

German court bans circumcision on religious grounds

Justus Leicht
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In a sensational judgement at the end of June, the Cologne state court banned the circumcision of boys for religious reasons, ruling that it was an unlawful act of bodily harm.

The verdict violates the constitutionally protected right to the free exercise of religion, as circumcision is an integral part of Islamic and Jewish traditions. The World Health Organisation (WHO) estimates that a third of the world's male population is circumcised.

The Cologne judgment is part of a growing international trend to suppress the open practice of the Islamic religion or to make it a criminal offence—with bans on the Muslim veil or headscarf in several countries, and the widely publicised anti-Muslim diatribes of German Social Democratic politician Thilo Sarrazin.

The decision of the Cologne judges, however, not only affects Muslims but also Jews. European rabbis spoke of the most “serious attack on Jewish life since the Holocaust.”

This was clearly embarrassing for the federal government, which for foreign policy reasons does not want to be tainted by the whiff of anti-Semitism. It has therefore announced that a statutory provision will soon be adopted explicitly allowing professionally performed circumcisions to be carried out on religious grounds. Parliament has confirmed this in a resolution.

The Cologne judgement also found support not only in rightwing and conservative circles, but also with the Greens and the Left Party, as well as some feminists.

The Left Party and several Green deputies did not support the Bundestag (parliamentary) resolution for a rapid regulation of circumcision. The Greens allowed their deputies to vote freely, and several voted against the resolution, citing the defence of children's rights.

The Left Party's religious affairs spokesman, Raju

Sharma, welcomed the Cologne ruling, accusing the federal government of recklessly providing a license for circumcision. This was “nothing more than negotiating a minimum limit for religiously motivated bodily harm”, he said.

The Cologne verdict came about as follows: at the request of both parents, a four-year-old Muslim boy was circumcised by a Muslim doctor. Due to post-procedure bleeding, which is not unusual, the boy was later hospitalized. The hospital called the police, and state attorneys brought charges against the doctor for grievous bodily harm. The basis of the indictment was not any possible malpractice, but the act of circumcision itself.

Initially, the Cologne District Court acquitted the doctor. The judge justified his decision by referring to parental consent: their decision had been based on the interests of the child, because circumcision attests to cultural and religious affiliation. He added that in American and Anglo-Saxon countries, circumcision plays an important hygienic role.

The prosecution then lodged an appeal before the state court. There, a court-mandated expert noted that the doctor had indeed performed perfectly well professionally, but that there were no medical reasons for circumcision (for example due to phimosis, when the foreskin cannot be retracted). He said there was no need—“at least in Central Europe”—for circumcision on general health grounds.

The state court ruled that the doctor had caused unlawful, intentional bodily harm to the boy. It rejected the lower court's reasoning—that the parents' consent to circumcision corresponded to the child's welfare. Possible marginalization within one's own religious environment was judged irrelevant.

The verdict maintains that parents' right to education

and religious freedom should yield to the child's right to bodily integrity and autonomy. The parents must wait and see if their son "later, when he is of age, decides himself to be circumcised as a visible sign of affiliation to Islam."

The state court acquitted the doctor, granting him a mistake of law. In general, a mistake of law occurs when an accused person is found to have been mistaken as to the content of the law and to have committed the act without the criminal state of mind required to have violated the law.

The verdict has serious consequences. Now, any doctor who performs a circumcision must fear prosecution; after the Cologne ruling, the Jewish Hospital in Berlin discontinued all religious circumcisions.

There is no comparable precedent in Germany for the judgement of the Cologne state court. The legal statutes on bodily harm upon which the ruling is based have existed since 1871, but they have never been applied to the circumcision of a boy on religious grounds.

The legal concepts underpinning the state court's verdict are not entirely new, however; they were developed largely by criminal law professors Rolf Dietrich Herzberg and Holm Putzke.

The latter, in a 2008 commemorative publication honouring Herzberg, expressly acknowledged that his key inspiration was a book by Necla Kelek, *The Prodigal Sons: A Plea for the Liberation of Turkish-Muslim Man*. For years, Kelek was a spokesman for anti-Islamic sentiments and defended Thilo Sarrazin's book *Germany Abolishes Itself*. Kelek calls the circumcision of Islamic boys a "hideous archaic custom," an "instrument of repression" deserving to be "outlawed".

Holm Putzke was formerly a fellow of the Christian Democratic Union-affiliated Konrad Adenauer Foundation and deputy chair of the Free Democratic Party-affiliated liberal university group. He currently teaches at the University of Passau.

Much of his essay "The Criminal Relevance of the Circumcision of Boys" reads like a longer version of the Cologne judgment. In it, he goes even further than the state court, and, like the prosecutor, describes circumcision as "dangerous" bodily harm, since it is carried out with "a weapon or dangerous object" (the scalpel). He argues vehemently against abandoning an

investigation because of a lack of public interest in prosecution, as circumcision is frequent.

Putzke's bias is obvious. While he denies parents the right to decide on the circumcision of their son, he grants them the same right when it comes to ear piercing, tattoos or surgery for protruding ears, hooked noses or moles. The wearing of earrings was "socially recognized, aesthetic and even in minors, a sign of individuality," he writes. Even cosmetic surgery served the interests of the child, because the child would otherwise be teased.

But this certainly cannot apply to circumcision, according to Putzke. He declared irrelevant any possible stigmatization of the child if circumcision were not carried out, even though this plays an important role in Judaism and Islam, similar to baptism or confirmation in Christianity. Rather, Judaism and Islam should give up their "bad habits".

Putzke himself recognizes that the risks from a properly conducted circumcision are low and that claims of "psychological consequences" are so far "insufficiently studied" (i.e., not proven). As evidence of "psychological stress, especially due to a religious circumcision", he refers to Necla Kelek, who has neither medical nor psychotherapeutic qualifications.

Reactions to the Cologne verdict show that anti-Semitism and Islamophobia are ideological soul mates. Supporters of the verdict include not only the far-right German National Party (NPD), but also the anti-Islamic blog *politically incorrect*, which usually combines its incitement against Islam with a supposedly "pro-Jewish" attitude.

Michael Stürzenberger, a former Christian Social Union spokesman who is now a leading member of the Freedom Party close to Dutch racist Geert Wilders, accuses Jewish associations and organizations of not distinguishing themselves from Islam "if they cling to the ancient commandment of circumcision."

"It is my firm belief, this is something we cannot allow in our country," he said.



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