal Court of Justice's decisions on homicides and sex-related crimes. Subsequently, possible alternatives to existing judicial assessments of culture-based violence by the Federal Court of Justice (BGH) are discussed.

The increasing number of reports on culture-based violence against immigrant women in the German media has led to a change in public opinion within the general debate on integration. Forced marriages, so-called 'honour killings' or female genital cutting now serve as a projection screen for criticism of integration policies to date. The growing attention that people pay to these forms of violence against women in Germany coincides with a discussion about the introduction of new or modifications to existing criminal provisions,² in order to reflect the public's abhorrence of such violent behaviour in case law. This paper examines the current approach of case law to violence identified as culture-based in the German case law at the Federal Court of Justice, demonstrated on sex-related crimes and homicides according to valid legal provisions.³ There are no extant decisions by the Federal Court of Justice on the criminality of forced marriages or customary female genital cutting in Germany. The German case law, on the other hand, has found ways of considering cultural evidence in the offender's favour with regard to

-
- 1 The term 'culture-based violence' is viewed critically by the author but used within this article referring to the terms of court language. The exact German term 'Gewalt mit fremdkulturellem Hintergrund' means in word-by-word translation 'violence with a foreign cultures background' but would be too complicated for the English chapter and was replaced by 'culture-based violence'.
 - 2 This has for some years concerned mainly the penal repression of forced marriages. For further details on currently applicable legal regulations and the reform discussion cf. Kaltheuner 2007; Schubert/Moebius 2006.
 - 3 A more comprehensive investigation of the punishment of so-called 'honour killings' and other homicides with cultural motivation can be found in Pohlreich 2009.

homicides and sex-related crimes, even though the German criminal code does not expressly admit it as a mitigating circumstance. The decisions under investigation do not exclusively refer to immigrant women, but they still allow for conclusions to be drawn about the criminal justice's way of dealing with violence against immigrant women.

Based on these decisions the study shows the circumstances under which the German criminal justice system at the Federal Court of Justice uses foreign cultural motives for offender-friendly determination of punishment and whether this results in immigrant women being protected differently by the law than German women. Seeing that the German criminal justice system assesses cultural motives for a crime inconsistently and even stereotypically, the question arises what alternatives are there when dealing with culturally-based violence. In the author's opinion, reference to the offenders' culture of origin is generally not necessary for determining an appropriate sentence. In the interest of legal certainty and a uniform application of the law it is, therefore suggested that cultural evidence should be considered when determining the sentence, but only within the framework of such criteria which may apply to offenders of any origin. Wherever these criteria do not apply, cultural evidence cannot be taken into consideration.

Sex-related crimes

When considering cultural evidence of sexual offences in the offender's favour, the Federal Court of Justice postulates varying requirements. In particular, the extent to what the offender's diverging perceptions must be reflected in their native culture in order to be considered in their favour remains unclear. Sometimes the offender's perceptions to be in unison with their native legal system is required, and sometimes this requirement seems to be dispensed with. Another decision from the recent past, presented in the following paragraphs, is even more difficult to place, as here the offender's immigrant background was not considered in his favour when determining the sentence but a decision made to the contrary.

Immigrant background as mitigating circumstance

In general, an offender's foreign cultural perceptions work in their favour when it comes to determining the sentence for a sexual offence. The Federal Court of Justice, however, contests general assumptions of the accused being

most probably absorbed in sexist images of women in his native country. Irrespective of the fact that the German criminal code applies in Germany, foreign perceptions can only be regarded as mitigating factors if they are in line with the other country's legal system.⁴ The Federal Court of Justice does not, however, regularly raise the question of whether an offender's sexual morals are in line with the criminal code of their country of origin. In a recent decision,⁵ it was apparently sufficient for the Federal Court of Justice to see that the offender's sexual morals were in line with the religious values of his culture of origin. The case dealt with a Kurdish Yazidi, whose family tried to force her to marry her cousin. He abducted her and repeatedly coerced her into sexual intercourse. The Federal Court of Justice confirmed the conviction for second degree kidnapping as well as a single count of rape. This was reasoned on the offender's and the victim's cultural background and the family's 'high expectations'. Pointing out that the victim's cultural background was Yazidi is peculiar, as this may lead to the inappropriate impression that Yazidi women must submit to sexual violence more than other women. Additional concerns are raised as now, apart from the – relatively – clear touchstone of the legal system of the country of origin, the criterion of religious background is introduced, which may tempt to make stereotyping assessments.

A decision from 2001⁶ also did not take the criminal code of the offender's country of origin into account. The offender had been living in Germany for 30 years and had been married to his wife from the same origin since 1975. As a result of marital problems, the wife moved out and filed for a divorce petition with the Family Court, but, when urged by her sons, returned to the accused. He coerced her into sexual intercourse by threatening her with a knife. The wife moved out of the flat after frequent altercations and further incidents of physical violence, and pressed charges for bodily harm. After the divorce, the situation calmed down, which is why the woman repeatedly asked for a lenient sentence during the trial. The Federal Court of Justice assumed a less severe case, the assertion of which is generally possible if individual facts of the case deviate significantly from the regular case and therefore call for less severe punishment.⁷ Such conditions were, in the assessment of the judges, the long years of marriage with the victim, his desire for her affection as well as the assumption that he was less inhibited than a German offender. Also the common origins of the spouses and their being

4 BGH NStZ-RR 1999, 359; 1998, 298f.

5 BGH decision dated 1st February 2007 – 4 StR 514/06, unpublished to date.

6 BGH StV 2002, 20f.

7 BGH StV 2002, 20f. with further references.

deeply rooted in common values, which supposedly demand submission and obedience of the wife, were considered in his favour.

In fact, it was a case of rape involving the use of a dangerous instrument, which § 177 par. 4 of the German Criminal Code penalises with a minimum prison term of five years. If, however, an unspecified less severe case, as defined by § 177 par. 5, applies, the term is one to ten years in prison. The Federal Court of Justice elaborated that in the case of concurrence of aggravated rape, as defined by § 177 par. 4 of the German Criminal Code (StGB) and a less severe count, the minimum term must not remain below the statutory minimum for rape, i.e., two years.

Foreign cultural background as aggravating circumstance

Interestingly enough, in the Federal Court of Justice considerations, the victim's origins and their cultural background sometimes are disadvantageous for the offender. Aggravating circumstances are, for instance, if a devout Turkish Muslim returns to her parents' home after multiple rapes, is no longer respected by her cultural community as a divorcee and is burdened by the reduced chances of entering into a suitable marriage.⁸ As the woman and the perpetrator have the same cultural background, it could have been assumed that, as in the case of the Yazidi Kurd, the cultural aspect would have been considered a mitigating factor. There is no information to the effect that the Yazidi culture is particularly sensitive or open about experiences of rape. The Yazidi Kurd woman, however, intended to calm the situation and 'extend a hand' to the accused by having her attorney declare that she would agree to a suspended sentence. It was the good fortune of the accused that she had, in the meantime, married her secret boyfriend and apparently did not have especially close ties with the Yazidi culture, thanks to which he received his mild sentence. Otherwise it could have been quite possible for the sentence to shift to the other extreme.

The question is, should the respective cultural background (be it a constructed or an actual one) be considered in the assessment of the severity of the punishment at all? The severe consequences for the repeatedly raped wife described in the latter decision should be clear to those without intimate knowledge of her culture as well, and should justify a comparably severe punishment, even when considered individually. As far as the cases described earlier are concerned, a more lenient punishment seems possible even without taking cultural evidence into account. This is why these decisions, by

8 BGH ruling dated 20/06/2007 – 1 StR 167/07.

emphasising cultural aspects, are conducive to a far too stereotypical perception of non-Western cultures.

Crimes against life

If the Federal Court of Justice's decisions on sex-related crimes with a foreign background appear inconsistent, this applies even more so to how the Federal Court of Justice deals with homicides committed by offenders with a non-German cultural background. Here case law in its sometimes contradictory and often confused causistry in individual cases refrains from the presumption of base motives for a crime and convicts the offenders of manslaughter (prison terms up to 15 years) instead of murder (life imprisonment), if no other criteria for murder apply.

According to case law, a motive is base, if '*according to general moral values it is at the lowest moral level, determined by uncontrollable, driven selfishness and therefore particularly condemnable, even contemptible.*'⁹ In the case of killings motivated by so-called foreign cultures, the question arises: according to what set of moral values should the motives be judged? It is imaginable to focus solely on the foreign morals. Current case law, however, asks objectively, whether the motive was base, i.e. without considering the perpetrator's origins or socially determining factors. The yardstick for assessing a motive is, moreover, to be derived from the values of the general legal community in the Federal Republic of Germany and not from the perceptions of ethnic communities that do not accept this legal community's moral and legal values.¹⁰ This in no way anticipates a negative result for the perpetrator, as long as perceptions, which initially appear foreign, are questioned critically to the effect of whether they indeed diametrically oppose the values in this country or whether they are universally comprehensible.¹¹

When it comes to culture-based killings, case law for once does not presume base motives, if the perpetrator at the time of the crime was not aware of the fact that these could be weighted as aggravating, or if he was not able to exercise will-power to control the passions determining his physical acts. This implies that a perpetrator allegedly determined to a large degree by his cultural perceptions, who due to his personality or living situation, was not able to disengage himself from them at the time of the offence, as an excep-

9 BGHSt 3, 132f.; 42, 226; 47, 128.

10 BGH NStZ 2006, 284; 2002, 369; 1995, 79; BGHR StGB § 211 II base motives 41; BGH NJW 2004, 1466ff.; BGH NStZ-RR 2004, 361f.

11 Cf. BGH NStZ 2006, 286.

tion to the rule can be convicted of manslaughter in spite of the objective baseness of his motives.¹² The same applies to the perpetrator still very much attached to his culture of origin, who cannot comprehend the meaning of baseness of the motive.¹³

Implications of cultural pressure

In the Federal Court of Justice's first decision on the authority of the country's values,¹⁴ the rejection of base motives was accounted for by the fact that the Eastern Anatolian accused acted on pressure exerted by his family. The length of his stay in Germany is not revealed, and neither is the sort of pressure exerted on him. Apart from his simple character, the Federal Court of Justice found it sufficient that the accused was *'caught up in the idea of 'vendetta' and 'chosen' by his family for carrying out the deed'*. This allegedly reduced his freedom of choice at the time of the offence.

A more recent decision by the Federal Court of Justice¹⁵ on the other hand, did not allow any kind of pressure on the perpetrator to be seen as a mitigating factor. This case dealt with the killing of a member of the Kurdish Workers' Party, PKK, and his mistress by three other members of the party on the orders of the regional leader, as he deemed this relationship to be dishonourable. The Federal Court of Justice affirmed the assumption of base motives in its decision. Pressure would only be considered a mitigating factor for the perpetrator if they were threatened with physical violence or death. It was apparently of no importance for the Federal Court of Justice in this case that two of the accused had already been severely beaten up in Turkey for not adhering to PKK orders – the possibility of torture cannot be ruled out – and the third accused suffered from extreme fear of physical violence after an imprisonment in Turkey.¹⁶ It might be conclusive not to consider these kinds of pressures nor the social consequences; but to be consistent, then, neither family exerted pressure nor an imminent social isolation must be counted as mitigating factors for the perpetrator per se, but only qualified pressure.¹⁷

12 BGH NStZ 1995, 79 with further references

13 BGH NJW 2006, 1008 (1012).

14 BGH NStZ 1995, 79.

15 BGH StV 2003, 21.

16 Cf. Momsen 2003: 238.

17 Partially different in Valerius 2008: 916, who questions the particular reprehensibility of the motives for the killing, if the loss of respect and honour in the perpetrator's social environment leads to social ostracism.

Implications of the perpetrator's social integration

Case law only intends to consider different moral values in a perpetrator's favour, if his fixation on values narrows his mind. As such, a fixation on values regularly decreases with the progress of integration it should only be taken into account in exceptional cases. Consequently, the consideration of base motives requires a comprehensive evaluation of the individual process of integration. Supposedly 'informative cues' in this question are a long stay in the host country, a working life, circles of friends and acquaintances, commitment to societies and political organisations, language difficulties as well as preferences in food and drink.¹⁸ For the Federal Court of Justice, the duration of stay does not directly translate into how well the perpetrator is integrated. But if the Federal Court of Justice does not pay attention to the time of stay, this begs the question why it emphasises it at all and with contradicting results.

In the PKK case, the Federal Court of Justice contested that the judgement of two of the accused was still affected after their fourteen-year stay in Germany, as they had already been convicted as joint offenders in a case of attempted vendetta killing in this country. It did, however, also affirm that the third accused was capable of rational judgement, notwithstanding the fact that he had only been in Germany for two years, as he had felt connected to 'the *people's* cause' but did not want to commit any further to the society or the PKK. As evidenced in a later decision, on the other hand, even after a ten-year stay in Germany and naturalisation, the assertion of rational judgement was not a given.¹⁹ In another decision, the accused pleaded his attachment to his culture of origin after a twenty-year stay in Germany and naturalisation, which was refuted as counterfactual.²⁰ In a decision dating from 1977²¹, the Federal Court of Justice elaborated that during the period of cultural adaptation a foreigner's judgement may be affected, as they may relapse into a 'Sicilian way of thinking' when committing a crime and not be able to fully comprehend the disproportion between the killing and its occasion. Apparently, the Federal Court of Justice assumes that immigrants increasingly adapt throughout their stay in this country. It is not taken into consideration that immigrants do not, as a rule, entirely assimilate and shake off their enculturation. Also the reference in one 2003²² decision by the Federal Court of Justice to an *'accused incapable of integration'* says a great deal about the

18 Schneider 2003: Paragraph 95; cf. also Fischer 2008: § 211 Paragraph 29.

19 BGH sentence dated 5th September 2007, 2 StR 306/07, unpublished to date.

20 BGH NStZ-RR 2007, 86.

21 BGH in Holtz 1977: 809.

22 BGH NStZ-RR 2004, 44 (commented by Trück 2004: 497).

judges' understanding of integration. Apparently there are not only those perpetrators who are unwilling to integrate, but those that are incapable of integration, so that in some cases, the rational judgement of perpetrators with foreign enculturation may still be affected after decades of living in Germany.

A more convincing decision stems from the year 2004²³ which dealt with a man originally from Turkey who had killed his wife, a German citizen who was born and raised in Germany, by stabbing her 48 times with a knife. She wanted to separate after being humiliated and abused by him and was not willing to support him in extending his residence permit. The Federal Court of Justice contested that his judgement was affected, seeing that members of the family had informed him about the relationship between men and women in German society; also the sister had threatened to call the police on him. Furthermore, it was to be doubted that the accused could have felt justified by his Anatolian values to continuously abuse and eventually kill his wife. Rather, turning up the volume on the radio before the act so as to make sure the neighbours could not hear what was going on, as well as denying the charges towards his parents, might indicate that he very well understood the German assessment of his motives. The Federal Court of Justice also affirmed his ability to control his passions, notwithstanding some indications that the crime was committed on impulse, as a perpetrator's growing passion cannot exonerate him if he, as in this case, consciously lets his controllable emotions drive him to completion of the act.

Implications of the law in the perpetrator's country of origin

Recently, the Federal Court of Justice has been referring to the law valid in the perpetrator's country of origin as an indicator for foreign perpetrators' subjective attitudes to their motive for killing. In a decision dating from 2004²⁴, the Federal Court of Justice affirmed the perpetrator's capacity for rational judgement, i.e. by referring to the perpetrator's country of origin and its laws. Motives not reflected in their native country's laws are pure sectarian convictions and therefore not to be considered when assessing the perpetrator's capability of judgement. In the case of the attempted killing of a former wife, who wanted to separate from her husband, the Federal Court of Justice emphasised that foreign behavioural patterns, convictions and notions were, as a rule, to be considered only, if they are in accordance with the for-

23 BGH NStZ 2004, 332.

24 BGH NStZ-RR 2004, 361.

eign legal system, something that did not apply in the case of the Turkish perpetrator.²⁵

The Federal Court of Justice does not intend to give a conclusive evaluation of the subjective part by referring to the law in the country of origin. It, therefore, proceeds along the lines of its regular decisions on the range of punishment, which at times do refer to the law in the country of origin, but at other times do not.²⁶

Preferably, considerations of the law applicable in the perpetrator's country of origin should be excluded altogether. More often than not, the law in the perpetrator's country of origin is not as unequivocal as to do away with any doubts about the perpetrator's original culture's leniency towards the crime committed by him. Moreover, a great number of states are made up not by a – relatively – homogeneous population, as it is the case in Germany. Particularly in multinational states like, for instance, Turkey, the Turkish criminal code cannot be expected to reflect all ethnic communities' values. This issue is even more complicated where states like Nigeria are concerned, where the applicable criminal code varies according to place of residence, ethnicity and religion.

Alternative solutions for the punishment of culture-based homicides

If the Federal Court of Justice's consideration of the assumed effects of foreign cultures in the case of sex-related crimes is questionable, it is even more so in the case of homicides, such as the so-called 'honour killings'. For culpable homicides, constitutional issues arise out of the mandatory lifelong prison sentence, as demanded for murder in § 211 StGB, because according to the Federal Constitutional Court's case law the sentence must be proportional to the severity of the crime and must not exceed the perpetrator's culpability.²⁷ On the other hand, the mandatory link between elements of murder and life imprisonment serves legal certainty and a uniform application of the law.²⁸

25 BGH NStZ-RR 2007, 86.

26 For the foreign legal code's authority cf. BGH in Pfister 1999: 359; BGH NStZ-RR 1998, 298. For a merely indicative effect of the foreign legal code cf. BGH NStZ 1996, 80; BGH NStZ-RR 2007, 86 (87).

27 BVerfGE 45, 187 (259 f.) with further references.

28 BVerfGE 45, 187 (260).

The Federal Constitutional Court infers from art. 103 par. 2 of the *Basic Law* (GG), the *German constitution*, that criminal provisions *defining* the more severely penalised crimes must be worded with the greatest precision.²⁹ Certain unspecified elements, however, are admissible as constitutional, provided a uniform case law accounted for the content.³⁰ Such a provision for base motives has yet to be worded. In case law the content of such murder criteria, however, has only been determined insufficiently by a casuistic as yet. The published decisions by the Federal Court of Justice on taking foreign cultural determination into consideration when evaluating subjective requirements for whether base motives apply show significant inconsistencies, resulting in understandable confusion for the judiciary. In fact, the assessment of whether base motives apply in cases of culpable homicides is reversed in 71% of the cases between indictment and conviction of the perpetrators.³¹ For no other element of murder do the assessments vary as significantly between judges and courts of appeal as they do for the element of base motives.³² It is, therefore, hardly to imagine how members of the public are supposed to make informed decisions, when judges themselves are often at a loss when faced with this question.

Criminal law responses to an offence dependent on cultural evidence must, when consistently applying this, lead to a discussion of circumstances, which often cannot be safely proved. Some of the questions arising from the consideration of foreign cultural influences are: whether certain views actually played a significant role in the perpetrator's socialisation; whether these views are only held by sectarians in the culture of origin; how the culture of origin is to be defined and to be limited; whether the crime is based on individual or psychological reasons and less on reasons determined by culture or socialisation;³³ whether the criminal behaviour was induced by compulsion; whether the perpetrator was already integrated and from what moment an immigrant can be considered sufficiently integrated; and whether the view reflected in the crime is in fact diametrically opposed to German views.

Another question is the difference between a perpetrator influenced by foreign culture – when culture is defined on the basis of similarities amongst all those who belong to it – and a person influenced by a subculture. In other words, why is the question of whether deviating views should be considered not posed for subcultures or members of a sect? It is certainly a misconception to believe that all Germans were brought up according to the same moral

29 BVerfGE 75, 329 (342f.).

30 BVerfGE 28, 175 (183); 37, 201 (208); 45, 363 (372); 73, 206 (243).

31 Kargl 2001: 368.

32 Eser 1981: 384.

33 On these issues cf. the paper by Gloor/Meier in this Reader.

code and that subculturally motivated perpetrators willingly cede this uniform socialisation and turn towards their subculture. For those who are part of a subculture, this belonging can be fateful as well, for instance, German perpetrators, who grow up in parts of Germany that are particularly infamous for their xenophobia or in such a family, who then go on to kill a foreigner out of racial hatred. Even if such a German perpetrator was socialised in an ordinary environment, they could have become involved with a subcultural community that had such a strong hold on them that the question of considering these ties when examining their capability of mastering their passions and controlling themselves should also arise here. This applies also to fanaticised members of a sect. If such consideration is demanded for perpetrators from different cultural backgrounds, then the exclusion of other (German) perpetrators whose ability to exercise will power or to control themselves must also be carefully considered, is not entirely convincing.

Limiting the consideration of cultural values to foreign cultures is not convincing, either, when examining the Federal Court of Justice's decision dating from the year 1956, in which it presumed base motives in the case of a grandmother and grandfather, who in an exaggerated sense of honour killed their grandchild soon after birth, because it was born out of wedlock.³⁴ It is easily imaginable that the grandparents at the time were not able to control their feelings, given that they lived in the country, found out about their unmarried daughter's pregnancy only when she entered labour and carried out the crime straight after finding out. As is well known, an illegitimate child born in 1950s rural Germany could mean social ostracism and complete isolation. The unexpected confrontation with this circumstance they regarded as shameful may have overwhelmed the couple and led them to commit the crime. Nevertheless, the Federal Court of Justice at the time did not even question their ability to control their passions. Moreover, reading between the lines it becomes clear that it, quite rightly, did not at all see a need to discuss the grandparents' ability to act in a controlled and rational manner. With regard to foreign perpetrators, on the other hand, the Federal Court of Justice – with the exception of premeditated murder – does feel the need to discuss whether the perpetrators were able to control themselves at the time of the offence in view of their socialisation and the ties following on from it. The Federal Court of Justice, therefore, applies double standards in considering the socialisation of German and foreign perpetrators, as it demands a higher measure of control of German perpetrators than of foreign offenders. Using the 'cultural impulse' to explain offences committed by perpetrators with a foreign cultural background in effect works in their favour, it reproduces and

34 BGHSt 9, 180; crit. Dreher 1956: 501.

perpetuates un-reflected, stereotypical perceptions of the non-Western ‘Foreigner’.

Limitations of questioning the ability to exercise rational judgement

The question of the rational judgement of perpetrators with a foreign cultural background should only arise if their motive for killing is privileged in the case law of their country of origin. It is, furthermore, to be assumed that all cultures in principle disapprove of the premeditated killing of a person. A specific provision for reduced punishment in the criminal code of the perpetrator’s country of origin, as Turkey’s former criminal code provided in its article 462 up until 2003, for some ‘honour killings’, does not in itself point to a lack of ability of rational judgement, as a reduced sentence does not exonerate the perpetrator from the crime they are charged with. Irrespective of the provision in article 462 of Turkey’s former criminal code, the ‘honour killings’ covered by it were still punished.

In any case, it can be expected that immigrants seeking permanent residence in Germany should inform themselves of the core provisions of the criminal code on entering this legal community. Even if they fail to do so and remain ignorant of the law, they can not be cleared of their responsibility in spite of their foreign cultural backgrounds.³⁵ It is not the perpetrator’s conduct they are charged with but the crime itself. Indeed, reproaching the perpetrator for their conduct would not be permissible,³⁶ as a perpetrator’s guilt must always refer to an individual crime. It is, for instance, not permissible to reproach perpetrators for something that happened through no fault of their own. Case law, however, does in certain cases link into wrongdoing before the actual crime was committed,³⁷ provided that perpetrators knowingly did not inform themselves of certain specific legal regulations, which they could not then learn at the time of the offence. This applies, for instance, to some-

35 Cf. Lesch 1996: 609.

36 According to the national socialist concept of criminal conduct, the determination of punishment could directly refer back to the perpetrator’s lifestyle before the crime. The guilt concept has luckily been replaced by the concept of responsibility for a crime. According to this concept, the punishment depends primarily on the question to what extent the individual perpetrator is to be blamed for the concrete crime. The perpetrator’s conduct must only be considered as an exception, and only if it is directly connected with the crime, cf. e.g. BGHSt 5, 132; BGH NStZ-RR 2001, 295.

37 BGHSt 2, 208 f.; critically on this decision, which deals not really with the avoidability but an actual error concerning the prohibited nature of an act, Roxin 2006: 949.

body with an occupation regulated by certain penal provisions or public order offences acts, of which they knowingly fail to get information. The argument in case law here is that it does not refer to all of the perpetrator's conduct in life, but to concrete violations of the duty of care. For it is still the actual crime the perpetrator is charged with, as long as the charge is founded on a clearly specified violation of the duty of care before the committal of the crime (e.g. lack of information about job-related penal provisions), which from the outset suggested a later violation of the regulation (e.g. a violation of job-related penal provisions).³⁸

Also it cannot be assumed that immigrants just ended up somewhere through no fault of their own, as specified in the concept of 'criminal conduct', if they knowingly and of their own volition determined to immigrate into a country like Germany. Somebody from a society bindingly applying tribal customary law or Islamic law to the individual members of that society cannot presume that the notions behind it coincide entirely with those in Western industrialised societies. At the least they can be expected to take note of the limited number of provisions of the core criminal code as from the time of entering the country it can be surmised that certain behaviour, more or less approved of or tolerated in the perpetrator's country of origin, will be disapproved of or even penalised in the host country. It goes without saying that immigrants must not ignore the opinions held in the host country, especially as they are not even required to share these convictions. Whoever assumes that perpetrators with a supposed foreign cultural background have an awareness of wrongdoing determined by fate in effect denies them any learning ability, which after all is an important aspect of a person's individual qualities and therefore their dignity.

Considering impaired mental responsibility

The assessment that an impaired mental responsibility reduces the wrong committed by the perpetrator, makes sense. Raising the fact that a perpetrator is from a different country to determine, whether they were able to exercise control results in an untenable, stereotyped image of non-German nationals. The Federal Court of Justice no longer considers cultural evidence in the same way as in its first pertinent decision³⁹, when it claimed that personality defects would have to be pleaded for '*psychopathic personalities*' and conse-

38 Roxin 2006: 949f.; Rudolphi 2008: Paragraph 44f. with further references.; Puppe 2004: 238 with further references.

39 BGH GA 1967, 244.

quently all the more for foreigners, if they are deeply rooted in the divergent values of their countries of origin. On the other hand, the question of impaired mental responsibility only marginally applies to perpetrators with a foreign cultural background, if we take a closer look at Paeffgen's example of substantiating this requirement: *'Same as a shackled person cannot be reproached for remaining inactive, someone wrapped up in their motivation cannot, in excess, be reproached for their inability to master their motives.'*⁴⁰

A person with an immigrant background is as rational an individual as anyone else and not so deeply wrapped up in their motivation so as not to be able to control themselves. Whoever wishes to consider diminished responsibility or lack of self-control based on cultural backgrounds in the perpetrator's favour, must at the same time take note of standards tolerating violence within the German culture and regard them in the German perpetrator's favour. Quite rightly, though, the Federal court of Justices show no signs of doing so.⁴¹ Here the constitutional requirement of the punishment's proportion to the crime is overemphasised for immigrants and – for very good reasons, nonetheless – subordinated for those perpetrators motivated by German culture. Besides, the consideration of foreign cultural ties depends on a tangle of factors not provable, thus favouring unpredictable court decisions. With regard to the predictability and uniformity of state penalisation this approach thus appears to be highly questionable.

It would, therefore, make sense to weigh the impaired mental responsibility of perpetrators with a foreign cultural background to the same extent as that of perpetrators socialised in Germany to presume diminished responsibility only for those reasons that potentially apply to anyone, e.g. overfatigue, paraphilias or spontaneous reactions to sudden uncontrollable passions⁴². Thus, the original cultural background of the perpetrator should not in itself become a reason for questioning their ability to exercise control over their passions.

Conclusion

When punishing violent crimes against immigrant women, the victim's ingrained cultural values carry any weight only in exceptional cases in the Fed-

40 Paeffgen 1982: 271.

41 Cf. BGHSt 9, 180.

42 BGH NJW 1989, 1739 (1740) with further references; NStZ-RR 1998, 67f.; NStZ-RR 2004, 108; BGHR StGB § 211 II base motives 10; Eser (2006): Paragraph 39; Schneider (2003): Paragraph 98.

eral Court judges' decisions. The question of whether or not to consider cultural evidence usually arises from the perpetrator's position and not their victim's. It is, however, highly problematic to consider foreign cultural elements without questioning whether these elements should also be taken into account for perpetrators without a foreign cultural background. Not explicitly considering cultural evidence to determinate the sentence would allow for a more consistent punishment of perpetrators with foreign cultural backgrounds, something that is not currently done.

Refraining from directly connecting cultural evidence with mitigating factors does not constitute a violation of art. 103 par. 2 GG setting out the constitutional right to a fair hearing. The judge's knowledge of the particularities of the other culture can and should help them qualify the evidentiary facts and the perpetrator's personality in line with criteria for determination of punishment that apply to all perpetrators of any origin or culture. Where, however, cultural evidence cannot be assigned to any generally acknowledged criterion of determining punishment, it goes beyond the limits of what can be taken into consideration.

References

- Dreher, Eduard (1956): Anmerkung zu BGH Urteil vom 27.1.1956. In: MDR 1956, S. 499–501.
- Eser, Albin (1981): Die Tötungsdelikte in der Rechtsprechung zwischen BVerfGE 45, 187 und BGH-GSSt 1/ 81. In: NStZ 1981, S. 383–388.
- Eser, Albin (2006): Kommentierung zu § 211 StGB. In: Schönke, Adolf/Schröder, Horst (Begr.): Strafgesetzbuch. Kommentar, München: C.H. Beck.
- Fischer, Thomas (2008): Strafgesetzbuch und Nebengesetze, München: Verlag C.H. Beck.
- Gloor, Daniela/Meier, Hanna (2011): The police's use of 'culture' in (re-)constructing domestic homicides. In this Reader.
- Holtz, Günter (1977): Aus der Rechtsprechung des Federal Court of Justices in Strafsachen. In: MDR 1977, S. 807–811.
- Kalthegener, Regina (2007): Strafrechtliche Ahndung der Zwangsverheiratung: Rechtslage – Praxiserfahrungen – Reformdiskussion. In: Bundesministerium für Familie, Senioren, Frauen und Jugend (Hrsg.): Zwangsverheiratung in Deutschland, Forschungsreihe Band 1. Baden-Baden: Nomos Verlag, S. 215–228.
- Kargl, Walter (2001): Gesetz, Dogmatik und Reform des Mordes (§ 211 StGB). In: StraFo 2001, S. 365–375.
- Lesch, Heiko (1996): Die Vermeidbarkeit des Verbotsirrtums. In: JA 1996, S. 607–612.
- Mezger, Edmund (1938): Die Straftat als Ganzes. In: ZStW 57, S. 675–701.
- Momsen, Carsten (2003): Der Mordtatbestand im Bewertungswandel? – Abweichende soziokulturelle Wertvorstellungen, Handeln auf Befehl und das Mordmerkmal der ‚niedrigen Beweggründe‘ (§ 211 StGB). In: NStZ 2003, S. 237–242.
- Paeffgen, Hans-Ulrich (1982): Einmal mehr – Habgier und niedrige Beweggründe. In: GA 1982, S. 255–275.

- Pfister, Wolfgang (1999): Aus der Rechtsprechung des BGH zu materiellrechtlichen Fragen des Sexualstrafrechts 1998–1999 – 2. Teil. In: *NStZ-RR* 1999, S. 353–359.
- Pohlreich, Erol Rudolf (2009): ‚Ehrenmorde‘ im Wandel des Strafrechts. Eine vergleichende Untersuchung am Beispiel des römischen, französischen, türkischen und deutschen Rechts. Berlin: Duncker und Humblot.
- Puppe, Ingeborg (2004): Bemerkungen zum Verbotsirrtum und seiner Vermeidbarkeit. In Rogall, Klaus/Puppe, Ingeborg/Stein, Ulrich/Wolter, Jürgen (Hrsg.): *Festschrift für Hans-Joachim Rudolph zum 70. Geburtstag*. Neuwied: Luchterhand Verlag, S. 231–241.
- Roxin, Claus (2006): *Strafrecht Allgemeiner Teil Band 1. Grundlagen. Der Aufbau der Verbrechenslehre*. München: Verlag C. H. Beck.
- Rudolphi, Hans-Joachim (2008): Kommentierung zu § 17 StGB. In: Rudolphi, Hans-Joachim/Horn, Eckhard/Samson, Erich (Hrsg.): *Systematischer Kommentar zum Strafgesetzbuch, Loseblattsammlung, Bd. 1 Allgemeiner Teil*, Neuwied: Luchterhand Verlag.
- Schneider, Hartmut (2003): Kommentierung zu § 211 StGB. In: Joecks, Wolfgang/Moebach, Klaus (Hrsg.): *Münchener Kommentar zum Strafgesetzbuch, Bd. 3*, München: Verlag C.H. Beck.
- Schubert, Karin/Moebius, Isabella (2006): Zwangsheirat – Mehr als nur ein Straftatbestand: Neue Wege zum Schutz der Opfer. In: *ZRP* 2006, S. 33–37.
- Trück, Thomas (2004): Die subjektive Komponente beim Mordmerkmal der niedrigen Beweggründe. Anmerkung zu BGH Beschluss vom 10.9.2003 – 5 StR 373/03. In: *NStZ* 2004, S. 497–499.
- Valerius, Brian (2008): Der sogenannte Ehrenmord: Wertvorstellungen als niedrige Beweggründe? In: *JZ* 2008, S. 912–919.