

# § 226a of the Criminal Code - Special offense of female circumcision & unconstitutional unequal treatment

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## E. Summary

The present study has shown that many voices in literature, and in particular the newly created § 226a StGB, outline the very complex issue of female genital mutilation only sketchily and simplistically. While extreme forms of female circumcision, such as the removal of the clitoris and above all infibulation, constitute endangerment of the child's well-being – with regard to their motives and the extent and consequences of the intervention – the classification of “mild Sunna” as child endangerment is downright absurd. Circumcision of the male foreskin and circumcision of the female clitoral foreskin are comparable at the anatomical level, at the level of consequences and risks, and in terms of parental motivation. A different handling of foreskin circumcision of girls and boys is an unjustifiable unequal treatment, based on gender. Here an amendment is required to § 1631d para 1 BGB, which must also apply to circumcision of female foreskins, whereby a gender neutral wording must refer to medically unnecessary foreskin circumcision of a child without the capacity to consent. Because of the (religious) parenting law, parental consent to clitoral hood circumcision must be considered effective and justified on account of the Constitution. Culpability of performing the “mild Sunna” must be excluded in the presence of parental consent and compliance with the relevant conditions, such as performance by a physician “according to the rules of medical science” etc. To classify “mild Sunna” within the meaning of a criminal offense as “female genital mutilation” as per

§ 226a StGB, with the punishment provided there, is absolutely disproportionate. Also, with regard to the possible group of offenders such classification is not justified. By subsuming foreskin circumcision under § 226a StGB, the legislature interferes with the circumciser's freedom of profession and general freedom of action. At the same time, the legislature violates the general principle of equality under Article 3, paragraph 1 GG, because of the different treatment of the circumciser of male foreskin and the circumciser of female foreskin. The criminalization of infibulation and clitoral excision is to be welcomed, however. There is no constitutional objection to the identification of infibulation as female genital mutilation and its punishment as a crime with a prison sentence of one year to fifteen years. This sentence appears reasonable. The sentence, however, seems too high for the excision of the clitoris. In this regard, a range of sentences between half a year, or one year, up to ten years is deemed proportionate.

At this point it should be noted that, according to the view represented here, it presents an essential flaw in the new § 226a StGB that the possibilities to trace such an offense are limited. A genital mutilation performed in Germany is, per § 3 StGB, a criminal offense. The possibilities to take action against a genital mutilation performed outside Germany – for example by way of a girl's vacation stay in an African home country – are, however, limited by the current legal situation because the so-called passive personalization principle, according to § 7 paragraph 1 StGB applies under governing law only if the girl who is mutilated abroad is a German citizen (§ § 1, 3 Act) and if, in the country where FGM was performed, a law against female genital mutilation exists. In order to punish a “vacation circumcision” effectively and, as the legislature itself states, to ensure a “higher level of protection of the persons concerned”, an expansion of the purview of German criminal law would be well-advised. Consideration should be given to creating an additional number in § 5 StGB or a complement to § 7 paragraph 1 StGB. Genital mutilation committed abroad should be able to be prosecuted if the act is directed against a person who is domiciled or habitually resident in the Federal Republic of Germany. This could allow offenders who take the child out of the country for the purpose of genital mutilation to be criminally prosecuted effectively in Germany.