

Male circumcision under Polish criminal law

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ABSTRACT

Introduction: Male circumcision is not widely discussed in Poland. This article is the first paper on circumcision in the light of Polish criminal law and anticipates a problem that can happen in the practice of the Polish criminal justice system in the next years. The author has discussed selected issues concerning male circumcision. The subject of deliberations has been circumcision of Jewish infants, taking place on the Polish territory.

Purpose: To examine whether circumcision of infants is prohibited in Polish criminal law and whether a person carrying out neonatal circumcision for religious reason is punishable for a criminal offence.

Materials and methods: The English- and German-language literature and other online available data relating to male circumcision have been examined. The provisions of the Polish Penal Code and other legal acts have been analysed. Moreover, judgements of the Polish courts and the Polish criminal law literature have also been the subject of research.

Results: In Poland, there is no special legislation on male circumcision, in particular, there is no special criminal offence of circumcision. However, a person performing infant circumcision completes the elements of criminal offence consisting of causing bodily injury.

Conclusions: In Polish criminal law, the customary justification of circumcision excludes the unlawfulness of the conduct of the person (called *mohel*) carrying out Jewish infant circumcision for religious reason. In the case of Jewish neonatal circumcision, we deal with so-called secondary legality of the committed act. In the final assessment in the aspect of criminal law, the conduct of a *mohel* is not unlawful and thus is not punishable as a criminal offence.

Key words: male circumcision, removal of foreskin, penalization of Jewish infant circumcision, criminal offence consisting of bodily injury, mistake of law, circumstance excluding unlawfulness

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INTRODUCTION

Male circumcision is not widely discussed in Poland. The majority of the society have heard about male circumcision and have a hazy imagination how it looks. Circumcision is commonly associated with Jews. To the best knowledge of the author, this article is the first paper on circumcision in the light of Polish criminal law. In Poland, the legal scientists do not describe male circumcision in their publications and even do not discuss this topic in academic circles. This article anticipates a problem that can happen in the practice of the Polish criminal justice system in the next years.

This paper is not meant as a complex analysis of the problem. The intention of the author is rather to draw attention to the problem and to evoke discussion among academics. In this paper, the author will discuss only selected issues. The subject of deliberations will be circumcision of Jewish infants, taking place on the Polish territory. The problems as circumcision of non-Jewish infants, circumcision of Muslim boys, and circumcision of adult men will be left out here. It can be, however, mentioned on the margin, that in the last years clinics offering male circumcision have been set up, probably as a sign of a trend promoted in some western countries [1,2]. The issue of circumcision of an adult man is less problematic from the legal perspective since an adult man, being a patient, gives in person his consent to his own circumcision. These deliberations will be devoted to the criminal law aspects of circumcision of Jewish newborns as a problem having the greatest social significance because of the number of Jewish minority members living in our country [3,4]. The deliberations will be led *de lege lata*, i.e. they will concern the current state of the law. The author leaves the issue of the rightness of the status *quo* outside these deliberations.

At the beginning it should be mentioned that there are lots of the English-language literature on the curriculum of the circumcision operation and about its negative consequences and positive results. A lot of the literature is available in the whole text for free on the Internet [5]. A lot of the literature has been written on the basis of the practice in the United States of America [6]. Many papers on circumcision have also been written in Germany in the last few years. The full texts of many German-language papers are freely available to the readers online [7]. For this reason the author of this article has decided to give up a detailed presentation of all aspects of circumcision and to focus on an issue which has not been discussed in the literature so far, that is on male infant circumcision under Polish criminal law.

MATERIALS AND METHODS

The English- and German-language literature and other online available data relating to male circumcision have been examined. The provisions of the Polish Penal Code and other legal acts have been analysed. Moreover, judgements of the Polish courts and the Polish criminal law literature have also been the subject of research.

DISCUSSION

Prior to analyzing circumcision in the light of Polish law, it is desired and justified, because of the same cultural area and the similarity between both legal systems, to concisely present the problem on the grounds of German law. This is even more desired for the reason that the state of the law on circumcision in Germany, being in force before the amendment to the civil code shown beneath, generally corresponded to the current state of the law in Poland. Therefore arguments given in the discussion on the legality of ritual circumcision, presented in the German-language literature, can be transferred to the situation in Poland [8-12]. For the deliberations made below in this paper, the German point of view to the problem in the light of criminal law before the amendment to the civil code is interesting and worth presenting in order to show the difference in the legal assessment of the problem despite the similarity between both legal systems. The relevant amendment to the German civil code (BGB = *Bürgerliches Gesetzbuch*) was made by the statute of 20 December 2012, which came into effect on 28 December 2012 [13]. This statute introduced § 1631d (*Beschneidung des männlichen Kindes*) that reads: (1) The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if the circumcision, even considering its purpose, jeopardizes the best interests of the child. (2) In the first six months after the child is born, circumcision may also be performed pursuant to subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions. This amendment was prompted by a ruling of one of the German criminal courts.

In the given case, a Muslim physician was accused of bodily injury to a 4-year-old boy through circumcising him (carried out *lege artis*), which happened with the consent of his Muslim parents and on religious grounds. A German court (*das Landgericht Köln*), acting as the court of

second instance, in the judgment of 7 May 2012, upheld the judgment of the court of first instance, which declared the physician not guilty. The court of second instance recognized that the physician carried out by his behavior the elements of the criminal offence consisting of bodily injury and that his behavior was unlawful. The court expressed an opinion that the right of parents to religious upbringing of their child has no precedence over the right of the child to bodily integrity and self-determination. The court also held that circumcision motivated by religious beliefs of parents infringes the right of the child to autonomous decision on his religious affiliation in the future. The court recognized, however, that the accused acted in a mistake of law (*error iuris*), which was impossible to avoid and therefore excludes guilt. The impossibility to avoid the given mistake was justified by the unclear state of the law and different opinions on the legality of circumcision expressed in the literature and judicature [14].

Both the above ruling of the court and the amendment to the civil code gave rise to a great deal of discussion in both scientific and political circles. The ruling of the court, as well as the opposite stance of the governing party, expressed in the amendment to the civil code, became the subject to harsh criticism [9,15-17].

In the current state of the law in Poland there is no regulation on male circumcision, especially there is no provision like § 1631d BGB. It does not mean that there is no legal problem, even if it is not noticed and discussed. It should be considered, whether, *de lege lata*, neonatal circumcision is prohibited under a penalty. It seems that if this question was asked non-Jewish members of Polish society, being non-lawyers, the answer would be that circumcision is not prohibited (that circumcision is neither criminal offence nor contravention). Another thing is that people do not know how in detail circumcision is performed and what negative consequences of circumcision are. The conviction that infant male circumcision is not prohibited under a penalty is closely connected with the knowledge on the motive of the conduct thereof. It is commonly known that the command of Jewish circumcision comes from the Torah. The section of the Torah stating about this command (Chapter 17 of Genesis) is less known. In Poland there are not available statistic data on the scope of the phenomenon of male circumcision. To the best knowledge of the author, no social research on circumcision has been or is currently conducted in Poland. Therefore it is difficult to estimate the range of circumcision cases among Jews living in Poland in our times, since – like in the whole world – not all Jews practice circumcision. Some say that they are secular Jews (Jews only by ethnicity). Some are strongly oppose to traditional ritual of

circumcision and promote an alternative form [18-22].

The legal explanation for the lawfulness of male circumcision is problematic. At this moment of deliberations, a mention can be made that the fact that police and prosecutors do know that the acts of circumcision are committed among members of Jewish society on the Polish territory and do not undertake any actions (no criminal investigations are commenced), despite the application of the principle of legality (Article 10 of the Polish Criminal Procedure Code [23]), weighs in favor of the conviction that acts consisting of infant male circumcision are legal.

The subject of the analysis will be an act of circumcision in the situation taking place in Poland the most frequently, that is circumcision of a Jewish male newborn for religious reason, on the initiative or at least with the consent of his parents, carried out by a Jew specially trained to do it (called *mohel*, not necessary being an educated physician [24]) and at home or in similar premises (i.e. not in hospital), carried out correctly (at least in the light of Jewish customs). The question about possible criminal responsibility of a person directly performing circumcision (*mohel*) as well as persons participating in the circumcision act (mainly parents) arises. The basic issue which should be analyzed is the question whether the behavior of a *mohel* completes the elements of a criminal offence. In Polish substantive criminal law *sensu largo* there is no separate criminal offence consisting of circumcision. The general types of criminal offences consisting of bodily injury are therefore relevant.

The criminal offences consisting of bodily injury are penalized in Article 156, Article 157 § 1 and Article 157 § 2 of the Polish Penal Code [25]. These Articles describe three types of bodily injury, that is serious, medium and light, respectively. Prior to an analysis, the above provisions of the Polish Penal Code should be presented. Article 156 § 1 reads: Whoever causes grievous bodily injury in a form: 1) which deprives a human being of sight, hearing, speech or the ability to procreate, or 2) of another serious crippling injury, a serious incurable illness or a serious long lasting illness, an illness actually dangerous to life, a permanent mental illness, a permanent total or substantial incapacity to work in an occupation, or a permanent substantial bodily disfigurement or deformation is liable to imprisonment for a term from 1 to 10 years. Article 156 § 3 is the following: If the consequence of an act specified in § 1 is the death of a human being, the perpetrator is liable to imprisonment for a term from 2 to 12 years. The provision of Article 157 § 1 states: Whoever causes bodily injury or impairment to health, other than specified in Article 156 § 1, is liable to imprisonment for a term from 3 months to 5 years.

Article 157 § 2 reads: Whoever causes bodily injury or impairment to health lasting no longer than 7 days, is liable to a fine, penalty of restriction of freedom or imprisonment for a term not exceeding 2 years. The provisions of both Articles penalizing unintentional conduct have been left out here as irrelevant in these deliberations.

Making decision which one of the above-given provisions would be applicable in case of male circumcision demands explaining what it consists of and showing its negative health consequences. The word 'circumcision' is derived from the Latin *circumcidere*, meaning 'to cut around' [26,27]. Male circumcision consists of the surgical removal of the foreskin (prepuce), the tissue covering the head (glans) of the penis [28]. Among physicians, especially American, there are both supporters and opponents of infant circumcision [29-32]. In the European legal and cultural area, objectors to circumcision clearly predominate. Many pediatric organizations have expressly spoken out against infant circumcision [33-35]. In the literature, both the health risks and benefits of infant circumcision are presented [36-40]. The analysis of the arguments given in the literature has led the author to the opinion that, in the aspect of human health, the negative consequences of circumcision substantially take precedence over the possible advantages of circumcision. The physical health complications and other negative consequences of circumcision will be indicated below.

The complications of every male circumcised include: loss of sexual sensitivity (15+/- cell layer increase in thickness of surface of glans penis), loss of the foreskin, loss of the frenulum, progressive loss of glans sensitivity, a scar on the penis, and changes in urethral orifice. The common complications are: hemorrhage, infections, meatitis (inflammation of the opening of the penis), meatal stenosis (constriction of the urethral opening), bridging (adhering of the cut edge to the glans creates tunnels), pubic hair on penile shaft pulled onto shaft after removal of too much foreskin, tight scar on shaft, curving of penis (due to removal of too much skin, often not apparent until an erection), pain with erection, bleeding during sexual intercourse, concealed or hidden penis (cut surface of remaining skin adheres to itself, burying glans), removal of too much skin, wound separation, and urinary retention [41]. The negative influence of circumcision on the mental health of a man is also important. The following effects and feelings were here noted: anger, rage, sense of having been victimized and mutilated, sense of loss, shame; low self-esteem, grief, fear, and distrust; relationship difficulties and sexual anxieties; depression; reduced emotional expression; avoidance of intimacy in male-female relationships, attitudes toward pain and stimulation;

reduced empathy [42,43]. It should be emphasized that not every of the above consequences for the physical health comes into existence in every case. It is also obvious that not every circumcised man feels the above consequences in the area of his mental health. However, it is important to point out that the foreskin plays a particular role and is not only a redundant piece of skin [44,45].

It is to discuss which of the above-cited provisions on causing bodily injury covers the negative health consequences of circumcision. It should be stated that circumcision carried out correctly neither constitutes nor leads to grievous bodily injury. In particular, it does not lead to the deprivation of the ability to procreate. A thesis that a circumcised man is a cripple (and this is serious crippling injury in the meaning of Article 156 § 1 paragraph 2 of the Polish Penal Code) would be very doubtful as well. Among other consequences constituting grievous bodily injury, a permanent substantial bodily disfigurement or deformation comes into play. The lawmaker used the aesthetic criterion, when introducing this kind of serious bodily injury. In the Polish criminal law literature, disfigurement is usually described as causing external changes to the body that contradict the widely accepted esthetic of the body [46]. Disfigurement does not consist of an anatomical change and is associated with the appearance of the body [47]. Therefore, it cannot be generally stated that circumcision causes disfigurement of the body. Although lots of women prefer the intact penis and for many women as well as men unnatural look of penis is unaesthetic, there are adult men who independently decide to undergo the circumcision operation just for aesthetic reason. There are also women who encourage or induce their sexual partners to get circumcised, sometimes only for the reason to gain more aesthetic appearance [48,49]. It can be stated that circumcision causes deformation of the body. This type of bodily injury consists of causing changes in the anatomical shape of the body [50]. These changes modify the normal shape of the body [47]. It should be underlined that deformation may concern any part of the body and not only the face or other usually uncovered body parts [51]. The removal of the foreskin is a permanent deformation of the body. It is not obvious, however, whether this kind of deformation should be qualified as 'substantial' in the meaning of Article 156 of the Polish Penal Code. It seems not. Circumcision can be generally qualified as medium bodily injury. It is very likely that the consequences of circumcision would last longer than seven days and therefore the act in question would not be covered by Article 157 § 2 which penalizes so-called light bodily injury. Summarizing, the perpetration of circumcision of an infant male constitutes the completion of the

elements of an act prohibited under a punishment by the Polish Penal Code.

The above statement does not automatically mean that a person carrying out circumcision (a *mohel* in most cases) commits a criminal offence. Under Polish criminal law, there are legal institutions which may exclude a criminal offence, although the elements of this offence have been completed. These institutions may exclude an element in the structure of the criminal offence, for example the guilt. A justified mistake of law is one of these institutions. According to Article 30 of the Polish Penal Code, whoever commits a prohibited act while being justifiably unaware of its unlawfulness, shall not commit a criminal offence; if the mistake of the perpetrator is not justifiable, the court may apply an extraordinary commutation of the punishment. At this section of the paper, it is worth reminding that the German court pointed exactly at this institution in the above-cited judgment, that is it justified its ruling with the (impossible to be avoided) mistake of law, when declaring the accused not guilty. It should be noted that only one perpetrator of circumcision could invoke the mistake of law in court. Moreover, he could do it only once since if a criminal process in a case of circumcision happened, the case – being a precedence - would be reported by mass media and discussed in public. No next perpetrator of circumcision could justify himself by saying that he didn't know that infant circumcision was a criminal offence. The acceptance of this legal solution would actually lead to the acknowledgment that in Poland neonatal circumcision on religious grounds constitutes criminal offence, whereas – as I already mentioned earlier - the state of the law is currently different.

In my opinion, a solution to this issue should be searched on the plane of unlawfulness. A circumstance excluding unlawfulness may be the legal ground for the exclusion of criminal responsibility. The basic issue, which is to discuss here, is the question whether behavior of a *mohel* is unlawful. There are two conditions of unlawfulness of an act, that is: 1. an attack on an interest protected by law (legal interest); 2. violation of a rule of dealing with a legal interest [52]. It should be examined whether an attack on a legal interest occurs in case of circumcision. The answer is yes. The attacked and violated legal interest is the health of an infant, his corporal inviolability and genital integrity as well as his intimacy, and also the freedom to choose religion in the future while not being marked by the stigma of circumcision. A *mohel* consciously violates rules of dealing with these legal interests, for example with health, through causing a physical injury to the body. It should be noted on the margin that it wouldn't be an attack on the legal interest if circumcision would be recommended for therapeutic reason, for

example in case where a patient suffers from phimosis (inability to retract a fully differentiated foreskin) [53]. In such a case, a person carrying out circumcision (the person would be an educated physician) does not attack health, but saves it. The conduct of the doctor carrying out circumcision would be originally legal [54]. There are no medical reasons in cases being the subject of the analysis in this paper. In these cases, circumcision is carried out on a healthy newborn for religious reason.

The above statement that the conduct of a *mohel* attacks legal interests and violates rules of dealing with these legal interests does not definitely mean that the behavior in question is unlawful, since a circumstance excluding unlawfulness may exist in a case. Circumstances excluding unlawfulness are referred to as 'justifications' or 'legal justifications' (in the Polish criminal law doctrine they are described with a specific term '*kontratypy*' [55,56]). There are the following general premises of the existence of a legal justification (general elements of so-called 'justification's situation'): 1. a collision of legal interests, 2. necessity to devote one of the legal interests being in the collision, 3. social profitability of devoting this legal interest [57]. In case of circumcision, the following legal interests are in the collision: on the one hand, legal interests lying on the side of an infant (health, corporal inviolability, genital integrity, intimacy, right to self-determination), and on the other hand, legal interest lying on the side of his parents, which is the right of parents to raise their child in their religion (Article 53, paragraph 3 of the Polish Constitution states that parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions). This right can be exercised through, among other things, practicing religious customs and rites. The legal interests being in the collision cannot stay inviolate, that means maintaining Jewish rite (to follow the command described in the Torah, Genesis, Chapter 17, sentences 10-14) demands circumcision of a boy on the eighth day after birth (to mark the covenant that God made with Abraham).

The most difficult issue is here the assessment of social profitability to devote a legal interest. This assessment depends on the accepted system of values. It could be argued that – beside the individual legal interests indicated above – the legal interest in the form of religious identity of a social group has a significance as well. This legal interest is lying on the same side as the legal interest in the form of the right of parents to bring up their child in accordance with their religious beliefs. It could be assessed that these two legal interests outweigh the individual legal interests of child. Moreover, the legal interest in the form of the right of child to be brought up in religion since

birthday can argue for the social profitability of circumcision [58].

The next issue is the question whether a specific circumstance excluding unlawfulness of causing bodily injury exists in Polish criminal law. In other words, the question is whether a legal justification of circumcision exists under Polish criminal law. It is obvious that there is no such a justification either in the Polish Penal Code or in other statute. Nevertheless, so-called uncodified justifications (i.e. justifications not provided for in a statute) function under Polish criminal law. They are also referred to as 'customary justifications'. They are already deep-rooted in Polish criminal law. However, it should be mentioned here that singular voices challenging the existence of these justifications appeared in the Polish literature [59-61]. Nonetheless, the majority of the Polish criminal law researchers speak in favor of the acknowledgment of such uncodified circumstances excluding unlawfulness [62-70]. The institution of customary justifications has been also accepted by the Polish Supreme Court [71-75]. The author of this paper belongs to the adherents of customary justifications. It should be highlighted that customary justifications actually function in the Polish legal system. They include: so-called *śmigus-dyngus* (Easter Monday custom of dousing other people with water), tokens of appreciation (giving small gifts to persons performing a public function), and New Year's Eve (disturbing night's silence through thunderous and wild celebrating), to give some examples [65,76,77].

It should be stated that circumcision fulfills the above-given general premises of legal justifications. Moreover, it seems that circumcision of Jewish infants is accepted by the majority of the Polish society, although practiced only by a small part of it. It can be, thus, recognized that circumcision is a socially accepted custom.

The acts consisting of circumcision of Jewish male newborns are commonly perceived as acts based on tradition and therefore accepted. It should be pointed out that the legal justification of circumcision may be applied in practice by the investigation and prosecution organs and, as it may be that, exactly on this uncodified grounds (although it happens in a tacit way), the perpetrators of causing bodily injury to infants through circumcising them are not prosecuted. So far nobody in the literature has included circumcision to the catalogue of customary justifications. It does not surprise if the subject of circumcision does not appear in the legal literature.

The author of this paper creates here a new legal justification in that way that she expressly includes the justification that already actually functions to the catalogue of customary justifications.

CONCLUSIONS

To summarize, the following should be stated. A *mohel* attacks legal interests and completes by his conduct the elements of criminal offence consisting of causing bodily injury. Under Polish criminal law, the customary justification of circumcision functions and excludes the unlawfulness of the behavior of a *mohel*. In the case of Jewish infant circumcision we deal with so-called secondary legality of the committed act [78]. In the final assessment in the aspect of criminal law, the conduct of a *mohel* is not unlawful and thus it is not punishable as a criminal offence.

In the deliberations carried out above, the author has undertaken an attempt to solve the legal problem consisting of theoretical explanation of the legal situation of a person carrying out circumcision in the light of criminal law. The author has made an analysis on the basis of the current state of the law. The findings presented here do not mean that the author is a supporter of the ritual of circumcision. The conclusion, that the author has reached after analysing the current law, does not mean that the author is personally convinced of the rightness of the solution *de lege lata* (as the law is).

Conflicts of interest

None to declare.

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