



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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WEEKLY REVIEW

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The ‘permanent’ Constitution need not be a prerequisite for holding elections in South Sudan

Joseph Geng Akech

On March 1st, 2022, the Sudd Institute – one of Africa’s top think-tanks based in Juba, South Sudan, published a Weekly Review entitled ‘**Democratic Elections in South Sudan**’. In that review, Dr Augustino T. Mayai, Prof Matthew LeRiche and William Underwood, a PhD student, raised emerging arguments against holding elections without certain precursors being put in place. In brief, they:

- Argue that certain fundamentals (election laws, adoption of a ‘permanent’ Constitution, population census, security sector reforms, return and resettlement of the displaced and refugees, political parties’ registration) have not been put in place;
- Contend that while these milestones are important, ‘the process, credibility, and associated legitimacy the elections need to produce are the most important elements rather than precise timing’; and
- Recommend open and transparent dialogue on elections including ‘opinion polling’ to gather and synthesise public perspectives on the elections process.

I applaud the authors and concur with their views expressed in that Weekly Review. This Review, therefore, complements these perspectives and recommendations on whether elections should be held. While largely in agreement, I argue that despite constitution building process being one of the key outcomes expected to be achieved under the Revitalised Agreement on the Resolution of Conflict in South Sudan (R-ARCSS), it should not be linked to the holding of elections. Before discussing the reasons for this perspective, it is necessary to first ask the following questions which the Weekly Review exposed:

1. Does the postponement of elections mean extension of the life of the R-ARCSS? If so, how long should the extension be?
2. What needs to happen during the extension period for political parties to implement the fundamentals raised in this Weekly Review?
3. Isn’t there a risk of perpetual extension to the point that frustration could trigger another violent conflict?
4. What would be the implications of holding elections using laws and frameworks that existed before the R-ARCSS?

These questions notwithstanding, we are aligned in the call to postpone elections to allow for election laws, registration of political parties, resettlement and return of internally displaced persons (IDPs) and refugees, security stabilisation and population census, to be first conducted.

My point of disagreement with the authors is that although the ‘permanent’ Constitution is one of the fundamentals, it should be isolated from being a precondition to holding elections. Of course, I understand that a constitution provides for structures of government and other crucial issues that have bearing on elections. However, the following reasons arguably trump over and above linking elections to a new constitution.

First, the constitution is and should not be linked to a particular government since it is concerned with setting the *grund norm* of a country. As a social contract among peoples of South Sudan, constitution making needs to be delinked from a democratic event like the holding of elections. This means if other fundamentals as highlighted by authors are put in place, shouldn’t elections be held on existing legal regime despite the absence of the ‘permanent’ Constitution?

Second, constitution making requires extensive time to engage people and to build consensus among the divides so that the resulting constitutional document may attain popular legitimacy.¹ This means the displaced people should also participate in the process. We must also acknowledge that constitution is *sui generis* (a living instrument). It is not only for the here and now or for the parties to the R-ARCSS to dictate. It requires everyone to participate in its design. Needless to emphasise, rushing a constitutional design could have long-lasting implications on the country. It is, therefore, imperative to be patient, strive to be inclusive, and to build consensus amongst all stakeholders, constituencies, and groups.

Finally, writing a permanent constitution before elections will likely heighten tensions as parties would want to write themselves into it in terms of power and positionalities.² This could be avoided if constitution building is undertaken after elections so that a democratically elected government steers the process.

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.

Authors’ biography

Joseph Geng Akech Geng is a human rights and constitutional lawyer. He has written extensively on South Sudan’s constitution building, transitional justice, human rights and governance. He holds a Doctor of Laws from the University of Pretoria, South Africa. His thesis is entitled ‘Foreign Influence and the Legitimacy of Constitution Building in South Sudan’. josephgakech@gmail.com

¹ Popular legitimacy is linked to people’s participation in a constitution. For more information, see; A Saati ‘Public participation in constitution building processes; what does it mean?’ (2012) <<http://umu.diva-portal.org/smash/get/diva2:759743/fulltext01.pdf>> accessed 3 March 2022.

² This tendency is what Kevin Cope refers to as ‘elite self-dealing’ or elite capture of a process. See; K Cope ‘The intermestic constitution: Lessons from the world’s newest nation’ (2013) 53 *Virginia Journal of International Law* & K Cope ‘South Sudan’s dualistic constitution’ in D Galligan and M Versteeg (eds.) *Social and political foundations of constitutions* (2013).