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P. O. Box 34, Juba, South Sudan • Tel: +211 (0)956 305 780
Email: thesudd.institute@gmail.com • www.suddinstitute.org

Policy Brief

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Reforms under the R-ARCSS could become mere Transitions without Democratic Change

Joseph Geng Akech

Summary

This policy brief rings alarm bells for the parties to the R-ARCSS, its guarantors, and civil society actors that unless certain actions are urgently taken, reforms under the revitalized peace agreement may fail to yield positive change in facilitating South Sudan's transition to constitutional democracy, peace and national unity. What follows is a summary of main strands of the analysis and recommendations:

- The R-ARCSS is a viable framework that could silence the guns and usher in democratic reforms that are vital for state building. It should be implemented in letter and spirit, despite parties' disagreements on the manner, breadth, and timing of reforms.
- Reforms can only achieve a meaningful change for the citizens if implemented in a timely fashion, and as an integrated whole but not piecemeal.
- Reforms that do not translate into a positive change for ordinary citizens in terms of peace, social cohesion, and economic benefits are mere transitions without change.
- It is paramount to situate reforms within constitution building agenda so that they culminate in strengthening institutions of government, thereby enhancing constitutional democracy.
- The RTGoNU should promote people's active participation in reforms through civic education, dialogue, and consensus building to ensure widespread ownership which may not be achieved if the people are not directly involved in the reform process.
- The RTGoNU must focus on the enablers of reforms, peace, and national unity and discourage spoilers. Whilst undertaking reforms, parties to the R-ARCSS must discourage war rhetoric and avoid any regression on gains made.

1 Introduction

When South Sudan gained independence in 2011, the optimism was that a democratic and prosperous state would emerge as a model of a successful break-up. That, too, was the promise of the Sudan Peoples' Liberation Movement/Army (SPLM/A) in the event that unity with the Sudan was untenable. Not only was the SPLM/A expected to initiate, lead and implement comprehensive state reforms, it was also incumbent upon its leaders to meet the expectations of the masses. But in just two years of independence, hopes turned into despair, as fighting broke out in December 2013, colliding fragile and ill-trained army against each other, and on tribal basis. The Agreement for the Resolution of Conflict in the Republic of South Sudan

(ARCSS) was negotiated and signed in 2015, but it collapsed in 2016. The collapsed pact was revitalized in 2018. The Revitalized ARCSS underscores reforms that must be implemented if the new nation was to attain a constitutional democracy.¹

Accordingly, the R-ARCSS symbolizes a tool for comprehensive state reform – focusing on laws, institutions, economy, political and security landscape – which would culminate in the holding of a first national election and subsequent establishment of democratic institutions of governance under a permanent constitution.² Achieving such ambitious framework of reforms arguably represents a democratic transition accompanied by real change. Seen from that perspective, if implemented, the R-ARCSS could epitomize a fundamental transition or a change towards constitutional democracy typified by the rule of law, prosperity, and sustainable peace. But due to trust deficit amongst political leaders, coupled with intransigence and other intervening factors, skeptics now ask whether reforms under the R-ARCSS merely represent transition without change. For instance, Professor Jok recently observed that ‘the whole peace agreement and its implementation have all been talk and no positive action, at least nothing on which the people have been able to build their hopes.’³ Jok is right, because in close to two years since the signing of the R-ACRSS, the parties to the R-ARCSS have only just formed a partial government of national unity and still largely remained opposed in virtually almost every other vital aspect of the consociational power deal. This raises two concerns: (a) could there be conceptual flaws in the R-ARCSS as a tool for state reform? or (b) are challenges accruing from R-ARCSS’ implementation too complex to overcome?

In answering these questions, this policy brief critiques reforms under the R-ARCSS in terms of whether or not they characterize meaningful change, or mere transitions without impact on constitutional democracy. It argues that implementing the R-ARCSS without achieving reforms, in their totality, symbolizes transition without change. It is akin to ticking a box without transforming dynamics around that box. And as some scholars have warned ‘South Sudan’s civil war [can] not end with a peace deal’ – meaning it is the reforms that will bring democratic, peaceful South Sudan.⁴ Covering four sections, the paper starts to set the tone by problematizing the centrality of reforms within the wider peacebuilding and constitutionalism in section one. In so doing, it surveys whether or not the R-ARCSS is a false start to national reform or a new wine in an old glass. Section two showcases the R-ARCSS as a reform agenda and reveals pivotal nature of reforms within the R-ARCSS. The paper then outlines and briefly discusses the enablers of reforms in section three. The last section suggests some actions for rethinking reforms within the premise of the R-ARCSS and other prevailing opportunities such as the national dialogue process.

2 Revitalized Peace Agreement as a Reform Agenda

The premise of the R-ARCSS is to ensure fundamental state reforms leading to permanent constitution under which citizens should enjoy sustainable peace and good governance. It is to be noted that calls for reforms underpinned negotiations at peace talks and were the only products various parties could sell to their constituencies. The parties made submissions as

¹ All the eight (8) chapters of the R-ARCSS are reforms oriented by chapters IV (economic and judicial reforms) and VI (permanent constitution building process are in particular instructive in terms of reforms.

² See IGAD ‘Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan’ (2018) 29 para 1.19.4 <<https://jmecsouthsudan.org/index.php/arcss-2015/igad-hlrf-agreement/108-revitalised-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan-r-arcss-2018/file>> (accessed 20 July 2020).

³ See <https://www.nation.co.ke/kenya/blogs-opinion/blogs/dot9/madut/a-president-and-five-deputies-but-south-sudan-still-cries-for-leadership-1359284>> (accessed 3 July 2020).

⁴ L de Vries & m Schomerus ‘South Sudan’s civil war will not end with a peace deal’ (2017) 29 *Peace Review*

to what needed to change and the rationale for such a change. In sum, one can spot the premise of reforms called for by the parties as espoused in the Preamble to the R-ARCSS,⁵ where they declare that they ‘deeply regret the untold human suffering inflicted on people as a result of disregarding [constitutional] commitments’ and are ‘determined to recommit to peace and constitutionalism and not to repeat past mistakes.’⁶ Substantively, the R-ARCSS stipulates far-reaching reforms akin to restructuring the state or resetting it anew. In that sense, it can be said that reforms exemplify transition to democratic change because it would lead to (i) reform of laws and policies, (ii) restructuring of state institutions (iii) ushering in a new constitution and (iv) ensure justice, accountability, reconciliation and healing.¹ If these milestones are not achieved, one can say such would represent a transition without change. But a multitude of challenges continue to bedevil the realization of any meaningful reforms.

Like most peace agreements, the design of the R-ARCSS implicates its smooth implementation. Firstly, inasmuch as its aim is to foster peace, reforms, justice and national healing, there are no adequate financial mechanisms to ensure that operational challenges do not impede implementation. The international community has reportedly declined to fund certain aspects of the R-ARCSS unless the RTGoNU demonstrates commitment to substantially finance the Agreement. Secondly, the R-ARCSS is heavily elitist and militant driven with peripheral role played by the ordinary citizens whose grievances have nothing to do with power sharing or consociational arrangements but rather how that power is exercised, including mechanisms to claim their rights. Lastly, the R-ARCSS’ supremacy status over existing constitutional order in relation to its provision – understandably to protect it against unilateral actions – creates a sense of super political and legal roadmap for restructuring the state and it could be used to subordinate existing governance structures.⁷ This inherently places R-ARCSS in constant tension arising from its legal and political identities, which render its implementation challenging.

Other than design faults, there are swarms of implementation barriers to achieving reforms. Firstly, lack of mutual trust between the principals (Kiir and Riek) and failure by the parties to embrace R-ARCSS wholeheartedly, thwart implementation. This has led, in part, to selective implementation. Secondly, the R-ARCSS recycles same comrades who were part of the old system they sought to change, signifying proverbial ‘old wine in the new glass’ mantra. It is important to note that the R-ARCSS excludes individuals implicated in human rights abuses and those engaged in corruption from taking part in the government. Specifically, it proscribes those indicted or found guilty of international crimes by the Hybrid Court,⁸ and anyone ‘found to have condoned or engaged in corrupt practices’⁹ from holding public office in both transitional and latter governments. But the mechanisms – Hybrid Court and the Commission for Truth, Reconciliation and Healing – which would have triggered these restrictions, are yet to be established.¹⁰

Regardless of these two sets of challenges, the skeptics hold the view that the R-ARCSS is a false start to achieving fundamental reforms and that any meaningful reforms only lie in

⁵ It can still be argued that the R-ARCSS represents reform although it was not signed by all parties as some estrange groups claim, amongst others, that it did not address root causes of the war.

⁶ Preamble to the Transitional Constitution, 2011 (as amended).

⁷ (n 2 above) 77 para 8.

⁸ As above, 70, para 5.8.

⁹ As above, 46 para 4.1.4.

¹⁰ See generally J Akech ‘Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation’ (2020) *International Journal of Transitional Justice*

renewed commitments by the parties, as stipulated in the R-ARCSS. There, the parties declared commitment to positive change guided by democracy, respect for human rights and rule of law, as well as never to repeat past mistakes. But what in particular did they swear to deliver in terms of reforms? It would be necessary, in answering this question, to turn the leaf of skepticism in search of democratic reforms. What follows is a bundle of suggestions of what is needed to achieve these reforms, vortex of challenges notwithstanding.

3 Enablers of Democratic Change and Reforms

3.1 Full and timely implementation of the R-ARCSS

A timely and unfettered implementation of the R-ARCSS is the springboard of reforms. Given that the underlying fundamental objective of the R-ARCSS is to ensure peace, promote development and democratic consolidation – in both long and short term – reforms under it must be implemented in totality, otherwise called ‘letter and spirit.’ Piecemeal or selective implementation cannot achieve the above stated goals. As revealed by the Revitalized Joint Monitoring and Evaluation Commission’s (RJMEC) quarterly reports,¹¹ most of the deliverables are yet to be achieved. Whilst a handful of critical reforms were attempted and some accomplished, a bulk remained forestalled, untouched or disregarded.¹² Neither the delays nor lack of progress is helpful in realizing reforms agenda because time is of essence since the R-ARCSS is supposed to culminate in national elections said to commence ‘sixty days prior to the end of the Transitional Period.’¹³

It is contended that for the R-ARCSS to yield a transition with meaningful, democratic change, it must achieve certain milestones, such as formation of an inclusive government of national unity; taking significant steps in security and economic sector reforms; undertaking law reform/review of critical laws to enhance fiscal transparency, respect for human rights and strengthening public resources management, including restructuring of key institutions of accountability. These processes must engender an inclusive constitution building, eventually culminating in a fair and transparent election – which is an important democratic process to usher in a culture of peaceful transfer of power and democratic governance. Achieving such a milestone in reform would facilitate the country’s transition from conflict to development and the eventual establishment of constitutional democracy under a ‘permanent’ constitution.

3.2 Establish and strengthen public institutions of governance

The R-ARCSS provides for the establishment of the Revitalized Government of National Unity (RTGoNU) and state governments as per responsibility sharing matrix amongst the parties to the R-ARCSS. In particular, it requires the establishment of an executive led by President and five Vice Presidents, more than 600 members of national legislature in the bicameral parliament of National Legislative Assembly and Council of States, respectively, including more than 20 national Commissions and other independent institutions. Of these,

¹¹ See cumulative RJMEC’s reports on the status of R-ARCSS here

<<https://jmecsouthsudan.org/index.php/reports/rjmec-quarterly-reports>> (accessed 26 July 2020).

¹²For detailed analysis of the status of implementation of the R-ARCSS, see RJMEC’s 2020 quarter two report on the status of implementation of the R-ARCSS. Available at <<https://jmecsouthsudan.org/index.php/reports/rjmec-quarterly-reports/167-rjmec-quarterly-report-to-igad-on-the-status-of-implementation-of-the-r-arcss-from-1st-april-to-30th-june-2020/file>> (accessed 14 July 2020). See also A Awolich ‘South Sudan peace process: The challenge to the implementation of the R-ARCSS’ (2019) 4 <<https://www.suddinstitute.org/publications/show/5dc027966fe22>> (accessed 10 July 2020).

¹³ (n 2 above) 29 para 1.20.5.

only the executive in both national and state levels have been formed albeit partial – the governor of Upper Nile State and state ministers are yet to be appointed. Of particular importance to reforms are the institutions that will initiate and lead reforms at various levels. For instance, the establishment of an independent Judicial Reforms Committee (JRC) would help expedite the judicial reforms, training and capacity strengthening of judiciary and rule of law institutions, yet this has not been established.¹⁴

It is envisaged that reforms would come in two forms: structural and substantive. For the former, the focus would be to strengthen public institutions to effectively implement new laws and policies whereas the latter focuses on law reforms or review. Underlying these efforts is the fight against corruption which is a central issue under the R-ACRSS. For these institutions to stamp corruption, it is imperative that they are strengthened and their independence and capacity enhanced. In particular, the Anti-corruption Commission and all institutions dealing with revenue mobilization and management are critical in uprooting corrupt practices and other maladministration in South Sudan. It would appear that reforms may be championed by those who stand to benefit, not those who stand to lose.

3.3 Security and economic sector reforms

The R-ARCSS provides elaborate reform agenda for security and economic sectors. Firstly, the R-ARCSS requires unification of the army, followed by a professionalization into a national army representing the country's diversity. This would have been done eight (8) months before the commencement of the Transition Period but as the R-JMEC's report shows, this area remains largely lagging.¹⁵ Overall, limited progress is being made in training of Necessary Unified Forces (NUF) amidst waves of challenges. Principally, concerns are raised about food shortages, limited healthcare facilities and COVID-19 which have compounded delays in forces unification and training.¹⁶ Nonetheless, it is praiseworthy to state that 25 cantonment sites are reportedly established although two (2) sites are not operational.¹⁷ The unification and training of forces is meant to bolster professionalization within security forces in accordance with international best practices.

Therefore, trainings and unification without requisite tailored program built on tested professional standards would fall below the threshold of quality of reforms contemplated in the R-ARCSS. That is why the R-ARCSS obliges RTGoNU to amend several laws governing the operation of security and law enforcement agencies to streamline their mandates, roles, and functions.¹⁸ Inherent in the security sector reforms is the fact that the R-ARCSS commands restoration of discipline, accountability and competence of financial institutions, as well as exerting efforts to increase domestic resources to reduce over dependence on foreign aid. Yet, little has been done in this pillar of reform as documented in quarterly reports of the RJMEC.¹⁹

3.4 Legislative and policy reform or review

Law review is a critical reform agenda inherently established in the R-ARCSS hence the reason an independent body – the National Constitutional Amendment Committee

¹⁴ JMEC's R-ARCSS status report (n 11 above) 5 para 19. See also R-ACRSS (n 2 above) art 1.17.3.

¹⁵ (n 2 above) 36 para 2.3.

¹⁶ RJMEC (n 11 above) 8-9.

¹⁷ As above 9 para 39.

¹⁸ These laws are discussed under section 3.4 of this paper.

¹⁹ See generally RJMEC's quarterly reports (n 10 above).

(NCAC) chaired by foreign national, is mandated to review bundles of legislation to bring them into conformity with the spirit and text of the R-ARCSS and to institute reforms leading to their professionalization.²⁰ These legislations include the SPLA Act, 2009, National Security Service Act, 2014, Police Service Act, 2009, Prisons Service Act, 2011, Wildlife Service Act, 2011, and Fire Brigade Service Act, 2009. Despite the fact that the R-ARCSS enjoins the NCAC to undertake legislative review within 90 days from the date of its signing, it was only recently that this task was completed. However, these laws are reportedly pending before the Ministry of Justice and Constitutional Affairs as the institution that would table them before the Council of Ministers and the Revitalized Transitional National Legislature which is yet to be reconstituted in accordance with the terms of the R-ARCSS. Moreover, it is important to note that the Constitutional Amendment Bill to incorporate the R-ARCSS into the Transitional Constitution, 2011 (as amended) should precede legislative review process. It is contended that legislative and policy reforms are foundational to building democracy and strong institutions, all of which underpin a constitutional democracy.

4 Conclusion and Recommendations

Overall, it seems that any successful reforms agenda is going to be impacted by two factors: (a) ability of the parties to the R-ARCSS to maintain a delicate balance in the subsisting consociational power sharing so that anti-peace sentiments are minimized or eliminated and (b) ensuring that public is sensitized to hold elites accountable in the implementation of the R-ARCSS. However, whilst the R-ARCSS faces a myriad of challenges, the parties must act bold by refocusing energies, resources and expertise to ensure reforms under it are implemented. It is contended that lack of attention to policy issues raised and discussed above and below could render reforms under the revitalized peace deal mere transitions without democratic change. In sum, no meaningful reform would be attained if intransigent habits, lack of focus, and fragmentation persist. In what follows, I put forward some of the recommendations deemed necessary to achieve comprehensive reforms.

First, reforms ought to be situated within the rule of law and constitutionalism agenda. Efforts at strengthening public institutions of governance, law and policy reforms must be anchored within the broader rule of law and constitutionalism agenda. This should include anticipating what the permanent constitution would look like and ensuring that law reforms prepare the path for the new constitution. Therefore, reforms under the R-ARCSS must not be seen in isolation from the broader rule of law framework. Accordingly, it is recommended that any efforts at reform be harmonized and coordinated to ensure coherence with other nation building governance processes such as national dialogue and constitution building processes.

Second, corridors of civic engagement in reforms have to be open and free. There is a need to popularize reforms in the peace deal among the people of South Sudan as the Agreement obliges the RTGoNU to ‘disseminate [it] amongst South Sudanese in the country, refugee camps and in diaspora.’²¹ However to effectively engage citizens would require opening up civic spaces and ensuring freedom of expression of citizens as stakeholders in governance. Since the signing of the R-ARCSS, no meaningful public sensitization has been conducted unlike during the Comprehensive Peace Agreement (CPA) which was popularized amongst the populace by the top leadership of the Sudan Peoples’ Liberation Movement (SPLM) and its

²⁰ (n 2 above) art 1.18.1.2.

²¹ (n 2 above) 4 para 1.4.3.1.

structures. To the contrary, the R-ARCSS lacks popular support because public participation has been limited, from negotiation to implementation. It must be remembered that peoples are the guarantors of any peace agreement and can hold to account leaders who renege on its terms, especially those who may be opposed to agreed reforms. In so doing, the public can demand that certain milestones be achieved as they would know the contents and purpose of reforms contemplated in the peace pact. It is argued that this accountability may not be achieved if the people are not stakeholders in reforms.

Third, there has to be an increased and undivided international pressure. To implement peace and avoid partisan renegotiation and interpretation of the R-ARCSS, the international community must speak with one voice – call out violators and constantly urge parties to ensure reforms are initiated and implemented. Reforms should be the key performance indicators (KPIs) of the parties to the R-ARCSS without which time and resources spent during transition period would represent mere transition without any meaningful democratic change. However, reforms would not be achieved without financial commitments from the Revitalized Transitional Government of National Unity (RTGoNU) as the primary duty bearer with support from international community. Funds will also support civic engagement with youth, civil society, faith-based organizations and community leaders. Lastly, the international community should support activation of other aspects of the peace agreement such as reconciliation and accountability mechanisms as they are a central facet of reforms and the country’s democratic takeoff.

Finally, a policy that erects expandable peace camp and focuses on the enablers is desired. President Salva Kiir is famously known for his ‘big tent’ approach to peace as witnessed in 2006 when he signed peace pacts with several militias in a bid to unite South Sudanese ahead of self-determination vote. That approach must now be reconsidered in terms of who and how to enter the expandable peace camp. This is necessary so as to ensure those who enter the camp have the right attitude and capacity to implement reforms agenda. The approach is also praised since it allows for accommodation of dissidents whilst maintaining focus on reforms. However, the RTGoNU must ensure that whilst the door to the peace camp is kept opened, only those who abandon violence in favor of peace should be allowed in. It must therefore disincentivize peace spoilers and reward reformists.

In that sense, the parties to the R-ARCSS must be careful not to recycle actors with toxic attitudes of intransigence and lack of empathy for the suffering that the conflict has caused the South Sudanese populace. Such actors and behavior make compromise less likely, yet it is fundamental if implementation of reforms has to be achieved. The peace camp must be opened to those who want peace and have common populace at heart. The parties must avoid monetization of loyalty which has triggered change of allegiance from one side to the other, depending on who can pay the ‘heaviest’ paycheck. Instead, the process should promote patriotic actions, as constituted in reforms for the betterment of all and to truly achieve prosperity, justice and liberty – values we should hold dear as nationalists.

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The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute’s intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

Author's Biography

Joseph Geng Akech is a passionate South Sudanese human rights lawyer. He holds Diploma in community development, (KISWCD, Kenya), Bachelor of Laws (BU, Uganda), LLM in human rights and democratisation in Africa, with distinction (Pretoria, South Africa) and PhD (doctoral) researcher on constitution building in fragile states. His research interests are in constitutional law, human rights, transitional justice and peace building. Joseph's doctoral research is entitled 'foreign influence and the legitimacy of constitution building in South Sudan' which interrogates international involvement and the legitimacy of resulting permanent constitution in the world's newest nation. Joseph has published numerous articles and chapters in books on constitutionalism and peacebuilding. He can be reached on josephgakech@gmail.com.