

THE CONSTITUTIONAL REVIEW COMMISSION (CRC) ACT 2017: AN INSTRUMENT FOR DEMOCRACY OR A DICTATOR'S CHARTER?



There is no doubt an overwhelming national consensus that the current 1997 Constitution which came into being following the overthrow of the PPP regime in July 1994 is unfit for purpose. The flaws of such code have over the following 20 plus years preceding it served as a constant disruption and sabotage to our nation's democracy and democratic institutions. Gradually a brutal unprecedented dictatorship which very few saw coming was born. Its democratic defeat was equally unprecedented albeit at a hefty price which cost, nature and extent may never be validly ascertained.

One thing for certain is that the unprecedented injection of a new government could never have happened without our collective dereliction of our civic duties and obligations – a costly mistake whose recurrence shall be a national indictment on us all and one whose depiction in history in later years will inevitably make villains of us all.

The election into office of the Coalition government in December 2016 was among other things an unequivocal instruction to rectify and address those afore stated unconscionable failings and, the construction of resilient democratic structures and institutions which shall be beyond the reach of a future would-be despot. This, brought about the Constitutional Review Commission Bill (now ACT) 2017 as the legal instrument of choice – the designed and intended conduit for the much yearned for innovative and historic recalibration.

Now, how does this legal instrument (CRC Act 2017) fare and compare with the democratic verdict of December 2016 and the Gambian people's expectation?:

1. Constitutionality of the CRC Act

Part 1 of the CRC Act 2017 describes its purpose as:

“An Act to provide for the establishment of a Constitutional review commission to draft and guide the process of promulgating a new Constitution for The Gambia...”.

It is pretty obvious from the above reference that the Act is not living up to its name: rather than (1) a review as its misleading title suggests its aim is to (2) draft a new Constitution. The former is Constitutional and can be achieved pursuant to Section 226 of the existing bona fide Sovereign Constitution of The Republic of The Gambia. However, the latter falls outside the dictates of the Constitution and, its implementation will constitute an overthrow of our Sovereign Republican Constitution; this will be no different to the treasonous actions of the Armed Forces Provisional Ruling Council (AFPRC) on the 22nd July 1994.

Implementation of this CRC Act 2017 will constitute a Treason. We draw the attention of the government of The Gambia to Section 6(1) of the existing bona fide Sovereign Constitution of the Republic of The Gambia which states:

“Any person who –

(a) by himself or herself or in concert with others, by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act, or
(b) aids and abets in any manner any person referred to in paragraph (a) commits the offence of treason and shall, on conviction, be liable to the penalty prescribed by an Act of the National Assembly for that offence.”

Another bloodless Coup by other means is certainly not something which the Gambian people had in mind when they voted for change in December 2016 and, staining the product of such democratic exercise (a democratically elected Coalition government) is morally reprehensible. This is a very crass and opportunistic transgression and one which must certainly not go unchallenged.

The existing Constitution (Section 226) has prescribed within it, a mechanism through which any alterations to it [including the one this CRC aims to achieve] can be achieved and unless there is an ulterior motive/undeclared agenda, there is no other plausible explanation why such is being departed.

Furthermore, section 4 of our Sovereign Constitution states:

“This Constitution is the supreme Law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.”

The CRC Act is wholly inconsistent with the letter and spirit of Section 226 and therefore unconstitutional pursuant to section 4 and worthy of a fierce challenge under section 5.

2. Problematic Provisions within the CRC Act

A. Section 4 CRC Act 2017 – Composition of the Commission:

Should members of the Judiciary be charged with a Legislative function?

This section mandates for the Constitutional Review Commission to be chaired by either the Chief Justice (CJ) or a Judge delegated such function by him.

It goes without saying that the above is against the principles of separation of Powers and it undermines the independence and impartiality of the CJ who also sits as a judge in the Supreme Court to adjudicate on Constitutional matters among others.

This creates an uneasy situation whereby a Supreme Court Judge may find themselves adjudicating on a Constitutional petition with respect to a substantive piece of legislation whose creation they personally also had an input in. This, is by all accounts a gross transgression of the principles of separation of powers whose adherence is a fundamental aim of our Constitution and this very CRC Act 2017 (Section 6(2)(d)(iii)).

B. Section 5 CRC Act 2017 – Appointment of members of the commission:

Who appoints the Commission members?

This section mandates that all 9 members of the commission shall be appointed by the President. The practice/culture of vesting such sweeping and unreasonable power in the hands of one man (a sitting head of state) on such a fundamentally important question is reminiscent of a dictatorship the likes of which was the case during the 1994 to 1996 Junta era.

This is a copycat of the very system which we are trying to salvage ourselves out from - the AFPRC model and vision. Such disaster model was a total failure which created more problems than solutions and it is a perplexing miscalculation void of reason and logic for a democratically elected government of the sort we have today to follow the precedence by the A.F.P.R.C junta as a substitute for the dictates of the relevant law as already highlighted. What is the Motive?

There is a clear distinction between the change of government in 1994 and that of 2016; The AFPRC had no sitting Legislative body which exercised legislative oversight. As self-appointed holders of public office they felt no sense of accountability to the public and therefore ruled by decrees and did as they wished. In 2018, the sitting government does not have the dictatorial luxuries the Junta had in 1994, therefore with a sitting Legislative body in place it is they who must spearhead the appointment / constitution of any Constitutional Review Commission to delegate their constitutional functions by virtue of Section 226 and not the President or an unelected member of Cabinet whose proposed involvement in this process cannot be supported by any existing legitimate legal authority (whether precedent or otherwise in The Gambia or in any Common Law jurisdiction in the entire world). This is totally bizarre and insane.

Who shall be eligible for appointment?

The criteria for appointment falls short of what is required for a number of reasons. One of these is that the exclusion list fails to expressly exclude politicians, political party supporters / militants/donors, political appointees including cabinet Ministers and those with a real and / or perceived vested political interest from appointment into this CRC. Does this mean that it shall be acceptable for the President to appoint such classes of people as Commissioners into the CRC? And what if he does go down this route?

The eligibility criteria are far from being water-tight. This aspect of the CRC Act 2017 is deeply flawed and abysmally open to abuse of the sort which could potentially undermine the essence and object of the CRC as a whole.

C. Section 6 CRC Act 2017 – Functions of the Commission:

Diaspora enfranchisement?

Whilst all other matters expressly identified for promotion and safeguarding are of fundamental importance, the exclusion/omission of the issue of 'Diaspora enfranchisement' casts a spanner in the works. The diaspora is an important component of the citizenry and

one whose diverse contribution annually to the Gambia's GDP among other things is too significant to have their rights to representation curtailed.

Diaspora enfranchisement was unequivocally pledged by all parties in the Coalition government whilst in opposition and it is right and proper for them to now deliver it in government. What happened to the democratic virtue: "no taxation without representation"?

D. Section 7 CRC Act 2017 – Independence of the Commission

Will the CRC Commission members be in a position to exercise meaningful independence?

This section is redundant given the structural mechanisms through which the Commission is constituted. It is an open question whether persons appointed solely by a Cabinet minister and the President through a mechanism which is void of Constitutionality and transparency can exercise their assigned duties independently.

What is the litmus test for assessing such independence? And what if the President appoints a person who is knowingly incapable of exercising the level of independence required?

The idea of vesting all such unrestrained power to the President is reprehensible and democratically unacceptable in the first place. However, it would have been a good idea to strike some measured balance by creating a reasonable mechanism/lever for the public to be able to challenge / question certain unsatisfactory appointments.

E. Section 8 CRC Act 2017 – Sittings and Procedures of the Commission

Quorum during sittings?

The quorum for the sittings of the commission which is set to 6 Commission members is extremely low given the importance and significance of the task which is being asked of them. The importance of the task should demand a much greater sense of participation, service and duty from those appointed and mandate compulsory attendance of all sittings with only limited reasonable exceptions allowed.

Unless the above becomes the case, such a low bar will inevitably create room for members of the commission to potentially systematically absent themselves from sittings and treat such an important duty as a part-time / spare job on the side.

The quality of control mechanisms put in place will determine the quality of the final product, however such a low ambition as expressly prescribed by section 8(3) CRC Act 2017 inspires very little confidence if any at all.

F. Section 21 CRC Act 2017 – Submission and Publication of the Constitution and Report & Section 22 CRC Act 2017 – Dissolution of the Commission

How will the draft Constitution transition into becoming The Constitution?

As per the above provisions of the CRC Act 2017, the draft Constitution shall not be subjected to any public scrutiny in the form of a referendum. This is not only against the dictates of the Constitution, but it flies in the face of everything the Gambian people have for the past 5 decades been fighting for and voted for in December 2016. If this does not lay bare the reality that a new dictatorship [perhaps much more sinister and calculating than the previous] is in the making nothing else will. This, if allowed to pass unchallenged, will set a very dangerous precedence for the future of our democracy – a precedence upon which any future sitting Gambian head of state can rely to usher in their own vision of a Constitution without recourse to existing laws and in total disregard of democratic virtues, the Gambian people and the people’s representatives in the Legislative body.

This style and manner of operation is unprecedented in any democracy around the world. Unfortunately, our beloved country would once again be making history yet again for all the wrong reasons by becoming the first democratic nation whose democratically elected government had for ideological reasons overthrown the Sovereign Republican Constitution replacing it with their own in total disregard of the legal order. It shall be a Constitution of the President by his chosen few (the CRC) for the benefit of President.

3. Our General Observation

The Constitutional Review? Commission Act 2017 is being fraudulently and deceitfully [whether intentionally or not] disguised as a piece of legislation which seeks to “review” the current Constitutional provisions akin to a tool for Democracy when in reality, its letter, spirit, substance and motive suggests that it is a piece of legislation which seeks to do the quite opposite and in crass contempt of the democratic will. It is a Dictator’s Charter which every pro democracy citizen among us must wholly and relentlessly oppose, reject and advocate for its legislative repeal or judicial overturn.

Democracy Watch Gambia (DWG)