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**Proposed Convict Enfranchisement in the Gambia: Lessons from America<sup>1</sup>**

**Gambiya'da Önerilen Mahkum Ayrıcalıkları: Amerika'dan Dersler**

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<sup>1</sup> This article is analyzed by two reviewers and it is screened for the resemblance rate by the editor/ Bu makale iki hakem tarafından incelenmiş ve editör tarafından benzerlik oranı taramasından geçirilmiştir.

\* In this article, the principles of scientific research and publication ethics were followed/ Bu makalede bilimsel araştırma ve yayın etiği ilkelerine uyulmuştur.

\* In memoriam, this article is devoted to Anthony Binitie Egi (b.1961) whose demise occurred in Toronto, Canada, on January 2, 2019. He gave so much in life to celebrate which include his priceless contribution towards opening the author's mind to the wonderful world of books during their memorable years at Western Boys' High School, Benin City, Nigeria (Class 1977).

### **Abstract**

Convict enfranchisement is among the themes The Gambia Constitution Review Commission is addressing in its appraisal and updating of the 1997 constitution. The dawn of a new political dispensation necessitated the assignment to usher in a third republic. By means of the United States case law, a country where most felonies lead to disenfranchisement, this article examine the likely consequences of enfranchising convicts in The Gambia. Blalock's Group Threat hypothesis explained the ulterior motives fuelling the enfranchisement call as the social dynamics of the country contrasts those of other nations like the United States which The Gambia seems to be keeping up with. Rather than addressing the issue of enfranchising an insignificant number of convicts, the conclusion shows that tackling constitutional irrationalities undermining the principles propping the separation of powers will be more beneficial.

**Keywords:** Constitution Review, Convict Enfranchisement, Disenfranchisement, Detainees, Gambia.

### **Öz**

Mahkum ayrıcalıkları, Gambiya Anayasa Gözden Geçirme Komisyonu'nun 1997 anayasasını değerlendirmesinde ve güncellemesinde ele aldığı konular arasında yer alıyor. Yeni bir siyasi muafiyetin doğuşu, üçüncü bir cumhuriyette yerine getirmeyi gerektirdi. Bu suçların çoğunun haklarından mahrum bırakıldığı bir ülke olan Birleşik Devletler dava hukuku sayesinde, bu makale Gambiya'daki kuşkulu hükümlülerin olası sonuçlarını inceler. Blalock'un Grup Tehdidi hipotezi, ülkenin sosyal dinamiklerini, Gambiya'nın örnek aldığı Amerika Birleşik Devletleri gibi diğer ülkelerin tezatlarıyla karşıtlık çağrısını körükleyen nedenleri açıkladı. Sonuç, önemsiz sayıda hükümlüye ayrıcalık verme konusunu ele almak yerine, güçler ayrılığını destekleyen ilkeleri baltalayan anayasal mantıksızlıklarla mücadelenin daha faydalı olacağını göstermektedir.

**Anahtar Kelimeler:** Anayasa Değerlendirmesi, Hükümlü Ayrıcalıkları, Hak Mahrumiyeti, Tutuklular, Gambiya.

## Introduction

The Gambia Constitution Review Commission (CRC) has the mandate to appraise and revise the 1997 Gambian constitution to usher in a third republic.<sup>2</sup> The dawn of a new dispensation which made the clamour for the envisaged republic indispensable necessitated the review exercise. Preceding the inauguration of the CRC, a political impasse ensued during the December 2016 Gambia presidential election which resulted in a declaration of a state of emergency. A group of opposition politicians were serving time, preceding the declaration, for staging an unauthorised public demonstration. In conformity with normal practice, they did not cast their vote while in incarceration. Eventually, a coalition of opposition parties defeated the ruling party and the inmates received pardon. Their lessons while in custody are yet to permeate public domain.

Members of the Commission are traversing the country seeking opinions of diverse interest groups on the content of the proposed document. A topic of interest is the enfranchisement of prisoners during national elections. The document under review is silent on the issue which has been a colonial heritage. Campbell H. Black defines a prisoner “as one, who is deprived of his liberty; one who is against his will kept in confinement or custody. A person restrained of his liberty upon any action, civil or criminal, or upon commandment,” (Campbell 1968, P.1358) This write up considers a prisoner as “a person who is serving time in prison after a court sentence” while “[civil detainees] are those apprehended by a law enforcement officer and are in custody, regardless of whether the person has yet been put in prison” (Garner 1999, 1213).

Denial of Gambian prisoners the suffrage predates her independence. The CRC, going by the opinion of Grady C. Sarah “must [have] drawn its meaning from the evolving standards of decency that mark the progress of a maturing society,” akin to *Trop v. Dulles* American seminal Eighth Amendment case. “The case envisioned the Amendment as evolutionary, where a form of punishment once unquestioned might be viewed by future generations as outside the limits of civilized standards and constitutionally impermissible” (Gardy 2013, p 454).

Every registered Gambian citizen being eighteen years or older and of sound mind has the franchise during national elections and referendums.<sup>3</sup> Furthermore, those on death roll, or who have served time (either six months or above) within five years preceding nomination for election to the House of Assembly cannot run, save those granted a free pardon” §90(1) (c).<sup>4</sup> Prisoner’s<sup>5</sup> ineligibility criteria remain notwithstanding being on the electoral roll before incarceration. The constitution nonetheless contains no provision restraining prisoners from contesting, as the disqualification clause contained in §90(1) (c) applies to those who served time and interested in running for National Assembly. Other than being a colonial heritage designed to discourage unacceptable behaviours in society, the essence of the disenfranchisement policy remains unspecified. Noteworthy is the concern that the entitlement of a prisoner to exercise his franchise was not part of criminal sentence. Nevertheless government, for the good of society, is under no legal obligation to

<sup>2</sup> The Gambia was banqueted a constitutional democracy at independence. Readers interested in the constitutional development of the country when it became a full-fledged colony since 1894 should consult Hughes, and Perfect, (2006; 2008).

<sup>3</sup> Gambian constitution. chapter. V §30 (1-2) 1997.

<sup>4</sup> Gambian constitution. VII §90(1) (c) 1997.

<sup>5</sup> This write-up concerns detainees who are either serving or have served time in prison after a court sentence. These classes are different from civil detainees who are awaiting trial but are either denied bail by a magistrate or are unable to fulfil bail conditions for their temporary release.

enforce the right. It is a direct consequence of a court verdict that occurs routinely (Nunn2005, p769).

Jason B. Conn remarked that “Politicians hide their justifications and find other arguments to justify their race-based opinions” (Jason 2005, p. 538). It is worth discerning the motive why convict enfranchisement is on the CRS’s agenda alongside other matters such as practices that undermine the separation of powers in a presidential democracy.<sup>6</sup>

Incarcerated convicts forgo certain rights and privileges whereas in some other jurisdictions the abridgements continue after discharge (Ebenstein 2018, p. 323). This paper applied the Group Threat hypothesis to present a case in limited support of the convict disenfranchisement policy of The Gambia. “The racial threat hypothesis originated in Blalock (1967), which argued that as the relative size of racial and ethnic minority group increases, members of the majority group perceive a growing threat”<sup>7</sup> (Geoghagan 2007, p. 49). However, in maintaining this ground serving prisoners and ex-convicts will be looked at differently. Consequently, the opinions advanced pertain to prisoners, a class distinct from free men on restrictions based on previous criminal convictions.

The analysis and conclusions rest on experiences tapped from United States case law, based on the Group Threat hypothesis, a country where felony convictions lead to disenfranchisement. Indeed, “no other democratic country in the world disenfranchises more people, in both total numbers and population percentage, because of criminal convictions” (Gardy2013, p. 496 and Christopher 2016) Also, The Gambia practices presidential democracy for which the U.S. is a leading practitioner. Besides, the opinions of the CRC members tilt towards the presidential system, an effect of American education on Gambians. The study being an integral part of the history of constitutional development of the country will be useful in governance and conservation of order in society.

The main predicament encountered during the preparation of this write up is dearth of information on The Gambia. Unlike South Africa and Nigeria where official documents could be accessible, information hoarding is a pastime of civil servants, a habit imbibed for personal safeguard since the highhanded 1994-2016 political dispensation.<sup>8</sup>

### **Causes and Practice of Convict Disenfranchisement**

Primarily, societies are stern on convicts for being untrustworthy relative to law abiding citizens (Roger, et al. 2008, p. 2). As a people of no character society feels they should put up with public reproof. Therefore, having failed to comply by the standards of permissible conduct, they merit exclusion from the law making process. Consequently, it is the “criminal’s own “default” [that] sets him apart in the eyes of the law,” rather than his inherent group characteristics, (Richard and Christopher 2012).

Reasons propping the denial of franchise to convicts cited in literature are civil (public) death and violation of social contract. The concept of civil death has been resonating in societies since the Ancient Greek and Roman Empires. “In Renaissance Europe, people who committed certain crimes suffer "civil death," which destroys "their legal capacity, as [does] natural death to their physical existence” (Nunn 2005, p 4). “English law developed the law of attainder which entails the forfeiture of property, inheritance and civil

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<sup>6</sup> These include the imposition of a presidential term limit which has been absent in all the constitutions.

<sup>7</sup> Blalock, H.M. *Toward a Theory of Minority-Group Relations*. New York: John Wiley & Sons (1967). cited in Geoghagam (2007), p 2.

<sup>8</sup> The causes of the highhandedness are not addressed in this write-up.

rights,” (Debra 2003, p. 2). Britain transplanted the practice to The Gambia and her other colonies. However in some jurisdictions, convicts have the vote.<sup>9</sup>

Incarceration deprives convicts certain civic rights for being unvirtuous subjects who could put a social order at risk if permitted to socialise. This explains why banishment was fashionable in Europe (Wallis 2017, pp. 16-18). Hence, this and other reasons necessitate civil death to become imperative in regulating bad characters in societies. The emergence of modern nation states has however confined banishment of convicts to antiquity. “One Founding Father, Benjamin Franklin, proposed shipping rattlesnakes to Britain to repay the favour.” As no nation like being a dumping ground for ‘rattlesnakes,’ “the transportation of convicts from England ceased in 1775, preceding American declaration of independence...”<sup>10</sup> Those of despicable disposition considered unfit to participate in public affairs are now internally exiled in prisons.<sup>11</sup>

Though not a White society, Gambian governing apparatus are vestiges of colonialism hence Western political thought and ideas still hold sway. Convict disenfranchisement has been defensible on the philosophical basis of Thomas Hobbes’s, John Locke and other thinker’s norm of Social Contract. The concept featured in the Platonic dialogues while Socrates was facing the death penalty in prison (The Dialogues of Plato 428-347-48 BCE pp. 211-222). Social contract implies understanding that living in a society entails a contract. One has to surrender the infinite freedoms one would have relished in a state of wild and conform to laws in return for state protection and its attendant advantages. This explains the supporting reason governments have both the power and responsibility to protect and grant protection to where it extracts allegiance (Richard and Christopher 2012, pp. 1599). Therefore committing a crime implies a violation of the coded laws and the social contract that binds the society. Hence “by their own default” lawbreakers abridged their rights (Richard and Christopher 2012, pp. 1599). On account of this, Western philosophers like Thomas Hobbes (*Leviathan* 1651), John Locke (*Two Treatises on Government* 1690), and Jean J. Rousseau (*Du contrat social* 1762) elucidated their writings in favour of disenfranchisement, though from different perspectives.<sup>12</sup> The political philosophy underpinning British colonialism tilts towards their reasoning.

Learned luminaries like the United States Judge Henry Friendly rationalised in *Green v Board of Elections* (1967),<sup>13</sup> that “Someone who breaks the law may have thought to have abandoned the right in making them” (Carlos 2013, p 1319). Also Richard M. Re and Christopher M. Re opined that “those who defied the rule of law were thought to have voluntarily set themselves apart from the body politic and to have forfeited the franchise to self-rule. Vice was defined by bad conduct, and bad conduct merited disenfranchisement” (Richard and Christopher 2012, pp. 1597). A Massachusetts legislator questioned the absurdity of permitting incarcerated convicts, with abridged rights to manage their affairs, to influence how freemen in societies run their lives. An extension of this thought explains why in some jurisdictions, anyone who has served time can neither be on the Bench nor retain his Bar membership<sup>14</sup> (Roger, et al, 2008 p. 1 footnote).

<sup>9</sup> Such places include Denmark, Israel, South Africa, Sweden, Switzerland, Germany and, Serbia. Canada, Australia, and the United Kingdom disenfranchise convicts restrictively than the United States, by barring certain offenders from voting while incarcerated.

<sup>10</sup> Judge James D. Maxwell II And Stay Out! A Look at Judicial Banishment in Mississippi. VOL. 8. (2012)

<sup>11</sup> William Shakespeare alluded to banishment in *Julius Caesar* when Metellus Cimber, a conspirator, entreated Caesar to pardon his exiled brother.

<sup>12</sup> However, other philosophers like David Hume (*Of civil Liberty* 1742) and J. S. Mill (*On Liberty* 1859) held divergent opinions of the political theory.

<sup>13</sup> US Court of Appeals for the Second Circuit - 380 F.2d 445 (2d Cir. 1967).

<sup>14</sup> US Court of Appeals for the Second Circuit - 380 F.2d 445 (2d Cir. 1967)

A state could prevent a convict from participating in the democratic process in view of the substantive issues for which he may vote as self-interest motivates individual decisions (Carlos, 2013, p. 1319). If a criminal has the ballot he is likely to vote in support of politicians that would enhance his delinquency. Haner Christopher averred that in the United States ... evidence shows that offenders support the existence of the laws they have broken (Christopher 2013, p. 933). A demonstration of this is the abuse of the prerogative of mercy which some misconstrue for presidential magnanimity. In August 2018 a Gambian newspaper reported the release of a convict paedophile on presidential pardon. Public outcry prompted the Justice Minister, then in Saudi Arabia, to distance himself from the act, in a statement. On his return to the country, the minister made a U-turn by justifying the release to the chagrin of the public. Subsequently, the convict was allegedly returned to custody due to public outcry. This demonstrates that prisoners will gravitate towards electoral contestants who promise to trade a presidential pardon for votes. It will be difficult to ascertain the outcome of prisoners' enfranchisement if the release of a paedophile serving time is so surreptitious. Rationality necessitated Kathleen Dean Moore to aver that the president [U.S.] should render account for his pardoning decisions (Kathleen 1993, p. 288). He is a public official making a decision that is part of the constitutional scheme of criminal justice." In this regard, The Gambia is yet to live up to expectation.

Shrewd politicians could capitalise on the notion that statistically, every vote counts. Hence prisoners in The Gambia, though numerically insignificant, could affect the outcome of elections. In past instances, narrow margin of victory in tightly contested House elections has underscored the necessity of votes<sup>15</sup> (Eli 2009, p. 193). It is noteworthy that "the 2000 United States presidential election [which] was decided by a mere 537 votes in Florida epitomized the principle that every vote matters." Mile 2 prison inmates in The Gambia could vote en masse to alter the election result in Banjul North constituency; the same applies to other constituencies which harbours prison facilities. This will be tantamount to law breakers, with their outcome determining votes, becoming king makers over law abiding citizens. Akin to the 2000 U.S. election result, tactically their numerically insignificant votes could be electorally significant. Hence, "People understandably argue that, [through vote dilution], enfranchising felons might cause the defeat of certain candidates who otherwise would win."<sup>16</sup> Competition for votes could lure perspective politicians to promise and implement immoral assurances that could be counterproductive to society. "The U.S. Supreme Court in *Davis v. Beason* implies that disenfranchisement is imperative to preclude criminals voting en masse for repeal of criminal laws."<sup>17</sup>

"The advocates for disenfranchisement believe that most, if not all, ex-felony offenders would vote to weaken the content and administration of criminal laws" <sup>18</sup>(Steinacker 2003). However, Andrea Steinacker asserted that "there is no evidence that this would occur. Just because someone has been convicted of one felony does not mean they will continue to commit crimes, and it does not mean that the ex-felon will automatically vote to weaken the criminal law" (Steinacker 2003 p. 821). Gambian history has however faulted Andrea's reasoning as those who persistently commit financial crimes still feature in cases of allied

<sup>15</sup>Gambia's prison population is put at approximately 1,121. [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_incarceration\\_rate](https://en.wikipedia.org/wiki/List_of_countries_by_incarceration_rate).

<sup>16</sup> US Court of Appeals for the Second Circuit - 380 F.2d 445 (2d Cir. 1967). (Portugal 2003, p. 1320-13

<sup>17</sup> *Id.* at 215. *Davis v. Beason*, 133 U.S. 333 (1890).

<sup>18</sup> This reasoning explains the concerted stern measures initiated to check the Mormons in Utah, Nevada, and Idaho in late nineteenth century.

pecuniary wrongdoings.<sup>19</sup>

Comparable to a privilege class, it is rare for a politician to relinquish political power on his own accord. In a re-election bid or power tussle, unscrupulous contestants will likely succumb to unconscionable campaign pledges thereby endangering the sanctity of society. Such subversive actions constitute a ground to stripe convicts of the vote while their reformation process is incomplete. While one cannot vouch that an ex-convict's behaviour is reformed, however it is safer to gamble with rehabilitated convicts than those undergoing reformation. The latter class should endure incarceration as they are in principle undeserving of the full rights of citizens. Franchise should be for honourable citizens, rather than those of no character. A convict should not be prejudged on probability, however considering his latent mischief; his case is analogous to arming an inebriate with a loaded firearm. Whether the drunk will use the weapon or not is immaterial as his possession endangers public safety. Likewise, experiences have shown that not all snakes are poisonous however; it will be hazardous to handle them with levity.

During uncivil times, the writ of *habeas corpus* could be in abeyance. "When the liberty of the subject comes into conflict with the safety and corporate existence of the state, the liberty of the individual must give way to the latter, *salus populi suprema lex*, particularly during times of war or national emergency" (Aihe 1971, pp. 213-224). Therefore, if law abiding citizens could have their inalienable rights abridged, convicts should deserve less. A situation whereby laws are malleable to the advantage of law breakers could lead to unintended consequences. "Indeed, the idea of some restriction on fundamental rights is inherent in any ordered, democratic society. It is intuitive that at some point individual rights must bow to the common good and protection of others in society at large," depending on compelling situations<sup>20</sup> (Brock 2016, p. 436). Consequently, as the activities of prisoners could endanger the cohesion of society, denying them the vote should be among the freedoms they should cede temporarily.

As it is the collective character of individuals that determines that of a society, keeping the democratic process devoid of moral corruption, by maintaining the sanctity of the ballot box is vital. So, in avoiding the contamination of the character of society, winnowing reprobates and their interests is imperative as their participation in the electoral process could taint the entire exercise. In the ruling opinion in *Washington v. State* (1884), the phrase "A democratic process devoid of moral corruption" featured.<sup>21</sup> Disenfranchising convicts, in this sense, is a mechanism for sanitising the polling process.

Intrinsically, disenfranchisement of prisoners should not generate controversy however; extending suffrage to prison inmates could create complications. In the U.K. the Representation of the People Act (1969) resulted in an unprecedented and unforeseen development. "In 1981 Bobby Sands, an influential member of the Provisional Irish Republican Army (IRA) ran for parliament from custody in Northern Ireland. Sands won the seat, though he died of hunger strike before he could take office. Right after Sands' election the United Kingdom parliament passed the Representation of the People Act 1981, which banned prisoners of more than twelve months from holding elective office."

<sup>19</sup> Justice Alghali Commission Report, Justice Paul commission Report, replicate names of virtually the same people found wanting by previous investigative panels. Also, the collapse of Continent Bank, Gambia Commercial and Development Bank, Meridian Bank and Gambia Agricultural Development Bank are linked to the same class of people.

[http://www.irmt.org/documents/research\\_reports/accounting\\_recs/IRMT\\_acc\\_rec\\_background.PDF](http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF)

<sup>20</sup> U.S. Code §1865 (b) (5) - Qualifications for jury service <https://www.gpo.gov/.../USCODE-2011-title28-partV-chap121-sec1865>

<sup>21</sup> *Washington v. State*, 75 Ala. 582, Ala. Supreme Court (1884). Appeal from Tuscaloosa Circuit Court. Tried before Hon. S. Sprott <https://www.ravellaw.com/opinions/2cd832ba9ca623083738c8d78078f82c>

Traficant A. James Jr., an Ohio legislator serving time failed in his bid for Congress in November 2002. “Although [he] was defeated, one looming question remains: had he been elected, could Traficant have legally taken his seat in Congress?” (Steinacker 2003, p. 802). He would have as “...the State of Ohio can deny Traficant the right to vote for his representative in Congress, but it cannot keep him from being that representative” (Steinacker p. 802).

As having the vote occasions running for elective office, in The Gambia, a constitutional challenge could arise if convicts serving time run for elective office. The residency requirement which bars some law abiding citizens in the diaspora from running will be applicable to prison inmates. §89 (1) (c) stipulates that a person qualifies to run if he has been resident in the constituency for at least one year preceding nomination. Prisoners who have been in detention for more than the period will be ineligible to contest. If a prisoner runs and wins, like the cases of Bobby Sands and James Traficant Jr., how will he represent his electorate from confinement? Will his victory nullify his remaining prison term? How will he shuttle from the prison yard and his office while concurrently serving his sentence possibly with hard labour? Why and how should a convict represent law abiding citizens? Which constituency will he represent, is it that of the prison yard or that of his ancestral home, or his residence preceding conviction? If the prison yard is his constituency, will §89 (1) (c) be set aside for his sake? If his conviction took place in a jurisdiction different from his last place of residence and ancestral home, should he represent a people he is a stranger to? Will the President exercise his prerogative of mercy to squash the sentence? Allowing inmates to run for elective office contravenes §90(1) (c) of the 1997 Gambian constitution.<sup>22</sup> These are knotty issues the constitution is silent on.

Article 25 of the International Covenant on Civil and Political Rights states that every citizen shall have the opportunity, without unreasonable restriction to partake in the conduct of public affairs, and to vote and to be elected at elections...<sup>23</sup>

“However, the phrase “*without unreasonable restrictions*” implies that some restrictions on election participation, not based on prohibited distinctions, are “reasonable” and, therefore, permissible” (Nunn 2005, p. 775). This indicates that restrictions grounded on mental capacity, criminal disenfranchisement, etc. are permissible.

Constitutional rights that harmonises with prisoner’s status are state guaranteed. However, akin to juveniles (civic immaturity), imbeciles, and foreigners, prisoners are outside the boundary of political participation. Citizenship is conferred on merit rather than by community membership, therefore imprisonment is tantamount to abridged citizenship. “Those who received all the benefits society had to offer but could not live up to [their] end of the bargain by obeying the law” needs reformation (Eli 2009p. 224) because a society wishing to maintain its self-governing status should have confidence in the character of each member.

Prisoner disenfranchisement pertains to the political participation in the affairs of a country; hence it concerns a people’s commitment to societal ideals. Ironically, the United States and Britain, both of whom are leading democracies, are among the strictest enforcers of prisoner disenfranchisement policy, a demonstration

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<sup>22</sup> § 90 (1) (c) of the Gambian constitution took cognisance of the point with regards to ex-convicts running for the National Assembly. “...is under sentence of death imposed on him or her by any court, or is serving, or within five years of his or her nomination for election completed serving, a sentence of imprisonment for a term exceeding six months imposed on him or her by a court or substituted by competent authority for some other sentence imposed on him or her by a court, and has not received a free pardon.”

<sup>23</sup> International Covenant On Civil And Political Rights <https://treaties.un.org/doc/publication/unts/volume-999-i-14668-english.pdf>



that the survival of a state transcends democratic ideals (Ebenstein 2018, p. 323). In the United States, felons and ex-felons grapple with assorted restrictions,<sup>24</sup> while the United Kingdom is familiar for disenfranchising prisoners, (Carter 2015, p. 12). “A defining moment for prisoner enfranchisement policy in the United Kingdom and Ireland occurred in 2004 (and 2006) with the European Council on Human Rights (ECHR) in *Hirst v United Kingdom...*”<sup>25</sup> “To this day the United Kingdom government has continued to avoid making any of the changes requested by the ECHR, thus raising the question as to why successive governments have been so attached to this policy” (Bonneau 2014, p. 87). The Grand Chamber ruled that the United Kingdom could not automatically disenfranchise convicts serving custodial sentences. Similar rulings were issued in Australia, Canada, and South Africa (Richard and Christopher 2012).

The Gambia has had cause to refine its ethical standards overtime; hence, disenfranchising prisoners (a community of base moral values) is a realistic way to ensure decency. Benefiting from citizenship implies obligation to the state and being above board. However, disenfranchisement should be time bound, except in exceptional circumstances, unlike most states in the United States where “disenfranchisement laws harshly and disproportionately affect minority populations in accordance with Balbock’s hypothesis.”<sup>26</sup> The creation of oppressive disenfranchisement laws in the 1800s in the U.S. demonstrates how criminal law controls a population deemed as a threat to a power structure (Geoghagan 2007 p. 49). American states tailor their disenfranchisement statutes to target crimes associated with minorities, such as theft, while “white” crimes, such as murder, occasion no loss of voting rights. Under Alabama law, a man convicted of vagrancy would lose his vote, but that convicted of killing his wife retains his (Nunn 2005 p. 768). “South Carolina, lawmakers made thievery, adultery, arson, wife beating, housebreaking, and attempted rape into felonies accompanied by the deprivation of voting rights, while murder and fighting were excluded from disenfranchisement,” (Nunn 2005, p. 768). In Alaska, “...the state’s largest minority group, Alaska Natives, is overrepresented in the state’s prison population, indicating a greater likelihood of disenfranchisement” (Murray 2006, p. 289). Everett averred that “one of the most obvious and detectable changes [brought about by the war on crime era in the U.S. 1970 - the present] is the increasingly punitive focus of the system and its increasingly disproportionate impact on minorities” (Everett and Periman 2011, p. 289) “The arguments also included that indigenous Australians were disproportionately disqualified from voting, as indigenous Australians are only 2.5% of the population, but constitute more than a quarter of the national prison population<sup>27</sup> (Roach v Electoral Commissioner 2007). “While each state in the United State has developed a system for restoring voting rights to ex-offenders, the restoration process is usually so complicated and cumbersome that it is rarely utilized”<sup>28</sup> (Brian Pinaire et al. 2003, p.1524). These are tactics of keeping

<sup>24</sup> (Only Vermont allows incarcerated prisoners to vote and Massachusetts disallowed the practice since 2000). Maine used to allow incarcerated citizens to vote. It recently disenfranchised the incarcerated.

<sup>25</sup> ECHR 681, (2006) 42 EHRR 41 [https://www.echr.coe.int/Documents/FS\\_Prisoners\\_vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf)

<sup>26</sup> The United States has one of the largest percentages of disenfranchised citizens in the world. 13% of African Americans are permanently disenfranchised compared to 2.3% of the population at large... Over 2 million African-Americans are currently disenfranchised because of a felony conviction. This result in the disenfranchisement of 7.7% black adults otherwise eligible to vote compared to the 1.8% criminal disfranchisement rate of the non-black population.

<sup>28</sup> Alabama, for example, requires that ex-offenders provide a DNA sample to the Alabama Department of Forensic Services as one part of the process of regaining the vote. ALLARD & MAUER, supra note 7, at 5. In Florida, clemency is granted only if the governor and three of his cabinet members consent. Additionally, Florida’s sixteen-page application asks for information such as the date of birth of all persons with whom the applicant may have had a child out of wedlock, the cause of death of the applicant’s parents, and the name and purpose of any organizations to which the applicant belongs. Thompson, (2001, P. 17.) At the federal level, Representative John Conyers and thirty-seven co-sponsors have introduced the Civic Participation and Rehabilitation Act, which seeks to restore federal

perceived threats at bay which harmonises with the Group Threat hypothesis as the majority has resentful cause to perceive the minorities as immoral. However, it is the legal practices which reinforce the Group Threat hypothesis while the consequences are manifested in social vices and cultural maladjustments among targeted groups. Exceptional circumstances that might endanger state security such as treason, rebellion, espionage, and electoral fraud are serious enough to be considered in justifying permanent disenfranchisement of ex-convicts. Should such situations arise, it should however warrant a pre-clearance constitutional provision of a magistrate to scrutinize and sanction the ban to ensure that government action passes the stringent test of constitutionality.<sup>29</sup>

Enfranchising serving prisoners could compromise the judiciary hence enacting laws prospectively protect society against arbitrary actions. This explains why magistrates cannot define crimes during trials, it is against the grain. "...a prospectively applicable criminal law provides notice as to a standard of conduct and so allows people to choose either to obey or to transgress" (Richard 2012, P.1620). Hence, society should be proactive to prevent situations from becoming intractable rather than resort to damage control measures which could contradict due process. Alan Paton reasoned that "a judge does not make Laws rather; it is the people that make the Law therefore, if the Law is unjust, and the judge judges according to the Law, it is justice, even if it is not. It is only the people that can be just while it is the duty of a judge to do justice. Therefore, if justice be not just, that is not to be laid at the door of the judge, but at the door of the people," (Paton, 1948). It denotes at the door of the representatives for they make the laws. If law breakers are opportune to manipulate the electoral and legislative processes to the peril of society, society is to blame hence possibilities of law breakers sully the judiciary exist, it is better nipped in the bud.

Law enforcement should take account of neither inherent group features nor entrenched machinations to maltreat or harass any social group. Effects of disenfranchisement in the United States are fuelling criticisms bothering on racism. However, there is no vindictive strategy in force in The Gambia to incarcerate subjects; rather convicts waived their rights, "by their default." This contrasts with the United States where, disenfranchisement laws overtly target the minorities" (Eli 2009, p. 198, and Haner 2013, p. 929).

"In Constitutional Law, constitutions bar only laws that are facially discriminatory or motivated by intentional discrimination." That explains the plethora of suits deluding the United States courts over electoral disenfranchisement. Notably, in The Gambia no person has neither voiced nor lodged any complaint hence disenfranchisement will be difficult to fault using the American model as it is neither formulated nor exercised with discriminatory motives.<sup>30</sup> Proponents of convict enfranchisement in the country appeal to emotions rather than litigation in propagating their cause.

### **The Gambian Situation**

However, caution is necessary as the Gambian society is becoming sophisticated. The absence of complaint does not connote stagnation. Tijan M. Sallah averred, with respect to a 1981 attempted coup d'état,

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voting rights to persons who have been released from incarceration, even if they are prohibited from participating in state elections. Civic Participation and Rehabilitation Act, H.R. 906, 106th Cong. §3(1999)

<sup>29</sup> *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Dunn Court held that laws affecting the right to vote, like other laws implicating fundamental rights, must assert a compelling government interest and be "tailored to serve their legitimate objectives." In approaching such an analysis, the Court stated that it gives no deference to state legislators when confronting a challenge to a citizen's ability to participate in the franchise. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627-28 (1969).

<sup>30</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976), also *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62-65 (1980).

that the rebel leaders disapprove of the mistreatment and disenfranchised status of the *Jola* ethnic group.

“The members of this ethnic group have unquestionably (though, perhaps, by no deliberate official design) been a 'permanent underclass'. Certainly, many of their womenfolk work for meagre pay in *Mandinka* and *Wolof* homes as *ajangas* or housemaids, cooking, washing, and cleaning for their employers. It is, in fact, not unreasonable to speculate that growing up in such a servant/master environment may have created the cumulative frustration that helps to explain the force of the eruption that took place in 1981.”

Therefore, some radio listeners concurred when the coupists accused the temporarily ousted president of tribalism among other accusations (Sallah 1990, pp. 621-624). The situation was deplorable that certain marginalised ethnic groups had to pass for others to circumvent mistreatment. Among the *Jolas*, three decades after independence, thirteen gained university education through Christian missions, while the first *Manjago* cabinet minister took office after same period. Within the period, no female *Jola* received university education.<sup>31</sup> Meanwhile, the total *Jola* population was 95,262 (10.6%) of the 617,239 country population. Contending with such deprivation connotes much for the fourth largest ethnic group of a country.<sup>32</sup>

As stated on page 2 above, “Evolving standards of decency that mark the progress of a maturing society” could result in a situation “where a form of punishment once unquestioned might be viewed by future generations as outside the limits of civilized standards and constitutionally impermissible.” It is probable that latent injustices and hitherto tolerated practices will in due course receive attention. In the United States, “Arguably laws were not created to have racial implications; however, the fact of the matter is they do and they are retarding minority access to power. Shockingly, ‘more black men are disqualified today by the operation of criminal disenfranchisement laws than were actually enfranchised by the passage of the Fifteenth Amendment in 1870,’ ”<sup>33</sup>. The situation is getting worse (Haner 2013, p. 916). Tribal innuendos of public functionaries and appointees are causes for concern.<sup>34</sup> The incident Tijan M. Sallah alluded to appears to symbolise a smouldering problem which might deteriorate. Presently, convict disenfranchisement is egalitarian however, as resource control becomes contentions among the various ethnic groups, simplistic situations could become hydra headed. “When a society generates a social problem it cannot solve within its own existence, policies for controlling the population are devised and implemented” (Geoghagan 2007, p. 56, citing Quinney 1977, p. 8). Instances in the United States have shown how issues of discrimination and minority rights became complicated. Litigations of *Hunter v. Underwood*,<sup>35</sup> *Richardson v. Ramirez*,<sup>36</sup> *Farrakhan v. Washington*<sup>37</sup> which started as *Farrakhan v. Locke*<sup>38</sup> and many others have revealed that few

<sup>31</sup> Dr. Ebrima Badjie, erstwhile Gambian Ambassador to India. John Jammeh, Late Lawrence Sanneh a French teacher, Emily Kujabi Director of Catholic Schools, Sotino Colley, Malang Jarju Alliance for Patriotic Reorientation and Construction (A.P.R.C.) mobilizer, Magistrate Kebba Sanyang, Edrisa Jarjou I.T. Department of National Water and Electricity Corporation (N.A.W.E.C.), Mustapha Colley former Director of G.P.M.B, Lamin Bojang erstwhile Minister of Works, Muhammed Lamin Gibba erstwhile Director of Gambia Ports Authority, Dickson Colley a Chemistry teacher, and William Kujabi, all male.

<sup>32</sup> Gambia Bureau of Statistics 2013 Population and Housing Census, Spatial Distribution Chapter 3: Ethnicity and Nationality pp 12. [https://www.gbos.gov.gm/uploads/census/2013/Spatial-distribution-report\\_%20Final.pdf](https://www.gbos.gov.gm/uploads/census/2013/Spatial-distribution-report_%20Final.pdf)

<sup>33</sup> Haner, *supra* note 29, at 916.

<sup>34</sup> Certain ethnic groups have been retarded in their bid to access power in the form of Public office appointments, perhaps not by deliberate government design. This has given a number of the citizens cause for concern.

<sup>35</sup> Carter (2015 p. 17) ...the only time the Court disallowed a felon disenfranchisement law was in the *Hunter v Underwood* (1985) decision. In this decision, the Alabama law that disenfranchised felons convicted for moral turpitude offenses was struck down because this law was passed with the expressed and explicit intention to disenfranchise blacks.

<sup>36</sup> U.S. Supreme Court *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>37</sup> *Farrakhan v. Washington*, 338 F. 3d 1009 - Court of Appeals, 9th Circuit 2003

<sup>38</sup> *Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D. Wash. 1997).

felon disenfranchisement laws would be unconstitutional as a violation of the Equal Protection Clause.” The most commonly litigated phrase in the Fourteenth Amendment is the Equal Protection Clause. §2 of the Amendment states:

... But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, *or other crimes*, the basis of representation therein shall be reduced. . .

The clause did not explicitly defined the phrase ‘*and other crimes*,’ a defect that empowered various states to upgrade every conceivable misdemeanour to felony with the motive of disenfranchising minorities. This “made the section one of the enduring mysteries” of the Amendment<sup>39</sup> (Richard 2012, p. 1587). In *Richardson v. Ramirez*,<sup>40</sup> the Court examined the legislative history and found that “throughout the floor debates in both the House and the Senate, where numerous changes of language in §2 were proposed, the language ‘*except for participation in rebellion, or other crime*’ remains intact (Steinacker 2003, p. 810).

### Comment

Breaching the rules of society implies exclusion from partaking in certain rights and privileges. Proponents of prisoner enfranchisement are yet to establish discriminatory results or intent in the implementation of Gambian convict disenfranchisement policy which cut across board. Noteworthy is the discretionary powers of government in enforcing the policy as “it is a collateral consequence of a court verdict that occurs automatically and administratively,” a legacy of British colonial rule (Nunn 2005, p. 796). “As a number of [U.S.] Second Circuit judges explained, ‘Declining to prohibit something is not the same as protecting it.’”<sup>41</sup> Constitutional silence on the prohibition is not tantamount to sanction. However, reasons propping the clamour for its abolition when it is not among the favourite constitutional changes in demand is worrisome.

Arming convicts with the vote could harbour latent threats to the cohesion of a society. As stated in *Hirst v. United Kingdom*, “to this day the United Kingdom government has continued to avoid making any of the changes requested by the ECHR, thus raising the question as to why successive governments have been so attached to this policy.” “Nearly a century passed before Congress enacted the Voting Rights Act (1965) to respond to the increasing sophistication with which racial minorities were denied the right to vote,” and the predicament is lingering (Portugal 2003, p. 1328). “Even where no discriminatory intent exists, racial bias in the criminal justice system contributes to the racially discriminatory effect of felon disenfranchisement statutes in the U.S” (Erika 2015, p. 740). Caution is indispensable in The Gambia because if an enfranchisement exercise elevates a class to the detriment of others its rescindment could be cataclysmic. That does not mean that the policy is irrevocable.

Reasons nourishing U.S. felon disenfranchisement does not dovetail with what obtains in The Gambia. The underlying wisdom of the disenfranchisement policy of America is under attack. “Critics point to the practices’ racially disparate effects, doubtful public benefits, and high-profile impact on tightly contested

<sup>39</sup> During Congressional debates on the Fourteenth and Fifteenth Amendments, congress members expressed their chronic abhorrence for crime. For a detailed analysis of the contributions of Senators and Representatives to House and Senate debates on the issues,

<sup>40</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>41</sup> *Hayden*, 449 F.3d at 349 (Parker, J., dissenting). Cited in Richard, *Supra* note 14 at 1589.

elections” (Richard and Christopher 2012, p. 1586-1587). Apparently, The Gambia is either keeping up with the Jones’s or furtive reasons are fuelling the desire. Besides, the American experience has taught The Gambia the reasons propping the disenfranchisement policy in the United States, though they could be similar, but the settings are different. The intended consequences on the United States are well reasoned out from the onset, however the intended consequences on The Gambia are yet to be reasoned out hence there is need to learn from the American experience as convict enfranchisement entails civic and educational improvement of the masses.<sup>42</sup>

“Living in a society that value both citizenship and loyalty to the *polis*, or city-state, the ancient Greeks [and Romans] saw fit to punish certain crimes with “infamy”—the wholesale revocation of such civic rights as court appearances, military service, and voting” (Javier 2914, p. 37). Similar to the ancients, losing the vote in the United States, South African, Australia, Germany, Sweden etc., is tantamount to erosion of honour and dignity. The Gambian situation is discernible. As the vote is not among the coveted values of society, its loss will not deter criminal behaviour, and neither will it violate any constitutional provision. “Like the district court in *Beacham v. Braterman*,<sup>43</sup> the Supreme Court noted that it had already ‘strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision’ ”<sup>44</sup> (Grady 2013, p. 443).

In consonance with social contract, should The Gambia withdraw the vote from criminals, it will venerate the rule of law. To enhance the reverence, In Common Law jurisdictions, magistrates standing trials cease hearing cases pending the determination of the substantive charges. They suspend passing judgements on those presumed innocent while their character is under the periscope of the law courts and that of public opinion. In the same vein, convicted legal practitioners suffer debarment for being morally unfit to defend and determine the fate of those presumed innocent. A citizen’s contribution towards the polity he owes allegiance demonstrates his respect for the law. If such magistrates (presumed innocent) standing trials are circumstantially suspended from the Bench, those certified guilty should not partake in the legislative process.<sup>45</sup> Erring citizens needs reformation to serve the state to which they owe fidelity rather than pampering them to build a state which they have resolved to destroy.

Most write-ups on this theme treat the concerns for convicts and ex-convicts simultaneously<sup>46</sup> (Brian 2003 and Lauren 2017). American writers emphasize racial injustices which they perceive as an undue advantage taken of the Fourteenth and Fifteenth Amendments and the Voters Rights Act of 1965 (Amendments of 1982) as it concerns convict and ex-convicts<sup>47</sup> (Carter 2015, p. 18). They underscore state

<sup>42</sup> The literacy rate in The Gambia for the population aged 10 years and over is estimated at 52.1% and the level is still low among females in the country – about 40% compared to an estimated 64% among males (GBoS, Census Report, 2003)

<sup>43</sup> *Beacham v. Braterman*, 300 F. Supp. 182 (SD Fla. 1969)

<sup>44</sup> “The Greeks and Romans dearly coveted these political rights, and losing them was equated with a loss of honor and one’s position as a citizen in society. As such, the threat of this loss was an effective way to deter criminal behaviour” also, (Thompson 2002, p.172)

<sup>45</sup> As highlighted on page 5 of this article.

<sup>46</sup> A distinction was made in the research findings between felons who are barred while behind bars and those permanently barred from the vote.

<sup>47</sup> ... the Voting Rights Act of 1982 and 2006 allows for challenges to these laws on the basis of their impacts. The Voting Rights Act of 1982 was enacted in response to the *Mobile v. Bolden* (1980) decision. In this case, the Court ruled that the Voting Rights Act of 1965 did not guarantee the election of blacks and that disparate impact was not a valid basis to challenge the legality of voting laws. Rather, plaintiffs had to demonstrate that the law was enacted with a deliberate and explicit racially discriminatory intent. In response to this decision Congress enacted the Voting Rights Act of 1982, which required courts to look at the totality of the circumstances when plaintiffs present evidence of racially discriminatory impacts.

criminal disenfranchisement laws which have resulted in at least six million African-American, Hispanics<sup>48</sup> and Native Americans being legally shut out of the electoral system, (Christopher and Sarah 2010). These misnomers need rectification if those who have paid their dues to society regain their full rights as citizens. The Canadian litigation of *Sauve v Canada*<sup>49</sup> addressed the case of those with previous criminal records, while the South African case *August and Another v. Election Commission and Others*<sup>50</sup>; and *The Hirst v. United Kingdom*<sup>51</sup> and the Australian case of *Roach v. Electoral Commissioner* (2007) concerns serving prisoners, similar to the focus of this paper.

The absence of prescribed procedure for restoring the abridged rights of ex-convicts results from lack of mechanism to monitor their activities. Ex-convicts in The Gambia regain freedom without proviso. That explains why franchise is automatically regained as it will be tasking to enforce restrictions on them due to absence of stringent citizen documentation scheme. Besides, existing government structures are inadequate to monitor their activities. Having paid their ‘debts’ by serving time, their readmission to full membership of society is justifiable. “If we trust offenders enough to release them back into society, can we justify not returning to them the full rights and privileges of political citizenship?” (Brian 2003, p. 1542 footnote). The number of recidivists a judicial system produces determines, to a degree, its failure in realizing the penological goals of rehabilitation, incapacitation, deterrence, and retribution. “It is clear that any lifetime felon disenfranchisement cannot serve legitimate rehabilitative ends” (Grady, 2013, p. 466-467). Moreover, Common law criminal justice system posits “that once a criminal has completed his sentence, society has the burden of proving the guilt of a new crime beyond a reasonable doubt and does not have the right to punish the ex-criminal in advance based on probability” (Harvey 1994, p. 1173).

However, on completion of a prison sentence, ex-convicts still contend with restrictions in The Gambia. Generally, they forfeit all public service entitlements antedating their conviction. §90 (1) (c) stipulates a path for those desirous to run for House membership. Akin to Florida ex-felons who must wait for five years for the restoration of their voting rights, Gambian ex-convicts must serve a mandatory five year post-discharge ban to contest House elections save receiving a free pardon (Carter 2015, p. 15). Revoking a person's franchise is not a deterrent as it is unlikely that a criminal in the face of a prison sentence, fines, or probation, will covet his voting rights, more so in a society where the vote is not revered (Haner 2013, p. 930). Thus, the CRC should recommend the expunction of §90 (1) (c) of the 1997 constitution. “Advocates [U.S.] saw criminal disenfranchisement provisions as a collateral sentencing consequence that excluded offenders from society and increased their likelihood of recidivism” (Grady 2013, p. 448). The opinion applies to The Gambia as recidivism rate will decline if ex-convicts have a second chance as a life time ban will be tantamount to making two wounds on a head that deserve one; a case of double jeopardy. Denying a convicted felon the franchise is a justifiable punishment during incarceration but justification ceases after the completion of the sentence (Steinacker 2003, p. 822).

Voter disenfranchisement laws are under attack in courts. Federal and state [U.S.] courts have addressed numerous challenges under §2 of the Fourteenth Amendment and §2 of the Voting Rights Act of

<sup>48</sup> “Hispanics, a group that strongly identifies with Democratic candidates, constitute over 60% of the New Mexico prison population.” (Jason 2005).

<sup>49</sup> *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

<sup>50</sup> *August and Another v. Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)

<sup>51</sup> ECHR 681, (2006) 42 EHRR 41 [https://www.echr.coe.int/Documents/FS\\_Prisoners\\_vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf)

1965 (Steinacker 2003, p. 808). *Scoppola v. Italy*<sup>52</sup> an Italian case, *Hirst v. United Kingdom, August and Another v. Election Commission*<sup>53</sup> of South Africa etc. are among celebrated moves. These proceedings have produced voluminous case law fortifying felon disenfranchisement laws in the United States (Jason 2005). Conversely, the Gambian public customarily perceives courts as battle arenas where antagonists outwit each other with the possibility of imprisoning the vanquished. However, the perception has changed significantly since the past two decades as people are becoming progressively realistic and astute. Notwithstanding the improvement, no Gambian convict, either in court or in the form of a protest statement, has ever challenged losing the vote. Unlike The Gambia where legislation would have been a catalyst for change, either the courts or the legislature handles rights related issues in the United States. In *Hayden v. Pataki*, the plaintiff Joseph Hayden is an ex-felon who challenged his disenfranchisement on the ground of race.<sup>54</sup> Congress enacted the Civil Rights Act (1964) and others to grant “injunctive relief against discrimination in places of public accommodation”<sup>55</sup> (Frazier 2006, pp. 499- 504). Most Gambian lawmakers however are ill-informed of the issues addressed in the House. Besides, they lack the supporting staff that would assist them to comprehend the legal and other complexities of House debates. Furthermore, the educational qualifications and degree of enlightenment of most of them are something else. Therefore civic consciousness needs improvement to empower the populace on the need to derive legitimacy of public and individual rights from court interpretations rather than emotions.

As the society has no craving for the vote, disenfranchisement is meaningless to those serving time. Consequently, the serious challenging deprivations in the society connotes there could be obscure motives underpinning its advocacy. Neither its deprivation nor empowerment will deter criminal behaviour. This partly explains why some voters abuse their votes during elections. Besides, unlike the United States, enfranchisement will address no perceptible problem of prisoners in The Gambia hence it will have no significant influence on the number of vote cast. It is noteworthy that all the laws and administrative procedures in the country are in principle colonial, but the ideas, ethics, and spirit propping them are in most cases flouted during their implementation. An instance is the case of the aforementioned convict paedophile, yet society expects identical results as those of other nations that enforce the rule of law. The question of convict enfranchisement is within this ambit.

The reasons nourishing the steadfast challenge to the Fourteenth and Fifteenth Amendments and the Voters Rights Act (1965) are neither prevalent nor applicable to The Gambian in the American form. Hitherto, nothing connects any class of crimes with any ethnic group to warrant tackling the problem from the American perspective and experience. Moreover, convict disenfranchisement cannot remain egalitarian in a caste based setting. The practice as introduced by the British has incised egalitarian motives. Class groupings underpin social stratification in The Gambia. While in America, “[a number] of factors explains [its] contradictions and penchant to disenfranchise a large proportion of its minority population: the persistence of racial fears<sup>56</sup> and the partisan advantage of denying minorities the right to vote”<sup>57</sup> (Jason 2005; Carter, 2015,

<sup>52</sup> *Scoppola v. Italy* (No. 3) (Application no. 126/05, 22 May 2012)

<sup>53</sup> *August and Another v. Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)

<sup>54</sup> *Hayden v. Pataki*, 449 F.3d 305 (2nd Cir. 2006).

<sup>55</sup> <https://legcounsel.house.gov/Comps/Civil%20Rights%20Act%20of%201964.pdf>

<sup>56</sup> Democrats would gain a significant number of potential voters at the state level if legislation that enfranchises ex-felons passes as Blacks, those without a high school degree, and low-income earners are more inclined towards democrats.

p. 20.) Another dimension is that Caucasian Americans resolute perpetuation of dominance has manifested in a clash of cultures and civilisations. Resource control is another facet. Competitive onslaughts from other races will compromise the present standard of living of the White population. Besides, as Quinney puts it, an understanding of crime indicates that the crucial point is not crime per se, but the historical development and opinion of a capitalist society (Geoghagan 2007, p. 49). Historical experiences such as The Slave Trade, The Cold war, the colonialization of the American continent and other events are of importance. Should the country be under attack by those antithetical to its values; White Americans will have cause be weary of the minorities. Taking these antecedents into consideration, any attempt to introduce extemporaneous reforms could lead to the collapse of the White civilisation of America. It is for these reasons that during the McCarthy era, an onslaught on communism deluged its advocates (Horowitz 1996 and Higgins 1979). Hence felon disenfranchisement measures are precautionary. In view of these, the constitutional amendments and legislations designed to address and ensure civil rights matters are losing their venom. The Gambia is a different ball game. Other than ethnic disparities, within each ethnic group, caste and multiple sub-disparities exist. These features are incompatible with the continuous application of the egalitarian policy.

Partisan politics, in the American sense, has no bearing on Gambian government decision-making process as no perceptible ideological/policy difference exist among the parties save one.<sup>58</sup> This has facilitated habitual convoluted cross carpeting among party members. Besides, no Gambian party has any policy or stand on convict disenfranchisement. Indeed, none has a clear cut plan or manifestos for addressing national issues. Prisoners' disenfranchisement is of colonial origin comparable in two ways namely, it was not design to target any class, and secondly it succeeds court conviction. If however its implementation is yielding undesired effects by denying any group access to power or privileges akin to the United States, there should be cause for concern. Presently, neither racial nor ethnic fear in The Gambia that warrants the implementation of the draconian U.S. measures exists. No political party or ethnic group stands to benefit from applying such technique of marginalisation on any ethnic group. Hence it will be irrational to rationalise the Gambian cause based on the American or leading democracies experiences. However, the future could be different.

37% of Germany's prison population are of foreign extraction, while Sweden has 30% (Bonneau 2014, pp. 45 and 51). The serpentine German unification predate its pre-unification wars till 1871, followed by WW I and the emergence of Weiner Republic after Versailles Treaty and Nazism and its catastrophic defeat in WW II. South Africa's experiences of racism and Apartheid are unique. "Sweden is a democratic state whose principles of political equality resulted in a prisoner enfranchisement policy" (Bonneau 2014, p. 46). These societies conceive prisoners and punishment differently. Their experiences, histories and social orientations are dissimilar with those of The Gambia with a rectilinear historical evolution. Hence, the issue of prisoners' enfranchisement on the CRC's agenda requires scrutiny.

It is noteworthy that 66.7% of Gambia's prison inmates are foreigners.<sup>59</sup> With a prison population of 1,121 (28 women 2.5%), it means 373 (including juveniles) Gambian nationals are in prison custody of which 203 (22.2%) are civil detainees, meaning that 170 adult Gambian prisoners are convicts. 1.3% (15) of

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<sup>57</sup> "The disenfranchisement of blacks today as it did in the post-Reconstruction era, advantages one party over the other. Today, with blacks voting for candidates of the Democratic Party in record numbers, disenfranchising blacks in record numbers clearly advantages both the Republican Party and conservative policy makers."

<sup>58</sup> The only exception is the People's Democratic Organisation for Independence and Socialism (PDOIS) Party

<sup>59</sup> World prison Briefs. Gambia: Prison population total (including pre-trial detainees / remand prisoners) 1121 in November 2014 (Report of United Nations Human Rights Rapporteurs). [www.prisonstudies.org/world-prison-brief](http://www.prisonstudies.org/world-prison-brief).



the total inmates is juvenile. The total adult inmates are 165. On the average, the three prison facilities in the country will accommodate 55 (165/3) adult Gambian prisoners.<sup>60</sup> Absence of stringent citizen identification scheme could undermine the authenticity of prison votes. Besides, as civic consciousness is abysmal, the educated, let alone the common man, finds it difficult to fathom the number in confinement. Consequently, during registration exercises what transpires in prison yards could be any one's guess. Moreover, those in control of the detention facilities are public employees susceptible to manipulations.

Why so much fervour prevails over a small number of inmates requires examination as the task of deciphering a politician's definitive intention could be daunting. Moreover, the clamour for enfranchisement is coming immediately after the coalition of opposition political parties ousted the ruling party that retained power for two decades. Besides, their subsequently released incarcerated associates are key figures in the new political dispensation. It is noteworthy that the ousted party maintained a sour relationship with Senegal, their closest neighbour throughout its reign. The change in dispensation in The Gambia thawed the frosty relationship. In both countries, the campaign for prisoner enfranchisement is concurrently in progress, buoyed by ex-convicts. It is thought provoking why the vote is preferentially considered of all the abridged rights of convicts. These reasons have necessitated questions than answers as the experiences of the pardoned ex-inmates are still confidential.

Contrary to enfranchisement, what the electorate needs include a fair constitutionally guaranteed revised voter's register predating every general election. Judging from expressed opinions in previous exit polls, the voters register retains names of emigrants and the deceased. Rather than compiling fresh rolls, the electoral commissions update antiquated editions by including names of returnee emigrants and those who attain voting age. Consequently, the accuracy of the register will be questionable as convict enfranchisement could be a tool for diluting votes in constituencies harbouring prison yards.

Vote dilution is an important technique of weakening a political opponent at the polls. Some U.S. rulings are comparable with the Gambian situation. In *Carrington v. Rash* Mr. Justice Stewart delivered that "A State can impose reasonable residence requirements for voting but it cannot, under the Equal Protection Clause, deny the ballot to a bona fide resident merely because he is a member of the armed services." The ruling concerns the importance of vote dilution "... on the constitutionality of a provision of the Constitution of the State of Texas that prohibited members of the military from voting if they were not residents of Texas preceding joining the armed services" (Guy, 2015, p. 413) ... a perceived threat from members of the military in local elections."<sup>61</sup>

In *Hayden v. Pataki*, and *Muntaqim v. Coombe*<sup>62</sup> the Court of Appeals decided "whether plaintiffs can state a claim for violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, based on allegations that a New York State statute that disenfranchises currently incarcerated felons and parolees, N.Y. Election Law § 5-106, results in unlawful vote denial and vote dilution."<sup>63</sup>

In *Evans v. Cornman*<sup>64</sup> the Court held that a restriction preventing voting by individuals living in a

<sup>60</sup> <http://www.prisonstudies.org/>

<sup>61</sup> U.S. Supreme Court, *Carrington v. Rash*, 380 U.S. 89 (1965)

<sup>62</sup> *Muntaqim v. Coombe*, 366 F. 3d 102 - Court of Appeals, 2nd Circuit 2004, and *Hayden v. Pataki*, 449 F. 3d 305 - Court of Appeals, 2nd Circuit 2006

<sup>63</sup> *Hayden v. Pataki*, 449 F. 3d 305 - Court of Appeals, 2nd Circuit 2006; *Thomburg v. Gingles* 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25, 1986 U.S. Lexis 121

<sup>64</sup> *Evans v. Cornman*, 398 U.S. 419 (1970)

federal enclave was unconstitutional. The State feared that these individuals lacked sufficient local interest in electoral decisions.”<sup>65</sup>

Additionally, convict enfranchisement, as shown in the comment will pose danger to the cohesive nature of the society if the convicts are still undergoing reformation. Fashioning solutions to Gambian convicts problems will be beneficial than keeping up with the Jones’s. A case in point is §7 (1) of the *Revised General Orders Code of Conduct and Public Service Rules and Regulations of The Gambia* which states that dismissal from service is a severe punishment as it entails forfeiture of pension and gratuity entitlement of the officer. Only in serious cases as serious misconduct, malpractices and criminal conviction is the punishment enforced.<sup>66</sup> Consequently, any public officer convicted of any crime, whether related to his official duty or not, shall in principle forfeit his statutory entitlements, in addition to serving time. The punishment has a striking similarity with the predicament §2 of the Fifteenth Amendment is inflicting on American minorities. What ‘*other crimes*’ connote in the American situation is vague. “Some commentators insist that the Fourteenth Amendment was carelessly drafted, but even the incomplete record available demonstrates that every word in §2 was weighed, debated, and voted on. It is fair to infer that the “other crime” exception was deliberate” (Richard and Christopher 2012 p.1611). It is hard to decipher what the drafters of The Gambia General Orders had in mind due to dearth of information in official circles. ‘*Criminal conviction, serious misconduct, and malpractices*’ in the Gambian context are nebulous. Their implicit connotation could open their interpretations to the whims and caprices of whosoever is in charge. As the Gambian society is becoming sophisticated, comparable to the U.S., this could become a window for bullying targeted social group.

Part III §22 of the *General Orders* bars all ex-convicts from seeking employment in the public service.<sup>67</sup> This is tantamount to advance punishment of “the ex-criminal [based on] probability.” Court convictions, in both cases, could discriminate access to privileges such as employment opportunities in society (Sallah 1990). “The stigma of conviction can pose an insurmountable barrier to former offenders seeking to reintegrate into the community and find employment,” (Everett 2011, p, 93). Employment prospects and reintegration of ex-convicts should interest activists. Barring them from public service will promote recidivism. Besides, Part III §22 is discriminatory as the policy pertains to public officers. It is inapplicable to private sector employees who forfeit neither entitlements nor employment opportunities after serving time. §33 (1) of the constitution states: All persons shall be equal before the law. While (3) states: no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions any public office or any public authority. Part III §22 of the General Orders should be subjected to court interpretation as the salient issues are of more benefits in a society where the vote has no coveted value.

### Concluding Remarks and Recommendations

A constitution drafting commission rather than a constitution review commission would have been relevant. The 1970 constitution is the precursor of the one under review. Having abandoned the parliamentary system of government, the latter ushered in a presidential system. §88 of it states that the National Assembly

<sup>65</sup>Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969), U.S. Supreme Court Dunn v. Blumstein, 405 U.S. 330 (1972) and, Sloane v. Smith, 351 F. Supp. 1299 - Dist. Court, MD Pennsylvania 1972

<sup>66</sup>Revised General Orders Code of Conduct and Public Service Rules and Regulations of The Gambia at, 67.

<sup>67</sup> *Id.*, at 82. Notwithstanding anything in this Part of these regulations contained, no proposal or application for the appointment to any public office of any person who has been at any time convicted of any criminal offence involving fraud or other dishonesty shall, in the case of a proposal, be made to or considered by or, in the case of an application, be considered by, the Commission unless the Head of Department in which the public office concerned is established has been informed of such person’s conviction and has agreed that such proposal or application, shall be made and considered, or considered, as the case may be.

shall comprise of forty-eight members, of which the president will nominate five. And § 93 (1) states that The Speaker and the Deputy Speaker shall be from among the nominated members. These are transplanted clauses from its precursor.<sup>68</sup> If nominated members alone could become the speaker and deputy speaker, it amounts to trampling on the spirit propping the presidential system as it contravenes the principle of separation of powers. There has been no objection to the absurdity after over two decades of operating the constitution. On this account, the erstwhile president changed the House speakers at will by recalling his nominated members.

The same applies to the appointment of judges going by the various provisions of Parts 4 and 6 of the 1997 constitution. Notwithstanding these paramount drawbacks, society expects identical results as those of other nations that enforce the principles of separation of powers. Ironically, these limitations are among the relics of the 1970 constitution which predated that of 1997, constitutions designed to address the defects of previous regimes. It is ironical for constitutional clauses to affront the separation of powers in a presidential democracy. Besides, the constitution under review suffered multiple amendments that it cannot be gainsaid that the House members lost count of the alterations, mutilations orchestrated to suit the aspirations of past regimes. These sorts of situations necessitate a new constitution. The integrity of the ruling class will continue to be in doubt if these absurdities persist in the Gambian version of presidential democracy. Adherence to the principle of separation of powers will enable the three arms of government to address issues, include prisoner's welfare, objectively rather than treating matters piecemeal. To ensure a holistic approach to the scorching constitutional issues confronting the society, panel beating the 1997 constitution with its defects will be tantamount to filling new bottles with old wine.

Enfranchising convicts could be precursors that will embolden advocates to demand constituency status for prison facilities to enable inmates have representation. Connivance with lobby and pressure groups, in such a situation, could undermine patriotic legislative efforts.

Logically, enfranchising prisoners should concomitantly repeal the incarceration of convicts as incarceration and disenfranchisement are attendant with court sentence, an aftermath of a court verdict that occurs automatically and administratively. The constitution is salient on the status of those convicted with an option of fine hence they regain freedom after settling the due. Ideally, they do not deserve the vote for the period they ought to serve time, but for the respite. A scenario could involve two accused panthers in crime, sentenced to prison terms with an option of fine. If one pays while his associate in crime serves time, it could result in an abnormality. While the one serving time is denied the vote, the other remains empowered. Irrespective of paying a fine or serving time, a convict remains a convict. Also notable are those found guilty but not sentenced. They are equally convicts. §90 (1) (c) technically bars them from running for National Assembly, but they can partake in determining their representatives whereas their counterparts serving time cannot, that is the prevailing situation in The Gambia. It implies that paying a court fine secures both liberty and enfranchisement. A verdict of guilt amounts to a conviction hence disenfranchisement should encompass all categories of convicts. The enforcement of the policy which targets only those serving time is defective and needs revision hence it should be a subject for legal interpretation.

“The modern practice of felon disenfranchisement in the United States is primarily a function of

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<sup>68</sup> §57 (d) of the 1970 Gambian constitution states that “until Parliament otherwise prescribes, three nominated members who shall be known as “nominated members” shall be appointed in accordance with the provisions of §65 of this constitution.” While §65 states that “the nominated members shall be appointed by the president.”

state law” (Richard and Christopher 2012, p. 1597) hence electoral matters are concurrently handled by the federal and state governments with different statutes (Murray 2006, p. 292). The Gambian situation is different. “A society committed to formal equality could in principle punish all instances of bad conduct with equal mercy, though adopting that policy would diminish the salience of formal equality by reducing the difference in treatment between bad and good actors” (Richard and Christopher 2012, p. 1597). However, a society whose social structures are caste rooted cannot be egalitarian. Hence, the egalitarian application of the disenfranchisement policy as introduced during the colonial era cannot *ad infinitum* stand the test of time as resource control gets ferocious. This breeds favouritism, inter alia, while the president is exercising his prerogative of mercy. The opaque process of exercising the prerogative of mercy in The Gambia does not class the exercise as part of the criminal justice scheme rather; the public construes it as presidential magnanimity. Indeed, an egalitarian caste society is an absurdity hence desegregation policies are indispensable in The Gambia. ‘Targeted groups’ in due course could on purpose be convicted without sentence, an action unsuspecting victims could misconstrue as leniency, which politicians might use for disenfranchisement.

Developments have shown, as Sallah alluded, that chasms among the various ethnic groups are becoming manifest in their struggle for resource control. Angel Dawn Geoghagan rationalised that “when conflicts between two opposing groups occur, the group that is more able to influence the creation of law is more likely to control the will of the opposing groups (Geoghagan 2007, p. 51). While D. F. Greenberg, continues the argument that the criminal law can be seen as a result of “the relative power of groups determined to use the [law] to advance their own special interests or to impose their moral preferences on others. This control is exercised, not merely in the creation of the law or in the enforcement of the law, but it extends to control of the state”<sup>69</sup> (Geoghagan 2007 citing Greenberg 1981, p. 4). This explains why under the present Gambian dispensation, the quest for power is getting fiercer thereby adding value to the scanty prison population.

Reasons propping U.S. disenfranchisement policy and its disparate consequences are absent in The Gambia. The tightly contested House elections are dissimilar with the high profile effect of the disenfranchisement on American politics. Besides, convict disenfranchisement is beneficial to a society where the vote is not coveted, unlike the United States.

The Gambian advocacy for the abolition of convict disenfranchisement seems to harbour some underlying motives. Similar to the racial tension rocking American ethnic minorities and their Caucasian countrymen, Tijan M. Sallah’s opinion expounds the existence of latent strains in a society, where ... “a political order seems to distinguish persons by their [station] rather than by their [actions]”<sup>70</sup> (Richard and Christopher 2012, p. 1590). Using the prison’s insignificant, but electorally significant votes for vote dilution could turn the electoral tables in the three prison constituencies.

“Additionally, criminal disenfranchisement exists at the intersection of two systems; electoral politics and criminal justice, which have been explicitly discriminatory for much of American history” (Portugal 2003, p. 1337). Foreign chief justices, judges, magistrates, and prosecutors inundated the Gambian judiciary caused by the aversion of the indigenes for such positions as filial relationships hinder them from

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<sup>69</sup> Id, at 56, citing Greenberg, 1981 p. 4, Greenberg, D.F. *Crime and Capitalism: Readings in Marxist Criminology*. Palo Alto, CA: Mayfield (1981).

<sup>70</sup> These egalitarian figures were profoundly influenced by what James Q. Whitman has called “the philosophy of formal equality.”

dispensing justice. The expatriates distanced themselves from ethnic bias, but they were infamous for allegedly receiving underhand government stipends to pervert justice during the erstwhile highhanded regime. The trend is reversing since the inception of the new dispensation. “The use of the criminal justice system as a control mechanism of the state is a prime example of how those in power can eliminate threats” (Liska, 1992). Probably for this reason, indigenes are encouraged to fill the positions. As tribal innuendos of public functionaries and appointees are generating ripples, the call for convict enfranchisement becomes worrisome.

The erstwhile president (who lost the December 2016 presidential election) was a minority who empowered his likes in an unprecedented fashion. He avail all, irrespective of ethnicity, coveted positions which past dispensations reserved for elites. Either by design or inadvertently, the process favoured all especially the minorities. Some citizens believe that that was among the bane of criticisms the administration grappled. In the U.S., “disenfranchisement operates racially; the disparate racial targeting and disparate treatments in the system are the significant causes” (Thedford 2018, pp. 96-100). Likewise, with appropriate constitutional amendments and legislative enactments, the judiciary could restrain minority’s access to power by aggravating the instance Tijan M. Sallah cited. Noteworthy on the CRC’s agenda is the question of redefining citizenship, a move that is already rendering some citizens stateless besides disenfranchisement. Ironically, convict enfranchisement advocacy and moves to deprive some of citizenship are progressing concurrently. The scenarios manifest a class desirous to perpetuate its grip on power seem to be utilising the prison issue to feather its nest. The defeat of the erstwhile regime in the December 2016 general elections flared up monumental nationwide jubilation among the majority ethnic group who perceived the minority as a threat to the previously established order. The crux of the matter is more of social contract than ideology as those of the ruling class are ideologically bankrupt. Angel Dawn Geoghagan pointed out that fundamentally, all societies are characterised by internal conflicts which may manifest in political, social, and legal decisions. These conflicts stem from struggle to either attain or retain power. “...social control is more likely to be exercised against minority groups that are perceived to be a threat in some way” (Geoghagan 2007, pp. 47 and 56).

If the country is keeping up with the Jones’s, which is unlikely, it will be tantamount to an infant wearing oversized adult shoes as the experiences of other countries advocating/enforcing enfranchisement policies are diametrically different.

Altering the policy on prisoner disenfranchisement with prospective intentions will be futile in improving the electoral pattern or crime situation of the country. Rather, it will lead to vote dilution which could vanquish prospective electoral victors with its attendant unintended consequences considering the prevailing political settings. Ostensibly, it will be inaccurate to conclude that prison disenfranchisement in contemporary times is targeting specific classes recognising that it originates from the ancients. Its application is of colonial origin whereas in the U.S. it is an historical racial antecedent expressed in sentencing disparities. However, *Hunter v. Underwood* demonstrated that the intent to discriminate with it is evident (Erika 2015). Similarly, the desire of the CRC which “must [have] drawn its meaning from the standards of decency that mark the progress of a society” might be facially neutral considering the change in the country’s political dispensation. “. . . History has proved that the slightest electoral error may alter the future of [the] world hence caution is imperative<sup>71</sup> (Thedford 2018, p. 109).

<sup>71</sup>United States Supreme Court *Hunter v. Underwood*, 471 U.S. 222 (1985) Argued: February 26, 1985, Decided: April 16, 1985

The campaign for enfranchisement manifests a springboard to upcoming events. Future politicians could tailor either the constitution or other legal instruments to become implements for resource control. Preceding their incarceration, the pardoned 2016 convicts seem to have no inkling of the link connecting serving inmates with electoral prospects. Their imprisonment was an eye opener. §90 (1) (c) could pose problems to ‘undesirable’ social classes, comparable with a United States predicament in 1870-1890. Disenfranchisement laws, grounded on justifiable fear, attacked the Mormon’s potentials to overturn the anti-plural marriage legislation through bloc-voting and territorial expansion, as their polygamous predispositions was repugnant to White Americans. Edmund Tucker Anti-Polygamy Act of (1882) disenfranchised the group considerably, and the sect’s ferocious attempt through legislation in *Murphy v. Ramsey* (1885)<sup>72</sup> to restore their rights was futile. On its own accord, the church outlawed polygamy among its members (Bowman 2004). A repeat experience of the Mormons could be applicable to the minorities and will likely undermine their effort in the past two decades.

The U.S. experiences with racial minorities demonstrate how a determined majority can have its way in manipulating a political process. A case in point is the nineteenth century fight for the political control of the territory of Utah (Oman 2002). The circumstances explain how the U.S. Supreme Court gave its tacit, and perhaps inadvertent, approval to targeted felony disenfranchisement in the West (Bowman 2004, p. 25) in contravention of Article 6 of the United States constitution.<sup>73</sup> In the U.S., “the scope of disenfranchisement continued to expand to encompass crimes including minor drug offenses” (Erika 2015, p. 710). Likewise, a modified §90 (1) (c) could disenfranchise targeted ex-convicts or prospective House members or those aspiring to public office, and any other ‘ill-favoured’ class. Richard and Christopher are of the view that “If an oppressive government used bills of attainder and ex post facto laws to divest disfavoured classes of political power, [ ] no one, howsoever virtuous his conduct, would be safe” (Richard and Christopher 2012, p. 1620). This should be cause for concern.

During the December 2016 presidential election, civil detainees in all detention facilities and those serving time had no franchise. The presumed innocence of the former should earn them vote until proven guilty. It is ironical that advocates neglected this disenfranchised class.

Double jeopardy practices should interest proponents of convict enfranchisement if the welfare of prisoners is their concern. A Gambian convict will consider losing all his statutory service entitlements, for say shoplifting, dreadful than the forfeiture of his vote.

Keeping track of the ethnic and other social composition of prisoners and ex-convicts is important in deciphering facially neutral but discriminatory laws or policies and those with obscured intentional discrimination.

The CRC traversing the country in search of diverse opinions is facially vital. However, seeking the views of a cross section of the citizenry has become a customary prelude to constitution drafting in the country. A society with 30 percent male and 60 percent female categorized as unembellished illiterates, interview results on matters of convict disenfranchisement will be spurious besides; the unlettered cannot comprehend the basics let alone the complexities. A similar exercise in 1996 which ushered in the 1997 constitution suffered the same fate. Illiteracy rate countrywide was 62%. Lapses of this nature are enough to

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<sup>72</sup> *Murphy v. Ramsey*, 114 U.S. 15 (1885)

<sup>73</sup> “No religious test shall ever be required as a qualification to any office or public trust under the United States.”

cause the sort of absurdities embedded in the previous constitutions. The CRC should prevail on educated citizens, particularly the Orient trained customarily classed among the unlettered due to their inability to express themselves in English, to weigh in on the constitution review debate as Plato averred that a good decision is based on knowledge not numbers. Also, court interpretations should be among the tools for upholding constitutional rights.

The American experience contrasts that of The Gambia in that the causes of ethnic marginalisation in the latter are distinct from convict disenfranchisement. The foundations are ethnicity, caste structures, elitism, resource control, fear of the empowered minorities for over two decades, and sub-regional geopolitics.

Laws are prospectively made in conformity with due process. Hence, a constitutional provision should reinforce the criteria for exercising the prerogative of mercy. Compelling public interests should justify the exercise rather than being an object of partisan manipulation. The case of the paedophile that had a temporary reprieve demonstrates that prisoners will exploit any opening to secure freedom.

If on the average each prison facility in the country harbours 55 potential voting prisoners, it will be administratively imprudent to grant them polling centre status as no polling centre nationwide caters for such an insignificant number of potential voters.

It is imperative for the principles and practice as well as the spirit of separation of powers which underpins the presidential system to be emulated to the letter. Experiences have shown that the self-serving elites modelled the past three constitutions to serve their interests hence the retention of the absurdities. This accounts for the widening disparity in the governance outcome between The Gambia and other presidential system of government. The unlettered might be versed in African native wisdom; however what a twenty first century constitution entails transcends native intelligence.

Lastly, Parents and tutors admonish their sons and their wards on the principles of good manners and justice not for fear of the law, but for character and family reputation.<sup>74</sup> Availing those who have dishonoured their families the vote is a slur on tradition.

### Summary

Karl Max averred that conflict stem from the struggle for power, either to attain or retain power. The Group Threat hypothesis as it relates to the United States has some similarities with the Gambian situation. However, unlike the former the Gambian electorate is nonchalant about political ideologies besides; the vote is not among the coveted values of society. Nevertheless, they both believe in putting the prison population to use in their tussle for power with different strategies.

Unlike the United States where it has legislative backup, The Gambian government exercises its discretionary powers in enforcing the convict disenfranchisement policy, without constitutional restraints. Therefore, one wonders why it is on the CRC's agenda instead of government invoking its executive powers to discontinue the practice.

Despite the constitutionally enshrined right in § 39 (2) of the Gambian constitution,<sup>75</sup> no convict

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<sup>74</sup> Plato—The Republic pp. 212 [www.idph.net/conteudos/ebooks/republic.pdf](http://www.idph.net/conteudos/ebooks/republic.pdf)

<sup>75</sup> 39 (2) of the constitution states that "Every citizen of The Gambia who is a registered voter shall be entitled to vote in a referendum held in accordance with this constitution or any other law."

has ever sought a court interpretation in challenging the unconstitutionality of convict disenfranchisement.

The United States prison composition is a testimony of effective disenfranchisement laws and tactics having disparate effects. In The Gambian, it is neither the ethnic composition of prisoners nor any disparate effect of the inherited colonial laws that interests the ruling class. Rather, irrespective of prisoners' composition and their numerical insignificance, enfranchisement will benefit the elites. As internal conflicts characterise all societies, stemming from struggle to either attain or retain power, "the minority community which already suffer limited political power, any dilution of that power may result in a community that is unable to effect substantive political change." Should the present dispensation succeed in disenfranchising 'targeted' groups, or dilute votes, it could erode the benefits that accrued to the minorities.

Indeed, "when a society generates a social problem it cannot solve within its own existence, policies for controlling the population are devised and implemented." This explains the enduring mystery of the Fourteenth Amendment. An incomplete record of Congressional deliberations on the Amendment resembles a ploy to leave no stone unturned while shelving a problem for future generations. It is strange that a Congressional debate was off record.<sup>76</sup> In tandem, The Gambia ruling class is fashioning enduring structures to perpetuate ingrained practices, an issue Tijan Sallah alluded to, inherited caste rooted structures, inter alia, which the minority rule assailed. A system "that distinguished persons by their [station] rather than by their [actions]." The ruling elites inherited practices which they are unwilling to refine as they seem to be strategizing to ensure the immutability of power control. The American experience shows that disenfranchisement could be the heaviest bill the minorities will incur as it will confine them to the periphery of the social order.

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<sup>76</sup> During congressional debates on the Fourteenth Amendment, a particular session was mysteriously off record. "Judges and commentators often lament that there was no recorded explanation for the sudden shift toward Williams's proposed language, which avoided any express mention of race and included the fateful exemption for disenfranchisement on account of "crime." (Richard and Christopher 2012 p1609).



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