

CIVIL SOCIETY MEMORANDUM ON THE PRESIDENTIAL MEMO THAT WAS SENT TO THE PARLIAMENT ON THE 9TH DECEMBER 2022

Background

The promulgation of the 2010 Constitution created a robust framework for public engagement in decision-making. The constitution recognizes the sovereignty of the people of Kenya and as such consultation with the public is paramount. On the 9th of December 2022, the country was ecstatic to learn about the MEMO that had been sent to the Speakers of the August House to consider some issues that the President believed would enhance institutional capacities, strengthen complementary interrelationships and refine mandates to conform with the constitutional provisions.

CRAWN Trust and partners noting the weight that the issues addressed in the MEMO hold and the importance of public consultation in matters of national interest convened Civil Society Organizations under the umbrella of the National Women Steering Committee; a platform that brings together individuals and organizations working for women's economic and political emancipation, and Civil Society Parliamentary Engagement Network to discuss the proposals in the MEMO.

These collaborative consultative forums intended to develop a common position on the proposals that were forwarded to the Parliament for consideration. We, therefore, make this submission to give our considered opinions on the four issues and draw the attention of Parliament to our proposals that we believe would strengthen and promote the rule of law, constitutionalism and good governance in Kenya.

Our position

1. Implementation of the Two-Thirds Gender Rule

We applaud the President for the deliberate effort to fully implement the Constitution, particularly for ensuring the inclusion of women in leadership positions. Two-Thirds Gender Principle is one of the Constitutional provisions whose realization has dragged on for far too long. We take great exception that the Parliament continues to hold its sessions despite being unconstitutionally constituted.

Therefore, we have considered the proposed formula and would like to make the following observations and recommendations:

1. The President is proposing a gender top-up to ensure that the Parliament is properly constituted. In his proposal, the President has used 97 as the third of 290(being the total number of members elected per constituency) and proposes a top-up of 24 members to bring the total number of women to 97. We find his proposal erroneous as it does not reflect the correct composition of the National Assembly. Further, the correct number of elected women per constituency is 28, not 26 as captured in the Presidential MEMO. The Constitution Article 96 provides that the National Assembly shall consist of 290 elected members per constituency, 47 affirmative action seats, 12 nominated members and the Speaker (Ex-Officio Member) thus bringing the total number to 350 members. A third of 350 is 117; therefore, we propose a top-up of 36 women to make the total number of women in the National Assembly 117 in compliance with the Constitution.
2. Further, we propose an amendment to Art 98(b) to delete women and insert special seats necessary to meet the Two-Thirds Gender Principle.
3. We further propose that a bill be tabled in the Parliament to operationalize Article 100 to ensure equal representation of women, youth, PWDs, marginalized communities and ethnic and other minorities.
4. We welcome the proposal to establish a fund to promote inclusion and political participation. We propose that the fund established to be known as Inclusion and Political Participation Fund (delete women) so that it covers other groups as well. Further, we would like to remind the Parliament that a provision exists under Section 26 of the Political Parties Act 2011 that sets aside 30% of the Political Parties Funds for promoting the participation of women, youth and PWDs in political processes. However, the funds have not met the intended objective due to a lack of strong accountability mechanisms. We propose that Section 26 (1) (g) be inserted to provide for the establishment of the Inclusion and Political Participation Fund and be pegged at 30% of the political parties' funds. The regulations should be amended to provide a mechanism to ensure transparency and accountability in the application of the funds established in Section 26(1) (g).
5. Finally, we propose that Section 28(3) be inserted in line with Art 81(b) to provide that Political Parties must submit lists that ensure Not-More than Two-Thirds of the parties' members are of the same gender.

2. Constituency Development, Senate Oversight and National Government Affirmative Action Funds.

Recognizing the judiciary determination on the issue of the Constituency Development Fund and the rulings, where the courts declared the fund unconstitutional and directed the Parliament to anchor it in law, we support the President's proposal to create an Equalization Fund under Article 204(A). Further, we note that there has been an overlap and duplication in the funds' application, especially NGCDF and NGAAF, therefore, we propose that a clear demarcation be established in the regulations to provide clarity as to what the two funds can be used for. Further, we propose enhanced accountability mechanisms to ensure proper utilization of the funds for the benefit of Kenyan citizens.

3. The Leader of Official Opposition

We support the creation of the Office of Leader of Official Opposition which seeks to enhance inclusivity and stability, promote democracy and strengthen checks and balances. However, we wish to state that the creation and operations of this particular office must be within the confines of the law. We must recognize that Kenya transitioned to a Presidential system after the promulgation of 2010. And, as we create this office, we must clearly define their operations, the funding mechanisms, the composition and their functions.

We take note of the additional funds that would be required to run this office and noting the heavy burden Kenyans are forced to bore to finance government operations, we propose that the office be kept as lean as possible and moderate resources be allocated to enable them to run the operations. We believe that the opposition would develop mechanisms to attract support from donors and the international community.

4. Parliamentary Oversight of the Executive

In his proposal, the President urges the Parliament to find a mechanism to facilitate Cabinet Secretaries' and Chief Administrative Secretaries' participation in parliamentary proceedings. He requests the Parliament to consider amending their standing orders to accommodate his proposal. We note that in the current dispensation, the Cabinet Secretaries are required by law to appear before corresponding house committees to respond to questions related to their ministries. Even though not all committee proceedings are publicized, we believe that this approach is sufficient enough to enhance parliamentary oversight of the Executive.

We would wish to remind the Parliament about the doctrine of Separation of Powers and the Constitution is the supreme law of the land, it cannot be amended by Standing Orders. The proposal by the President not only seek to alter the basic structure but also offends the doctrine of separation of powers. We believe that for the President's proposal to suffice, a constitutional amendment must be initiated to enable CSs to participate in parliamentary proceedings. Therefore, we posit that Parliament follows due process as provided for in the Constitution to accommodate the President's proposal.

Further, we wish to remind that President and Parliament that the Chief Administrative Secretary position is not recognized by law and even the court has pronounced itself of the same. To mention a non-existent position is a gross violation of the Constitution and we urge the Parliament to ignore the same.

Conclusion

Upholding the rule of law and strict adherence to the Constitutional provision is a responsibility bestowed on every Kenyan citizen. Article 1 recognizes the sovereignty of the people and gives the citizens power to exercise their power either directly or indirectly. The realization of some constitutional provisions has taken longer than expected and has been adjudicated enough times. Being the symbol of unity and under oath to uphold the Constitution, the President has demonstrated his willingness to rule within the walls of the law. And, through this MEMO we reiterate our full support of this process that would ensure that every citizen of Kenya feels represented. We urge the Parliament to carefully consider the proposals within legal frameworks to achieve the broader goal of fostering democracy and rule of law.