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Weekly Review

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Operationalizing the 2023 National Elections Act: Opportunities and Challenges

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Summary

This Weekly Review assesses the South Sudan's National Elections Act, 2023. This is paramount because the upcoming elections are crucial for democratic consolidation in the country. Time, however, is running out as there are only 14 months left before the elections are supposedly held. In recognition of this, the Revitalized National Legislature has passed the National Elections Act (Amendment 2023), legally enabling the conduct of these elections in 2024. Nonetheless, the National Elections Act is marred by substantive and operational challenges, which the Unity Government should address. One of the challenges includes section 60, which suffers a mathematical error. Specifically, section 60 states that 50% representations shall come from geographical constituencies, 35% women, and 15% proportional closed party lists, all of which sum up to a 100%. The law then adds 5% of the 332 legislators to be appointed by an elected president. Understandably, this is an error that should be immediately corrected. In addition, the Act is silent on how to determine the population of South Sudan and the adoption of permanent constitution as a prerequisite for the conduct of elections. Also, section 61, which prescribes the composition of state legislative assemblies, ought to be amended to reflect the three administrative areas.

It is in this context that we make the following policy recommendations to help operationalize the National Elections Act, 2023:

- *The RTGoNU should amend section 60 of the National Elections Act (Amendment 2023) to address the underlying inaccuracies.*
- *Amend relevant sections that affect the three administrative areas such as section 61.*
- *Develop and incorporate a procedure for appointing 5% of the legislators, with due consideration to youth, persons with disabilities, veterans, professionals, and smaller ethnic communities such as Bongo, Kachipo (Suri), and many others.*
- *Should urgently reconstitute the National Elections Commission and resource it to ensure operational preparedness, and*
- *The parties to the Revitalized Peace Agreement to agree on other substantive issues bearing importance to the elections such as conditionality of the permanent constitution¹.*

¹ The authors are grateful to Adv. Pourac Achiek for collating and sharing some of the materials used in this analysis.

1 Introduction

Since independence in 2011, the Republic of South Sudan never held elections. The polls planned for 2015 were never held due to sudden onset of violence in December 2013 that engulfed the entire country and reversed democratic gains. Before the eruption of violence, significant progress had been made in adopting the permanent constitution as stipulated in the Transitional Constitution. The Revitalized Peace Agreement, signed to end the 2013 war, stipulates a host of reforms that should be implemented, all of which culminate in an election. But the slow implementation of the Revitalized Peace Agreement led to several extensions. The extended pact, the “Agreement on the Roadmap to a Peaceful and Democratic End of the Transitional Period of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (Roadmap),” provides for elections to be held by December 2024.

The sluggish implementation of the Revitalized Peace Agreement and the fact that the country has been on transition since independence are driving calls for elections to be held on time. This view is popular among citizens² and scholars alike, some of whom contend that elections may not be fair and credible, but democracy cannot wait.³ It is in this context that the country is bracing for elections in 2024. Elections, however, face daunting challenges since critical milestones in the Revitalized Peace Agreement remain unsettled. The good news is that the country’s parliament—the National Legislative Assembly—has passed a crucial legislation, the National Elections Amendment Act, 2023, to pave way for elections.

There is cumulative evidence from various experiences that elections do play a critical role in building peace and grounding democratization in post-conflict settings. It is recognized, however, that the conduct of elections in the post-conflict environment is often a recipe for renewed violence. Still, if these are carefully designed, implemented, and tailored to the context, elections could put the country on the sustainable path of peace and democratization. It is argued that there is no iron law according to which elections are doomed to fail, as there has been a number of elections that succeeded by establishing an independent, well-functioning election commission and an effective and responsive election complaints system.⁴ One critical question for any elections is not only about how to conduct them, but also for what/whom the citizens will vote. If elections are conducted to accentuate a system of governance that is not based on checks and balances, separation of powers, and not guided by the needs of citizens, such elections may expose a country to the risk of a relapse into war and violence. Thus, having a constitution that defines what people will vote for and who to complaint to if necessary is critical for successful elections.

This Weekly Review examines the challenges and opportunities for elections in South Sudan and makes recommendations concern with operationalizing the National Elections Amendment Act, 2023.

2 Overview of the National Elections Act 2012 (as amended) 2023

² N Cheeseman, L Biong, and E Yakani ‘How (not) to Hold Elections in South Sudan’ (2023) available at, <<https://library.fes.de/pdf-files/bueros/suedsudan/20294.pdf>> (accessed 15 October 2023) pp. 3.

³ J G Akech ‘To whom it may concern: South Sudan may not be ready for elections, yet democracy cannot wait’ (2022) <<https://africlaw.com/2022/07/25/to-whom-it-may-concern-south-sudan-may-not-be-ready-for-elections-yet-democracy-cannot-wait/>> (accessed 20 October 2023).

⁴ See <<https://library.fes.de/pdf-files/iez/07416.pdf>> (accessed on 21 October 2023).

The National Elections Act, 2012 (Amendment Act, 2023) was passed by the National Legislative Assembly (NLA) and assented into law by the President on 26 September 2023. The Act was amended as required by the Revitalized Agreement on the Resolutions of Conflict in South Sudan (Revitalized Peace Agreement).⁵ The Revitalized Peace Agreement provides that ‘the National Elections Act, 2012 shall be amended to conform to the terms of this Agreement’. In addition to such a narrow purpose, the grand aim of the amendment is to provide a ‘legal framework for the conduct of periodic, transparent, genuine, democratic and peaceful, free and fair elections’.⁶ The basic principles include respect of the will of the people, right of every citizen to participate in elections, and ensuring transparency in the elections process, among others.⁷ These principles may be realized if the operationalization of the Elections Act addresses substantive and operational challenges that stand in the way of fair and credible elections in South Sudan.⁸

Generally, the process of amending the 2012 National Elections Act was very inclusive and participatory. Unlike the 2012 Act, the 2023 Act adheres to the affirmative action by increasing representation of women from 25% to 35% and reducing the seats for geographical constituencies from 60% down to 50%. This is a big achievement, and it will put South Sudan as one of the leading countries advancing women empowerment in the region. However, some of the issues raised by various stakeholders during the consultations and hearings such as the representation of youth and persons with disabilities have not been considered. This is a missed opportunity as consideration of such issues would have made the Act a people-driven legislation and one of the exemplars in the continent. Also, the passing of the Act by the NLA was marred by lack of consensus, as the SPLM-IO objected to section 60 that gives the elected president the power to appoint 5% of the legislature.

One way to address this contradiction is to follow the legislative intent being that the electable seats out of 332 members of the NLA are 315. This implicitly means that the 5% (16.6 rounded to 17 seats) appointed legislators are to be deducted from the total of 332, leaving 315 seats as electable according to the following distributions:

- 50% (157.5 rounded to 158 seats) for geographical constituencies elected on first-pass-the-post basis.
- 35% (110.25 rounded to 110 seats) for women and
- 15% (47.25 rounded to 47 seats) to be elected based on proportional representation from closed party lists.

It is our view that some of these issues could be addressed in the process of operationalizing the NEA and if necessary, there will be a need to amend some of its sections.

3 Operationalizing the National Elections Act (NEA)

The passing of the NEA is an important progress as it has unlocked one of the key barriers to the preparation and conduct of elections. The NEA provides the necessary legal infrastructure, systems, structures and pathway for the conduct of elections. However, the elections journey in South Sudan will be a bumpy one as the operationalization of the NEA

⁵ Article 1.20.3 of the Revitalised Peace Agreement.

⁶ Section 3 of the National Elections Amendment Act 2023.

⁷ *ibid*, section 6.

⁸ L Biong ‘South Sudan is gearing up for its first election—3 things it must get right’ (2023) *The Conversation*, available at, <<https://theconversation.com/south-sudan-is-gearing-up-for-its-first-election-3-things-it-must-get-right-211355>> (accessed on 14 October 2023).

will face challenges that will require some strategic choices and decisions that are apparently within the remit and powers of the parties to the 2018 Peace Agreement. The following subsections highlight some of the substantive and operational challenges the country faces ahead of the December 2024 elections.

3.1 Substantive challenges

According to the Revitalized Peace Agreement, the conduct of population census is one of the activities to be carried out during the transitional period as that would provide the accurate population to determine the geographical constituencies. It is, however, our view that the population census is not a prerequisite for the conduct of elections, *per se*. The NEA only refers to the population of South Sudan in determining the geographical constituencies and it is silent on how such a condition will be satisfied in the absence of new population figures. This ambiguity will need to be addressed.

The Agreement is, however, explicit in linking elections with the adoption of a permanent constitution to address governance questions and what people will be voting for. Although the National Elections Act (Amendment) 2023 implicitly aims to hold elections based on the Transitional Constitution 2011 (as amended), there will be a legal vacuum as holding elections not based on a permanent constitution could easily be challenged in the court of law. A political charter in this regard may be needed. With only 14 months remaining to the slatted elections, these unimplemented issues may need to be addressed through political consensus among parties to the Revitalised Peace Agreement.

The other substantive issue to be addressed is section 60 of the NEA which contains a provision that grants the elected President powers to appoint five percent of the National Legislature. This provision stipulates that ‘the elected President shall appoint five percent (5%) or seventeen (16.6 rounded to 17 seats) of the three hundred and thirty-two (332) members of the National Legislative Assembly’.⁹ This provision was protested by the Sudan People’s Liberation Movement–In Opposition (SPLM–IO) which walked out of the sitting during the vote.¹⁰ That notwithstanding, there is evidence of the value and imperative of appointing limited number of parliamentarians from disadvantaged and marginalized groups.

In specific terms, the elections law stipulates that:¹¹

- Fifty percent (50%) are to be elected to represent geographical constituencies;
- Thirty-five percent (35%) of women members shall be elected on the basis of proportional representation from closed party lists;
- Fifteen percent (15%) of members shall be elected on the basis of proportional representation from closed party lists; and
- Five percent (5%) to be appointed by an elected President.

This provision raises a number of legal issues:

⁹ Section 6(2)(5) of the National Elections Amendment Act 2023.

¹⁰ *ibid*, sec 6(2)(4).

¹¹ *ibid*, sec 60.

First, the total of these percentages produces a 105 percent, inflating the numerator. This means the article on five percent appointed legislators needs to be properly operationalized in the law.

Second, the law is silent on the procedure of appointing the 5 percent to the parliament. However, the practice by which an elected President appoints some members of parliament is not unique to South Sudan. It is practiced in some countries but with clear criteria and due process for such appointments. In this regard, the elections law could empower the National Elections Commission (NEC) to develop regulations on the appointment procedure for the appointable seats.

Third, the word *elected president* means a president who has been sworn in to office as opposed to *president elect*. This means the appointment of five (5) percent of the members of the National Legislative Assembly shall only occur after elections are over since parliamentary and presidential elections will take place simultaneously. This calls for amendment of the entire section 60 to reflect the percentages of electable and appointable members of parliament.

Fourth, the inclusion of the three administrative areas as one of the tiers of government in the NEA requires a revision of all the relevant acts. For example, section 61 of the 2012 NEA has not been amended to specify the number of members of the administrative area councils. There are a number of sections of the 2012 NEA that need to be amended to reflect the three administrative areas.

Fifth, as the NEA entrusts the NEC to conduct elections at all levels, including local governments by December 2024, some strategic decisions may need to be considered beforehand. Given time factor and limited resources, the NEC may make hard choices of whether to hold elections at the same time at all levels, or partially conduct them by starting at the national level first, followed by state, and then local government. Another option is to start with President, Governors, Chief Administrators, and County Commissioners. Experiences have shown that starting with local elections is more prudent as stakes in competition for power and wealth are less dramatic in the second and third tiers of government than they are at the national level¹². In the case of South Sudan, the perception surveys indicate that the political competition at states and local levels will be fiercer than at the national level. Also, there is unsustainable and huge national government that constitutes a real burden on the citizens and local governments. The NEA provides opportunity to reduce such a burdensome size of the national government.

Evidently, the language and conceptualization of the electoral law could be better harmonized. There is, however, some room for further dialogue and consensus as there is evidence of the value and significance of appointing a limited number of parliamentarians from disadvantaged and marginalized groups.

3.2 Operational Challenges: Minimum Conditions

Time is running out, calling for thoughtful leadership, prioritization, and resources to operationalize the NEA. There are some minimum conditions to be considered for a successful conduct of elections by December 2024. On top of these conditions is to urgently reconstitute the NEC and relevant mechanisms in the states and Administrative Areas. The

¹² See <<https://library.fes.de/pdf-files/iez/07416.pdf>> (accessed on 20 October 2023).

NEC should be staffed with competent and impartial individuals to embark on the challenging task of organizing elections. Another minimum condition is to create a conducive environment by expediting the deployment of the unified security forces as per the provisions of the Peace Agreement, as well as addressing the shrinking civil space and sub-national violence to reduce their impact on the credibility of elections.

The formation of the overdue Political Parties Council is critical for the registration of political parties, and it is a prerequisite for the conduct of elections. Also, building confidence in the elections process requires effective complaint and justice systems and functioning police to address electoral offences and political disputes. Alternative informal disputes resolution of electoral complaints may need to be considered such as South Sudan Council of Churches that enjoys respect, credibility, and legitimacy across South Sudan and beyond. Forming a confidence building forum for all political parties and other stakeholders such as civil society, faith-based institutions, media and academia to nurture the culture of peace, tolerance and dialogue during the entire process of elections will provide a credible and trusted point of departure into disputes resolution.

4 Pathways to Operationalizing the NEA

Elections are a crucial post-conflict democratic transformation initiative. The Revitalized Peace Agreement stipulates holding of elections in South Sudan at the end of transitional period. For elections to be fair and credible, the RTGoNU would need to overcome operational and substantive challenges befalling the NEA. It is in this context that we make the following policy recommendations.

First, the RTGoNU should address lacuna in section 60 of the NEA (Amendment 2023) to accurately redistribute the entire section to simply clarify that 5% (17 seats) will first be taken from the total of 332 seats of the Assembly and the remaining seats (315 seats) will be allocated as per the provisions of section 60 of the NEA.

Second, the allocation of 5% of the seats of the Assembly to be appointed by an elected president is crucial, especially if such seats are meant to ensure inclusivity and representation of youth, persons with disabilities, veterans, professionals, and small ethnic groups such as Bongo and Kachipo (Suri). As section 60 of the NEA is silent on this target group, it can be amended to task the NEC to develop criteria and procedures for appointing these members of the Assembly.

Third, with the inclusion of the three administrative areas in the NEA, some of the provisions relating to the levels of government need to be amended, particularly section 61 that is silent on the number of members of the administrative areas' legislative councils.

Fourth, the RTGoNU should urgently reconstitute the NEC to commence elections operational preparedness. Members of the NEC should be people with integrity, competence, and qualifications necessary for delivering such challenging elections.

Fifth, the RTGoNU may agree to delink the adoption of the permanent constitution from the conduct of elections and to amend the current constitution to include critical issues to guide elections or agree on a charter (i.e., declaration) that will define what citizens will be voting for.

Sixth, as the NEA is silent on how to determine the population of South Sudan, the NEC to urgently work with relevant institutions such as National Bureau of Statistics, the University of Juba, the Sudd Institute and other strategic international partners to come up with realistic estimates and projections of the population of South Sudan at different levels.

Seventh, the NEC to consider forming informal electoral disputes resolution mechanisms, including the use of South Sudan Council of Churches to assume this role at all levels, as well as establishing confidence building forum for preaching culture of peace, tolerance, respect of rule of law and dialogue during the entire process of elections.

Eighth, NEC may seek technical and informed advice from the relevant institutions, experts and international strategic partners on different options for sequencing and prioritizing the conduct of elections in light of time pressure and limited resources.

Ninth, the parties to the Revitalized Peace Agreement must agree on other relevant issues to smooth the elections process. These include adoption of a ‘permanent’ constitution, security arrangements, and other matters that are essential for elections.

Lastly, the RTGoNU may entrust the National Constitutional Amendment Committee (NCAC) to make the necessary amendments in the NEA as per the aforementioned issues.

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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.

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