



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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Weekly Review

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The Creation of 28 South Sudanese States: Is It Economically and Legally Viable?

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I. Introduction

South Sudan's President, Salva Kiir Mayardit, on October 2nd, 2015, issued an executive order that increased the country's current 10 states to 28 decentralized states. The new arrangement, to a certain degree, follows ethnic boundaries¹, methodically isolating those communities mainly in the Upper Nile region². Thus, the decision supposedly addresses longstanding demands for devolution of powers and participatory democracy, reduces power wrangling at the center, responds to ethnic conflicts necessitated by perceived and/or real domination, and mitigates new conflict dynamics created by the ARCISS. Public response has been mixed. Some citizens believe the decision is a positive development, which paves way for self-governance. On the other hand, others see it as negatively impactful, especially in light of many constraints, such as lack of consideration for constitutional procedures and prevailing economic situation in the country.

The executive decision underlies the notion that creating more states produces more seats to accommodate political elites. Likewise, the new states partly surface by transferring positions from the national government to subnational communities, thereby curtailing power conflicts at the federal level. The objective is to transfer half of the size of the central government to the states, narrowing the government at the top and broadening it

¹ The basis for drawing administrative or subnational boundaries and which type of a territory qualifies to be a subnational entity does not exist. It has not been clear in terms of a size of population, geographical scope, ethnicity and religion, among others.

² The new states are based on ethnic boundaries mainly in the Upper Nile region where communal conflicts fuel political conflicts and vice versa. The boundaries are not the same in most of Equatoria and Bahr el Ghazal regions where some ethnic communities still share the same states.

at the base. Advocates for the federal system are generally concerned with direct involvement of the governed, thus establishing additional subnational administrative units supposedly promotes participatory democracy. Ethnic conflicts, like political conflicts at the center, are equally seen as a product of current governance structures. South Sudan comprises over 60 ethnic communities. While ethnic diversity could be an incentive if well managed, the country is plagued by longstanding ethnic hostilities. At times, ethnic conflicts amplify political conflicts, hence ethnically fanned political violence. Ethnic federation, as is momentarily the practice in Ethiopia, may allow for cohesion in the country, the decision seems to suggest. Lastly, the new order attempts to preempt the new political dynamics the ARCISS has generated in the Upper Nile region, subjecting government supporters in Upper Nile and Unity states to the opposition's rule. A new conflict could arise if the government supporters in those states do not buy the agreement. Expanding space for shared governance in the two areas, the government possibly discerns, could reduce future conflicts.

While some quarters of the South Sudanese population are celebrating as evident by public response, the procedure of the decision and its contradictions to the transitional constitution and the agreement for the resolution of conflict in South Sudan (ARCIS) are also being challenged. The rebel movement that Dr. Riek Machar commands, for example, has already expressed its disapproval of the new order, on these bases. A number of peace advocates have also expressed similar concerns.

In this weekly review, the Sudd Institute attempts to shed light on the expansion of states in South Sudan. The analysis looks at the driving factors behind the decision, implications in the context of economic viability, constitutionality, and timing of the decision. Our sense is that, although there are plausible merits to the creation of additional states, it could turn negative, depending on how the political stakeholders manage it. In the sections that follow, our analysis provides detailed discussions on the decision's key motivations and implications.

II. Motivations

This section sheds light on the complexities and dynamics behind the decision by the President to create 28 states. A better response or reaction to the decision by both the citizens and the international community cannot be arrived at without a proper understanding of the dynamics and complexities surrounding it. We think that the decision came as a result of many motivations, both at the national and local levels, with the local dynamics presumably bearing the heaviest weight. These include new dynamics created by the ARCISS, historical communal conflicts, and the emergence of the 2013 violence seemingly on the need to devolve political powers as a way to engender and maintain harmony in the country.

The ARCISS has created new conflicts by pitting local communities against each other through new political power arrangements. For example, although the government currently controls all these areas, the ARCISS designates both Unity and Upper Nile states as strong holds for the armed opposition during the transitional period. The current governors in Unity and Upper Nile states come from Bul Nuer and Padang Dinka,

communities that are allied to the government. The new arrangements hand over much of the political power of these two states to sections largely allied to the opposition. This ethnic/interethnic rivalry, however, did not just emerge during the 2013 war. In 2010, for example, some of the Bul SPLA commanders rebelled after Taban Deng Gai got elected governor of Unity state. In 2013, these rebels were pardoned. After governor Taban was removed the Bul rebels switched their allegiance to the government, targeting Taban's community, which has essentially allied with the rebel camp. The new agreement is worrying for those presently in power, as it returns state control to rival counterparts.

In Jonglei State, the Lou Nuer, the largest supporter of the armed opposition, feels betrayed by the agreement that concedes the appointment of the governor to the government. The Dinka and Nuer in Jonglei have had conflicts for centuries. These were exacerbated by the 2013 violence, with Lou Nuer White army ransacking Bor community several times. Consequently, an armed Bor youth stormed a UN civilian protection site and killed scores of Nuer civilians there. The ARCISS, therefore, is seen as a political project that does not seem to immediately address the many layers of communal problems. The fact that members of the Nuer community are still in the UN protection camps in Bor despite having a Nuer governor simply speaks of the deep animosities between these communities. Sources say that both the Bor area Dinka communities and Nuer communities asked the President to split the state.

The emergence of the conflict in 2013 created some ethnic based lobbying groups namely the Jieng (Dinka) Council of Elders (JCE) and the Nuer Council of Elders (NCE). Although there are other ethno-regional lobbyists of the same kind, the two councils have been very visible and vocal. The JCE has been the most vocal of all. Based on its writings, it emerged to counter the narrative that paints the conflict as Jieng versus Nuer and which portrays the government as synonymous with Jieng. The JCE's central argument has been that the Jieng are separate from the government, noting that the government includes members of Nuer and other ethnic groups and that mistakes of the government should not be blamed on Jieng as an ethnic group. When the armed opposition created 21 states in 2014 based on the former British districts model, the JCE saw this as a sinister motive aimed at taking control of Jieng land that contains oil. It reacted by proposing 23 states that methodically carved Jieng out of the states suggested by the opposition. As such, the JCE has been accused of pursuing ethnically divisive agenda. To be sure, although our sources indicate that this decision was conceived at the executive level, some South Sudanese suspect that the new order responds to the demand of President Kiir's ethnic elders.

There is historical demand for new states, especially in Tonj, Ruweng, Yirol, Bor, and greater Equatoria. This demand has been often justified as an SPLM's vision of taking towns to the people. The establishment order reflects the objectives of this popular demand, including (1) devolution of powers and resources to improve livelihoods of rural citizens, (2) reduction of the size of national government to free up more resources for local governments, (3) attracting, encouraging, and mobilizing national experts to work at the state and county levels and (4) promotion of social and economic development amongst the rural people.

III. Economic viability

The government of South Sudan funds its political programs using incomes from oil. Recent declines in oil prices and the current civil war have, however, negatively impacted the government's budgets and the country's macro-economy as a whole. Plummeting oil production and prices have meant distressed fiscal commitments at all levels of the government. Experts believe that the country is currently in a serious financial crisis. This problem permeates all sectors since the central government is a major funder of public programs. More specifically, the 10 states of the country largely depend for their functions on the transfers from the central government. The current states rarely generate revenues from other sources due to a number of factors, including lack of capacity. This burden will continue to be borne by the central government for a considerable duration.

The newly announced arrangement implies expanded fiscal commitment by the central government. Due to ongoing economic constraints, South Sudan has limited means to fund new political projects. The new states invoke an additional workforce, expanding the salary sector of the national budget and potentially retarding investments in basic services and development. Moreover, previous budgetary commitments to the local levels compared to the central government have been marginal at best. To make the subnational systems economically sustainable and attractive to political elites, the government needs to raise more funds to boost spending in those areas. Since the local economy is incapable of meeting these new fiscal challenges and the government lacks credit to secure international loans, the creation of new states is likely to disappoint. Essentially, 29 state and national governments, in addition to counties, are unlikely to be economically viable for the country.

IV. Legal viability

The decision has fundamental legal implications, as it relates both to the constitution and the ARCISS' commitments. Even some of those who agree with the creation of new states think that the process should have considered the constitution and the ARCISS. This category of people says the President has got the answer without applying the correct formula³. The rest say the President has grounded his decision on sections 166 (6) (a) and (b), 101 (k) and (u), 101 (b), 101 (f) of the constitution, whose validity we explore below.

Section 36 (1) of the constitution gives "all levels of government" the power to "promote democratic principles and political pluralism ... guided by the principles of decentralization and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs." Since this talks about levels of government, one could argue it also includes the national government headed by the President, and so he is justified in creating the new states. However, the section does

³ The phrase getting the "answer without using a formula" was coined by one of the members of Development Policy Forum (DPF) of the Ebony Center for Strategic Studies, who agrees with the President but thinks he should have followed the constitutional process.

not specify what the President or head of any level of government can do to promote such objectives. In addition, the main action is about promotion of democratic principles and political pluralism guided by principles of decentralization and devolution of power; it has nothing to do with the President deciding it alone. Democratic principles and political pluralism are things that need broad based participation in the decision making, particularly through democratic institutions such as the parliament, which represents the people.

Section 166 (6) (a) and (b) stipulate the objectives of the local government which are about promotion of self-governance and enhancement of the participation of people and communities, maintenance of law and order, promotion of democratic, transparent and accountable local government, and establishment of the local government institutions that are as close as possible to the people. This section is about what local government can do in promoting such endeavors but does not suggest President's involvement in any kind of way.

Section 101 (b) gives the President the power to “supervise constitutional and executive institutions and provide exemplary leadership in public affairs.” Since the task is to supervise, this section seems irrelevant as a basis for the establishment of new administrative units by the executive. The clause would have been relevant if it were about supervising constitutional and executive institutions of the newly created states.

Sections 101 (k) and (u) grant President powers to “establish independent institutions and commissions” and “perform any other function as may be prescribed by law.” Here, the constitution is talking about creation of institutional organs, not geographical-based political constituencies. Perhaps lawyers who advised the President might have used this section to also mean states. However, states (territories) are not synonymous with political institutions, core or ad hoc.

Section 101(f) gives the President the authority to “initiate constitutional amendments and legislation and assent to and sign into law bills passed by the National Legislature.” Section 101 (f) is the most relevant section for this decision; however, the establishment order did not pursue the necessary procedures. Critics argue that the constitution recognizes 10 states only, with the new order seen as a contradiction.

The body the constitution grants power to legislate on the decentralization system and territorial reorganization is the Council of States. Section 59 (a) of the constitution says the Council of States can “initiate legislation on the decentralized system of government and other issues of interest to the states and pass such legislation with two-thirds majority of all representatives.” Based on section 59 (g), the Council of States members are also charged with approving “changes in state names, capital towns and boundaries.” In fact, the order provides for a border dispute resolution committee to be established by the President and whose reports should be submitted to the Council of States for final approval. However, the order only cites 59 (g) with respect to the border dispute resolution committee's report but leaves out 59 (a). For the order to be in line with the constitutional procedure, it should have started with engaging the Council of States to enact a legislation that establishes the 28 states. Such legislation should have laid out the

establishment of the states as in the order and amended the constitution, subsequently making submission to the President only for an assent and declaration to the nation.

With regards to the ARCISS, the whole argument is based on the fact that this agreement only recognizes 10 states as the basis for power sharing. Supporters of the decision argue that this is a minute violation that can still be corrected by having government and opposition dialogue and agree on the states where power-sharing formula apply. However, critics argue that the decision fuels mistrust between the parties and it would be difficult to bring the parties to work together. Others suggest that what the government has done is similar to what the armed opposition did in establishing 21 states except that the government has added additional 7 states. Therefore, the two parties should seek a common ground over this new order.

Perhaps if the parties were to cooperate, they have a number of options at hands, one of which is to apply the ARCISS' formula to the newly created states while considering some criteria. One of those criteria could be to look at the support base and apply the formula accordingly. For example, in Jonglei, which is now divided into four states, the SPLM/A IO, based on the support base, could appoint governors in the newly created Eastern and Western Bieh States and get 40% of the cabinet positions just as stipulated in the agreement. In the new Jonglei and Boma States the government could appoint governors and get 46%. In the Upper Nile State, SPLM/A IO could appoint governors in Latjor and Western Nile States while the government could appoint a governor in Eastern Nile and maintain the same formula of cabinet ratio. In Unity, the government could appoint two governors for Ruweng and Northern Liech States while the SPLM/A IO could appoint a governor for Southern Liech State. If this formula is applied, the SPLM/A IO and the government could each get five governors in the whole region of Upper Nile. The parties may encounter some challenges if the support base does not want the cabinet ratios to be applied to the new states as in the agreement.

V. Timing

Public opinion is divided on the timing of the order. There are those who think it is appropriate as this measure resolves local conflicts the ARCISS does not address, and paves way for the smooth implementation of this agreement. Others think it would complicate already damaged social fabric as it creates ethnic based states that could act as ethnic enclaves, discouraging South Sudanese from interacting with and embracing each other. Essentially, for an ethnically stratified society bogged down by history of disharmony, observers argue, chopping the country into pieces amidst political turmoil can be a recipe for further disintegration. Some communities would see this as a way to chase other ethnicities away from their new states. At the time when emotions are considerably high, it would have been best to first focus on healing and reconciliation efforts provided for in the ARCISS. Focusing on rebuilding South Sudan's social fabric allows the society to heal, with restructuring the country's systems of governance in the future featuring as an endeavor to engender an inclusive development. This crowd argues that what is needed at the moment is a move that would promote interactions, not isolation, especially on ethnic lines.

Beyond being cognizance of fiscal and ethnicity constraints, a new governance arrangement in South Sudan requires substantial participation of both political actors and the citizenry. The timing of the order does not provide such a necessary opportunity for inclusivity. A strategic and an inclusive process, such as an approval by parliament or a referendum might be required to enact new administrative structures. This is a project that should take a few years before instituting to allow the country to first gain traction on stabilization agenda. This means that political and economic stability should be prioritized upon before propagating and implementing the federalism project.

Conclusions and recommendations

1. On the one hand, we deduce from the highlights of the driving factors that the decision can resolve new local conflict dynamics, which the ARCISS has either not resolved or created. In other words, the new states could provide some sort of cushion for the communities to heal independently since the wounds are so fresh that the communities are not yet ready to trust each other. This could be a temporary measure to keep communities separate until reconciliation and healing processes and the new constitution making process provide a new direction for the country.
2. On the other hand, the move is seen as a tool to further divide communities and create ethnic enclaves, potentially making it difficult to heal and build one nation in isolation. Healing and reconciliation processes, we suggest, should precede new political developments in this direction.
3. Our analysis shows that the decision has little constitutional grounding and this can set dangerous precedent for the country. However, based on the way communities have received it, we also infer that the decision has answered some demands of many communities and may result in further severe consequences if reversed despite lacking in constitutional procedures. To resolve this dilemma, it can still be constitutionally grounded if the President asks the Council of States to amend, debate, and approve the establishment.
4. The decision has huge implications on the ARCISS. However, both sides to the conflicts should pursue a common ground to locate opportunities for sustainable peace. They should sit and discuss the way forward. The government should reach out to the armed opposition and other political stakeholders to seek their thoughts on the matter.
5. We infer that it would be difficult to sustain the new states economically as the country is already facing dire economic hardships. However, knowing the realities behind the decision, it would not be wise to reverse it on economic viability as resolving conflict trumps all. What could be done is for the states to start on austerity budget. In addition, the national government should be drastically reduced, with most of its roles and finances transferred to the states. Focus should be on the basic necessities of communities and state administrations. Since this contributes to resolving the local conflict and promoting self-governance and

bringing power and services closer to the people, it would be appropriate for the government to engage the international community for support in key areas.

6. In conclusion, the decision could turn negative, depending on how it is being managed. A sober response may produce positive feedback that could help this country move forward.

About Sudd Institute

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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