

## **Female genital mutilation in light of Polish criminal law**

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### **ABSTRACT**

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**Introduction:** Female genital mutilation is a practice that causes devastating physical, psychological, and social consequences for girls and women. Female genital mutilation is internationally recognized as a violation of the human rights of girls and women.

**Purpose:** To examine whether women are appropriately protected against female genital mutilation under Polish criminal law, in particular, whether a special criminal offence should be created.

**Materials and methods:** The international legal acts, reports and other online available data related to female genital mutilation have been examined. The provisions of the Polish Penal Code and the relevant regulations of English criminal law have been analysed. Moreover, judgements of the Polish courts and the literature have also been the subject of research.

**Results:** In Poland, there is no special legislation on female genital mutilation. However, female genital mutilation is punishable under general criminal law provisions. Female genital mutilation is a criminal offence and can be prosecuted as a form of grievous bodily injury or as a form of bodily injury and impairment to health.

**Conclusions:** A legislative action is needed to ensure that acts of female genital cutting are criminalized irrespective of the place of their commission. The Polish criminal lawmaker should make female genital mutilation exempt from the condition of double criminalization.

**Key words:** female genital mutilation, female circumcision, infibulation, penalization of female genital mutilation, grievous bodily harm, violence against women

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## **INTRODUCTION**

Female genital mutilation is a global health issue that can have devastating physical, psychological, and social consequences for girls and women [1]. The term ‘female genital mutilation’, commonly abbreviated to FGM, refers to procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons. Female genital mutilation consists of partial or total removal of the external female genitalia or other injury to the female genital organs [2]. This mutilation is sometimes referred to as female circumcision [3].

There are a few types of FGM. According to the World Health Organization (WHO) modified typology of 2007, which replaced the typology of 1995, there are four following types of FGM:

- Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).
- Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).
- Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).
- Type IV: Unclassified: All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization [4].

Recent estimates indicate that around 10% of cases are infibulations. This is the most severe form of FGM, also known as pharaonic FGM, as opposed to so-called sunna FGM that can refer to the first and second type [5].

The World Health Organization emphasizes that ‘Female genital mutilation has no known health benefits. On the contrary, it is known to be harmful to girls and women in many ways. First and foremost, it is painful and traumatic. The removal of or damage to healthy, normal genital tissue interferes with the natural functioning of the body and causes several immediate and long-term health consequences’ [6].

The immediate consequences include: severe pain, bleeding, shock, wound infections (including, for example, gangrene, as well as blood-borne viruses such as, for example, HIV), inability to urinate, injury to vulval tissues surrounding the entrance to the vagina, and damage to other organs nearby, such as the urethra and the bowel. It is not unknown that a girl or woman die from the effects of such mutilation of her genitals. The long-term health consequences comprise: chronic vaginal and pelvic infections, abnormal periods, difficulty passing urine, and persistent urine infections, kidney impairment and possible kidney failure, damage to the reproductive system, including infertility, cysts and the formation of scar tissue, complications in

pregnancy and newborn deaths, pain during sex and lack of pleasurable sensation, psychological damage, including low libido, depression and anxiety, flashbacks during pregnancy and childbirth, and the need for later surgery to open the lower vagina for sexual intercourse and childbirth [7]. There are also observed psychological and mental health problems. Victims of FGM report that genital mutilation is an extremely traumatic experience, which stays with them for the rest of their lives. Moreover, they report feelings of betrayal by parents, as well as regret and anger [8].

It is important to appreciate the scale of the problem. The World Health Organization estimates that between 100 and 140 million girls and women worldwide have been subjected to one of the first three types of female genital mutilation. On the basis of the most recent prevalence data, it is estimated that 91.5 million girls and women above 9 years old in Africa are currently living with the consequences of female genital mutilation. There are an estimated 3 million girls in Africa at risk of undergoing female genital mutilation each year, which makes approximately 8000 girls per day. Types I, II and III of FGM have been documented in 28 countries in Africa and in a few countries in Asia and the Middle East. In Africa, countries with high prevalence rates are, for example, Somalia, Egypt and Mali. Some forms of female circumcision have also been reported from other countries, including among certain ethnic groups in Central and South America. Growing migration has increased the number of girls and women living outside their country of origin who have undergone female genital cutting or who may be at risk of becoming victims of this practice [9].

A natural question arises, namely, why such an abhorrent, horrendous and barbaric practice still happens in the 21<sup>st</sup> century. Female genital mutilation is carried out for cultural and social reasons, and, sometimes, for religious reasons [10]. It is usually considered necessary to raise a girl properly and to prepare her for adulthood and marriage. A circumcision ceremony has been traditionally held as a rite of passage from childhood to womanhood, however, it can be noticed in recent decades that younger and younger girls have been cut; it even happened that a week old baby-girl was genitally mutilated [11]. Many communities believe that partial or total removal of female genital organs reduces a woman's libido and discourages sexual activity before marriage, and thus it ensures and preserves a girl's or woman's virginity. It is also thought to restrain sexual desire, and thereby ensuring marital fidelity. Women sometimes express an opinion that FGM in the form of infibulation is meant to enhance men's sexual pleasure. It is also believed that cutting makes a girl beautiful by making her genital part of body smooth. In some

communities, the practice is associated with religion, i.e. it is seen as a religious obligation [12]. However, even though the practice can be found among Muslims, Christians and Jews, none of the holy texts of any of these religions prescribes female genital mutilation. Moreover, the practice pre-dates both Christianity and Islam. The role of religious leaders is important in this field. The attitude of contemporary religious leaders varies. Some of them still support the practice, while many others, especially those living in Europe [13], participate in efforts to eliminate the practice. Girls and young women living in traditional communities, both in their countries of origin or in European states, are under pressure to undergo the procedure. Young women living in remote communities in less developed countries especially, in particular in African countries, are under a very strong social pressure to be cut to become a member of their society. Cases even happen, where mutilated women say that it stinks when a non-circumcised woman comes into the room. Female genital mutilation is often a social convention and it is difficult for families to abandon it without support from the wider community. Anyone departing from the norm may face condemnation and ostracism. It is believed that nobody will marry a girl who has not been circumcised. Having their daughter married and getting a dowry from the husband's family is a key factor for many families to continue the practice [14].

The circumcision is usually made in an abhorrent and terrifying manner. It takes place in a house or shelter or even under a tree where some or many girls are brought together. They are cut during the same ceremony and usually with the same tool, such as a knife, a piece of broken glass, a razor blade, scissors or even a sharp stone. The tools are frequently not sterilized. No anesthesia is used. The cutting is usually performed by a traditional circumciser (usually an older community member). Assisting women often close the eyes of the screaming girl and stuff a cloth into her mouth. To cool down the sharp pain, a raw egg is broken on the wound and to stop bleeding, traditional herbs and thorns are put on the wound. Some thorns are used to sew up the wound [15]. Hygiene conditions are terrible. No gloves are worn during the operation and hands may not be washed at all. The circumciser's finger nails are used as pincers during the operation. Rings and amulets are rarely removed before the operation [16]. If the infibulation is not proper, i.e. not tight enough, that is the girl's family regard the remaining hole (the vaginal opening) as too large, the procedure is repeated [17]. The custom is that the groom deinfibulates his bride with his penis. If the man is not able to do it, he uses a little knife or the woman is deinfibulated by a midwife [18]. In some areas the 'opening up' occurs as part of a ceremony and in the presence of female relatives of the bride

and groom to verify that the bride is a virgin at the time of marriage [19].

As stated above, the mutilation of female genitals is traditionally performed by a non-professional circumciser. However, in recent years, a phenomenon of so-called medicalization of the practice has occurred. There has been an increase in the proportion of FGM operations carried out by trained health-care providers. For example, today in Egypt 94% of women arrange for their daughters to undergo the 'medicalized' form of FGM. WHO and UNICEF point out that this approach may reduce some of the immediate consequences of the procedure, such as pain and bleeding, but it also tends to obscure its human rights aspect and could hinder the development of long-term solutions for ending the practice [20].

While infibulation and reinfibulation (usually after giving birth) are forms of female genital mutilation and therefore illegal, an opposite intervention to female genitals, called defibulation, is legal and may be necessary. Medical services in some countries offer so-called surgical 'reversal' to the women and girls who were subjected to genital cutting. As stated at the official website of the National Health Service in the United Kingdom, 'Surgery can be performed to open up the lower vagina. This is sometimes called "reversal", although it cannot restore sensitive tissue that has been removed. Surgery may be necessary for women who are unable to have intercourse, as the vagina is too narrow. In addition, some pregnant women who have had FGM will need to have their lower vagina opened up before labour, to allow a safer birth. [21]. A different and controversial issue is a clitoral reconstruction. Some doctors offer such reconstructive surgery. Dr Barri from Barcelona, in Spain, is one of them. In an interview made by a BBC reporter, he explained that 'The aim of the operation is to restore the clitoral anatomy and its function. It means removing all scar tissue, and then identifying the remaining clitoris and replacing it in the natural place. It isn't complicated surgery.' Dr Barri learned how to carry out the operation when he studied in Paris. The technique was pioneered by a French surgeon. There is, however, some criticism of such operations. Some experts say that the claims are not anatomically possible and the operation cannot possibly work. Dr Barri's reply to the criticism was this: 'I've never seen any mutilated woman without remaining clitoris. Whenever we need to remove the whole clitoris - for example in the case of cancer - it's not an easy thing to do. Normally the patients, at least the ones that survive the FGM, will always have a remaining clitoris. So they can always benefit from replacing it in the right place.' Moreover, Dr Barri emphasized that, apart from a physical outcome of the operation, there is a psychological effect and 'that's about not being different any more'. But his opponents claim that carrying out such operations

undermines the campaign to prevent FGM [22].

## **DISCUSSION**

As stated by the WHO, 'FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women. It is nearly always carried out on minors and is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death. [23].

There are many international and regional documents aiming at the protection of the human rights of girls and women. The documents established in the forum of the United Nations Organization include, for example, the Universal Declaration of Human Rights of 10 December 1948, the Convention on the Elimination of all Forms of Discrimination against Women of 18 December 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, and the Convention on the Rights of the Child of 20 November 1989. The relevant regional documents include, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, and the African Charter on Human and Peoples' Rights (Banjul Charter) of 27 June 1981 [24]. The international and regional bodies have not stopped their efforts to eliminate female genital mutilation and continue to enact legal instruments aiming at preventing and combating the practice. The latest legal instruments include, for instance, the UN General Assembly resolution of 20 December 2012 on eliminating female genital mutilation and the UN General Assembly resolution of 18 December 2014 on intensifying global efforts for the elimination of female genital mutilations [25]. The World Health Organization plays a key role at the international level and undertakes many actions to eradicate FGM [26]. The European Parliament is also concerned about the practice of FGM and therefore passed the resolution of 24 March 2009 on combating female genital mutilation in the EU and the resolution of 14 June 2012 on ending female genital mutilation [27]. In the first resolution, the European Parliament called on the member states of the European Union to: regard any form of FGM as a crime, irrespective of whether or not the woman concerned has given any form of consent, and to punish anybody who helps, encourages, advises or procures support for anybody to carry out any of these acts on the body of a woman or girl; pursue, prosecute and punish any resident who has committed the crime of FGM, even if the offence was committed outside their borders

(extraterritoriality); and adopt legislative measures to allow judges or public prosecutors to take precautionary and preventive measures if they are aware of cases of women or girls at risk of being mutilated.

A few years ago the Council of Europe passed a significant legal act concerning, among other things, the practice of FGM. This is the Convention on preventing and combating violence against women and domestic violence, adopted by the Council of Europe Committee of Ministers on 7 April 2011. The Convention opened for signature on 11 May 2011 on the occasion of the 121st Session of the Committee of Ministers in Istanbul; that is why it is called the Istanbul Convention [28]. It is the first European legally-binding instrument specifically devoted to violence against women. The Convention explicitly makes an act constituting female genital mutilation a criminal offence. This is the first time a document in the form of an international treaty has created a special criminal offence of female genital mutilation. Article 38 of the Convention, entitled 'Female genital mutilation', states: 'Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a) excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; b) coercing or procuring a woman to undergo any of the acts listed in point a; c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.' As given in the Explanatory Report to the Convention, lit. a) criminalizes acts of FGM, including when performed by medical professionals, as enshrined in the WHO World Health Assembly Resolution 61.16 on accelerating actions to eliminate female genital mutilation. Lit. b) covers the act of assisting the perpetrator to perform acts of FGM by coercing or procuring a woman to undergo FGM. Lit. c) criminalizes the act of assisting the perpetrator to perform acts of FGM by inciting, coercing or procuring a girl to undergo FGM. The provision under lit. c) is limited to girl victims only and includes situations where anyone, in particular parents, grandparents or other relatives coerce their daughter or relative to undergo the procedure [29].

At the official website of the Council of Europe, it is stated that many girls and women in Europe are affected or threatened by FGM and this is a fact that has long remained unacknowledged. Girls and women are either at risk of being taken to their parents' country of origin or of undergoing the procedure of FGM in a Council of Europe member state. Further, it is stated that in Europe there is widespread ignorance as to what constitutes FGM and the devastating impact it has on women's lives. They go on to say that the Istanbul Convention recognizes the existence of FGM in Europe and that introducing national legislation on FGM is the first step in recognizing the severity of this practice and

ensuring that such acts are appropriately prosecuted [30]. The Convention requires states parties to criminalize and prosecute, among other behaviours, female genital mutilation, whether the mutilation is carried out in their territory or abroad by or against one of their nationals or permanent residents. States parties shall ensure that their jurisdiction over FGM cases is not subordinated to the condition that the acts of FGM are criminalised in the territory where they were committed (Article 44). This means that the condition of double criminalization (the condition of dual criminality) is not applicable. States shall ensure that the offence of FGM is punishable by effective, proportionate and dissuasive sanctions (Article 45). The provision of Article 46 provides for aggravated circumstances that should be taken into consideration at sentencing. Thus, a severe sentence should be imposed on, for instance, re-offenders and in cases where the victim is a child.

The Istanbul Convention is supposed to gain a global extent as it is open for signature by the member states of the Council of Europe and the non-member states which have participated in its elaboration and by the European Union, and for accession by other non-member states. The Treaty entered into force on 1 August 2014, after having been ratified by 10 states, including 8 member states. It establishes a specific monitoring mechanism in order to ensure effective implementation of its provisions by the parties. As of 11 February 2015, the total number of ratifications or accessions is 16. Poland signed the Convention on 18 December 2012 but has not ratified it to date [31].

It is worth mentioning the International Day of Zero Tolerance for Female Genital Mutilation. The day is marked each year on 6 February. Zero Tolerance Day originated on 6 February 2003, when the first lady of Nigeria officially declared "Zero Tolerance to FGM" in Africa during a conference organized by the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. Since then, this day has been observed around the world [32]. The UN General Assembly in the resolution of 20 December 2012 called upon its member states to continue to observe 6 February as the International Day of Zero Tolerance for Female Genital Mutilation and to use the day to enhance awareness-raising campaigns [33].

The legislative measures made at international and regional levels, as well as many summits [34] and conferences about the negative consequences of female genital mutilation have brought some effects. Studies carried out on the behalf of the WHO indicate that the number of FGM cases worldwide has decreased [35]. It is estimated that there is 33% less chance a girl will be cut today than 30 years ago [36]. The national legislation on criminal law plays an important role in preventing

female genital cutting. This is especially important in the continent with the highest prevalence rates of FGM, i.e. in Africa. Most African countries have either laws that specifically prohibit the practice of FGM (for instance, Egypt, Senegal, Tanzania) or no specific laws, but existing general provisions of penal codes which can be applied to FGM [37]. To illustrate the situation in another continent, a case from the United States of America can be examined. In the United States, the first criminal conviction for an act consisting of female circumcision was in January 2006. An Ethiopian immigrant was convicted of the genital mutilation of his 2-year-old daughter and was sentenced to 10 years in prison. According to the factual findings, he used scissors to remove his daughter's clitoris in his family's apartment in 2001. At that time, federal law specifically banned the practice of genital mutilation, but many states did not have a law addressing it. Georgia lawmakers passed an anti-mutilation law in 2005. The accused was not tried under that law since it did not exist when he performed the circumcision. He was found guilty of aggravated battery and cruelty to children [38].

In most European countries female circumcision is punishable as a criminal offence. However, most Council of Europe member states do not have specific legislation on female genital mutilation [39]. A recent study on FGM in the European Union and Croatia showed that in all EU member states, legal provisions dealing with bodily injury, mutilation and removal of organs or body tissue, are applicable to the practice of FGM. In some countries, however, a specific criminal law has been enacted to address the problem of FGM. These countries are, for example, Austria, Belgium, Cyprus, Denmark, Italy, Spain, Sweden and the United Kingdom. In 1982, Sweden was the first European country to adopt specific legislation on FGM. It was followed by the United Kingdom in 1985. It should be emphasized that there is no substantial evidence that specific criminal law provisions are more effective in prosecuting and punishing acts of FGM. The study outcomes showed that a limited number of criminal cases on FGM have been brought to courts in Denmark, Sweden, France, Italy, Spain and the Netherlands and that the majority of these cases took place in France, where FGM is punishable under general criminal law and a specific criminal law on FGM is not deemed necessary. However, a gradual trend across EU member states is the introduction of FGM-specific criminal legislation, as stated in the report [40].

The situation and legislation in the United Kingdom (UK) is worth presenting because this state has carried out many actions, including awareness-raising campaigns, and launched many programs, including prevention programs [41], to face the problem of FGM. In the United Kingdom, clear information on FGM is easily available online and

this is of great practical significance. It is estimated that up to 137,000 women and girls living in England and Wales could have undergone FGM [42]. According to another source, it has been estimated that each year over 20,000 girls under the age of 15 are at risk of FGM in the UK, and that 66,000 women in the UK are living with the consequences of FGM. To help girls and women who have been subjected to FGM, there are a number of specialist clinics within the National Health Service that offer a range of healthcare services, including reversal surgery [43]. To prevent and combat the practice, legislative measures have been established. In English criminal law, female genital cutting has been punishable as a special criminal offence since 1985, when the Prohibition of Female Circumcision Act was passed. In 2003 the Female Genital Mutilation Act was enacted which came into force on 3rd March 2004. It applies in England, Wales and Northern Ireland and does not extend to Scotland where a relevant statute of 2005 is in force. The Female Genital Mutilation Act 2003 changed, among other things, the terminology from circumcision to mutilation. Moreover, it introduced the principle of extraterritoriality, which has the effect that an act is punishable even if committed in a country where the practice is not considered illegal. This statute also increased the maximum penalty for FGM from 5 to 14 years' imprisonment. Under section 1(1) of the FGM Act 2003, 'A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris'. Subsection (2) makes an exception for necessary surgical operations and operations carried out in connection with the labour or childbirth. Section 2 provides for an offence of assisting a girl to mutilate her own genitalia ('A person is guilty of an offence if he aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris.'). However, a girl carrying out an FGM operation on herself does not commit an offence. Section 3(1) establishes an offence of assisting a non-UK person to mutilate overseas a girl's genitalia (A person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or permanent United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom). For example, a person commits an offence when he arranges by telephone from his home in England for his UK national daughter to undergo FGM abroad by a foreign national who is not a permanent UK resident. According to the provisions of the FGM Act 2003, it is also an offence when, for instance, a person in the UK advises his UK national brother over the telephone how to carry out genital cutting of his daughter abroad. Under section (4), there is an offence when, for instance, a permanent UK resident takes his permanent UK

resident daughter to the doctor's surgery in another country so that an FGM operation can be carried out [44]. It has been pointed out in the British media that despite FGM being outlawed years ago no-one has been prosecuted so far [45]. The main reason for this has been evidential problems [46] due to the familiar and very intimate character of the issue. It was not until 21 March 2014 that the first UK prosecutions over female genital cutting were announced by the Crown Prosecution Service. It was alleged that following a patient giving birth in November 2012, a doctor at a London hospital repaired FGM that had previously been performed on the woman (by stitching the woman back up (a 1.5 cm stitch), i.e. of sewing up the woman's vagina following the birth, and in this way re-doing the mutilation, i.e. reinstatement of FGM known as reinfibulation, which she suffered as a six-year-old girl in Somalia), thus carrying out FGM himself. The second accused has been charged with the offence of intentionally encouraging FGM. The doctor maintained that it was one simple figure-of-eight stitch to stop the patient bleeding. On 4 February 2015 both accused were acquitted by a jury. Following this, the prosecutors were accused of pursuing a "show trial" and the defense barrister said that the doctor had been "hung out to dry and made a scapegoat" for hospital failings [47].

Poland is a party to many international and European conventions concerning human rights. It ratified, for example, the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Poland also signed, but at the moment this paper is written (i.e. February 2015) has not ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence. In Poland, there are no provisions referring *expressis verbis* to female genital mutilation. No legal act enacted by the Polish lawmaker mentions female genital mutilation. Under Polish law, however, there are regulations related to violence against women. The Act on Counteracting Domestic Violence can be seen as the most important act, devoted specifically to this problem [48]. Many provisions of the Family and Guardianship Code aim at the protection of children. There is the National Program for Counteracting Domestic Violence, but it does not mention the problem of female genital cutting. There is no special action plan dealing with female genital mutilation. Moreover, there is not even any data available on FGM prevalence in Poland.

The issue of female genital mutilation in light of Polish criminal law has not been the subject of an analysis made by Polish criminal law researchers so far. The examination of the Polish

criminal law literature has shown that there are no papers on this issue and not even any references to FGM in the commentaries to the Penal Code having as the subject provisions on bodily injury. The examination of the case law has shown that there are also no references to FGM in the judicial decisions. It should be mentioned here, however, that there exists a concise report entitled 'The current situation of female genital mutilation in Poland', available online, which has been made within the framework of the European Institute for Gender Equality and covers the situation as of February 2012 [49]. In this report there is a three-sentence-long reference to criminal law.

The examination of the regulations of Polish law has shown that there is no special criminal law legislation on female genital mutilation. This does not mean, however, that the acts of female genital mutilation could not be prosecuted under Polish criminal law. The research carried out has led to the conclusion that a case of female genital mutilation could be qualified as a type of bodily injury and thus prosecuted. Under Polish criminal law, there are three types of bodily injury that is serious, medium and light. There are three relevant criminal offences in Article 156, Article 157 § 1 and Article 157 § 2, respectively. Prior to a detailed analysis, relevant provisions (or parts of them) of the Polish Penal Code [50] should be presented. Article 156 § 1 states: 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 from 1 to 10 years. Article 156 § 3 reads: If the consequence of an act specified in § 1 is the death of a human being, the perpetrator is liable to imprisonment from 2 to 12 years. The provision of Article 157 § 1 is the following: Whoever causes bodily injury or impairment to health, other than specified in Article 156 § 1, is liable to imprisonment from 3 months to 5 years. Article 157 § 2 states: 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 up to 2 years. The provisions of both Articles criminalizing unintentional conduct have been left out here as irrelevant in this discussion. It is obvious that the subject of penalization is an intentional act of female genital mutilation. Which of the above given provisions would be applicable in a particular case depends on the form of female genital mutilation. Female genital mutilation of type I, II and III (in medical terminology: clitoridectomy, excision and infibulation) should be qualified as serious bodily injury in terms of criminal law. It

seems that female genital mutilation of type IV, so acts such as, for example, piercing or incision, can be generally qualified as medium bodily injury. It seems likely that the consequences of female genital mutilation of this type 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. However, the right decision can only be taken on a case by case basis and it will depend on expert medical advice. To make it clear, female genital mutilation of type I, II or III is covered by Article 156 § 1 (grievous bodily injury) and female genital mutilation of type IV is covered by Article 157 § 1 (bodily injury and impairment to health). In any form, female genital mutilation is a criminal offence under Polish criminal law.

There are a few specific issues to discuss as to the right legal qualification of the act of the perpetrator. As presented above, Article 156 § 1 of the Polish Penal Code is very casuistic, i.e. its structure is very expanded. At charging and especially at convicting a perpetrator, not only the number of article and/or paragraph, but also the number of point, if applicable, should be given. Moreover, in the justification of judgment, it should be specified what the caused grievous bodily injury consists of. For this reason, a detailed analysis of Article 156 § 1 in reference to the types and consequences of female genital mutilation should be made. A few concrete forms of grievous bodily injury should be taken into consideration. First of all, female genital mutilation can be immediately associated with the deprivation of the ability to procreate. The consequence in the form of infertility may occur, although it does not necessarily follow in every case. The example of the continuity of the African population and of many African women who arrange the cutting for their daughters proves that they are able to be inseminated and to deliver a baby. The long-term health consequences comprise kidney impairment and possible kidney failure. The latter could be recognized as 'another serious crippling injury'. Bearing in mind the above-named possible long-term consequences of female genital mutilation, a serious incurable illness or a serious long-lasting illness also comes into play. To give an example, AIDS is a recognized serious and incurable illness. To be infected with HIV resulting in AIDS is a real danger, for instance when the cutting is performed with the same instrument on a few or more girls during the same ceremony, as often happens.

Even in a case where genital cutting was not followed by a special impairment to health, which can be the case where the mutilation was carried out in an appropriate way, in particular by using a sterilized tool, it can still constitute a kind of grievous bodily injury. When creating the criminal offence of grievous bodily injury and defining its scope, the Polish lawmaker used, among other

things, the aesthetic criterion. Thus, grievous bodily injury may consist of a permanent and substantial disfigurement of the body or a permanent and substantial deformation of the body. It seems that on the basis of this criterion, every female genital mutilation of type I, II or III may be qualified as grievous bodily injury. An analysis is required to state which term, disfigurement or deformation, would be more suitable. At the beginning, it should be noted that little attention has been given to this form of grievous bodily injury in the criminal law literature. The authors, especially those of commentaries to the Penal Code, tend to focus on other kinds of grievous bodily injury. This is possibly because of the greater practical significance of those other kinds. It can be supposed that the judiciary relatively rarely deal with bodily disfigurement or deformation. The examination of many judicial decisions (those of appeal courts and the Supreme Court), which were delivered in the period of the application of the current Penal Code, did not yield to find any judgment related to grievous bodily injury in the form of disfigurement or deformation. In the Polish criminal law literature, disfigurement is usually defined as causing external changes to the body that contradict the commonly accepted esthetic of the body [51]. Disfigurement is associated with the appearance of the body and does not consist of an anatomical change [52]. Deformation consists of causing changes in the anatomical shape of the body [53]. These changes modify the normal shape of the body [54]. Both disfigurement and deformation may concern any part of the body and not only the face or other usually uncovered body parts [55]. However, they have to be substantial to be caught by the criminal offence of grievous bodily injury. Moreover, both disfigurement and deformation have to be permanent, as provided for in Article 156 § 1 of the Penal Code. The feature 'permanent' is not to be understood as irreversible. It does not matter for the liability of the perpetrator that disfigurement or deformation can be repaired through an operation [56]. It is commonly known that the achievements and possibilities of contemporary plastic surgery are very high.

It is not always easy to differentiate between disfigurement and deformation. They are both very evaluative features. As to the issue of female genital mutilation, it seems that deformation rather than disfigurement comes into play. It should be emphasized that disfigurement is a more evaluative feature than deformation. The anatomical structure of the body of both men and women is identical throughout the world. There are, of course, differences in posture and shape of particular body parts, so some ethnic or racial groups have typical distinguishing features. Thus, deformation is easier to catch and is less disputable. Furthermore, there are different modes of perception of what beauty is. What is beautiful for one group of people can be ugly

and nasty for another group. And so it is in the case of female genital mutilation. Genital parts of a woman's body are appreciated in the vast majority of communities and people groups worldwide. However, they are considered bad and ugly in many African communities which practice female genital mutilation. One of the reasons for mutilation is a wish to make a girl beautiful. Moreover, there is a common belief that there is something bad between a woman's legs which has to be cut out. In conclusion, any form of female genital mutilation of type I, II or III, even only partial removal of the clitoris, should be classified as deformation of a woman's body. It follows from this conclusion and the above statements that particular kinds of grievous bodily injury may coincide in a given case. From the perspective of criminal law, there may be cases where a perpetrator causes two or more results described in one provision. What is important is that the perpetrator has caused a grievous bodily injury. This fact, however, should be reflected in the judgment justification. Furthermore, the extent of criminal consequences of an act should be taken into account at sentencing.

If a consequence of genital mutilation is the death of a woman or girl, the perpetrator shall be punished with a more severe penalty. There are two different possible situations. Firstly, in a criminal proceedings, the perpetrator's behaviour would be qualified as the criminal offence described in Article 156 § 3 of the Penal Code if he carried out female genital mutilation of type I, II or III, so one of those forms which can be covered by grievous bodily injury. The second situation seems to happen more rarely and is not covered by one provision of the Penal Code. Bearing in mind many possible forms of female genital mutilation are classified as type IV, it is not excluded that the victim dies of the effects of genital mutilation of type IV because of infection or bleeding. In such a case, the perpetrator's behaviour would be qualified as the criminal offence described both in Article 157 § 1 and Article 155 of the Penal Code. Article 155 states: Whoever unintentionally causes the death of a human being is liable to imprisonment from 3 months to 5 years. To put it simply, a perpetrator intentionally performs female genital mutilation but he does not intend to cause the woman death, which, however, occurs.

With regard to the phenomenon of female genital mutilation, it is particularly important to ensure that acts of female genital cutting are criminalized under Polish criminal law irrespective of the place of their performance. The experience of European states with a higher percentage of foreign population and having the collected data on FGM prevalence rates shows that it is common practice to take a girl abroad to the country of origin of her parents or grandparents to be cut there. This usually happens during the summer holidays, so the girl has time to heal before returning to school. There are

even the terms 'cutting holidays' and 'cutting season' in use to refer to this practice [57].

According to the principle of territoriality, described in Article 5 of the Polish Penal Code, acts of female genital mutilation would be prosecuted if committed in the territory of Poland, irrespective of the nationality of the perpetrator. The criminal responsibility for offences committed abroad is regulated in Chapter XIII. of the Polish Penal Code. The first rule states that the Polish statutes on criminal law are applicable to a Polish national who commits an offence abroad (Article 109). It should be here noted that statutes on criminal law include the Penal Code and other legal acts containing provisions on criminal law. So, if a Polish national takes his daughter to Africa and there carries out mutilation on her, he commits an offence which is punishable and may be prosecuted under Polish criminal law. In a case where a foreigner, i.e. a person who does not have Polish nationality, carries out female genital mutilation abroad, i.e. outside the territory of Poland, there are two situations to differentiate. First, a foreigner mutilates the genitals of a girl who is a Polish national (Article 110 § 1). Second, a foreigner mutilates the genitals of a girl who does not possess Polish nationality (Article 110 § 2). In both situations, the Polish statutes on criminal law are applicable to this foreigner, i.e. he is punishable and may be prosecuted under Polish criminal law. However, there is a requirement applicable to the second situation, namely, the perpetrator stays in the territory of Poland and it has not been decided to extradite him. Furthermore, Article 111 § 1 of the Polish Penal Code sets a condition which has to be met to prosecute an offence committed abroad. This is the condition of double criminalization, also called the requirement of dual criminality. Thus, the prosecution of both a Polish national and a foreigner depends on the criminalization of female genital mutilation in the state where the act took place. This condition is not applicable to a Polish public functionary who commits an offence in connection with performing his duty or to a person who commits an offence in a place being under jurisdiction of no state, for example, in Antarctica (Article 111 § 3). The conclusion is that in the current state of the law, the admissibility of prosecution in Poland of female genital mutilation carried out abroad depends on the criminalization of female genital mutilation in a given state. Thus, Polish law does not give adequate protection to every potential victim of female genital mutilation, despite the fact that many states, including states in Africa, where the FGM prevalence rate is the highest, have criminalized female genital mutilation. The Polish legislator has to amend the Penal Code to ensure that acts of female genital mutilation are punishable in every case, wherever they are committed. This aim could be achieved by the inclusion of female genital

mutilation into Article 112 of the Penal Code, which relates to only a few offences described in it and enshrines the applicability of the Polish statutes on criminal law and thus the criminal prosecution irrespective of provisions applying in the place where the act was committed. However, it will not be necessary in the case of the ratification of the Istanbul Convention by Poland. In this case, Poland as a party to the Convention would be obliged to criminalize acts of female genital mutilation. According to Article 113 of the Polish Penal Code, the principle of double incrimination is not applicable to offences which have to be prosecuted by Poland by virtue of an international agreement.

## CONCLUSIONS

In Poland, there is little knowledge on the subject of female genital mutilation. In fact, the mass media only provide some information on cases abroad from time to time. For example, on 6 February there was some mention in the media of the International Day of Zero Tolerance for Female Genital Mutilation [58]. The phenomenon of female genital mutilation is seen as a foreign problem and not ours. It is thought of as something happening in Africa, far away. It is even widely believed that the phenomenon of female genital mutilation does not exist in Poland. However, it can be supposed that similar ways of thinking existed in other member states of the European Union prior to women who had been subjected to female genital mutilation beginning to appear in hospitals to deliver babies. An explanation for this attitude of Polish people is a relatively small number of foreigners in Poland. In fact, immigration to our country of people, especially women, from countries where genital cutting is a common practice, is very limited. According to the data of the (Polish) Central Statistical Office and the Eurostat, as of 2011 foreigners made up only around 0.15% of the population of Poland. The percentage of foreigners in Poland was the lowest in the European Union [59]. The statistical data collected by the (Polish) Office for Foreigners shows that at the end of 2013, around 121,000 foreigners had permission for residency, which made up around 0.3% of the population of Poland [60]. The vast majority of foreigners do not come from countries with a high FGM prevalence rate. From this, however, the conclusion should not follow that female genital mutilation does not occur in Poland. The nature of this crime should be kept in mind and therefore the occurrence of the so-called 'dark number' or 'dark field' should not be forgotten. Moreover, it should be noted that foreigners coming to Poland from the European Union states may have European Union citizenship and therefore be classified as such, even if they are of African origin. It is interesting to mention that the number of current applications for permission for residency in Poland

on the grounds of marriage with a Polish citizen is increasing and the applications are mostly from Turkey, Nigeria, Egypt and Tunisia [61]. As we know, some of these countries are heavily affected by the phenomenon of female genital mutilation.

It may be true that the risk that any given girl or woman will be subjected to genital cutting in Poland is low. However, it is very important to prevent the phenomenon of female genital mutilation even if only one girl or woman was in danger of being subjected to genital circumcision. Health care workers have to be prepared for how to deal with cases of female genital mutilation. This affects not only gynaecologists and midwives, but also other medical professionals. The consequences of female genital mutilation are of a varied nature and include chronic infections and the like. Psychological assistance is important as well. An awareness-raising campaign addressing the general public must be made in the media. Furthermore, training for health care workers and teachers, in particular those employed in nursery schools, needs to be conducted, so they are careful and sensitive to the problem of female genital mutilation. An informative action should be undertaken irrespective of any change in the field of criminal law. It will be more effective than any legislative change. An awareness-raising campaign, aiming at a deterrent effect, must specifically target groups of potential perpetrators. It seems enough to say clearly that female genital mutilation is a criminal offence and is severely punishable, without giving the number of the article in the Penal Code; the name of the offence, whether a special offence of female genital mutilation or an offence of grievous bodily injury, has much lesser importance for laypeople.

To summarize the legal aspects, the following should be stated. Female genital mutilation is punishable under Polish criminal law. In the current state of the law, female genital mutilation is a criminal offence and can be prosecuted as a form of grievous bodily injury (which it seems would be the case in most actual situations) or as a form of bodily injury and impairment to health. Thus, female genital mutilation is punishable under general criminal law provisions. There is no special legislation on female genital mutilation. One could consider it desirable to create a special criminal offence of female genital mutilation. It could be argued that the introduction of such an offence to the Penal Code would make female genital mutilation more recognizable and its criminality more obvious. On the other hand, it can be argued that the example of some other European states provides no evidence for an increase in the effectiveness of the prosecution in the case of special legislation. The situation in France and in the United Kingdom, presented above, confirm this thesis. To conclude, it is up to the legislator to decide whether it is rational to create a new criminal offence. In the

current situation in Poland, where, fortunately, no cases of female genital mutilation appear in courts and therefore no potential legal problems arise, it seems more important to prevent female genital mutilation through performing an adequate awareness-raising campaign, among other things through informing new foreigners granted with asylum or the right to residency about the criminality of carrying out female genital mutilation. However, as indicated in the above analysis, a legislative action is needed to ensure that acts of female genital cutting are punishable irrespective of the place of their commission. Thus, the Polish criminal lawmaker has to amend the Penal Code and to abolish the condition of double criminalization as regards female genital mutilation.

### **Conflicts of interest**

None to declare.

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  46. See e.g. [http://www.cps.gov.uk/legal/d\\_to\\_g/female\\_genital\\_mutilation/#evidential](http://www.cps.gov.uk/legal/d_to_g/female_genital_mutilation/#evidential) [cited 2015 Feb 13] ('FGM cases are difficult to prosecute for a number of reasons, but primarily because of difficulties in obtaining evidence where a complaint is made, and maintaining continued cooperation with the victim.'). For more on obstacles to prosecution see <http://www.newstatesman.com/politics/2014/03/why-did-first-prosecution-female-genital-mutilation-take-30-years> [cited 2015 Feb 13].
  47. <http://blog.cps.gov.uk/2014/03/cps-announces-first-prosecutions-for-female-genital-mutilation.html> [cited 2015 Feb 13]; <http://www.bbc.com/news/uk-26681364> [cited 2015 Feb 13]; <http://www.telegraph.co.uk/news/uknews/law-and-order/11390629/NHS-doctor->

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50. Act of 6 June 1997 – The Penal Code, Official Journal of 2nd August 1997, no. 88, item 553, with later changes. (Polish)
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56. Zoll A. [in:] A. Zoll (ed.), Kodeks karny. Część szczególna, volume II. Komentarz do art. 117-277, Warszawa 2013, p. 365; Szwarczyk M. [in:] T. Bojarski (ed.), Kodeks karny. Komentarz, Warszawa 2011, p. 328. (Polish)
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