

11th July 2017 (COI included up to 4th July 2017)

A Commentary on the December 2016 Country Policy and Information Note issued on Female Genital Mutilation (FGM) in The Gambia

This commentary identifies what Asylum Research Consultancy (ARC) considers to be the main inconsistencies and omissions between the currently available Country of Origin Information (COI) and case law on The Gambia and the conclusions reached in the following Country Policy and Information (CPIN) note issued by the UK Home Office:

- [Country Policy and Information Note: Gambia: Female genital mutilation \(FGM\), December 2016](#)

Where we believe inconsistencies have been identified, the relevant section of the CPIN report is highlighted in blue. An index of full sources of the COI referred to in this commentary is also provided at the end of the document (COI up to 4th July 2017). To supplement the publicly available information included, 2 country experts and one specialised NGO on The Gambia provided their opinions in May and June 2017 having been asked the following question:

- *What practical effect has the December 2015 enactment of Section 32 of the 2010 Women's Act (Amendment) criminalising female circumcision had on access to effective protection for women fearing Female Genital Mutilation/Cutting?*

This commentary is a guide for legal practitioners and decision-makers in respect of the relevant COI, by reference to the sections of the CPIN report on The Gambia issued in December 2016.

The document should be used as a tool to help to identify relevant COI and the COI referred to can be considered by decision makers in assessing asylum applications and appeals. This document should not be submitted as evidence to the UK Home Office, the Tribunal or other decision makers in asylum applications or appeals. However, legal representatives are welcome to submit the COI referred to in this document to decision makers (including judges) to assist in the accurate determination of an asylum claim or appeal.

The COI referred to in this document is not exhaustive and should always be complemented by case-specific COI research.

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Policy guidance

2. Consideration of Issues

2.3 Assessment of risk

In relation to the assessment of risk in '2.3 Assessment of risk, i. Women and girls fearing FGM', the CPIN solely relies on the findings of [K and others \(FGM\) Gambia CG \[2013\] UKUT 62 \(IAC\)](#) as follows (emphasis added):

Excerpt from the December 2016 The Gambia CPIN

2.3.2 In the country guidance case of [K and others \(FGM\) Gambia CG \[2013\] UKUT 62 \(IAC\)](#) the Upper Tribunal found that FGM has been practised upon about three quarters of the female population of Gambia historically and that there has been no significant change in its incidence (para 120). Incidence of FGM varies by ethnic group and in no ethnic group is the practice universal (para 121) and the evidence falls short of demonstrating that intact females in Gambia are, as such, at real risk of FGM. The assessment of risk of FGM is a fact sensitive exercise (para 122).

2.3.3 The Upper Tribunal in [K and others](#) found that there are significant variables which affect the risk:

- the practice of the kin group of birth;
- the ethnic background, taking into account high levels of intermarriage and of polygamy;
- the education of the individual said to be at risk;
- her age;
- whether she lived in an urban or rural area before coming to the UK;
- the kin group into which she has married (if married);
- and the practice of the kin group into which she has married (if married).

Also relevant is the prevalence of FGM amongst the extended family, as this may increase or reduce the relevant risk which may arise from the prevalence of the practice amongst members of the ethnic group in general (para 123).

2.3.4 In addition to the statistical information currently known about the prevalence of the practice within the ethnic group (para 124), the Upper Tribunal in [K and others](#) identified the following factors which are of general application (para 125):

a. In the case of an unmarried woman, parental opposition reduces the risk. In the case of a married woman, opposition from the husband reduces the risk. If the husband has no other "wives", the risk may be reduced further. **However, it should be borne in mind that parental/spousal opposition may be insufficient to prevent the girl or woman from being subjected to FGM where the extended family is one that practises it, although this will always be a question of fact.**

b. If the prevalence of the practice amongst the extended family is greater than the prevalence of the practice in the ethnic group in question, this will increase the risk. Conversely, if the prevalence of the practice amongst the extended family is less than the prevalence of the practice in the ethnic group in question, this will reduce the risk.

c. If the woman is educated (whether she is single or married), the risk will reduce.

d. If the individual lived in an urban area prior to coming to the United Kingdom, this will reduce the risk. Conversely, if the individual lived in a rural area prior to coming to the United Kingdom, this will increase the risk.

e. The age of a woman does not affect the risk measurably; it is an issue upon marriage. Amongst the Fula, FGM has been carried out on babies as young as one week old. The average age at which FGM is carried out appears to be reducing and this may be due to concerns about the international pressure to stop the practice. Although there are statistics about the average age at which FGM is carried out on girls and women for particular ethnic groups, the evidence does not show that, in general, being above or below the relevant average age has a material effect on risk. It would therefore be unhelpful in most cases to

focus on the age of the girl or woman and the average age at which FGM is carried out for the ethnic group of her father (if unmarried) or that of her husband (if married).

Thus, it is possible to arrive at a conclusion that the risk faced by an individual is less than, or more than, the rate of incidence of FGM in the ethnic group of the individual's father (if unmarried) or her husband (if married). The rate of incidence of FGM in an ethnic group must therefore be distinguished from the degree of likelihood of infliction on an individual against her will or against the will of her parents. Some individuals from ethnic groups with a high incidence may not be at risk, while some individuals from ethnic groups with a low incidence may be at risk (para 126).

2.3.5 See also Prevalence by age, Prevalence by ethnic groups and Prevalence by region.

Whilst the case law and the policy guidance in the CPIN at paragraphs 2.3.3 and 2.3.4 above recognise the importance of FGM prevalence and practice of the extended family, no COI is included in the CPIN on FGM decision making in The Gambia. For example, the following COI on the role that grandmothers play would have been useful to include:

- [Information provided by Bettina Shell Duncan \(Univ. Washington\), EASO Workshop on FGM/C & COI, held on: 25-26 October 2016, Malta, May 2017 p. 16, 23, 24 \[A copy of the report can be requested directly from ARC or EASO – see 'Index of Sources' for details\]](#)

Presentation by Bettina Shell Duncan (Univ. Washington) [...]

In the presentation that I put together, I have the most recent national level survey data from Senegal and the Gambia, which is from the demographic and health surveys from last year and the year before. [...]

We did research on decision-making. We talked to families for whom circumcision had been discussed in the past 3 years. We divided it up for whether the girl was still uncircumcised or whether the girl was recently circumcised. We asked who participated in this conversation - this is a direct conversation about whether or not a girl should be cut. The number on mothers is very low. We were talking with the mothers and we realized they didn't mention themselves because they thought it was obvious – 'We are talking to you' - but mothers are not the most powerful persons in this decision-making. They told us that by and far the most powerful people in this decision-making were the grandmothers. If a woman's mother-in-law says, 'Now it is the time for circumcision', the younger women in the family have to defer. They can send messages and say what their opinions are, but they are not the most powerful people in the conversations, but rather elder women in the families. [...]

The blithesome responsibilities for the girls are held by the entire extended family. So if a mom was saying, 'We are not going to cut this girl', and then the mum is at the market and an aunt comes, or the grandmother, and takes the girl to the circumciser, there was nothing in terms of common law or written law about this. That was not a police matter: that is their right to do so. It is one thing if an entire extended family wasn't onboard with a no-cutting decision. For a mom to be able to enforce that -this was something that I had to talk about in asylum statements that I have done for Gambian women - she would have to be with that young girl 24 hours a day, holding the baby, never handing the baby over to anybody else. The idea that she would be able to protect that girl indefinitely and if that girl were to marry into a family that cuts would still be risk-free, just wasn't feasible. [...]

- [Population Council, A State-of-the-Art Synthesis on Female Genital Mutilation/Cutting What Do We Know Now? October 2016 \(Update\) p.20](#)

[...] FGM/C Is Embedded Within Complex Social Systems

[...] In many communities, in countries as diverse as Sudan, Kenya, Sierra Leone, The Gambia, and Senegal, the FGM/C preferences of girls or even their mothers are often superseded by those of elder women in the family or community. These matriarchs typically play the unspoken role of upholders of tradition and are in charge of the training, rituals, celebrations, and other activities associated with the practice, and as such, may be influential for introducing change.²³ One study in The Gambia found that among already-cut mothers of

at least one daughter, 70 percent felt unable to influence the opinions of other decisionmakers.²⁴ Further research is needed in other settings on the constellation of decisionmakers, social factors or experiences that influence their opinions, and the degree of influence they bring to the decisionmaking process . [...]

23 Thomas, Lynn. 2000. "Ngaitana (I will circumcise myself): Lessons from colonial campaigns to ban excision in Meru, Kenya." in *Female "Circumcision" in Africa: Culture, Controversy, and Change*. eds. Shell-Duncan, Bettina and Ylva Hernlund. Boulder, CO. Lynne Rienner Publishers; Shell-Duncan, Bettina. 2011. "Dynamics of change in the practice of female genital cutting in Senegambia: Testing predictions of social convention theory." *Social Science and Medicine* 73(8): 1275-1283; Aubel, Judi, Ibrahima Touré, and Mamadou Diagne. 2004. "Senegalese grandmothers promote improved maternal and child nutrition practices: the guardians of tradition are not averse to change." *Social Science and Medicine*. 59: 945-959; and Gruenbaum. 2001. "The Female Circumcision Controversy: An Anthropological Perspective."

24 Shell-Duncan, Bettina. 2000. "Becoming a Muslim, becoming a person: Female "circumcision," religious identity, and person- hood in Guinea-Bissau." in *Female "Circumcision" in Africa: Culture, Controversy, and Change*. eds. Shell- Duncan, Bettina & Ylva Hernlund. Boulder, CO. Lynne Rienner Publishers

➤ [28 Too Many, Gambia Country Profile, March 2015](#) p.53

[...] SOCIAL ACCEPTANCE /CULTURAL IDENTITY

[...] FGM is seen as a way of both honouring elders and instituting the established relationships between girls and their community (what is referred to as 'knowing the eye').

Elder women are central to the process because they gain the respect of younger women by undertaking the practice and further assert their authority through perpetuating the tradition. Therefore, the benefits are considered to be both for the girl being cut as well as others in the community. The wider social significance is evidenced by the fact that grandmothers (maternal and paternal) are regarded as the main decision-makers on whether FGM takes place, or not (Shell-Duncan et al., 2010). [...]

A recent study undertaken by Bellemare et al. appears to contradict the social convention theory as applicable to The Gambia, indicating that the driving force is 'all within the family', rather than the community at large (Bellemare et al., 2014). The study compares data from Senegal (using 2010/2011 DHS data) and The Gambia (drawing on MICS 2005/2006 data).

By analysing the relationship between whether a woman reports having undergone FGM and whether she supports continuation of the practice, and quantifying the contribution of individual, household, and village/wider-level factors, the study assesses why FGM persists. The study reports that in The Gambia, 85% of the relationship between FGM status and support for the practice can be explained by individual and household factors (i.e. is driven within the family), with only 15% attributable to the village level and beyond (i.e. is driven by the community). This is versus Senegal, where 49% of the relationship is explained by factors at the village level and beyond. [...]

2.4 Protection

In comparison to the previous '2.3 Assessment of risk, i. Women and girls fearing FGM' section which solely relies on the findings of [K and others \(FGM\) Gambia CG \[2013\] UKUT 62 \(IAC\)](#), section '2.4 Protection' argues for a departure from the case law based on a change to The Gambian criminal law and evidence of its implementation (emphasis added):

Excerpt from December 2016 The Gambia CIPN

2.4.1 In December, 2015 the Women's (Amendment) Act was enacted making it an offence for any person to engage in FGM, or to be an accomplice of those engaging in FGM, punishable by a fine or imprisonment for 3 years or both. The Act also makes it an offence to fail to report that FGM is happening or about to happen. If the act results in death the person can face life imprisonment.

There are reports that the authorities have brought charges under the new legislation against at least two people. FGM remains a deeply entrenched practice and concerns have been expressed that the criminalisation of FGM may force the practice underground, or into neighbouring countries where it is not criminalised (see Legal position).

2.4.2 **The Home Office's view is that this change to the Gambian criminal law specifically banning FGM, and the evidence of it being implemented amounts to strong grounds supported by cogent evidence to depart from the finding in [K and others](#)** that there is no effective state protection for those at risk of FGM (para 127).

2.4.3 In general effective state protection is likely to be available. Decision makers need to consider each case on its facts. The onus is on the person to show why they would not be able to seek and obtain effective state protection.

2.4.4 For further guidance on assessing the availability or not of state protection, see the Asylum Instruction on Assessing Credibility and Refugee Status.

However, the only evidence presented in the CPIN on the implementation of the provision of the December 2015 Women's (Amendment Act) criminalising FGM as summarised above in paragraphs 2.4.1 and 2.4.2 of the policy guidance relate to *charges* brought against two individuals. Not only is this a miniscule number in the context of a country with a total prevalence rate of 75% of girls and women aged 15 to 49 years who have undergone FGM/C¹, which rises to over 90% in some regions and amongst certain ethnicities², but the evidence presented relates to arrests not convictions. Furthermore, no mention is made of any action plan in existence or resources allocated to support the legislation and to challenge long held cultural perceptions of FGM. It is therefore surprising that whilst the policy guidance above at paragraph 2.4.1 recognises that FGM is an "entrenched practice" and that its criminalisation may force the practice underground or abroad, it views the evidence of charges brought against two individuals as a sufficient basis to assert that effective protection for women fearing FGM is now available throughout The Gambia.

Since the CPIN was published no documented convictions for FGM were found and further evidence in the public domain indicates that there is a lack of consistent enforcement of the law banning FGM:

- [Adriana Kaplan & Abdoulai Drammeh on behalf of WassuKafo Gambia, *Exploring the Knowledge & Perceptions of Gambians about the Law banning Female Genital Mutilation/Cutting*, July 2017 \[A copy of the report can be requested directly from ARC – see 'Index of Sources' for details\] \[emphasis added\]](#)
Introduction [...]

¹ UNICEF, [Gambia Country Profile 2016](#), 17 August 2016. This information is also included in the CPIN note [Gambia: Female genital mutilation \(FGM\), December 2016](#) at paragraph 6.2.4.

² 28 Too Many, [Gambia Country Profile](#), March 2015 p.10. This information is also included in the CPIN note [Gambia: Female genital mutilation \(FGM\), December 2016](#) at paragraph 6.2.6.

This research project seeks to fill that knowledge gap by analysing the knowledge and perceptions of a cross section of Gambians (health professionals, students, traditional birth attendants and local women groups) on the newly enacted legislation banning FGM/C in The Gambia. [...]

Preliminary Results [...]

Court cases

From January 2016 to June 2017, only two cases of violations related to the practice of FGM/C were reported in Gambia. Both cases have occurred in the Lower River Region of (LRR) The Gambia.

The first case, as reported by the daily observer, happened in the Kiang West Village of Sankandi, on the 27th of February 2016. Two accused persons (Mother and grandmother) were arraigned before the Mansa Konko regional court for a hearing when a five-month old baby allegedly died from FGM/C. The duo was charged with conspiracy to commit a felony, being accomplices to female circumcision and inciting and promoting female circumcision contrary to article 32A of the Women's Act 2015.

The second case involving a grandfather and a circumciser from Toniataba and Sankuya villages respectively were arrested and taken to Mansa Konko police station on the 28th February 2017. On the 01st of March 2017, the police confirmed that both parties were released on bail in the sum of D50, 000 with two Gambian sureties each, pending investigation. Per police information, both are charged for conspiracy to commit an offence. The allegation is that the grandfather of the six-year old girl authorised the circumciser to perform FGM/C on his granddaughter while both parents of the child left for teaching at their respective schools as Quranic teachers.

From the above two cases one can argue that it is a great achievement to have perpetrators of FGM/C being arrested and brought to justice, with the first violators arrested barely 5 months after the law has been enacted. However, for the law to be effective as a deterrent, gathering of concrete evidence is necessary for successful conviction (Kandala&Komba, 2015). In addition, because the above cases require evidence, the trials are still continuing in the courts for further investigations which could potentially lead to failed prosecutions. FGM/C, like many other crimes, can be secretly performed and therefore gathering evidence of knowledge of cutting as well as who performs the practice can be challenging. In addition, **law enforcers such as the police must have the necessary knowledge about the requirements of the law under the Women's Act 2015. Not all police officers are equipped in terms of knowledge of the requirements of the law.** In fact, in the Toniataba and Sankuya case at the Mansa Konko police post, a police officer admits not having a copy of the anti-FGM law at hand.

From the above, successful implementation of the law will require resources in terms of financial as well as knowledge to enable law enforcers carry their duties effectively.

Meanwhile, in the Sankandi case, the main potential barrier to successful conviction is the issue of evidence gathering for the cause of death of the affected child. The prosecution must be able to prove beyond reasonable doubts that the cause of death was as a result of the practice of FGM/C. This also relies on the health professional's ability to identify and establish link between the practice of FGM/C and health-related complications. Notwithstanding, the law gives legitimacy to all the civil society organisations, NGOs and government agencies to work in the area of FGM/C in The Gambia. [...]

➤ [The Point \(Banjul\), Gambia: Activist Wants Govt Assurance On FGM, Child Marriage Laws, 21 June 2017](#)

FGM activist and founder of Safe Hands for Girls, Jaha Dukureh, has called on the new government to affirm publicly that Female Genital Mutilation and Child Marriage laws passed by the former regime are here to stay [...]

Jaha said: "I have met with the new government and the president has assured me that the law is not going anywhere but we have not heard them publicly."

She said it was very crucial for the people on the ground to understand that this was not a Jammeh law but a Gambian law.

She added that the new government, saying it indoors was not enough, hence they need to come out in the press or release statements.

According to Jaha, the more government remained silent, the more people would continue to say that the law is a Jammeh law and continue to flout it with impunity [...]

- [Information provided by Bettina Shell Duncan \(Univ. Washington\), EASO Workshop on FGM/C & COI, held on: 25-26 October 2016, Malta, May 2017 p. 80 \[A copy of the report can be requested directly from ARC or EASO – see ‘Index of Sources’ for details\]](#)
 [...] Bettina: In terms of protection, as I mentioned in Gambia, a law was just passed a few months ago. I have not been there since it was passed, but obviously implementation will take a while if it is implemented at all. It was not only not illegal but it was also celebrated by the President of the country until late last year, so any kind of protection was utterly unthinkable and non-existent in Gambia. My guess is that it is going to take quite some time for anything to change. [...]
- [Information provided by Terres des Femmes \(TdF\), EASO Workshop on FGM/C & COI, held on: 25-26 October 2016, Malta, May 2017 p. 81, 82 \[A copy of the report can be requested directly from ARC or EASO – see ‘Index of Sources’ for details\]](#)
 [...]: I should say that generally in most of the African countries where the legislation has been there, nevertheless we don't see much impact on the FGM figures. That means the governments have failed to effectively implement this law. No matter, the fact is that this is a top-down strategy that the communities don't access in most cases. They were not involved in the process, they feel left out, they feel it's a dictated method of implementing, and like I said, in most of these cultures they live a cultural way of life.
 They look up to their traditional chiefs and religious leaders more than to their government because those are not authorities to them, those are people that they go to in times of conflict. They go to in times of need and so on and so forth. So government may fail to protect common people, a common person on the ground whereas the chiefs, the religious leaders, mediate into that situation immediately and make a move, or solve a problem immediately. [...]
- [Daily Observer, CHANGE OF GOV'T. DOES NOT AFFECT FGM/C BAN -WB EXECUTIVE DIRECTOR, 27 April 2017](#)
 The Executive Director of Women's Bureau Binta Jammeh Sidibeh has stated that the change of government does not affect the ban on Female Genital Mutilation/Cutting (FGM/C), adding that the ban and law still remains.
 "Government can be changed but the law still remains. The law is made by the National Assembly Members (NAM), therefore, if you offend the law, you will be punished according to the law. It is true that the law still exists, but is also significant that we inform the people that still now the law is there. We want you the religious leaders to preach it during your religious and social gatherings for the fact that there are certain individuals that think that the law was made during the former regime and now there is new government, the law those not exist," she added. [...]
- [U.S. Department of State, Country Reports on Human Rights Practices for 2016: Gambia, The, 3 March 2017, Executive Summary,](#)
 [...] The government enacted laws banning FGM/C and early and forced marriage and took steps to prosecute or punish some individuals who committed abuses. Nevertheless, impunity and the lack of consistent enforcement remained problems [...]
 On March 10, Banjul Magistrate Court charged two women with four criminal offenses, after a five-month-old girl child died of FGM/C in the Kiang West, Sankandi village, Lower River Region (LRR). The accused, Sunkaru Darboe, and Saffiatou Darboe, denied the allegations. On March 21, the Banjul Magistrate Court transferred the case to Mansankonko High Court in LRR for lack of jurisdiction. The case remained pending at year's end [2016] [...]
- [Foroyaa Newspaper, Grandfather and circumciser arrested and granted bail on FGM offence, 2 March 2017](#)
 A grandfather who is said to have hailed from Toniataba village and a circumciser Mariama Sura of Sankuya village both from Jarra in the Lower River Region, were arrested on Monday night, and taken to Mansankonko police station where both suspects were seen by this reporter on the 28th of February 2017. On 01st of March, the police confirmed that both parties were released on bail in the sum of (D50.000) fifty thousand dalasi with two Gambian sureties each, pending investigation. The allegation is that the grandfather of the six-year-old girl authorized the circumciser to perform female

genital mutilation on his granddaughter and they were all in their custody whilst both parents of the circumcised girl, left to teach in their different schools as Quranic teachers in Jarra Soma some kilometres away from their settlement. The commissioner lamented that he lacked the Women's Amendment Act on FGM 2015 at their disposal but have now received copies of the Act which will be useful in the case.

The Acting Executive Director of GAMCOTRAP, Mrs. Mary Small indicated that when the case was reported to GAMCOTRAP, they travelled to Mansakonko to get the details just to find out that the circumciser was trained and has been engaged in activities carried out in the region. [...]

➤ [Daily Observer, Mass Sensitisation, A Tool to Support Anti-FGM Bill – Guardian Country Coordinator, 8 February 2017](#)

The country coordinator of the Guardian Global Media Campaign to end Female Genital Mutilation (FGM) has underscored the importance of mass sensitisation in their effort to fight against the deep-rooted cultural practise in The Gambia.

Mam Lisa Camara, who was speaking in an exclusive interview with the Daily Observer, noted that sensitisation is one of the most powerful tools to ease the enforcement of the ban of the practice by The Gambia Government. [...]

She stressed the need to sensitise communities, saying despite the ban on FGM, which is the greatest achievement of the FGM global campaign, local communities still need to be sensitise more about the implications and consequences of the act as well as the law put in place.

Moreover, expert opinions provided to ARC for this commentary in response to the question “*What practical effect has the December 2015 enactment of Section 32 of the 2010 Women’s Act (Amendment) criminalising female circumcision had on access to effective protection for women fearing Female Genital Mutilation/Cutting?*” similarly challenge the practical implementation of the law and its effectiveness to offer protection.

Professor Tony Barnett, in his written response to ARC in May 2017 considers that:

1. The Policy Information Note provides little in the way of objective empirical evidence to support the conclusion arrived at in para 2.4.2.
2. Regarding the statement in para 3.1.2 that “A new law enacted in December 2015 specifically bans FGM, and there is evidence that this is being implemented and prosecutions brought by the authorities”
 - a. This is but a statement that two prosecutions are being brought: it is not evidence that even one successful prosecution has occurred.
 - b. Even were two successful prosecutions to have been brought (and there is no evidence of this), there is no evidence that the law enforcement agencies have either the resources or inclination to pursue such prosecutions given the number of cases reflected in the prevalence figures reported in the Policy Information Note.
 - c. Justice Naceesay Sallah-Wadda [appointed as Gambian High Court Judge in 2007 and had served as Justice of The Gambia Court of Appeal from 2011 to 2016³] noted⁴ that “the challenges in The Gambia, in her view, remained in the areas of lack of awareness of the various legislations protecting the rights of women, as well as the unwillingness in many cases of having womenfolk report instances of violence and abuse being meted out to them.”
 - d. It is important to note that even were the local police and other relevant authorities to be able to pursue offenders – and we must remember that the prevalence rate would require huge resources – it is unlikely that both male and female public opinion does not in general sympathize with the intent of the legislation. The evidence for this is in the currently reported prevalence and also most important, the *incidence* of the practice in all its forms. In particular, discussion of the incidence question in the Policy Information Note at para 2.3.4,

³ Gambiano, [GAMBIA: JUDICIARY: Six Gambians appointed Superior Court Judges!](#), 28 April 2017

⁴ The Point (Banjul), [Gambia: 'Women's Act 2010 Amendment a Step in the Right Direction'](#), 3 March 2017

is at the very least open to substantial critical concerns as to its statistical argument and the quality of evidence it adduces.⁵

Professor Tony Barnett concluded that “while it is to be welcomed, the Gambian Women’s Amendment Act 2015, is at this time a statement of legal intention but there is no evidence that its effect is to make the risk of FGM significantly or even slightly less in practice to young girls and women in the Gambia”.⁶

Dr. Pamela Kea, in her written response to ARC in May 2017 concluded that [emphasis added]:

The 2015 enactment of Section 32 of the 2010 Women’s Act (Amendment) criminalizing female circumcision has had little practical effect on access to effective protection for women fearing female genital mutilation / cutting.

Firstly, only two women have been charged (in March 2016) since the 2015 enactment. Given the high prevalence rates of FGM in The Gambia, this number is negligible and demonstrates how ineffectual the enactment has been.

Secondly, although the recent enactment has outlawed the practice of FGM, many fear that this will simply drive it underground because community and religious leaders continue to support this deeply entrenched cultural practice. Indeed: “*We know from other African countries that have introduced bans that legislation is only one part of the jigsaw,*” said Julia Lalla-Maharajh, head of the British-based Orchid Project which supports anti-FGM programmes in Gambia.⁷ FGM is a deeply entrenched cultural practice, which is central to community and gendered identity: *‘Community identity is important. One must conform to the community’s rules and traditions. Being circumcised is considered a necessary part of this. The mothers and grandmothers who perpetuate this practice are not doing so out of cruelty. They are simply re-enacting an age-old custom so that their daughters and granddaughters will become accepted members of society.’*⁸ Research in Senegal, which banned FGM in 1999, found that legislation did little to prevent the practice amongst those who supported it. It merely drove the practice underground.⁹ Further: *‘There is a vested interest in continuing this practice in The Gambia. Many of the excisors are traditional practitioners or trained health attendants. They supplement their income with the money and other articles they receive from work as excisors. In fact, the income they earn from performing this procedure is often higher than what they earn as midwives or nurses. Their social status also improves as an excisor’.*¹⁰

Thirdly, one can draw parallels between the criminalisation of FGM and legislation implemented on the legal age of marriage, to see what little practical effect the criminalisation of female circumcision has had on access to effective protection of women fearing FGM. The 2005 Children’s Act prohibits marriage and betrothal to anyone under the age of 18. The 1997 Constitution states that all marriages shall be based on the free and full consent of the intended parties [...] Marriage before the age of 18 is common practice for girls. Indeed, girls as young as 12 years of age may be forced to marry. Most cases of early or forced marriage go unreported as they are viewed as private and not considered wrong [...] there have been no prosecutions or criminal proceedings in relation to these crimes.

Lastly, the Gambia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol). However, *‘it has not yet ratified the Optional Protocol to CEDAW.’* The following violations of women’s human rights continue: *‘the persistence of discriminatory laws; discrimination within the family; violence against women; unequal access to*

⁵ See [Annex I](#) for Professor Tony Barnett’s full expert commentary.

⁶ See [Annex I](#) for Professor Tony Barnett’s full expert commentary.

⁷ Thomson Reuters Foundation, [Gambia FGM Ban could drive practice underground, campaigners warn](#), 7 December 2015

⁸ Women’s News Network, [Slowly changing, but unmoving: The plight of FGM in The Gambia, Africa](#), 26 June 2016

⁹ Shell-Duncan, Hernlund Y., Wander K. and Moreau A., [Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal](#), in *Law Society Review*, 2013 Dec 1; 47 (4)

¹⁰ U.S. Department of State, [The Gambia: Report on Female Genital Mutilation \(FGM\) or Female Genital Cutting \(FGC\)](#), Undated, date accessed 20 June 2017

*property, education and employment; under-representation in decision-making positions; and lack of access to health services.*¹¹. Similarly, despite the introduction of the Children’s Act (2005), children continue to be subjected to sexual abuse and exploitation, harmful traditional practices, domestic violence and abandonment [according to UNICEF]^{12, 13}.

In her written response to ARC in June 2017 Maria Saine, Programme Officer at Safe Hands For Girls¹⁴, notes that “The current Gambian case in court centering on a child who died during the process of FGM/C is a classic example of the legal effect of the law against female circumcision. This case has also showed that the state hasn’t done much in ensuring speedy trial for the victim”.¹⁵ She further states that “As can be noticed in the present day society, FGM/C is no more a practice spoken of in ‘high regard’ when contrasted with the years leading up to 2015. This is not to infer that the practice has ceased in totality as some are still carried out in a highly secretive manner in fear of the legal resultant”.¹⁶ Maria Saine, Programme Officer at Safe Hands For Girls, concludes that (emphasis added):

the law criminalizing FGM/C as provided by the Womens Act 2015 (Amendment) is indeed sufficient in serving as a protective vice for girls/women in fear of the practice of FGM/C. What however remains to be addressed is the issue of **cross-border cutting**. The Women’s Amendment Act 2015 is **very silent in that regard**. What this infers is that young girls can still be circumcised out the borders of The Gambia and the Women’s Amendment Act 2015 doesn’t provide for any provision that addresses a case like that. What is however particularly material to highlight is that, **the existent law criminalizing FGM/C is not the only necessary step to be taken to bring an end to the practice of FGM/C. More needs to be done in ensuring that the law is not only present but also effectively applicable in the society. Access to justice in courts needs to be made.** The Gambian government can also open up centers to look into the social, mental and most importantly health effects that girls/women experience prior to, and in some instances after FGM/C.¹⁷

The current situation in the UK might also be a useful comparator. The UK House of Commons Home Affairs Committee published a report in September 2016 stating that “the practice [of FGM] has been illegal in the UK since 1985 but the covert nature of the crime has made it difficult to prosecute. It took 29 years before the first FGM-related prosecution was brought to trial in the UK. The defendants were found not guilty”.¹⁸ The report further stated that “There have been no further FGM-related prosecutions since, despite recent legislative changes to expand the range of offences. Since 2010, only 29 cases of FGM offences have been referred to the CPS [Crown Prosecution Service] and a number of those cases are still live”.¹⁹ The Home Affairs Committee concluded that:

¹¹ Africa for Women’s Rights, [Gambia](#), undated, date accessed 20 June 2017

¹² UNICEF, [Gambia; Child protection](#), undated, date accessed 20 June 2017

¹³ See [Annex II](#) for Dr. Pamela Kea’s full expert commentary.

¹⁴ The NGO ‘Safe Hands For Girls’ “Safe Hands for Girls was founded in 2013 to help end Female Genital Mutilation, provide support to women and girls who are survivors of the practice and address its lifelong, harmful physical and psychological consequences [...] Over time our mission has evolved to address other forms of violence against women and abuses of women’s rights which deter many women from reaching their full human potential”. To find out more visit Safe Hands For Girls, [About Safe Hands For Girls](#), Undated, date accessed 20 June 2017

¹⁵ See [Annex III](#) for Maria Saine’s full expert commentary.

¹⁶ See [Annex III](#) for Maria Saine’s full expert commentary.

¹⁷ See [Annex III](#) for Maria Saine’s full expert commentary.

¹⁸ UK House of Commons, Home Affairs Committee, [Female genital mutilation: abuse unchecked](#), Ninth Report of Session 2016-2017, 15 September 2016, *paragraph 9, p. 5*

¹⁹ UK House of Commons, Home Affairs Committee, [Female genital mutilation: abuse unchecked](#), Ninth Report of Session 2016-2017, 15 September 2016, *paragraph 51, p. 20*

- [UK House of Commons, Home Affairs Committee, Female genital mutilation: abuse unchecked, Ninth Report of Session 2016-2017, 15 September 2016](#), paragraph 56, p. 21
[...] 56. It is beyond belief that there still has not been a successful prosecution for an FGM offence since it was made illegal over 30 years ago. That is a lamentable record and the failure to identify cases, to prosecute and to achieve convictions can only have negative consequences for those who are brave enough to come forward to highlight this crime. In the absence of successful prosecutions, FGM remains a national scandal that is continuing to result in the preventable mutilation of thousands of girls. [...]

Similarly, [Professor Tony Barnett](#), in his written response to ARC in May 2017 concluded that:

Failure by the UK authorities to prosecute successfully even one case of FGM in a country with incomparably greater resources, different traditions, public revulsion at the practice and far lower prevalence²⁰ lends support to the view that the argument in the Policy Information Note is not sustainable.²¹

In addition, it is considered that some sources of COI have been selectively presented in the CPIN. For example the text highlighted in blue was omitted from the following three sources in the CPIN:

Excerpt from December 2016 The Gambia CIPN

7. Legal position

7.1.1 A February 2016 Foroyaa Newspaper report noted:

‘On 28/12/2015 lawmakers passed a Bill banning FGM/C and criminalizing the practice.

‘The Amendment to the 2010 Women’s Act states that a person who engages in Female Circumcision commits an offence and if found guilty of the act shall face imprisonment for 3 years or fine of D50,000 [approx £900] or both.

‘Where Female Circumcision causes death, the penalty is life imprisonment.

‘Accomplices of those engaged in the act will face up to 3 years imprisonment or D50,000 [approx £900] fine or both; a person who knows that FGM is happening or about to happen and fails to report it is subject to a fine of D10,000 [approx £180].

‘Research has shown that sanctions against FGM/C are not the alpha and omega of everything. The practice requires civil, political, economic, social and cultural interventions from state and non-state actors to be addressed.’

[The Numbeo.com website (updated in January 2016) referred to an average net monthly wage in the country of D2,366 (equivalent to approximately £45 using xe.com currency converter) https://www.numbeo.com/cost-of-living/country_result.jsp?country=Gambi.]

7.1.2 An AfricLaw report from January 2016 noted:

‘From the coastal village of Brufut, on the chilly night of 24 November 2015, President Jammeh declared a ban on FGM stating that it was a cultural and not a religious practice... This was swiftly followed by the passing of the Women’s (Amendment) Bill 2015 by the National Assembly on 2 December 2015 to prohibit female circumcision. The amendment addresses one of the key deficiencies of the Women’s Act 2010 which was the absence of a provision on eliminating harmful traditional practices. The Amendment Act added sections 32A and 32B in the Women’s Act. With the enactment, The Gambia joined a number of African countries in adopting legislation as a reform strategy for ending FGM.

‘...The Act uses the term ‘circumcision’ instead of ‘mutilation’. However, in defining circumcision, it lists female genital mutilation. Section 32A makes it an offence for any person to engage in female circumcision and whoever contravenes it is liable on conviction to an imprisonment for a term of three years or a fine of fifty thousand dalasis (approximately \$1250) or both. The Act also stipulates a life sentence in prison when the circumcision results in death.

²⁰ BBC News, [FGM: Lack of convictions 'a national scandal'](#), 15 September 2016

²¹ See [Annex I](#) for Professor Tony Barnett’s full expert commentary.

'The Act also addresses those who commission the procedure in section 32B(1). It states that 'a person who requests, incites or promotes female circumcision by providing tools or by any other means commits an offence and is liable on conviction to imprisonment for a term of three years or a fine of fifty thousand Dalasis or both.' In addition, a fine of ten thousand dalasis (approximately \$250) as provided in section 32B(2) of the Act is levied against anyone knowing about the practice and failing to report.

'However, there is a major lacuna in the Act, in so far as it makes no provision for cross-border circumcision addressing both circumcisers who perform the procedure outside the country as well as girls forced to undergo the procedure in countries with weaker FGM laws. Girls living nearer the borders are more vulnerable as they can be forced to move. A good example of a country addressing cross-border circumcision is Ghana which reviewed its laws to prosecute all perpetrators including those who perform it outside the country.

'The Gambia has been known to enact laws that address specific issues such as the 2013 Domestic Violence Act and the Sexual Offences Act. It is thus surprising that an anti-FGM law was not enacted but rather was subsumed in the Women's Act 2010. Generally, the enforcement of the Women's Act is weak. To ensure Sections 32A and 32B do not become 'scarecrows', there would be the need to put in place detailed plan for implementation, enforcement and monitoring as well as establishment of enforcement mechanisms such as an Anti-FGM Prosecution Unit and the Anti-FGM Board. The existence of such 'tools' may bring about accountability in terms of reporting, investigating and prosecuting FGM cases.

'A long standing and cherished traditional practice may not easily go away with the enactment of a law. It could, on the contrary, drive the practice underground and make it more harmful and dangerous for the children. Continuous engagement and dialogue with the practicing communities, including circumcisers, religious leaders and traditional gate keepers, popularisation of the law to every nook and corner of the country, enhancing coordination among relevant sectors and empowerment of children and young people are necessary conditions to bring about lasting change. We must make FGM unacceptable in the minds and hearts of every man, woman, boy and girl in The Gambia. Boys and men should be more proactively targeted.

'Laws must be drafted to drive implementation, including clear mandates, procedures, funding and accountability mechanisms. Effective implementation, coordination and enforcement of the law and programmes against FGM would require that the technical, human and financial capacities of the Ministry of Women's Affairs, the National Women's Council and Women's Bureau, the lead state machineries, are enhanced greatly. It is therefore recommended that Women's Bureau establishes a Legal Unit to which new lawyers from the University can be assigned to litigate on women's rights and monitor the enforcement of laws.'

7.1.8 In October 2016 Foroyaa reported cited UNICEF Country Representative, Mrs. Sara Beysolow Nyanti as stating that

'In many countries ... despite the existence of legal mechanisms to oversee FGM/C, challenges and limitations in implementation persist, and are primarily due to a lack of resources, skilled personnel, appropriate documentation, as well as weak organizational capacity

Where will families who continue to practice FGM/C run to for support? They might go underground to cutters who still illegally practice. But they might also go out of the country as well. It is very well known that when efforts are made in one country to ban such practices, cross border initiatives to neighboring countries increase.'

Furthermore, the following relevant excerpt on this point from a source cited elsewhere in the CPIN (at paragraphs 5.1.2, 6.2.3 and 6.4.1) was also omitted:

- [International Journal of Women's Health, 'Female genital mutilation/cutting: changes and trends in knowledge, attitudes, and practices among health care professionals in The Gambia', 12 April 2016](#)

[...] Introduction

[...] Regarding legal implications, The Gambia had signed national legal conventions that implicitly oppose the practice, but no specific legislation in the country was proposed until December 2015, when The Gambia's National Assembly historically approved FGM/C prohibition and criminalization

through the amendment of the National Women's Act. Different preventive interventions have been implemented across the country with timid results, but a comprehensive national plan of action towards FGM/C abandonment has yet to be developed. [...]

Discussion

[...] While more knowledge regarding the human rights framework is related to human rights-based approaches fostered in The Gambia, general misunderstanding of national legislation can be associated with muddled speeches delivered during some of the anti-FGM/C campaigns that could have contributed to driving the practice to private settings under fear of prosecution. [...]

Additional country information found in the public domain since the CPIN was published also indicate the need of a cultural shift to happen before enactment of the laws can be realised:

- [Adriana Kaplan & Abdoulai Drammeh on behalf of WassuKafo Gambia, Exploring the Knowledge & Perceptions of Gambians about the Law banning Female Genital Mutilation/Cutting, July 2017](#) [A copy of the report can be requested directly from ARC – see 'Index of Sources' for details] [emphasis added]

Introduction [...]

This research project seeks to fill that knowledge gap by analysing the knowledge and perceptions of a cross section of Gambians (health professionals, students, traditional birth attendants and local women groups) on the newly enacted legislation banning FGM/C in The Gambia. [...]

Preliminary Results [...]

86% and 90% of health professionals and students respectively, reported to be aware of the specific law that ban the practice of FGM/C. When asked whether they support the anti-FGM/C law in The Gambia, 94% and 86% of health professionals and students respectively responded in the affirmative. However, 73% and 78% of health professionals and students (future health professionals) believe that the practice of FGM/C will continue despite the law [...]

Majority of health professionals and students (82% and 92% respectively) mentioned sensitisation and training as the best method for stopping the practice of FGM/C in The Gambia, followed by laws and legislation as the second best method. [...]

it appears that practicing communities are on the defensive and try to bury their practices for fear of being exposed. In fact, the idea of supporting the law should be treated with caution as there is a high potential for participants to over-state their willingness to supporting the law. Given the sensitive nature of the law in the context of fear of being jailed, most respondents may feel obliged to answer in the affirmative. [...]

When asked about whether they are aware of the legislation that bans the practice of FGM/C in The Gambia, All the participants responded in the affirmative. They all mentioned that they heard about the law as a result of sensitisation programmes discussing its implementation through the national television (GRTS). However, participants were divided on how communities see the law. They highlighted that some people are in support of the law while others are not. [...]

Meanwhile, responding to questions on how they think the law will influence culture; participants remain divided in their response. **Participants, who hail from ethnic groups that perform the practice of FGM/C, appear to believe that the law will not change the practice whatsoever. However, all the women agreed that the law will drive the practice underground in order to evade prosecution** [...]

The above responses demonstrate that the issue of utilising the law to ban a deep rooted cultural practice remain controversial among practising and non-practising communities in The Gambia. For FGM/C to be abandoned in the Gambia there should have been proper consultations with communities before the enactment up to implementation of the law. In fact, another reported issue that arose from the discussion is the issue of sensitisation and community consultation. One housewife mentioned that law banning FGM/C cannot be properly enforced in The Gambia without the cooperation of target communities [...]

Lifting the ban on FGM/C and repealing of the law

In another article published by The Standard newspaper on the 06 March 2017, a handful of circumcisers have called on the new government to lift the ban on the practice of FGM/C which was placed by the former government under the regime of Yahya Jammeh. The practitioners argued that girls need to undergo the practice as it helps them in many ways [...]

Speaking to The Standard, one circumciser argued that if the government is promoting human rights then they (the practitioners) should be allowed to practice their tradition without hindrance. [...]

From the above responses, it is obvious that there is high level of opposition to the FGM/C law which could lead to challenges to law enforcement and successful conviction of violations. Some practitioners still believe that the practice is culturally acceptable and leads to no health complications. Despite series of trainings and sensitisations on the health complications of FGM/C by activists and civil society organisations, some practicing communities still do not accept that FGM/C causes health complications in survivors or complications seen among survivors are as a result of FGM/C. This can have serious implications for young girls as the practice could now be forced underground without the knowledge of law enforcement officers.

Additionally, some practitioners believe that FGM/C is part of African identity and that support for the ban is influenced by Western ideologies and culture. In other words, practicing communities see this as cultural clash between Western and African cultures where the White people want their cultures and traditions to prevail over African traditions. Similarly, the responses above revealed that public policies in the form of legislations can be less effective in changing behaviours with regards to traditional and cultural practices when they are blanketly applied to targeted communities without due dialogue and consultations with the target populations. [...]

➤ [The Point, Yeswecan Foundation Sensitises Children on FGM, 22 May 2017](#)

Yeswecan Foundation organized a daylong sensitisation workshop for schoolchildren on Female Genital Mutilation (FGM), at the Faraba Bantang Upper Basic School on Saturday [...]

Malang Jawo, secretary general of the foundation[...] he added, they also understand that [sic] it's a deep rooted tradition, saying through advocacy they would be able to change the mindset of the people. [...]

➤ [smbc News, Dropping the knife and ending FGM in the New Gambia, 7 February 2017](#)

[...] FGM practice has been pushed underground after Gambian authorities indicted two women over the death of a two-year-old girl in the country's Lower River Region.

According to Musu Bakoto Sawo, the Program Director for Think Young Women, there is a need for continuous advocacy against the practice. Prosecution, she says, is not what they seek but educating the people and collaborating with law enforcement to prevent any young girl from being harmed. [...]

➤ [Human Rights Watch, World Report 2017: Gambia – Events of 2016, 12 January 2017, Women's and Girl's Rights](#)

[...] Women's rights advocates underscored that, as a complement to punitive measures, intensive community education campaigns would be necessary to address the centuries-old customs that underpin these practices. [...]

In her written response to ARC in June 2017 [Maria Saine, Programme Officer at Safe Hands For Girls](#), noted that "The practice of FGM/C has long been recognized by many within the society as a norm, and to others, a sacrosanct practice based on cultural, religious and/or other societal dispositions".²²

²² See [Annex III](#) for Maria Saine's full expert commentary.

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ANNEX I: Expert commentary prepared by [Professor Tony Barnett](#)

HOME OFFICE COUNTRY POLICY AND INFORMATION NOTE: GAMBIA: FEMALE GENITAL MUTILATION (FGM): VERSION 1.0; DECEMBER 2016

RE: *K and others (FGM) Gambia CG [2013] UKUT 62 (IAC)*

BY: PROFESSOR TONY BARNETT

IN THE LIGHT OF:

2015 Women's Amendment Act (Gambia) 2015, specifically regarding Country Policy and Information Note para 2.4.2 which states as follows:

"The Home Office's view is that this change to the Gambian criminal law specifically banning FGM, and the evidence of it being implemented amounts to strong grounds supported by cogent evidence to depart from the finding in *K and others* that there is no effective state protection for those at risk of FGM (para 127)"

COMMENT

1. The Policy Information Note provides little in the way of objective empirical evidence to support the conclusion arrived at in para 2.4.2.
2. Regarding the statement in para 3.1.2 that "A new law enacted in December 2015 specifically bans FGM, and there is evidence that this is being implemented and prosecutions brought by the authorities"
 - a. This is but a statement that two prosecutions are being brought: it is not evidence that even one successful prosecution has occurred.
 - b. Even were two successful prosecutions to have been brought (and there is no evidence of this), there is no evidence that the law enforcement agencies have either the resources or inclination to pursue such prosecutions given the number of cases reflected in the prevalence figures reported in the Policy Information Note.
 - c. Justice Naceesay Sallah-Wadda noted²³ that "the challenges in The Gambia, in her view, remained in the areas of lack of awareness of the various legislations protecting the rights of women, as well as the unwillingness in many cases of having womenfolk report instances of violence and abuse being meted out to them."
 - d. It is important to note that even were the local police and other relevant authorities to be able to pursue offenders – and we must remember that the prevalence rate would require huge resources – it is unlikely that both male and female public opinion does not in general sympathize with the intent of the legislation. The evidence for this is in the currently reported prevalence and also most important, the *incidence* of the practice in all its forms. In particular, discussion of the incidence question in the Policy Information Note at para 2.3.4, is at the very least open to substantial critical concerns as to its statistical argument and the quality of evidence it adduces.
3. Failure by the UK authorities to prosecute successfully even one case of FGM in a country with incomparably greater resources, different traditions, public revulsion at the practice and far lower prevalence²⁴ lends support to the view that the argument in the Policy Information Note is not sustainable.

²³ <http://allafrica.com/stories/201703030793.html> accessed 18 May 2017.

²⁴ <http://www.bbc.co.uk/news/uk-37364079> accessed 18 May 2017.

In view of the above, it is my opinion that while it is to be welcomed, the Gambian Women's Amendment Act 2015, is at this time a statement of legal intention but there is no evidence that its effect is to make the risk of FGM significantly or even slightly less in practise to young girls and women in the Gambia.

TONY BARNETT RELEVANT EXPERIENCE

1. Professorial Research Fellow in the Social Sciences of Infectious Diseases at the London School of Hygiene and Tropical Medicine
2. Previously held chairs at the University of East Anglia, London School of Economics; Visiting Overseas Professor at the Institute of Developing Economies Advanced School, Tokyo, Japan, Visiting Professor the Harvard School of Public Health.
3. A socio-economist with training and skills in social anthropology, sociology, political science and economics. Degrees of BA (Hons), MA (Econ) and PhD. 54 years' experience of researching, teaching and advising about social, cultural, economic and political issues in the countries of Africa, Asia, the Middle East and the Pacific.
4. Research experience in The Gambia; I have acted as an expert witness in at least 60 FGM related case, in each case based on extensive research on that matter.
5. I have acted as an expert witness in such matters in England, Scotland, the United States of America, the Netherlands and Germany. Most recent, agency US Department of Homeland Security, applicant's legal representation: (i) Frankfurt, Kunitz, Klein, Selz, (ii) Venable LLP, both New York, *pro bono* advice.

DATE: 18 MAY 2017

© Tony Barnett

NOTE: this report was prepared *pro bono* in a personal capacity and the London School of Hygiene and Tropical Medicine is in no way party to it.

ANNEX II: Expert commentary prepared by [Dr. Pamela Kea](#)

WHAT PRACTICAL EFFECT HAS THE DECEMBER 2015 ENACTMENT OF SECTION 32 OF THE 2010 WOMEN'S ACT (AMENDMENT) CRIMINALISING FEMALE CIRCUMCISION HAD ON ACCESS TO EFFECTIVE PROTECTION FOR WOMEN FEARING FEMALE GENITAL MUTILATION/CUTTING?

The 2015 enactment of Section 32 of the 2010 Women's Act (Amendment) criminalizing female circumcision has had little practical effect on access to effective protection for women fearing female genital mutilation / cutting. Firstly, only two women have been charged (in March 2016) since the 2015 enactment. Given the high prevalence rates of FGM in The Gambia, this number is negligible and demonstrates how ineffectual the enactment has been.

Secondly, although the recent enactment has outlawed the practice of FGM, many fear that this will simply drive it underground because community and religious leaders continue to support this deeply entrenched cultural practice. Indeed: "We know from other African countries that have introduced bans that legislation is only one part of the jigsaw," said Julia Lalla-Maharajh, head of the British-based Orchid Project which supports anti-FGM programmes in Gambia.²⁵ FGM is a deeply entrenched cultural practice, which is central to community and gendered identity: 'Community identity is important. One must conform to the community's rules and traditions. Being circumcised is considered a necessary part of this. The mothers and grandmothers who perpetuate this practice are not doing so out of cruelty. They are simply re-enacting an age-old custom so that their daughters and granddaughters will become accepted members of society.'²⁶ Research in Senegal, which banned FGM in 1999, found that legislation did little to prevent the practice amongst those who supported it. It merely drove the practice underground.²⁷ Further: 'There is a vested interest in continuing this practice in The Gambia. Many of the excisors are traditional practitioners or trained health attendants. They supplement their income with the money and other articles they receive from work as excisors. In fact, the income they earn from performing this procedure is often higher than what they earn as midwives or nurses. Their social status also improves as an excisor'.²⁸

Thirdly, one can draw parallels between the criminalisation of FGM and legislation implemented on the legal age of marriage, to see what little practical effect the criminalisation of female circumcision has had on access to effective protection of women fearing FGM. The 2005 Children's Act prohibits marriage and betrothal to anyone under the age of 18. The 1997 Constitution states that all marriages shall be based on the free and full consent of the intended parties. It should also be undertaken voluntarily by men and women of 'the requisite age and capacity'.²⁹ However, over 90% of Gambian women follow customary and Sharia law in relation to marriage and family matters.³⁰ Marriage before the age of 18 is common practice for girls. Indeed, girls as young as 12 years of age may be forced to marry. Most cases of early or forced marriage go unreported as they are viewed as private and not considered wrong. Multi-Indicator Cluster Survey (MICS4) data from 2010 indicates that 8.6% of women were married before the age of 15, and 46.5% of women were married before

²⁵ Gambia FGM Ban could drive practice underground, campaigners warn. L. Hunt. Thomas Reuters Foundation. Dec. 7, 2015.

²⁶ Women's News Network, cited in Fraga-svar: Gambia, Konsstymning inom staman Fula. 2015-06-12.

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³⁰ Social Institutions and Gender Index OECD, 2009.

the age of 18.³¹ Yet, there have been no prosecutions or criminal proceedings in relation to these crimes.

Lastly, the Gambia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol). However, 'it has not yet ratified the Optional Protocol to CEDAW.' The following violations of women's human rights continue: 'the persistence of discriminatory laws; discrimination within the family; violence against women; unequal access to property, education and employment; under-representation in decision-making positions; and lack of access to health services.'³² Similarly, despite the introduction of the Children's Act (2005), children continue to be subjected to sexual abuse and exploitation, harmful traditional practices, domestic violence and abandonment.³³

Prepared by Dr. Pamela Kea
31/5/17

I am an Anthropologist with an M.Sc. (University College London) and Ph.D. in Social Anthropology (School of Oriental and African Studies, University of London), and currently a senior lecturer in The Department of Anthropology at The University of Sussex. I have extensive knowledge of Gambian culture and political economy having carried out research there since 1993. I have acted as an expert witness in approximately 60 cases, most of which have focused on FGM and forced marriage in The Gambia. As well as co-writing the 2011 Gambia Country of Origin Information report, I act as a country expert for the Fahamu Refugee Programme.

³¹ Social Institutions and Gender Index 2014.

³² http://www.africa4womensrights.org/public/Dossier_of_Claims/GambiaENG.pdf

³³ https://www.unicef.org/gambia/activities_8342.html

Annex III: Expert commentary prepared by Maria Saine, Programmes Officer, [Safe Hands For Girls](#)

What practical effect has the December 2015 enactment of Section 32 of the 2010 Women's Act (Amendment) criminalizing female circumcision had on access to effective protection for women fearing Female Genital Mutilation/Cutting?

The practice of FGM/C has long been recognized by many within the society as a norm, and to others, a sacrosanct practice based on cultural, religious and/or other societal dispositions. The World Health Organization recognizes the practice of FGM to comprise of 'all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons'.³⁴

Two years ago, a declaration banning the practice of FGM/C was made (by then President Yahya Jammeh) and subsequently, an FGM/C law was enacted (in December 2015) to give full legal effect to the declaration, as well as criminalize the harmful practice of FGM/C in The Gambia.

The law criminalizing FGM/C is encapsulated in Section 32 of the Women's Act 2015 (Amendment) which defines female circumcision and makes it an offence to engage in, aid or abet FGM/C. As a consequence, a person who engages in female circumcision faces a three year imprisonment term and/or a Fifty Thousand Dalasis fine. In the event that such circumcision causes death; life imprisonment. Accomplices of female circumcision are liable on conviction to a three year jail term and/or a Fifty Thousand Dalasis fine. The law also imposes a duty on persons to report matters of FGM/C to the appropriate authorities as promptly as can be. Failure to do so without good reason would amount to a fine of Ten Thousand Dalasis.

Now, given the variation and vast prominence of FGM/C amongst many ethnicities in The Gambia, it is only trite that the 2015 law criminalizing female circumcision is apt and timely. It goes without saying therefore that, the essence of criminalizing female circumcision can be best appreciated based on its practical effect in the society *vis-à-vis* the circumstances relating to female circumcision. For the purposes of this task therefore as well as its relevance to the subsequent paragraphs, the practical effects of criminalizing female circumcision shall be discussed with regards to the effective protection of women from FGM/C.

By way of an introduction, the essence of the law is to separate (clearly) acceptable from unacceptable conduct. The 2015 law criminalizing FGM/C in The Gambia is instructive of the fact that FGM/C can no longer be seen as acceptable conduct in the society and thus, its illegal status. By virtue of this realization, the law serves as an immediate remedy for and to anyone who has undergone FGM/C (post 2015) or anyone who is at risk of undergoing FGM/C. The means of remedy referred to herein is through the court system where cases can be filed for determination based on the circumstances and relevant facts of the case.

This essentially infers that every Gambian (now) has a medium and in fact right to express resentment to FGM/C in full reliance on the guarantee that the law would guard his or her interest should the society try to 'clamp' on them. The current Gambian case in court centering on a child who died during the process of FGM/C is a classic example of the legal effect of the law against female circumcision. This case has also showed that the state hasn't done much in ensuring speedy trial for the victim.

³⁴ Available at: <http://forwarduk.org.uk/key-issues/fgm/> 07-Jun-17.

More so, the criminalization of FGM/C has enabled for the protection of girls/women by way of a deterrence mechanism. The purpose of deterrence is to discourage the practice of FGM/C at all levels and thus, make for an FGM/C free society. For example, with the enactment of the Women's Act 2015 (Amendment) as well as the activities of various Agencies, NGO's and relevant stakeholders, it is only trite to state that the larger bulk of the Gambian society is adequately informed of the criminalization of FGM/C. Even stronger on the legal side is the presumption that the law criminalizing FGM/C is known to all based on the principle that 'ignorance of the law is no excuse'. Essentially, the disadvantages accompanying the consequences for disregard of the law far outweigh any perceived advantages of the practice of FGM/C. As can be noticed in the present day society, FGM/C is no more a practice spoken of in 'high regard' when contrasted with the years leading up to 2015. This is not to infer that the practice has ceased in totality as some are still carried out in a highly secretive manner in fear of the legal resultant. However, the inference is that members of the society are wary of falling on the wrong side of the law and thus, cautious not to be offenders.

Indeed, there is incidental towards the protective function of the law, enlightenment and literacy increment among the young, especially for school going children. The law criminalizing FGM/C protects every girl/woman from female circumcision. FGM/C is usually carried out on children who barely appreciate the modalities of the law, their bodies and/or their rights. This has on several occasions led to Agencies and NGO's engaging in inter-regional tours to enlighten children on what FGM/C is (as defined by law), the effects it has on the body (which are of course negative), and the mediums by which FGM/C can be avoided (especially for those who are in consternation that they may undergo the practice soon). Therefore, it goes without saying that, the criminalization of FGM/C has contributed to a more literate Gambian society especially among children and youth who feel the brunt of this practice most. Effective protection can also be understood in relation to the ability of one at risk of undergoing FGM/C to appreciate the future repercussions, as well as know the legal/rightful steps to take to prevent FGM/C.

In conclusion therefore, the law criminalizing FGM/C as provided by the Womens Act 2015 (Amendment) is indeed sufficient in serving as a protective vice for girls/women in fear of the practice of FGM/C. What however remains to be addressed is the issue of cross-border cutting. The Women's Amendment Act 2015 is very silent in that regard. What this infers is that young girls can still be circumcised out the borders of The Gambia and the Women's Amendment Act 2015 doesn't provide for any provision that addresses a case like that. What is however particularly material to highlight is that, the existent law criminalizing FGM/C is not the only necessary step to be taken to bring an end to the practice of FGM/C. More needs to be done in ensuring that the law is not only present but also effectively applicable in the society. Access to justice in courts needs to be made. The Gambian government can also open up centers to look into the social, mental and most importantly health effects that girls/women experience prior to, and in some instances after FGM/C.