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

Circumcision without the Knowledge of the Mother

Question(s) at stake:

Whether the consent of the father is sufficient for the circumcision of his son.

Outcome of the ruling:

The justification of a male circumcision requires the consent of all the persons entitled to custody of the child

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Bodily harm
- Bodily integrity
- Genital modifications
- Genital modifications
- Male circumcision

Tag(s):

- Consent
- Different opinions of parents

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Country:

Germany

Official citation:

Local Court Essen, Judgement of 01 September 2016, 58 Ls 91/16 (AG Essen, Urteil vom 01. September 2016, 58 Ls 91/16)

Link to the decision:

https://openjur.de/u/2172877.html

ECLI:

ECLI:DE:AGE1:2016:0901.58LS91.16.00

Date:

01 September 2016

Jurisdiction / Court / Chamber:

Essen Local Court (Amtsgericht)

Remedy / Procedural stage:

First instance court

Previous stages:

- None

Subsequent stages:

- Regional Court (Landgericht) Essen, 22 May 2017, 31 Ns 13/17
- Higher Regional Court (Oberlandesgericht) Hamm, 21 November 2017, 5RVs 125/17
- Regional Court Essen, (date of the judgment not known), 24 Ns 22/18.

Branches / Areas of law:

Criminal law

Facts:

The defendant is a father of two children. He had never been married to their mother, who has sole custody of the children. While the children were spending their summer holidays with him, he brought the eight-year-old son to a circumcision centre and had him circumcised by a physician. Before the intervention, he had signed a document giving his consent and had to declare at the same time, probably by signing a form, that he was the only person who had custody and that in case there was an additional person who had custody, (s)he consented to the circumcision as well. The mother, however, was neither present at the circumcision nor informed about the father's initiative. In the hearing of the evidence, the defendant claimed that the mother had given her consent, but upon review, the court came to the conclusion that the mother had not agreed, she did not even know of the planned circumcision and was obviously not present during the actual circumcision, which the court found surprising given the importance of circumcision in the Muslim community.

The defendant was convicted for bodily harm and sentenced to a suspended sixth-month prison term.

Ruling:

The defendant was convicted of bodily harm because the consent of the boy's mother was missing and the circumcision had not been necessary owing to urgent medical reasons, art. 223 and 230 German Penal Code (Strafgesetzbuch [StGB]).

Main quotations on cultural or religious diversity:

"Given the importance of the circumcision of a boy in the Muslim community, it can be assumed that particularly the mother – if she had consented – would have been informed about such an event so that she could have been present." (para. 16)

"It had to be taken into account in his favour that it had not been his intention to hurt and inflict pain on his son but to pave the way for him to become a member of the religious community of Islam by creating the conditions that are usual for that in the Muslim society. Circumcision is an established tradition in Muslim and Jewish societies and is also widespread in the United States, Africa, and the Arab

world. By introducing the new Section 1631d of the German Civil Code, the German legislature classified the circumcision of a male child who does not yet have sufficient cognitive faculty and judgement as lawful under certain circumstances thereby decriminalizing this tradition, which is usual and rooted in other cultures." (para. 28)

Main legal texts quoted in the decision:

- Sections 46 223 (para 1) and 230 of the German Penal Code (Strafgesetzbuch [StGB])
- Section 1631d of the German Civil Code (Bürgerliches Gesetzbuch [BGB])

Cases cited in the decision:

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Commentary

Circumcision without the Knowledge of the Mother

After a vivid discussion about the punishability of male circumcision, the German legislature in 2012 passed Section 1631d of the German Civil Code (*Bürgerliches Gesetzbuch* [BGB]), which enables parents to request the circumcision of their son within the framework of their right to care and custody if certain requirements are fulfilled (see CUREDI033DE001). One of these requirements is the informed consent of the parents who have custody. If both have custody, both must consent. If only one of them has custody, it is sufficient if s(he) consents.

The present case illustrates that in practice, parents may have different opinions about circumcision: in this situation, the father wanted to have the son circumcised and took advantage of the temporary absence of the mother. Similar scenarios may occur, e.g., when a Muslim father is separated or divorced from the mother and the son stays with him during the holidays.

Both the defendant and the public prosecutor appealed the judgement, restricting the appeal to the severity of punishment but the points of discussion do not concern cultural or religious diversity.

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

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.
- 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.
- Herzberg, Rolf Dietrich. 2009. “Rechtliche Probleme der rituellen Beschneidung”. *JuristenZeitung* 64 (7): 332–339.
- 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 am 14. Februar 2008,* 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.
- Manok, Andreas. 2015. *Die medizinisch nicht indizierte Beschneidung des männlichen Kindes – Rechtslage vor und nach Inkrafttreten des § 1631d BGB unter besonderer Berücksichtigung der Grundrechte*. Berlin: Duncker & Humblot.
- Steiner, Nicole. 2014. *Die religiös motivierte Knabenbeschneidung im Lichte des Strafrechts – Zugleich ein Beitrag zu Möglichkeiten und Grenzen*

elterlicher Einwilligung. Berlin: Duncker & Humblot.

- Yalçın, Ünal. 2012. “Zur Strafbarkeit der Beschneidung – Ein Plädoyer für die elterliche Sorge”. *Betrifft Justiz* 112: 380–389.

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