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Question(s) at stake:

Whether male circumcision constitutes bodily harm?

Outcome of the ruling:

Male circumcision constitutes the offence of bodily harm, but the defendant had to be acquitted because he made an unavoidable mistake regarding the unlawfulness of the circumcision and therefore acted without guilt.

Topic(s):

- Crime and Punishment under State Law

Keywords:

Tag(s):

Author(s):

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Country:

Germany

Official citation:

Regional Court Cologne, Judgment of 07 May 2012, 151 Ns 169/11 (LG Köln, Urteil vom 07.05.2012, 151 Ns 169/11)

Link to the decision:

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ECLI:

ECLI:DE:LGK:2012:0507.151NS169.11.00

Date:

07 May 2012

Jurisdiction / Court / Chamber:

Regional Court (Landgericht), 1.Small Criminal Division (1.Kleine Strafkammer)

Remedy / Procedural stage:

Appeal

Previous stages:

- Local Court Köln (Amtsgericht Köln)

Subsequent stages:

-

Branches / Areas of law:

Criminal law

Facts:

In November 2010 the defendant, a physician, performed a circumcision on a 4-year-old boy. He acted *lege artis* and upon request of the parents. Secondary bleeding had to be stopped in a hospital two days later. Afterwards, the public prosecutor indicted the physician on the charge of bodily harm.

On 21 September 2011, the defendant was acquitted by Cologne's Local Court (Amtsgericht). The Court regarded the circumcision as bodily harm that was nonetheless justified owing to the valid consent of the parents. The public prosecutor's office appealed the sentence at Cologne's Regional Court. The Regional Court confirmed the acquittal but based on different reasoning.

Ruling:

According to the appeal court, the circumcision *lege artis* of a 4-year-old boy by a competent physician at the request of his parents constitutes bodily harm, which cannot be justified by the consent of the parents. In the court's view, however, the legal situation at the time of the judgment was very unclear. Therefore, the court stated that the defendant made an unavoidable mistake when determining whether his actions constituted a crime. That means that he was not guilty and had to be acquitted.

Main quotations on cultural or religious diversity:

- "Nach wohl herrschender Auffassung in der Literatur [...] entspricht die Beschneidung des nicht einwilligungsfähigen Knaben weder unter dem Blickwinkel der Vermeidung einer Ausgrenzung innerhalb des jeweiligen religiös gesellschaftlichen Umfeldes noch unter dem des elterlichen Erziehungsrechts dem Wohl des Kindes. Die Grundrechte der Eltern aus Artikel 4 Abs. 1, 6 Abs. 2 GG werden ihrerseits durch das Grundrecht des Kindes auf körperliche Unversehrtheit und Selbstbestimmung gemäß Artikel 2 Abs.1 und 2 Satz 1 GG begrenzt."

  (According to the probably prevailing opinion in the doctrine[…],circumcision of the boy who is incapable of giving consent is not in the best interests of the child, either from the point of view of avoiding exclusion within the respective religious social environment or from the point of view of the parents' right to raise the child. The parents' fundamental rights under Articles 4 (1), 6 (2) of the Basic Law are in turn limited by the child's fundamental right to physical integrity and self-determination under Article 2 (1) and (2) sentence 1 of the Basic Law.) (para. 15)

- "Der Angeklagte hat, das hat er in der Hauptverhandlung glaubhaft geschildert, subjektiv guten Gewissens gehandelt. Er ging fest davon aus, als frommem Muslim und fachkundigem Arzt sei ihm die Beschneidung des Knaben auf Wunsch der Eltern aus religiösen Gründen gestattet."

  (As the defendant credibly described in the main hearing he acted in good conscience. He safely assumed that, as a pious Muslim and a competent doctor, he was permitted to perform the circumcision on the boy at the parents' request on religious grounds.) (para. 17)

Main legal texts quoted in the decision:

- Article 2, 4 pararaph 1 and 2, 6 paragraph 2 Basic Law
- Sections 17, 223 para 1, 224 para 1 no.2 German Penal Code,
- Section 1627d German Civil Code

Cases cited in the decision:

- Local Court Cologne, Judgment of 21 September 2011, 528 Ds 30/11

Commentary:

Punishability of Male Circumcision: A Judgment That Caused an Amendment of the German Civil Code

This case is the judgment of a Regional Court (Landgericht) which functioned here as a court of appeal on points of fact and law (and not as a court of first instance as in some other cases). Nevertheless, it is a lower court and its decision is not binding for other courts. Why then is this case so interesting?

Until 2008, the question of whether male circumcision is punishable as bodily harm had only been mentioned occasionally in the legal literature. One of the few authors addressing the issue stated that the arguably prevailing view was that circumcision does not constitute a crime because it is considered socially adequate (Fischer 2008: § 223 recital 6 b). An opposing view regarded male circumcision as bodily harm that is at best justified by religious practice (Gropp 2005: § 6 recital 231). In 2008, Holm Putzke argued in his article “Die strafrechtliche Relevanz der Beschneidung von Knaben” that male circumcision has to be punished because parents cannot give valid consent to male circumcision as it is not in line with the best interest of the child: it causes pain and in the long run might entail negative physical and psychical consequences for the child. Putzke made a cost-benefit analysis and concluded that the costs for the child exceed the benefits by far. This article sparked a vivid discussion among German scholars of criminal law. Some authors agreed with these arguments (e.g., Herzberg 2009). Others held the opposite opinion. Almost all of them agreed, however, that circumcision performed without therapeutic purposes – as they must be present with every surgical intervention – constitutes bodily harm but they accepted the existence of a ground for justification. There are differences among them as to the ground for justification. Furthermore, penalists discussed the question at the constitutional level in an attempt to balance conflicting rights.

For instance, one opinion admits that the constitutional right of the parents to decide about the religious education of their child (Article 6, paragraph 2, Article 4 paragraph 1 and 2 of the German Basic Law and the right of the child to physical integrity (Article 2, paragraph. 2 Basic Law) are in conflict but argue that this conflict can be resolved if the circumcision is performed *lege artis* by a physician (Zähle 2009: 452) According to another opinion, circumcision is falls within the meaning of the the parents right to care for and raise their child, which is a very strong right guaranteed by the constitution (article 6 Basic Law). And, according to this view, although this right is restricted by the best interest of the child, parents have broad discretion in terms of their idea of what constitutes the best interest of the child– and the state can exercise its function as a guardian only in extreme cases (see Fateh-Moghadam 2012: 1137).

In the court rulings on penal matters, there is, to my knowledge, only one case from before 2012. In the said case, an individual was punished for circumcising seven boys. But in this case the court held that there circumcision was not justified by a valid consent of the parents because the circumciser had used instruments that did not fulfil the hygienic requirements of such an operation and the court argued that the parents would not have given their consent if they had known about this circumstance. Thus, informed consent of the parents was missing and therefore the conduct was considered punishable as bodily harm (AG Düsseldorf, 17.11.2004, 411 Ds 60 Js 3518). This judgment did not trigger much interest.

The judgment of Cologne’s Regional Court (*Landgericht*), however, attracted great attention from the general public, media, as well as political circles and scholarly discussions. In the first stage – at the local court – the Muslim physician who had circumcised the boy was acquitted. The court had regarded the circumcision as bodily harm but had accepted the consent of the parents as grounds for justification (AG Köln 21.09.2011, 528 Ds 30/11). When balancing the constitutional rights of the child to physical integrity (Article 2 paragraph 2 Basic Law) against the rights of the parents to care and upbringing of their children (Article 6 paragraph 2, sentence1 Basic Law) as well as their freedom of religion (Article 4 paragraph 1, 2 Basic Law), the court argued that circumcision was a traditional ritual of admission to the Muslim community, which at the same time avoids stigmatizing the child in his community, furthermore circumcision plays an important role as a preventive “precautionary” measure from the medical point of view. In the view of the court, the consent was valid because the parents had exercised their right and their duty to care for and raise the child in line with the child’s best interest, which means that the right of the parents to care for and upbringing prevailed over the child’s right to the protection of physical integrity. The public prosecutor’s office appealed the judgment.

On appeal, the Cologne Regional Court held that the circumcision constituted bodily harm and did not recognize the consent of the parents as a justification. It rejected the arguments of the first instance court and argued that circumcision is not in line with the best interest of the child because the basic rights of the parents to care for and upbringing the child and their freedom of religion are limited by the basic right of the child to physical integrity and self-determination (Article 2 paragraph 1, 2 Basic Law). When balancing both rights against each other under consideration of the principle of proportionality, the court concluded that circumcision as part of religious education was disproportionate in confront with the child's right to bodily integrity because the body of the child would be permanently and irreparably modified, which would run counter to the right of the child to choose his religion later. Moreover, it would not be unreasonable to expect the parents to wait until the child is mature and can decide independently whether he accepts circumcision as a sign of his adherence to Islam or not. Nevertheless, the court acquitted the defendant, arguing that he committed an unavoidable error of law because the legal situation was uncertain.

This judgment caused considerable public unrest in Germany, particularly in the Jewish and Muslim communities for whom circumcision is a decisive sign of religious affiliation. After said judgment, it was no longer clear whether circumcision was still possible in Germany. Many doctors and hospitals stopped performing circumcisions, including the Jewish Hospital and the famous hospital Charité, both in Berlin. Statements from within the Jewish community expressed the fear that for the community, life in Germany would not be possible anymore.

Also, in both the constitutional and penal doctrine, a plethora of articles were published on this topic. Some authors criticized the judgment of the Court because it did not sufficiently and correctly discuss all the different constitutional aspects of the case before balancing the conflicting rights at stake (e.g., Germann 2012), furthermore because it acquitted the defendant because of an unavoidable mistake of law due to an unclear legal situation though no judgment existed at that time that ha d punished a circumciser for bodily harm if he had acted *lege artis* (Beulke and Dießner 2012: 338). Other authors welcomed the judgment (Putzke 2012).

It was a political decision that only a few weeks later, to remove the legal uncertainty caused by the Cologne judgment, the German Federal Parliament urged the government to present a draft of a law. This draft law should provide that male circumcision in due consideration of the constitutionally-protected interests, namely the best interest of the child and its bodily integrity, freedom of religion and the right of the parents to care and upbringing of their child should be regulated in the sense that it is generally lawful if performed *lege artis* and without unnecessary pains.

On 20 December 2012, an amendment of the German Civil Code (Section 1631 d) was adopted allowing parents to give their informed consent to the circumcision of a male child even if there are no pressing therapeutic reasons and the child is not yet capable of reasoning and forming a judgment, under the condition that the circumcision is performed *lege artis,* a requirement that also comprises anaesthesia. The consent of the parents does not need to have religious motives. As a rule, the intervention has to be made by a physician; within six months after birth, it may also be performed by persons designated by a religious group for this procedure even if they are not physicians comparably qualified to perform circumcisions in a manner that is comparable to the qualification of medical doctors in this field. However, regardless of its purpose, circumcision is not allowed if it jeopardizes the best interest of the child. Of course, statements and publications on this topic r did not cease immediately. But the law created legal certainty and calmed the public unrest, particularly within the Jewish and Muslim communities.

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

Specific legal publications addressing the case

- Beulke, Werner and Annika Dießner. 2012. "(…) ein kleiner Schnitt für einen Menschen, aber ein großes Thema für die Menschheit – Warum das Urteil des LG Köln zur religiös motivierten Beschneidung von Knaben nicht überzeugt." *Zeitschrift für internationale Strafrechtswissenschaft* 7. 338–346.
- Fateh-Moghadam, Bijan. 2012. "Criminalizing Male Circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012–No. 151 Ns 169/11". *German Law Journal* 13 (9): 1131–1145.
- Germann, Michael. 2012. "Die grundrechtliche Freiheit zur religiös motivierten Beschneidung". In Johannes Heil and Stephan J. Kramer (eds), *Beschneidung: das Zeichen des Bundes in der Kritik*, 83–97. Berlin: Metropol.
- Putzke, Holm. 2012. "Recht und Ritual – ein großes Urteil einer kleinen Strafkammer". *Medizinrecht* 30 (10): 621–625.

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

- Fateh-Moghadam, Bijan. 2010. "Religiöse Rechtfertigung? Die Beschneidung von Knaben zwischen Strafrecht, Religionsfreiheit und elterlichem Sorgerecht". *Rechtswissenschaft* 1 (2): 115–142.
- Thomas, Fischer. 2008. *Strafgesetzbuch und Nebengesetze, 55*. ed. München: C.H. Beck.

- Germann, Michael. 2013. “Die Verfassungsmäßigkeit des Gesetzes über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes vom 20.12.2012”. *Medizinrecht* 31 (7): 412–424.
- Deutscher Bundestag. 2012. “Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes”. *Bundestag.de,* available at https://www.bundestag.de/btd/17/112/1711295.pdf accessed 28 March 2022.
- Gropp, Walter. 2005. *Strafrecht Allgemeiner Teil*. Berlin, Heidelberg: Springer.
- Herzberg, Rolf Dietrich. 2009. “Rechtliche Probleme der rituellen Beschneidung”. *JuristenZeitung* 64 (7): 332.
- Hörnle, Tatjana and Stefan Huster. 2013. “Wie weit reicht das Erziehungsrecht der Eltern? Am Beispiel der Beschneidung von Jungen”. *JuristenZeitung* 68 (7): 328–339.
- Putzke, Holm. 2008. “Die strafrechtliche Relevanz der Beschneidung von Knaben. Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personensorge”. In Holm Putzke, Bernhard Hardtung, Tatjana Hörnle, Reinhard Merkel, Jörg Scheinfeld, Horst Schlehofer and Jürgen Seier (eds), *Strafrecht zwischen System und Telos. Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag*, 669–709. Tübingen: Mohr Siebeck.
- Schramm, Edward. 2012. “Die Beschneidung von Knaben aus strafrechtswissenschaftlicher Sicht”. In Johannes Heil and Stephan J. Kramer (eds), *Beschneidung: das Zeichen des Bundes in der Kritik: zur Debatte um das Kölner Urteil* , 134–145. Berlin: Metropol.
- Steiner, Nicole. 2014. *Die religiös motivierte Knabenbeschneidung im Lichte des Strafrechts: zugleich ein Beitrag zu Möglichkeiten und Grenzen elterlicher Einwilligung*. Berlin: Duncker & Humblot.
- Yalcin, Ünal. 2012. “Zur Strafbarkeit der Beschneidung”. *Betrifft Justiz* (112): 380–389.
- Zähle, Kai. 2009. “Religionsfreiheit und fremdschädigende Praktiken: Zu den Grenzen des forum externum”. *Archiv des öffentlichen Rechts* 134 (3): 434–454.

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