



Max-Planck-Institut
für ausländisches und
internationales Strafrecht

Victimization and Access to Justice in Culturally Diverse Societies

Hans-Joerg Albrecht

Max Planck Institute for Foreign and International Criminal Law

<http://www.mpicc.de>



Outline



- Migration and Traveling Laws and Values
- Problems Unfolding
- Culture, Crime, and Victimization
- Protecting Victims or Stigmatizing Immigrants
- Access to Justice

Traveling Values and Norms



- Migration has resulted in immigrants representing a significant share at populations of Western European countries
 - In Germany immigrants account today for more than one fourth of the population
- Migrants bring with them also norms, values, customs
- Value (and legal) pluralism is an important characteristic of post modern societies and widely endorsed
 - Individualization increases degrees of freedom
- This may result in conflicts and the questions of
 - New victims (and the need for new criminal law)
 - How to assist victims



Criminal Law, Foreigners and Territoriality



- §3 Criminal Code
 - German criminal law will be applied to criminal acts carried out on domestic territory
 - No exceptions made

- Criminal Code 1871
 - German criminal law will be applied to criminal acts carried out on domestic territory also if the offender is a foreigner

- Equality before the law

Problems Unfolding



- Already early in the 20th century cultural conflicts have been theorized by conflict theory
- However, there was no discussion about cultural diversity and criminal law
 - The problem of social diversity and criminal law (class background, poverty, age) was recognized
- Conflicts may arise from (foreign) cultural practices and attitudes tainted by religion which deviate from norms established by the dominant culture
- The idea of „cultural defences“ which protect immigrants (and minorities) was born but also new problems of defining criminal offences, offenders and victims of crime

Situations and Crimes



- Honor violence (killing), Blood feuds
- Female genital mutilation, male circumcision
- Forced marriage (including child marriage)
- Negative social control (England/Wales Serious Crime Act 2015)
- Blasphemy and religious feelings
- Informal justice systems (denial of access to formal justice)



How Can Criminal Law Respond?



- Creating culturally justified exemptions from punishment
 - Denial of harm, responsibility and victimization

- Creating new criminal offence statutes
 - Traditional harmful practices
 - Protection of feelings
 - Penalization of motives (and hate)

- Improving access to justice and victim support in case of particularly vulnerable victims
 - Victims forced to comply with traditional dispute resolution processes

Hate, Feelings and Victimization



- Incitement to hatred
- Hate motivations and crime
- Blasphemy laws
- Victims of threat, fear, insults (and threats to public order)



- Most crimes committed by immigrants are not tainted by culture (though by social class, age etc.)
- Only few criminal offences (and situations) are suited to invoke the question of how to respond to cultural diversity
- However, these crimes have a high signal value
 - Signal: Something (beyond the individual case) went completely wrong and must be straightened out
 - Trump evidently tried to exploit a high signal value when targeting honor violence in a 2017 executive order imposing a travel ban for selected countries

International Responses



- Council of Europe Istanbul Convention 2011 requests
 - Penalization of
 - » Genital mutilation
 - » Forced marriage
- Honor may not be considered (as justification or mitigation) when judging criminal cases
- Mandatory informal justice (mediation) must be prohibited

Justifying the Need for New Criminal Law



- Calls for penalization and are justified with estimates of huge numbers of victims
 - Based on what is called “extrapolation-of-African-prevalence-data-method”
 - Estimates on prevalence of female genital mutilation (or cutting) in Western European countries are computed by applying the ratios of mutilation drawn from surveys carried out in African or Asian countries to the number of female immigrants in Europe
 - This results 2020 in estimates of ca. 75.000 women affected by mutilation in Germany and ca. 20.000 girls (<18 years) at risk of mutilation
- However, the number of convictions is low (2014-2021: 7 convictions)

Conflicts About the Relevance of Culture



- „Harmful practices“ or „traditional harmful practices“
- Traditional practices and stigmatization of culture and religion
- EU Victim Directive 2012/29 speaks of
 - different forms of harmful practices, such as forced marriages, female genital mutilation and so-called ‘honour crimes’
- Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Human Rights Council, United Nations 2012
 - Cultural norms and beliefs are in fact the causal factors for harmful practices

Selective Criminal Law and Selection of Victims



- Male circumcision and the assault offence in Germany
- A Cologne court judges circumcision of a male baby a criminal offence: assault
 - Offence elements established
 - No medical reason
- International press coverage
 - Introduction of §1631d BGB
 - Parental custody of a child includes the right to consent to the circumcision of a male child which is not requested by medical reasons and performed through best medical practice
- In Iceland, Denmark, Sweden draft laws had been tabled in 2018 which would have penalized male circumcision. None of these made it through Parliament

Access to Justice



- Prohibition of mandatory dispute resolution (Istanbul Convention)
 - Access to justice is difficult for certain groups of victims
 - Privatization of crime control through traditional mediation
 - Retaliation and threat of expulsion from family and/or social group
 - Strictly state-controlled mediation
- Protection orders (UK)
- Obligations (of members of social/youth authorities etc) to avert genital mutilation (criminal offence statute)

Conclusions



- Cultural defences are not accepted in Europe when it comes to defences against a criminal wrong
 - Except Germany in case of male circumcision

- Culturally tainted offence statutes have been adopted widely
 - High signal (and symbolic) value but rarely applied