



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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Weekly Review

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South Sudan: The Looming Legitimacy Crisis

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Summary

This Weekly Review analyses the looming legitimacy crisis in South Sudan and how it may be averted. With the scheduled December 22 general elections as announced by the Chairperson of the National Elections Commissions (NEC), the President is bound by the provisions of the National Elections Act to dissolve by September 22, 2024, the National Legislature, State Legislative Assemblies, the national government, and state governments as per section 16 (2) of the Elections Act. With the current conditions, the general elections will not be held by December 22, 2024. This raises a fundamental question of what the RTGONU could do to avoid the looming legitimacy crisis. Unfortunately, the RTGONU has a limited time to use the normal constitutional amendment process to extend the lifespan of the R-TGONU, nor does the NEC have a political leverage to postpone the entire general elections as per the provisions of the Elections Act.

It is, therefore, argued in this Review that the R-ARCSS has structural in-built defects that impair it to resuscitate itself and any attempt to continue to give it a new lifespan for its implementation only creates more crisis and accentuates fragility trap. The Tumaini Initiative is the only safety belt that can break the fragility trap created by the R-ARCSS, but it must as well be subjected to the amendment of the R-ARCSS which is the main source of legitimacy of the R-TGONU. This Weekly Review provides a set of options for the parties to the R-ARCSS to consider for avoiding the looming legitimacy crisis. Some of these options are incomplete, particularly in the eyes of the citizens who have never exercised the right to choose their political leaders through ballot box since 2010. The last two options provide better opportunity and pathways for peace and democratic transition in South Sudan as they anchor any postponement of the general elections to the outcomes of the Tumaini Initiative.

1. Introduction

I wrote ten years ago a piece entitled “the looming crisis of constitutional legitimacy in South Sudan”¹. Interestingly, the same conditions that threatened the legitimacy of the SPLM-led government in 2015 are still relevant and even more compelling in 2024. The National Elections Commission (NEC) has announced the conduct of elections on December 22, 2024, as per the provisions of the National Elections Act, 2012 (amended), 2023 and the provisions of the R-ARCSS Roadmap 2022. With this announcement of the date of elections, the President shall, within three months, which falls on September 22, 2024, dissolve the National Legislature, State Legislative Assemblies, the national government, and state governments as per section 16 (2) of the Elections Act. The President, First Vice President and the other 4 Vice Presidents shall remain in their positions during

¹ <https://sudantribune.com/article52435/>

the elections period until the newly elected president takes over as per section 16 (4) of the Elections Act.

The real question is whether the elections will be conducted on December 22, 2024. The Chairperson of the NEC has highlighted two critical conditions to conduct elections by December 2024, namely the urgent need to amend the National Elections Act to address some ambiguities (i.e., a mathematical error in representation quotas) in the Act and to avail resources for the elections. Even if the resources for the elections are availed, which is unlikely, there is not enough time to amend the Elections Act. Besides the two conditions prioritized by the Chairperson of the NEC, the permanent constitution, as one of the prerequisites for the conduct of elections, is not ready and the conduct of population census to provide the basis for determining the number of electoral constituencies has not been conducted. With these conditions, elections will unlikely be conducted by December 2024.

In addition, the people of South Sudan are tired of sustained postponements of elections and extensions of the lifespan of a government brought by elites' power-sharing agreements, rather than through their choice. An overwhelming majority of citizens (70%) want elections to be held as scheduled despite the concerns about whether the environment is conducive for elections². One analyst summarized this dilemma by stating that "It is better for a nation to face its challenges while exercising elections and the entitlements of democracy than to die politically and economically with nothing"³. Resorting to extensions of the R-ARCSS due to utter failure of the parties to the RTGONU to implement the R-ARCSS and create conducive conditions for elections is politically risky, as it is not marketable to the citizens. Although the RTGONU may have an option of allowing itself to become illegitimate in the eyes of its citizens through shortcut processes, this Review offers six options for the RTGONU to avert the looming legitimacy crisis.

2. The Options for Avoiding the Looming Legitimacy Crisis

The first option is for the NEC to act in accordance with section 15 (2)(j) of the Elections Act to postpone any electoral procedure or event for any election or referendum when warranted by the situation in accordance with the provisions of the Elections Act and to determine new dates for conducting such processes. Specifically, section 57 (1) of the Elections Act 2012 gives powers to the NEC to postpone elections of the President and state Governors if it becomes impossible to conduct the election by reason of proven occurrence of an imminent danger that threatens the country or state. These threats include an event that may lead to a declaration of the state of emergency according to article 189 of the Transitional Constitution of the Republic of South Sudan 2011. Even so, the Commission ought to fix a new date for elections as soon as possible, which should not exceed sixty days from the original date established for such elections. Otherwise, there are no other conditions as per the provisions of the Elections Act that warrant the postponement of general elections.

The challenge with this option is that the current 2023 Elections Act is that besides its ambiguities, it has to be amended to comply with the provisions of the permanent constitution. It would be in the interest of the NEC not to take the blame for the

² <https://library.fes.de/pdf-files/bueros/suedsudan/21307-20240627.pdf>

³ https://www.facebook.com/groups/631842173528412/posts/8030968770282345/?paipv=0&ea v=AfaywJ5V7kkeH8omsk5Of7DPJWzFCW255oUP0LpqSB5I-kNGNh4atfq5LIwoCrp7wlQ&_rdr

postponement of elections, and it is within its best interest not to act on section 15 (2) (j), essentially deferring such political responsibility of postponing elections to the parties signatory to the R-ARCSS. The same observation was raised by one advocate that the postponement of elections, if any, is squarely a responsibility of the parties to the R-ARCSS and not the NEC⁴.

The second option is for the parties to the R-ARCSS to agree (i.e., Declaration of Principles) to extend the transitional period and postpone elections by amending the R-ARCSS as per the provisions of section 8.4 of the R-ARCSS. This requires at least two-thirds of the Council of Ministers of the RTGoNU voting in favor, and at least two-thirds of the voting members of the Revitalised Joint Monitoring and Evaluation Commission consenting to the amendment, followed by ratification by the Transitional National Legislature, according to the constitutional amendment procedures set out in the TCRSS, 2011 (as amended). This option is likely to be unpopular and unacceptable, given that it legitimizes the failure of the parties to the R-ARCSS as the basis for extending the transitional period and postponing elections. Nonetheless, there is limited time to amend the constitution ahead of the dissolution of the government. To amend the constitution as provided for in Article 199 requires the proposed amendment to be introduced at least one month prior to the deliberations for its approval by the national legislature. This option is both politically unpopular and not feasible to be effected in the remaining time.

The third option is to challenge the announcement of the date of general elections before the Supreme Court on a technicality ground. Section 16 (1) of the Elections Act states that the date of the election must be announced at least six months in advance. The Chairman of the NEC made the announcement on July 5, 2024. The six months window ends on January 5, 2025, not on December 22, 2024. Therefore, the law has been compromised. Hence, the RTGoNU can request the court to declare the announcement null and void on this technical ground. The pray of the government should also include seeking the court for the stay of execution until the case is decided. This can give all parties the opportunity to consider all possibilities, including the Tumaini Initiative. This option is feasible as it buys the parties more time for the Tumaini Initiative negotiations and settlement. The problem with this option is that it is only postponing a problem, and the government will be seen as merely hiding behind such technicality.

The fourth option is for the President to dissolve the National Legislature, State Legislative Assemblies, the national government, state and administrative governments and to retain his position and the positions of other five Vice Presidents during the elections period until taking over of the next president as per the provisions of section 16 (2) and (4) of the Elections Act. The RTGoNU could avail the necessary resources for the NEC to conduct partial elections on December 22, 2024, for the president, state governors and chief administrators as those do not require a population census. The President, with consultation within the Presidency, may retain the 2010 elected members of the National Legislature (including those elected to the Khartoum Legislature) and State Legislative and the members of the current councils of the administrative areas and to extend the transitional period for at least two years. This will allow the conclusion of the Tumaini Initiative negotiations, passing of the permanent constitution, and the conduct of the population census that are necessary for the elections of members representing geographical constituencies (50%) and proportional representation for women (35%) and party lists (15%). This option is feasible and

⁴ <https://www.radiotamazuj.org/en/news/article/opinion-the-looming-constitutional-crisis-in-south-sudan-and-the-way-forward>

marketable to the people of South Sudan as it will reduce the burden of the huge size of the current TGONU. However, given the limited time available to conduct the partial elections within less than four months, even with the necessary resources availed, it is unlikely that some processes under such option will be feasible.

The fifth option is for the TGONU to reach agreement by September 16, 2024, with the opposition group through the Tumaini Initiative. This will provide the basis for the extension of the transitional period and postponement of the general elections for three years. Despite the resistance by some members of the TGONU to the Tumaini Initiative, recent online perception survey conducted by the Sudd Institute among its 206 associate researchers shows about 61% of the respondents view the Tumaini Initiative as a positive step towards realizing peace in South Sudan, with 71% of respondents from Bahr el Ghazal, 59% from Upper Nile (59%), and 40% from Equatoria holding this favorable view.

Our review and comparison between the R-ARCSS and the initialed and proposed protocols of the Tumaini Initiative clearly show the two processes are not mutually exclusive; rather, they complement each other with an added synergy. In its proposed protocols, the Tumaini Initiative has clearly defined its objectives to improve and strengthen the oversight and implementation of the R-ARCSS. The parties to the R-ARCSS should be candid enough to accept that they have failed to implement the R-ARCSS and prepare the country for a democratic transition. Any repeated attempts to extend the R-ARCSS will not only exacerbate the crisis but will also create and accentuate fragility trap. The argument by some members of the RTGONU that the Tumaini Initiative has surrendered to new colonization does not hold water as ‘sovereignty is a responsibility.’ The failure of the government to discharge the core functions of any sovereign state such as monopoly of legitimate violence, provision of basic services to the citizens whose two-thirds of its population are facing acute food insecurity and famine-like conditions, and even the inability to pay salaries to its employees, place such government in an unfavorable position as echoed by one scholar⁵.

As I argued in 2015 for the SPLM-led government to conclude peace agreement with the SPLM-IO as the basis to justify its constitutional legitimacy, I argue again here for the RTGONU, particularly the SPLM-IO, to prioritize the signing of the protocols of the Tumaini Initiative as basis for extending the transitional period and postponement of elections. Unlike the R-ARCSS, the outcomes of the Tumaini Initiative are more likely to garner the much-needed support of the people of South Sudan and the international community to conduct credible elections and to expedite the democratic transition. However, this option faces some challenges as timing is of great essence as there is a need to expeditiously conclude the protocols of the Tumaini Initiative by September 16 and to give ample time to present it to the parties to the R-ARCSS to amend the R-ARCSS as per Article 8.4 of the R-ARCSS as the basis for amending the Constitution. With the resistance of some parties to the R-ARCSS to the Tumaini Initiative, there will be limited time to conclude and sign the proposed protocols by the Tumaini Initiative to be presented to the parties to the R-ARCSS to amend the R-ARCSS as per Article 8.4 and basis for amending the constitution and to extend the transitional period and postpone elections.

The sixth option is for the President to act as per section 16 (2) and 16 (4) of the Elections Act to dissolve the National Legislature, State Legislative Assemblies, the national government, state and administrative areas governments and to retain his position and the positions of the five vice presidents for a new transitional period and new date for elections

⁵ <https://www.eyeradio.org/john-akec-salary-delays-mean-south-sudan-not-truly-liberated/>

as may be agreed upon in the Tumaini Initiative and approved by the Presidency. The President has, with consultation within the Presidency, an option to appoint a caretaking government at national, state and administrative areas levels until elections are held and to allow the conclusion of the negotiations at the Tumaini Initiative. This option is feasible and probably acceptable to the citizens, as it will substantially reduce the unbearable size of the RTGONU, possibly allowing for the outcomes of the Tumaini Initiative to resuscitate the implementation of the R-ARCSS and to create a conducive environment for the conduct of free general elections.

3. Conclusion

In conclusion, South Sudan is facing a similar predicament of legitimacy crisis now as it did in 2015. According to the provisions of the Elections Act and with the announcement of the date of the general elections, the national legislatures, state legislatures, and governments at national, state and administrative areas levels are to be dissolved in less than two weeks, specifically by September 22, 2024. With the current conditions, the general elections will not be held by December 22, 2024. This raises a fundamental question of what the RTGONU could do to avoid the looming legitimacy crisis. Unlike in 2015, the parties to the RTGONU have a limited time to address this looming crisis through constitutional amendments.

Therefore, the options provided in this Review may help the RTGONU make the right decision to address the looming legitimacy crisis. Some of the critical factors that the RTGONU may consider in making a strategic choice among these options include the fact that the people of South Sudan are tired of the sustained extensions of the R-ARCSS and postponements of general elections because of a persistent failure of the parties to the R-ARCSS to create conducive conditions for the conduct of elections. The R-ARCSS has structural in-built defects⁶ that inhibit it to resuscitate itself, and any attempt to continue giving it a new lifespan for its implementation will only create more crisis and accentuate fragility trap. The Tumaini Initiative is the only safety belt that can break the fragility trap created by a sluggish implementation of the R-ARCSS. All the same, some of the options provided in this paper are incomprehensive, particularly in the eyes of the citizens who last exercised their right to choose their political leaders in 2010 and who now yearn for the conduct of new elections. The last two options provide better opportunity and pathways for peace and democratic transition in South Sudan as they are anchored on the outcomes of the Tumaini Initiative.

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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

⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400471

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