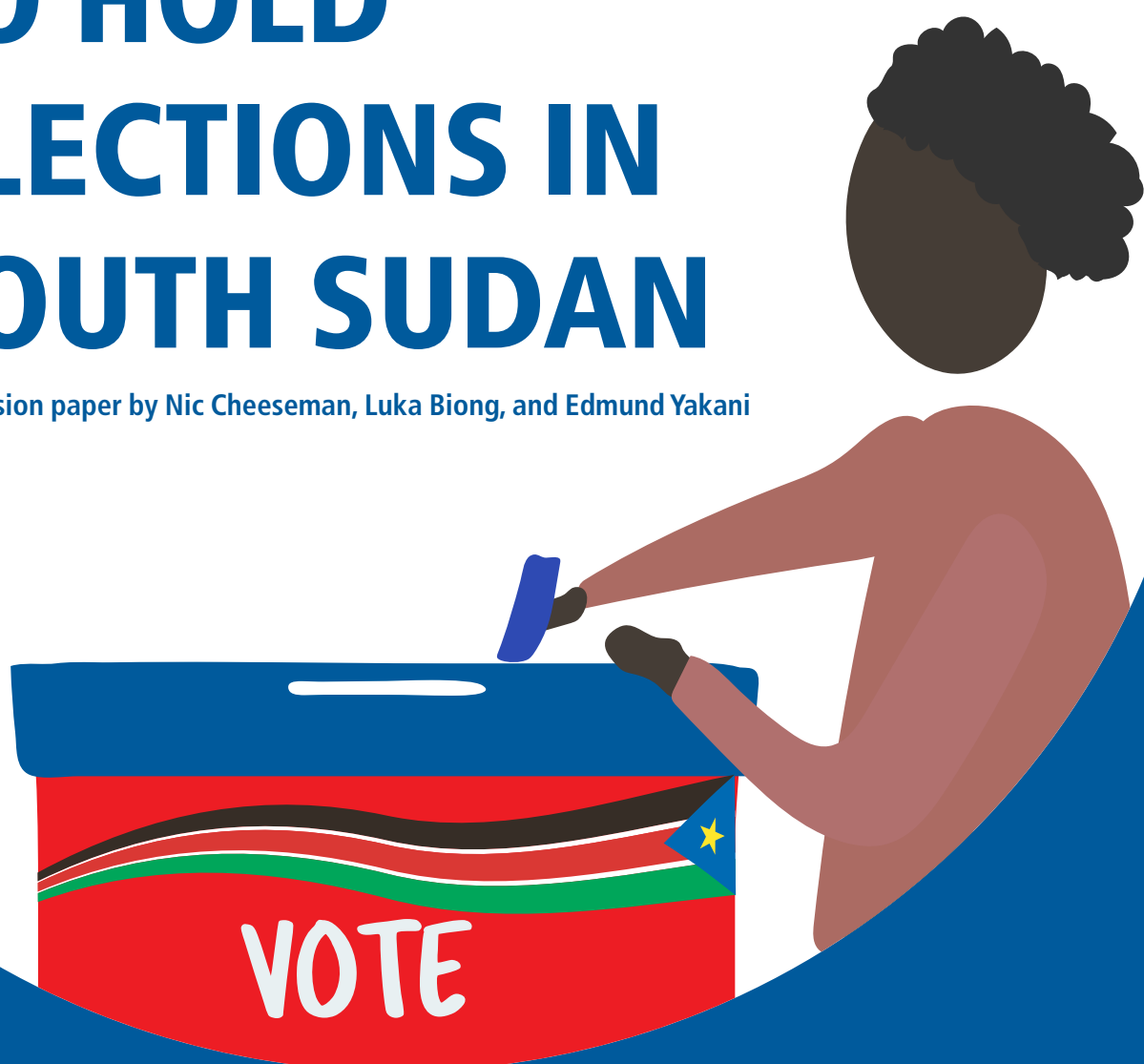


# HOW NOT TO HOLD ELECTIONS IN SOUTH SUDAN

A discussion paper by Nic Cheeseman, Luka Biong, and Edmund Yakani



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# Foreword

Whether or not, and if, when, and then, how? Open questions on South Sudan's first elections planned for December 2024 abound. On the one hand is the people's demonstrated will for election to happen rather sooner than later, on the other is the magnitude of challenges against the backdrop of slow implementation of the peace agreement - and fear that an election gone wrong could exacerbate violence and humanitarian crises.

The FES South Sudan Office in March 2023 convened select civil society members, political decision-makers, and academics from South Sudan for discussions on how to deliver a credible vote in conversation with international electoral experts. This paper co-authored by Nic Cheeseman, Luka Biong and Edmund Yakani reflects and builds on the group's discussion, highlighting key challenges, trade-offs, and policy options.

None other than South Sudanese can and should determine which way the world's youngest country will chart forward. We hope that this discussion paper may contribute to vibrant and informed public debate on how (not) to hold elections that will put South Sudan on the path to a democratic and peaceful future.

Dr. Anna Reuss  
Country director, FES South Sudan Office

# How (not) to hold elections in South Sudan

Nic Cheeseman, Luka Biong and Edmund Yakani.

In August 2022, the parties to the Revitalized Agreement for the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) extended the transitional period provided for in the 2018 peace agreement by another two years.

This pushes the designated date for the country's first local and national elections since independence in 2011 to December 2024. This is not the first time that elections have been postponed in South Sudan, and it may not be the last. There are however, strong pressures from multiple sources for the elections to be held this time round.

South Sudanese interviewed in a representative national survey expressed their strong interest to "hold [the elections] sooner rather than later"<sup>1</sup>. More than half of the respondents (58%) are of the opinion that elections should be held "next year." About a quarter of the respondents (24%) believe that the elections should be held "within the next 3-5 years." Only 3% of the respondents rejected outright the idea of elections by answering "never". Even in areas where the majority of the citizens worry that elections could bring division and violence, most of them want elections to take place.

The parties to the Revitalised Agreement have also expressed their commitment to hold the elections on time. This is in line with the new "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" signed on 2nd August 2022. There is considerable public suspicion on how genuine this support for elections from the parties to the conflict is, given the risks that political competition and the resulting political uncertainty could pose for their continued tenure on power.

The international community, on the other hand, remains highly supportive of the idea of elections. This is because, as is so often the case, elections are seen in some quarters as the endpoint of conflict, which paves the way to

transition to peace. They also see elections as a signal to trigger and legitimise, hopefully, the disengagement of the international community.

Despite international and domestic support, the prospects for elections in South Sudan are as unclear as ever. While open conflict and violence among the main signatories to the peace agreement might have reduced, inter-communal violence persists and trust between the rival leaders, forces and groups is in short supply. The Revitalised Agreement stipulates that before the transitional arrangement comes to an end a new constitution should be in place. The talks on a constitutional arrangement may be ongoing but its completion seems a long way off. The Agreement also stipulates that a census be held before the end of the transition period, but no-one is currently talking of it loudly.

While the Political Parties Act (Amendment Bill) 2022 has been approved, neither the Political Parties Council nor the National Electoral Commission (NEC) has been reconstituted. The National Elections Bill was approved by the Council of Ministers on April 14th, 2023. Parliament now has to pass the bill into law. This and the other relevant legislations will need to be reviewed and potentially amended once a new constitution is finalised, to make sure that they are consistent with the new text.

While the imperative of completing these steps can be used to explain the need for an electoral delay, there also appears to be a lack of political will among the parties to enable a timely and complete conclusion of the transitional period. Indeed, many worry that the peace agreement will be extended once again, as leaders seek to preserve existing privileged while insulating themselves from the risk of accountability for past actions. Against the backdrop of these concerns, there is a genuine risk that the pursuit of a democratic transition will become an elusive quest. According to the report of the Reconstituted Joint Monitoring and Evaluation Committee (RJMEC) on the status of the implementation of the Revitalised Agreement for the period 1 January to 31 March 2023, progress under the thematic area of national elections 'has been slow'<sup>2</sup>. As a result, 'all the election-related tasks including the establishment and functioning of institutions that drive the elections process, are behind schedule'<sup>3</sup>.

***Despite international and domestic support, the prospects for elections in South Sudan are as unclear as ever.***

1 Deng et al (2022)

2 RJMEC, March 2023.

3 Ibid.

The lack of momentum on key political reforms means that there are serious questions on whether it will be feasible to hold credible elections in less than two years' time. This is particularly so in light of the limited progress made towards establishing the kind of legal and infrastructural frameworks commonly understood to represent a solid foundation for multiparty politics. This raises a number of serious questions and trade-offs:

1. **The sequencing of reforms.** Do elections need to be held under a new constitution or can it be held under the current interim constitution? If held prior to enactment of a permanent constitution, what would be the minimum set of issues that the political leaders need to agree on before polls could be held?
2. **Voter registration and delimitation.** What are the challenges of voter registration and delimitation in the absence of a census? Can other data sets such as population estimates, voter registration data or previous constituencies be used instead? And if so, what challenges does this present to the electoral commission?
3. **The choice of electoral and political system.** How can the electoral and political systems be designed to give a broad range of elites and citizens a stake in the system – including IDPs and minorities? And how can it be used to reduce the risk of party schisms on one hand, and without creating a single party dominance, on the other hand?
4. **The primacy of parties.** Elections are only as good as the parties that contest them. So, what kind of parties does South Sudan want and need? And are inclusive parties best generated through quotas or some other electoral design systems?
5. **Electoral system mandate.** Given the electoral commission is yet to be reconstituted, what are the risks of giving it a broad mandate, including, for example, voter registration and monitoring hate speech, as opposed to a narrow focus on the delivery of the elections themselves?
6. **Security and conflict prevention.** Should elections only be organised when the country achieves greater security, or can it be held come what may, because elections can be assumed to create a more legitimate government and hence promote peace?
7. **Electoral sustainability.** Is it better to hold elections in December 2024 – the proposed time, even though this would likely require high levels of international

support, potentially making democratic gains less sustainable? Or would it be better to hold them with a longer run-in to ensure that the South Sudanese themselves have ownership of key elements?

The answers to these questions can only be provided by the South Sudanese and their political leaders. This report reviews these questions by drawing on a range of recent experiences from across sub-Saharan Africa as well as discussions with South Sudanese academics, politicians, and civil society representatives. Rather than aim to resolve these debates, the report wants to highlight potential costs and benefits of the main options available to the South Sudanese actor.

Theoretically, elections are possible in the absence of a permanent constitution, but this would most likely require the modification of the Revitalised Agreement. Proceeding without an established permanent constitutional framework would also render the process more fragile given the absence of established dispute resolution mechanisms such as a well rooted Supreme Court. The political elite would need to come to an agreement on some form of charter on basic rules that make an election possible in such an environment, while avoiding the risk of turning the electoral process into a politically negotiated rather than a rules-based one. We suggest that it should be possible to register voters without a census. However, the legal pitfalls of moving ahead without a full census are many. It may even make it harder to resolve some critical questions, such as how to draw constituency boundaries.

A mixed electoral and political system that combines first-past-the-post constituencies with proportional representation constituencies aimed at protecting minorities and historically marginalized groups is likely to gain a broad-based elite support. The experience from Kenya and Nigeria suggests that future political stability does not just depend on whether electoral seats are distributed in an inclusive way, but also on how resources and power are distributed.

Long-term security and stability are likely to require avoiding the consolidation of "ethnic" parties that are seen to represent only one or two communities. We can learn important lessons about how to do this from countries such as Burundi and Nigeria. Yet, the main ways to achieve this – ethnic party bans, ethnic quotas and through tweaking the electoral rules – come with costs as well as benefits and would be challenging for the existing political parties in South Sudan to implement. The best way of avoiding exclusionary parties while fostering internal party democracy therefore needs to be thought through very carefully. The provisions included in the Political Parties

Act (Amendment Bill) 2022 seem likely to encourage parties to adopt a national outlook. This, however, will only be effective if the Political Parties Council and the other relevant institutions have the capacity and, critically, the power to monitor and enforce them.

It is also important not to lose sight of the importance of inter-party relations when thinking of the kinds of parties that are most desirable. Regular and structured engagement, for example, through party liaison committees chaired and attended by the electoral commission, has often been found to promote mutual understanding and trust ahead of elections in countries like Ghana. Again, the Political Parties Council can play this role, but only if it is resourced and empowered to do so.

Given its limited capacity at present, we warn against overloading the electoral commission with a wide range of responsibilities. Considering the magnitude of logistical, procurement and staffing challenges the electoral commission is likely to face, it makes sense to enlist civil society actors, especially the church, to support the delivery of civic and voter education. The recent experience of Kenya suggests that there may be benefits from creating a semi-independent state entity, such as the National Cohesion and Integration Commission (NCIC), to collaborate with civil society groups such as the churches when it comes to fostering peace. South Sudan could do this by building on the blueprint for a Commission for Truth, Healing and Reconciliation that was provided for in the 2018 Peace Agreement and expanding and updating its mandate.

Elections can and often have been held against backdrops of violence. Elections in Liberia and Sierra Leone have

played important roles in putting these countries back on a pathway to peace. Yet, it is also true that elections can exacerbate inter-communal tensions. Thus, when holding elections in post-conflict contexts it is particularly important to build inclusive political systems so that no group feels completely excluded from access to the state, and to practice conflict *prevention* as well as conflict resolution.

Finally, heavy international involvement in elections can help to overcome the kind of major logistical challenges that South Sudan is likely to face if it is to hold elections in December 2024. However, evidence from Angola and the Democratic Republic of Congo, among others, show that heavy international involvement increases the risk that any democratic gains secured through post-conflict elections will not be domestically sustainable. Rather, it is likely to leave the country in a similar situation to the one it is in now the next time elections roll around. Taking a little more time to ensure local ownership may be a trade-off worth making. However, given the strong public support for elections ‘sooner rather than later,’ any delay will need to be justified with reference to clear gains in terms of quality and sustainability. The adoption of explicit actions, timelines, and monitoring mechanisms would be needed to build trust and avoid further slippage.

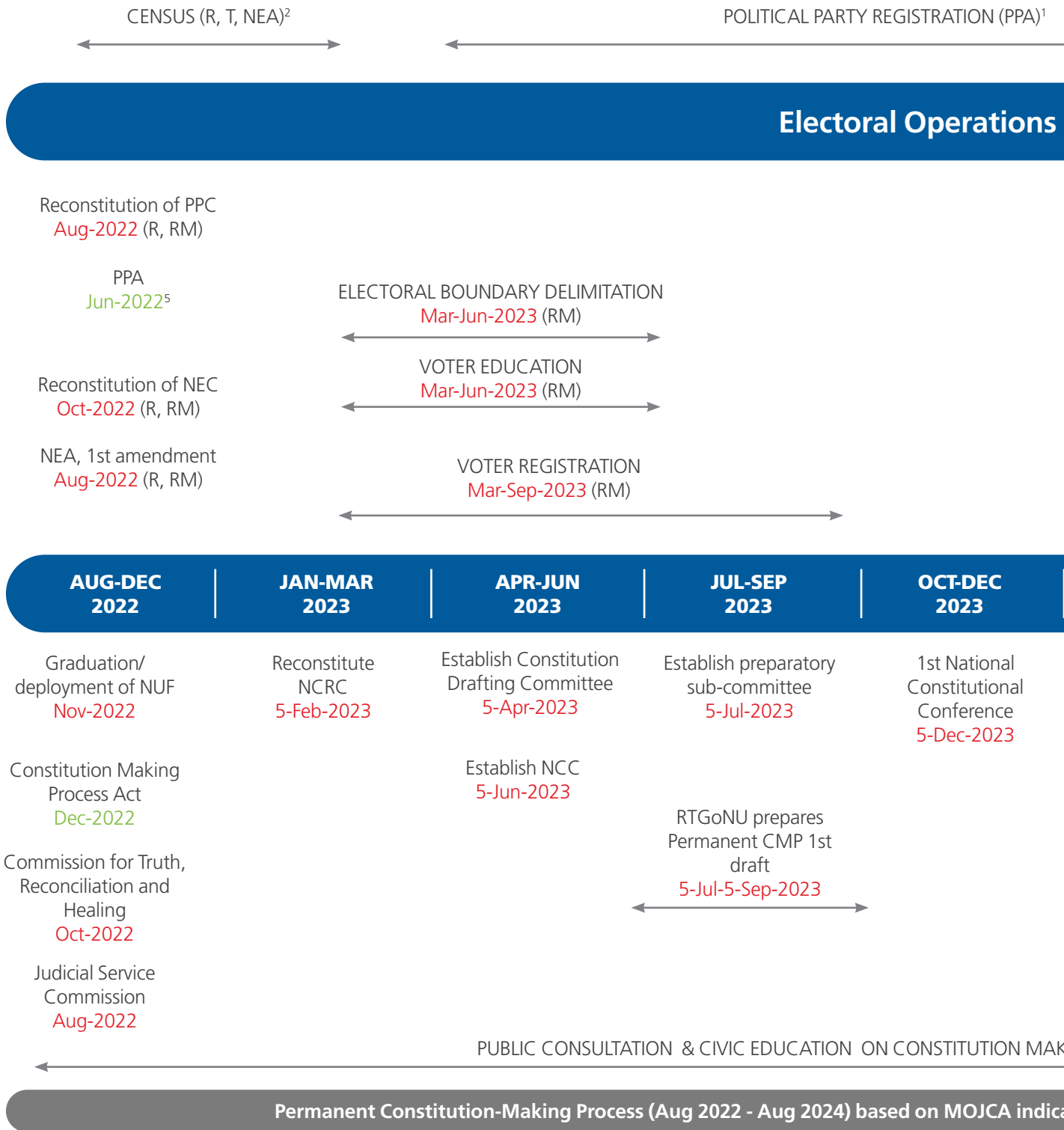
In conclusion, those empowered to make decisions about the forthcoming elections do not face easy choices. Pressing ahead with elections in the absence of a permanent constitution, an inclusive political and electoral framework, and domestic ownership, could be a recipe for the polls to be viewed as a failure in future. Similarly, postponing elections once again could fatally undermine the credibility of the peace deal, as well as the patience of the South Sudanese citizens.

*When holding elections in post-conflict contexts it is particularly important to build inclusive political systems so that no group feels completely excluded from access to the state, and to practice conflict prevention as well as conflict resolution.*

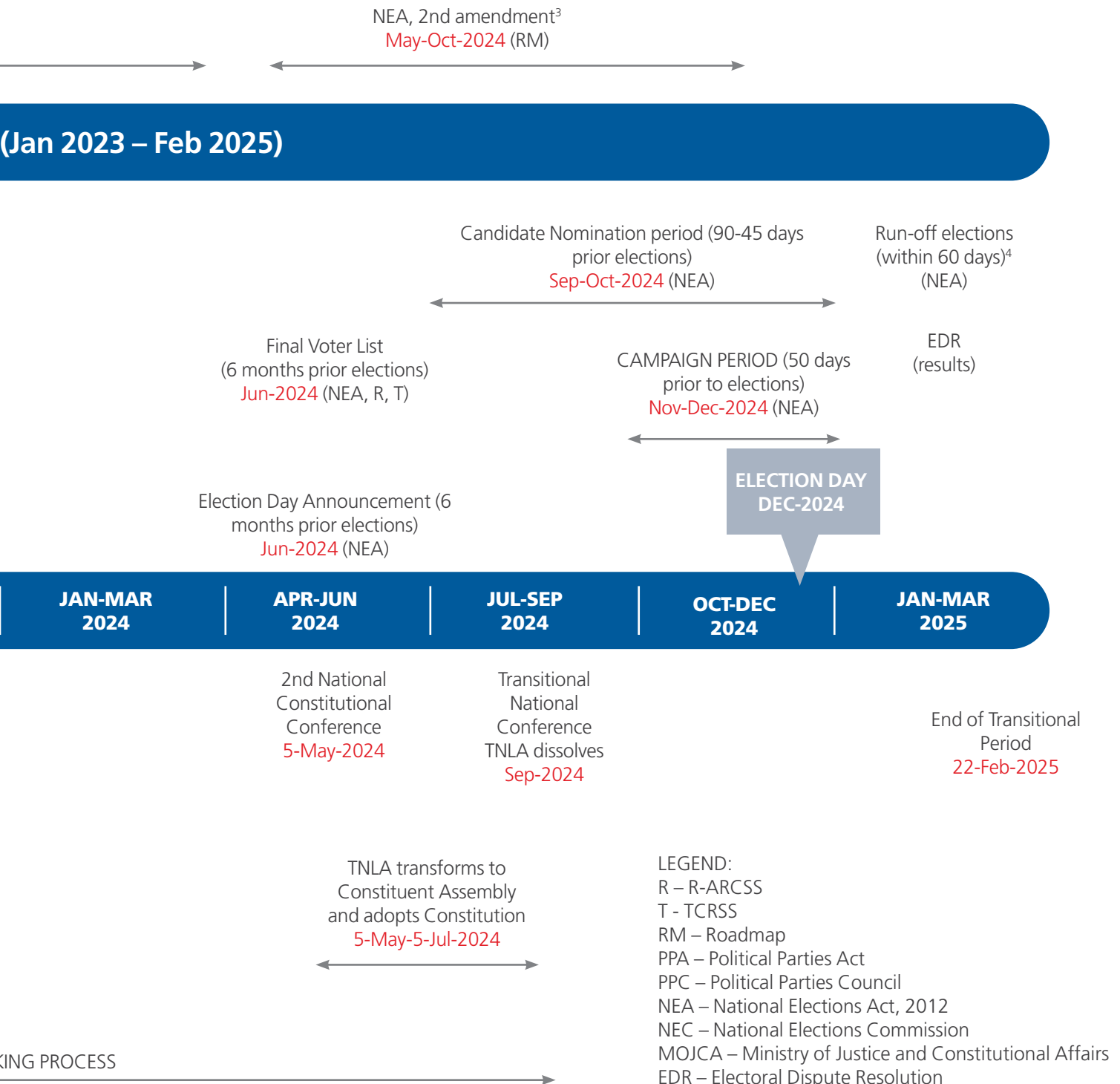


# South Sudan Political Timelines: Constitution-Making & Electoral Processes

Elections timeline based on R-ARCSS, TCRSS, NEA, Roadmap and PPA. Permanent Constitution-Making Process timeline based on MOJCA indicative approved timeline (19-Jan-2023).







**Alternative approved timeline (19-Jan-2023)**

**LEGEND:**  
 R – R-ARCSS  
 T - TCRSS  
 RM – Roadmap  
 PPA – Political Parties Act  
 PPC – Political Parties Council  
 NEA – National Elections Act, 2012  
 NEC – National Elections Commission  
 MOJCA – Ministry of Justice and Constitutional Affairs  
 EDR – Electoral Dispute Resolution

**FOOTNOTES:**

- 1 Full registration of a political party may take more than 360 days
- 2 While no timeframe is indicated; census is likely to require at least one year
- 3 RM envisions three different timeframes
- 4 Possible run-off for Presidential and Governor elections
- 5 PPA assented by the President on 24-Jun-22



## 1. The sequencing of reforms.

### Does it make more sense to hold elections before a new constitution is introduced, or do credible elections depend on an agreed constitution?

The slow progress with the constitution-making process has raised the question whether South Sudanese could go to the ballot before a permanent constitution is enacted. The Revitalized Agreement in Chapter VI, Art. 4 is explicit that a permanent constitution must be in place before elections. This makes sense: a constitution is the guiding legal document that regulates political activity. Having a respected constitution in place is therefore an important foundation for an election.

Elections are not always held after constitutions are agreed, however, and it may be that a political agreement could be reached to remove this requirement in the South Sudanese case if the relevant parties conclude that to wait for a new constitution would create too long an electoral delay. In some cases, elections have been held specifically to create a constituent assembly, also known as a constitutional convention or constitutional assembly, for the purpose of drafting a new constitution. This can work well if the vote produces an inclusive political body that is seen to be representative of the people and hence legitimate. The negotiations within such a constituent assembly can strengthen the constitution so made. The most recent example of this model is Chile in 2021. Other examples include Costa Rica, India and Nepal.

Moving forward without a constitution can be a high-risk strategy, tough, if trust between the rival parties is low. This is more so, when important protection measures are not put in place to guarantee the interests of the different communities during the constitution making process. Perhaps most importantly, in the absence of a viable constitution, it may be unclear how election grievances can be dealt with, and whether they can be managed impartially. A permanent constitution would usually set out how an appeal process must work. It would establish the judiciary in the form of a Supreme or Constitutional

Court. Such a court typically would preside over any election petition or complaints. In contentious elections, the presence of a trusted arbitrator can often mean the difference between a peaceful and a violent election.

In Kenya, for example, the creation of a Supreme Court that has demonstrated its independence from the ruling party has been critical to reducing the risk of election violence. During the 2007/8 elections, controversy around the results spilled over into ethnic clashes and state repression. One reason for this was that the losing opposition leaders did not trust the judicial system, which had been packed with figures who were seen to be loyal to the president. As part of the changes put in place to address the post-election violence, the 2010 constitution introduced a Supreme Court to hear election petitions. In 2017, the Court broke new ground by becoming the first judicial body in Africa to nullify the election of a sitting president. It ruled that the elections had been illegal and ordered a “fresh” vote to be held. This helped to build the Court’s reputation, which in turn meant that when fresh election controversy erupted in 2022, the losing candidates were more likely to take their grievances through official channels rather than going to the streets.

A Supreme Court was established in South Sudan under the leadership of Chan Reec Madut in August 2011, but as with many other institutions mentioned in this report, it needs to be reformed and reconstituted in line with the 2018 Peace Agreement and the 2022 Revitalised Agreement. However, to play a similar conflict moderating role to that of the Kenyan Supreme Court, it will need to be embedded in an effective and integrated constitution and legal system – within a wider web of institutional checks and balances – that is well-resourced and, critically, respected by the main political players.

***In contentious elections, the presence of a trusted arbitrator can often mean the difference between a peaceful and a violent election.***

It is also important to understand that holding elections without a constitution does not mean that all the difficult questions holding up the constitution drafting process can be deferred. The various parties and leaders would need to agree on a set of rules or a charter to govern the practice of the elections. This would need to cover, at a bare minimum:

- The electoral system and hence the responsibilities and powers of officials and leaders, i.e., a considerable portion of the country's political system. This way voters would know what and who they are casting their ballots for and how to evaluate these individuals and parties.
- The design of constituencies and the principles for delimitation to aid the drawing of electoral boundaries.
- How voter registration will be conducted, including how to manage the needs of Internally Displaced Persons, so that the electoral roll can be generated.
- The mandate, form and budget of the electoral commission to be a viable institution capable of running the polls.
- How voting will take place and the votes will be counted: whether this will be done manually or electronically? The electoral commission must know this in advance in preparation for procurement and training.
- Which institutions would be responsible for activities such as enforcing electoral rules, safeguarding elections, conducting civic and voter education, and managing electoral disputes.
- The criteria for political leaders or organizations to register candidates or parties and the rules of how parties should and must operate during the campaigns.
- Which domestic and international organizations should be invited to observe the elections.
- A viable electoral timetable to ensure that it is feasible to deliver the vote as expected.
- How the elections will be financed, and the appropriate roles of the international partners including UNMISS, so funds can be mobilised well ahead of time.

The idea of a charter is not unprecedented. In October 2010, the South Sudan Political Parties Leadership Forum was established, to agree on a charter and a roadmap for the parties to work together during and after the referendum on independence. Repeating this experience a second time might be considerably more difficult. For it to work, the political elite would need to forge consensus on a wide range of contested issues even if elections go ahead in the absence of a constitution. This might be possible, for example by expanding the National Elections Bill so that it covers all of the topics set out above, but there would still be serious questions regarding whether rival leaders would trust new and temporary legal institutions to deliver justice in the absence of an overarching constitutional foundation. Moving ahead in the absence of a new constitutional framework may therefore increase the likelihood that electoral controversy could lead to violence. It would, therefore, be particularly important to adopt an inclusive political and electoral system set out in section 3, and conflict prevention mechanisms identified in section 6.



## 2. Voter registration and delimitation.

### What are the challenges of voter registration and delimitation in the absence of a census?

One of the biggest challenges in a post-conflict election is generating an inclusive and credible electoral register. The fact that many citizens lack documentation due to a combination of conflict, displacement and limited functioning of government institutions can make it particularly difficult to know how many citizens exist and where they are located. There is also the thorny challenge of how to make sure that IDPs can exercise their democratic rights, as they are particularly likely to lack documentation and may be residing hundreds of miles away from where they would normally vote.

This is especially significant because poor quality electoral registers, with fake or ghost voters, or lacking sufficient details to verify and track citizens and thus prevent multiple voting, are one of the main causes of flawed elections. Moreover, registers that are not inclusive – for example, because of very low registration among certain communities – can be a cause of controversy, undermining the legitimacy of the wider process. Flawed electoral registers have consistently been a major source of controversy, for example, in Zimbabwe.

The importance of accurate data is one of the reasons many countries' constitutions or legal regulations include rules that a census should be held before activities such as the identification and revision of constituency boundaries and voter registration. One of the most important criteria for how to design electoral constituencies is equity: having each legislator represent roughly the same number of people. It is critical to know how many people are eligible to register as voters and where they live. This information also helps electoral commissions to plan the registration process. In its absence, it can be difficult to know how many registration centres to open in each area, and how many staff would be needed.

These issues are particularly sensitive in South Sudan because politicians know that the respective size of different communities can be invoked to make a case for them receiving more legislative seats and a greater share of national resources and power. Ahead of the referendum that led to independence of South Sudan in

2011, remarkably high registration rates in five of the states led to claims from some leaders that the register had been manipulated.<sup>4</sup> This controversy, fortunately, had limited effect in the referendum vote, as almost everyone who voted ticked "yes." The contestation of the register could have had much more profound and divisive consequences had the margin been slighter as it is likely to be in an election to select the country's next government.

The census has not been updated since independence, yet there has been considerable population movement over the last decade, not least due to high levels of displacement during the conflict. A new census is thus highly desirable ahead of the elections. Yet this would likely delay the polls because it typically takes over a year to plan and arrange a census. More so, as the delimitation and voter registration could only begin once the census is completed. In principle, an alternative option would be to go ahead on the basis of a population estimation survey exercise which is effectively a quicker process of estimating the size and distribution of the population and would more efficiently generate information. Such an exercise was recently conducted in South Sudan under the leadership of the National Bureau of Statistics (NBS)<sup>5</sup>, using satellite imagery. Unfortunately, although the exercise was approved by the Council of Ministers and the data was subsequently publicly launched, it cannot be used to inform delimitation and voter registration exercises for two reasons. First, when the data was accepted by the Council of Ministers, this was done with the important caveat that it would not be used for election delimitation purposes. Secondly, the data has proved to be highly controversial. A reduction in the population of Jonglei since 2008, combined with the fact that 'Warrap alone has more people than the 3 states of the Upper Nile combined'<sup>6</sup> have led to accusations that the estimates were politically manipulated.

These developments may be fatal to using the population estimate approach. There are also other challenges, both practical and legal. Practically, population mapping exercises are generally less precise, and so represent a less strong foundation for some of the activities that would need to happen before the election, such as the drawing

4 Voice of America, 21 December 2009.

5 Other partners that provided technical inputs into the design, conduct and analysis of the Population Estimation Survey include Ministries, Departments, Agencies of the Republic of South Sudan, local academic institutions (University of Juba, University of Upper Nile), University of Southampton, Columbia University, UNFPA and other UN partners. UNFPA, Sweden, Irish Aid, Norway, UNDP, UN Women, UNAIDS, WFP supported the survey. Other UN agencies, including UNICEF, WFP, UNHCR, IOM and UNFAO provided logistical support in form of tablets and vehicles.

6 See, for example, Mayai (2023); Sudans Post, 8 April 2023.

of constituency boundaries. This is a particularly significant point for two reasons. On the one hand, constituency boundaries are likely to be extremely controversial, especially given the recent proliferation of counties, which are envisaged as the template for constituencies. On the other hand, once constituency boundaries are set down, they tend to be “sticky” and hard to revise, because voters and leaders tend to get invested in the status quo. Given this, there is a significant cost to getting the boundaries wrong in a “founding” election.

Legally, the Revitalized Agreement does not explicitly link the holding of elections to a census but does state that ‘a National Population and Housing Census’ should be conducted ‘before the end of the Transitional Period’. This means that although the yet to be finalised National Electoral Bill is believed to empower the NEC to create

the national electoral register, and to revise the electoral register by addition, deletion, or amendment once per annum, a census would still be required to bring the transition to an end. Removing this barrier is not impossible, but it would require cross party agreement. In turn, this means that anyone who hopes to delay the polls, for example because they do not believe they or their party will perform well, can insist on the requirement of a census being held first as an easy way to prevent them from going ahead.

For this reason, it is particularly important to make sure that the political and electoral systems provide a cross-section of the leaders and parties with sufficient incentives to support elections and a multiparty democratic system, as discussed in section 3.



### 3. The choice of electoral and political system. How should the electoral and political systems be designed?

What electoral and political systems to select is a critical issue for a country emerging from conflict. In many cases, countries simply adopt the political systems they are used to, or adopt a model from another country, such as the United States. This is unfortunate, as political and electoral systems should be designed to reflect the context on the ground. To support democratic stability, they should also be developed in a way that provides the key political elites with incentives to invest in the system, provides citizens with a sense that they have a stake in that system, and be able to maintain accountability.

One of the key lessons from other countries with fragmented elites and history of ethnic and religious tensions is to make a wide range of leaders and communities to feel that they do benefit from the system. This is a viable way of boosting political stability. In Nigeria, efforts to stabilise the country after the civil war led to the creation of a political system broken down into an increasing number of states, from three at the time of the conflict to 36 today. Similarly, in Kenya the electoral crisis of 2007/8, in which over 1,000 people lost their lives, was followed by a new constitution that introduced a system of decentralization, with considerable power devolved to 47 county governments. In both cases, the capacity of the state or county level positions gave a wider range of elites a stake in the political system by allowing them to control significant resources. In Kenya, at least 15% of the national budget must be devolved to the county level. In Nigeria, states such as Rivers have budgets in excess of \$5 billion.

We already have a good indication of how South Sudanese leaders have thought through some of these challenges. This is based provisionally on our understanding of the content of the National Elections Bill. That legislation appears to include an electoral system that features a presidential election with a 50% + 1 clause. Such an election will require a run-off between the top two candidates if no candidate secures an absolute majority in the first round. The Bill currently provides for a national legislature in which 125 seats would be elected based on first-past-the post, with a further 125 seats elected based on proportional representation. These proportional seats would be elected based on closed party lists broken down into several categories, including 35% for women, 3% for the youth and 2% for people with disabilities.

At the state level, elections would mirror the national level. Governors would be directly elected based on a

“two round” system, with state legislative assemblies that will combine first-past-the-post and proportional representation, with guaranteed representation for women, youth, and people with disabilities. Each state assembly will then elect four seats in the Council of States, a Senate like body, one of which must be a woman.

Several features of this model are commendable. The inclusion of guaranteed seats for women, youth and people with disabilities would place South Sudan among the world leaders in terms of descriptive representation across a range of groups. Other features of the system also promise to promote inclusivity. Having half of the assemblies elected based on proportional representation means that the electoral system will not exacerbate the victory of the largest party as is often the case in first-past-the-post systems. Because first-past-the-post constituencies form the legislature based on which party wins each constituency, rather than the overall vote distribution, it is possible for a party to come second in every seat, winning 49% of the vote every time, and yet receive zero seats in parliament. The adoption of a “two round run off” system for electing the president will also force winning candidates to build support among a wider proportion of the population, creating an electoral incentive to avoid making exclusive appeals to certain regions or communities.

It is worth noting, however, that the inclusion of a run-off system for both the president and the governors could massively exacerbate the logistical challenges facing the electoral commission. This will be especially challenging if, as is typical, the run-off must take place a short time after the original election. Certain distinctive features of the proposed system also mean that it is likely to frustrate smaller parties and communities. For example, the fact that only half of the Assemblies at national and state level are chosen via proportional representation means that smaller parties whose votes are widely distributed across several constituencies are still likely to be underrepresented compared to their national popularity. The creation of multiple distinct party lists for different categories (unrestricted party list, women, youth, PWD) also reduces the prospects for smaller parties to gain election. This is because the more sub-categories you introduce into the seats elected by proportional representation, the higher the percentage of votes required to be allocated a seat in any one category.

To give an illustrative example of what this means: a smaller party who wins 6% of the vote from a support base that is highly dispersed across the country would win 6% of the seats under a fully proportional model and may well win no seats under a fully first-past-the-post model. With half of the seats elected proportionally, as is the current proposal in South Sudan, they might be expected to receive around 3% of Assembly seats, but if multiple categories of seats are adopted, this figure might be considerably lower. Given this, there is a risk that the proposed system might not do enough to balance the need for a coherent Assembly with the need to ensure that citizens and elites view the system as legitimate. Preventing legislative fragmentation and the emergence of many “briefcase” parties is a legitimate concern. It is also important to prevent the kind of one-party dominance that can undermine legislative scrutiny and lead minorities to feel politically excluded. If the electoral system set out in the National Elections Bill is confirmed, it will be important to make sure that other steps are taken to promote political inclusion and the fair distribution of state resources. This might include provisions that devolve a greater proportion of the national budget to the state level, as in Kenya and Nigeria, and of

a formula that considers factors such as poverty levels. At present, South Sudan’s Fiscal and Financial Allocation and Monitoring Commission is tasked to allocate resources to different levels of government based not on objective criteria but is required to distribute the budget equally among the country’s states and counties, with no mechanism to take into account size or need.

Building an inclusive political system will also necessitate constitutional provisions to protect the interests of minorities, and careful attention to government, bureaucratic and parastatal appointments, to ensure that they are not seen to be only benefiting one part of society. It should also ensure that each political party is more inclusive of a range of communities and views, as discussed in Section 4. Agreeing to these measures is likely to require considerable restraint on the part of leaders and parties who believe they are likely to hold power in any future government. It is important to stress, however, that this will also be in the long run interest of larger parties, because power can only be effectively wielded if the system from which it emerges has the ability to overcome storms and survive.

***Preventing legislative fragmentation and the emergence of many “briefcase” parties is a legitimate concern. It is also important to prevent the kind of one-party dominance that can undermine legislative scrutiny and lead minorities to feel politically excluded.***



## 4. The primacy of parties.

### Elections are only as good as the parties that contest them, but what kinds of parties does South Sudan want and need?

In the run-up to elections there is often a strong focus on electoral systems and protocols, with much less attention paid to the question of what kinds of political parties will contest the polls. Yet, an election is only as good as the political parties that contest it. Parties that campaign on issues that matter to citizens, eschew violence and vote buying, and seek to represent a cross-section of society can help to strengthen a democratic political system. Conversely, parties that rely on clientelism and patronage, use intimidation and disinformation to mobilise through fear, and only seek to appeal to a particular community, can undermine not only the quality of the elections but also the credibility of the wider political system.

Recognizing the potential of parties to play both constructive and destructive roles in new democracies, many political systems include rules that are designed to encourage political parties to have a national outlook. Some countries explicitly ban parties that only seek to represent one group, while others include quotas that force parties to field candidates that include individuals from multiple ethnicities and both genders. The constitution of Burundi, for example, mandates that “Political parties must not be established on the basis of ethnic or regional exclusivity” (art. 78 of the Constitution) and, quite importantly, each list of electoral candidates must reflect Burundi’s ethnic and gender diversity. Out of three successive candidates proposed by a party on a blocked list, at least one needs to be of a different ethnic group<sup>7</sup>. An alternative strategy is to include electoral requirements that prevent winning candidates from securing all their votes in one or two “homelands”. In the recently concluded Nigerian elections, for example, the winning presidential candidate had to secure both the highest number of votes and 25% of the votes in at least 24 of the 36 states.

***Parties that campaign on issues that matter to citizens, eschew violence and vote buying, and seek to represent a cross-section of society can help to strengthen a democratic political system.***

One of the choices facing South Sudan is therefore what kinds of political parties it wishes to encourage, and how best to go about achieving this. There seems to be a general belief that parties should have a national orientation and should avoid narrow or exclusive sectional appeals. If this is true, then the question will become which of the available models of promoting inclusive parties best suits the South Sudanese context.

The benefit of the Nigerian model is that it provides incentives for leaders to try and win support across the country. Hence, where no one ethnic group represents a strong majority of the population, it provides a strong disincentive for any candidate to deploy ethno-nationalist sentiment. A similar logic would likely play out in South Sudan. The limitation of the model, however, is that it does not guarantee inclusion within the ruling party itself. This is well demonstrated by the fact that Nigeria’s current president elect, Bola Tinubu, a Muslim, courted controversy during his campaign by breaking a long-practised convention and not selecting a Christian running mate. He ran on a “Muslim/Muslim” ticket. The “25% in 24 states” requirement also only applies to winning candidates, which means that candidates with less broad support can run but may be unlikely to win and take up office, even if they get a plurality of votes.

It is, therefore, worth considering whether aspects of the Burundian model could also work in South Sudan. One of the downsides of the Burundian model is that it shines a spotlight on ethnicity and enshrines it as a key feature of the political system. The upside is that it has worked in Burundi, where ethnic violence appeared to be endemic, including a series of mass killings in 1972 that some describe as a genocide. Although the post-conflict constitution in Burundi has failed to strengthen its democracy, by forcing parties to recruit across ethnic lines, as well as ensuring that the minority community is overly represented in the distribution of government ministries, it has created multi-ethnic political vehicles and so reduced the prospect of a return to ethnic conflict. A similar approach, requiring parties to submit ethnically mixed lists for proportional representation seats, could potentially have similar consequences in South Sudan.

<sup>7</sup> Vandeginste (2009), 75.



It is important to note that these kinds of measures are usually introduced at the national level rather than at the sub-national level. This is necessary to allow smaller parties representation, for example in state assemblies (see Section 4). It is also common for electoral systems and party regulations to enable parties to meet national-level criteria through coalition deals with other parties rather than having to disband their organizations and form a new political vehicle for this purpose. This helps to enable smaller and more regional parties to participate on the national stage, avoiding the risk of their supporters feeling excluded from the political process if they were banned from running, while still providing an incentive for such parties and leaders to operate in a more inclusive way.

Political parties in a democratic political system should of course also be democratic, and that means holding internal party meetings that allow members to have a say over party policies and allow them to select leaders and candidates for office. It may, therefore, be desirable to establish requirements on parties that wish to contest elections, such as having party constitutions, electing party leaders, and maintaining proper accounts. The approved Political Parties Act (Amendment Bill) 2022 stipulates that to be provisionally registered parties must, among other things, submit:

- A copy of the party constitution.
- A signed resolution of the first meeting of the founding members, policies, plans and manifesto.
- The name of the party.
- A list of the names of the party leaders.
- The proposed party emblem and logo.

To be fully registered, the Act then sets out a series of further requirements, many of which are clearly designed to promote internal party democracy. These include the need to have:

- Recruited as members not less than five hundred eligible voters from at least two-thirds of the states and administrative areas.
- Ensured that these members 'reflect regional and ethnic diversity; and gender balance/representation' (p. 9).
- Ensured that at least 35% of the members of its governing body are women.

- Demonstrated that members of its governing body meet the requirements of the Constitution and the Political Parties Act.
- Submitted a list of the names, addresses, and ID particulars of all members.

These requirements are both demanding and, in some cases, ambiguous, for example in terms of exactly what it means to ensure that members 'reflect regional and ethnic diversity; and gender balance/representation'. This, however, means that while the legislation encourages inclusive parties, on its own it cannot guarantee it. It will, therefore, be essential to have a strong regulatory framework and institutions that have the capacity to monitor party behaviour and impose meaningful sanctions on parties that fail to comply. In South Sudan, the role is supposed to be played by the Political Parties Leadership Forum, under the auspices of the Political Parties Council, which was established in 2010 and operates on the basis of the Political Parties Act. Although the Act stipulates that the Council should be comprised of a full time Chairman, Deputy Chairman, and seven full-time members, it has yet to be reconstituted, and so is currently largely defunct.

The defunct nature of the Political Parties Council poses the question of whether these political leaders are willing to accept these kinds of rules and constraints - and to breathe life into an institution that is tasked with enforcing them. One reason that political parties have been described as the "weakest link"<sup>8</sup> in new democracies is precisely because they usually have the power to veto such proposals. In the absence of high-level "buy-in" from political leaders and parties themselves, rules cannot be enforced unless electoral and judicial institutions are particularly strong. Thus, unfortunately even well-designed party legislations may have little effect here.

Whatever kind of political parties are created, it will be important to build trust between them. Many countries employ inter-party liaison committees around elections, in which party representatives and the electoral commission come together to discuss pressing issues and agree on the electoral rules. In Ghana, for example, the Inter-Parliamentary Advisory Committee (IPAC) has been credited with enabling the country to move on from the controversy that marked the elections of 1992. By creating a forum in which parties could agree on a series of electoral reforms, while creating an opportunity for them to engage in a constructive way to build cross-party trust and understanding. IPAC is believed to have made an important contribution in strengthening Ghanaian democracy. In countries where relations between parties

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8 Carothers (2006).

are difficult, and there is a risk of political violence, national level committee are often replicated at the sub-national level as a way of focussing localised tensions.

Such institutions have already been established in South Sudan, setting a precedent that can be built on. Most notably one of the responsibilities of the Political Parties Council was to sustain inter-party dialogue. It will, therefore, be particularly important to ensure that

a reconstituted Council has the funds required to hold regular inclusive meetings. It is important that there is room for such meetings to be held regularly and preferably as soon as the electoral process and timetable have been agreed upon. It is through regular interactions in this kind of forums that parties and leaders are likely to be able to forge agreements on how they should behave and be regulated in the context of an election campaign.

***In the absence of high-level “buy-in” from political leaders and parties themselves, rules cannot be enforced unless electoral and judicial institutions are particularly strong.***



## 5. Electoral Commission mandate.

### How much responsibility should the electoral commission have?

South Sudan has an electoral commission, the National Electoral Commission (NEC), as stipulated in the 2011 constitution. The NEC was launched in Juba in 2013, under the chairmanship of Professor Abednego Akok Kachuol. At present, however, the NEC is not a fully functional organization, having not yet been fully reconstituted as required under the peace agreement. The organization lacks effective infrastructure and funding base. It is struggling to pay its rent and electricity bills. Although South Sudanese have experience of voting at individual levels, the NEC has never held a national election, and so has limited protocol and experience to fall back on to. Most of the sub-national offices that were created by NEC have been destroyed or lie moribund. It is also currently unclear whether any of the remaining four commissioners would continue in their positions once the NEC is reconstituted, given that their tenure officially expired in 2018. Consequently, as things stand the NEC neither has the human nor logistical capacity to begin election preparations.

Prof. Kachuol has consistently argued that the NEC requires more funds to be able to plan for and hold elections. It is also seeking for greater interaction and guidance from the political leaders as to when elections are likely to be scheduled. Due to the legal ambiguity generated by the civil war and the peace agreements, the NEC will also require a clearer understanding of its mandate, and what it is, and it is not, responsible for delivering. This will mean deciding whether the NEC should have a narrow and focussed or broad and all-encompassing set of responsibilities. Given that the electoral body is expected to be independent and is tasked with running elections, it is tempting to assume that it should have responsibility for a wide range of core activities including:

- Overseeing constituency delimitation.
- Conducting voter registration.
- Designing and carrying out voter education.
- Registering political parties and monitoring their activities.
- Monitoring candidates' campaigns and issuing penalties for those who breach regulations, such as buying votes or using hate speech.

- Making key decisions on the process of voting, including whether digital technology should be used.
- Delivering elections and coordinating electoral security plans.
- Counting and releasing votes and the election outcome.

In many countries, however, some of these tasks are given to other institutions. Constituency delimitation, for example, can be a full-time job in and of itself, especially in a context where constituency boundaries are likely to be contested. It is, therefore, common for this task to be overseen by a separate committee or body, which often reports to the parliament. Meanwhile, responsibility for voter education is often shared with civil society organizations, with a separate institution created to manage political parties. In Kenya, for example, the Office of the Registrar of Political Parties (ORPP) is distinct from, though connected to, the Independent Boundaries and Electoral Commission (IEBC). The benefit of separating these offices is that it considerably eases the burden on the electoral commission and therefore makes it easier to deliver a credible voting and counting process. In the light of the logistical challenges facing the NEC, such a more constrained mandate could significantly reduce the burden on the Commission during what is likely to be a particularly busy and stressful time.

***Due to the legal ambiguity generated by the civil war and the peace agreements, the NEC will also require a clearer understanding of its mandate, and what it is, and it is not, responsible for delivering.***

In South Sudan, the National Elections Bill appears to give the NEC the primary responsibility for civic and voter education, and to give the NEC the authority to engage with the African Union and the United Nations to deliver this education. There is no reference to civil society groups to carry out such activities. This does not mean that civil society groups are prohibited from doing so. There

also appears to be nothing within the Bill that would preclude this. As noted above, South Sudan already has embraced the principle of the separation of some electoral responsibilities with the formation of the Political Parties Council. Under the Political Parties Act (Amendment Bill) of 2022 the power to register parties resides with the Political Parties Council. This will take a significant logistical task and responsibility away from the NEC.

It is important to note that, separating electoral responsibilities, is no silver bullet. Instead, as with all of the choices highlighted in this report, there are pros and cons to every option. The fragmentation of key electoral responsibilities has, for example, two possible downsides. The first is that it may still lead to low quality outcomes if some of these groups and institutions are weak or cannot be created in time. For example, encouraging civil society groups to take over voter education is most effective when a vibrant set of well-trained civic groups with networks in all parts of the country already exists. The second is that the

proliferation of institutions and roles can lead to confusion and make it harder to ensure effective coordination. This has been the case at times in Kenya, where it has not always been completely clear how the IEBC and ORPP relate to one another, and what the ORPP can do in the absence of IEBC approval.

These challenges can be managed by clear legal guidance and regulations, and by evolving a set of established practices during less pressured moments, such as during by-elections. The challenge in the case of South Sudan will be that if elections are to be held in December 2024, or close to this date, there will be little preparation or “down” time. If the decision is taken to divide the key electoral responsibilities, it will be particularly important to make sure that electoral guidelines are explicit about the division of responsibilities. There would also be need to establish a coordinating committee that meets regularly to promote cohesion and coordination between the different institutions involved.



## 6. Peace and conflict prevention.

### Should elections only be organised when the country achieves a sustainable peace, or can elections be held come what may?

One of the greatest challenges in conflict or post-conflict contexts is insecurity. Voters are likely to stay away from the polls if they do not feel safe or feel intimidated into voting one way or the other. They may shy away also when they feel that the defeat of a certain candidate would almost certainly lead to a return to war. This is why, in an ideal world, a genuine peace – not just the silence of guns or the absence of conflicts, but also the process of rebuilding community relations and trust, should take place before the start of the election campaigns. At the very least, this should involve:

- A complete end to active conflict, skirmishes, and clashes.
- A durable peace agreement respected by all sides.
- Disarmament and the creation of a unified and coherent security forces under a central command.
- The preparation of a thorough and well-designed election security plan, with a national as well as a state plan, with the agreement and support of all parties.

***Voters are likely to stay away from the polls if they do not feel safe or feel intimidated into voting one way or the other.***

It seems highly unlikely that South Sudan will come close to fulfilling these criteria in the next two years. The Revitalised Agreement appears to have considerably reduced but not completely ceased tensions and violent conflicts between the principal parties. Partly as a result, progress towards the creation of an integrated national army has been slow. In September 2022, the United Nations warned that “deeply disturbing” violence was escalating “all over” South Sudan. These include high levels of gender-based violence, and systematic human rights abuses by both sets of forces (UN, 2022). Given that this escalation is taking place when there is a peace agreement and the United Nations Mission in South Sudan (UNMISS) has deployed

20,000 peacekeepers, is a clear indication that civilians are likely to remain vulnerable, should elections continue to exacerbate political tensions.

The risks of holding an election against such a backdrop, and the conditions under which post-conflict polls are most likely to kick-start a new political era of democracy and legitimacy, are well illustrated by the example of Liberia. In 1997, multiparty elections saw rival warlords competing against one another against a backdrop of conflict that had been paused, rather than ended. The notorious rebel leader Charles Taylor ultimately “won” the polls, in part because he held a large amount of territory. Liberia voters feared that he would return the country to civil war, should he lose. Liberia subsequently returned to civil strife. Eight years later, following the end of that conflict and the formation of a transitional government, a much better-quality election was held in 2005. One of the hallmarks of this election was that it was agreed that none of the warlords that had taken part in the conflict should contest the election. The presence of a different set of candidates, and a more effective peace, led to the victory of Ellen Sirleaf-Johnson, and a long period of competitive, if rocky, multiparty politics practices.

The key lesson from Liberia is therefore, that the more comprehensive a peace deal, and the less involved the main protagonists in the civil war in subsequent elections, the better the prospects for a peaceful democratic transition. This makes clear just how challenging the decision now facing South Sudan truly is. Delaying elections may disappoint citizens and increase the risks of the peace process fraying. But holding elections in a context in which the peace process is limited and many of the protagonists in past violence are expected to stand as candidates may also increase the prospects of a return to civil war.

If elections are to be held before a genuine peace is achieved, it will be particularly important to not only think about conflict resolution but also to actively pursue conflict prevention. Far too often security strategies around elections focus more on dealing with potential clashes when they emerge than preventing disputes from arising in the first place. In cases where recent conflicts mean that distrust between rival parties and communities remains high, it is critical to invest heavily in measures that can mitigate the risk of further conflicts. Governments and

their international partners have developed a range of strategies for anticipating and diffusing conflict that could be deployed ahead of elections. These include:

- Establishing national level commissions responsible for monitoring hate speech and promoting positive inter-group relations, such as Kenya's National Integration and Cohesion Commission (NCIC).
- Creating local peace committees comprising of a range of actors, including women and youth, to identify potential problems ahead of time and work to constructively resolve them, while feeding information into the national structures.
- Funding a wide range of civil society groups to foster dialogue between leaders of the different communities to build trust and resolve potential disagreements ahead of time.
- Supporting employment projects designed to encourage groups often targeted for recruitment into electoral violence, such as young men, to eschew political violence.

- Fostering more cohesive relations between political parties through inter-party liaison groups at multiple levels, as discussed in section 4.
- Drafting and implementation of a thorough and well-designed election security plan, with both national and state level plans, acceptable to all parties.

To be effective, these activities would need to begin as soon as the final electoral timetable is agreed upon and the electoral legislation is passed. Given the fragmented and patchy nature of civil society in South Sudan, it seems likely that the church would need to play a central role in this process. It would also be important to ensure consistent communication between those organizations seeking to promote peace, the electoral commission, and the police, to ensure that the election security plans reflect the most accurate information available, and that resources and peace-making interventions can be targeted in advance to the areas of greatest risk.

***Where recent conflicts mean that distrust between rival parties and communities remains high, it is critical to invest heavily in measures that can mitigate the risk of further conflicts.***



## 7. Electoral sustainability.

### Is it better to deliver elections in December 2024, or hold them with a longer run-in to ensure South Sudanese ownership?

Elections are, before everything else, massive logistical challenges. Thousands of polling stations have to be demarcated. Tens of thousands of staff need to be hired and trained to run them. Millions of ballot papers need to be procured, safely held, and distributed. These require effective and responsive bureaucracy. A critical question in post-conflict contexts in which the electoral commission has limited capacity, is how to overcome these challenges. In many cases, these have led to high levels of international involvement, with the United Nations and the other actors playing significant roles in supporting electoral administrations. Such interventions have often been essential in enabling elections to go ahead. There have also been occasions when insufficient attention to local ownership meant that democratic gains were not domestically sustainable.

The risks of a largely internationally managed process are well demonstrated by the example of the 2007 elections in the Democratic Republic of Congo (DRC). That election was supported by the International Committee in Support of the Transition (CIAT), which played a key role in the funding and organization of the electoral process. This model effectively delivered an election, and in this sense helped the country in its political transition. However, there are two important caveats to this success. The first is that its continuation depended on heavy and sustained international involvement. In the context of the DRC, donors invested over \$1 billion in a combination of

peacekeeping and electoral administration, which may not be feasible in the current international context.

The second is that it breeds a form of “democratic dependence”<sup>9</sup> that undermines the long-term development of stronger democratic institutions. In post-conflict contexts such as the DRC and Angola (1993), the heavy presence of international consultants, experts, and organizations, backed by donor funding, ensured that elections could be held. Yet, it also meant that the electoral process was not really managed, or owned, by the citizens and officials of the country itself. Due to the great rush to hold elections, there is often greater focus on meeting basic logistical challenges than the need to train individuals and build durable structures. In some cases, even voters’ registers and polling stations were not developed in a way that they could be used again for the next election.

It is therefore important that the next South Sudanese elections are domestically owned. This means that South Sudanese leaders and citizens must make the key decisions over the electoral timetable and the choices highlighted in this report. The imperative of domestic sustainability is one of the criteria that is employed when setting out a feasible electoral timetable. If this means delaying the elections a little bit beyond December 2024, that may be a decision worth taking if such a delay is justified with respect to clear set of goals and steps that all sides can agree to.

***The imperative of domestic sustainability is one of the criteria that is employed when setting out a feasible electoral timetable. If this means delaying the elections a little bit beyond December 2024, that may be a decision worth taking if such a delay is justified with respect to clear set of goals and steps that all sides can agree to.***

9 Cheeseman (2015).

# Conclusion

## How (not) to hold elections in South Sudan

Elections can play a critical role in connecting citizens to the political process and enabling them to hold their leaders to account. Across Africa, more democratic countries enjoy higher levels of economic growth, are less prone to conflict, and deliver better quality public services than less democratic countries. Multiparty government is therefore an important goal for a country like South Sudan, and this is one of the reasons that the country's citizens want elections to be held soon. Such a strong desire to be able to elect a civilian government soon is understandable. So is the limited patience for further delays. It is, however, important to be clear sighted about the challenges of holding elections in December 2024.

***Across Africa, more democratic countries enjoy higher levels of economic growth, are less prone to conflict, and deliver better quality public services than less democratic countries.***

The options of waiting for the constitution, census, institutionalised electoral commission and a lasting peace will frustrate many citizens, as it may be misconstrued that the polls are delayed indefinitely. On the other hand, moving ahead without these building blocks will significantly increase the risks of the elections generating political controversy and instability. The risk of moving more quickly to elections can be reduced, but not eradicated, by employing inclusive political and electoral systems, building trust between rival parties, and engaging in conflict prevention strategies. One of the strategies that is often relied upon to minimise such challenges is the intense international intervention to keep peace and deliver polls, which often means that any democratic gains achieved are not domestically sustainable.

***The risk of moving more quickly to elections can be reduced, but not eradicated, by employing inclusive political and electoral systems, building trust between rival parties, and engaging in conflict prevention strategies.***

Ultimately, there is no easy way to resolve the difficult choices set out in this report. What is critically important is therefore, that they are widely recognized as choices that have to be made. The pros and cons of each choice in the South Sudanese context should be openly discussed, and appropriate steps taken to strengthen the positives and minimise the negatives, of whatever set of options are chosen. Building a stable democracy is a long-term process. The next election cannot complete this process, but nonetheless has the potential to present a critical step in the right direction, despite the many challenges.

Perhaps the greatest threat to South Sudan would be if the political leaders take advantage of the magnitude of the challenges it faces to justify inaction. The slow pace of change so far exhibited suggests lack of political will in making difficult decisions, reach compromises or even to allow the transfer of power to the hands of the citizens. Such a strategy may be consistent with short-term political stability. However, the capacity of elections to exacerbate existing tensions make some to argue that this is not the best way to maintain order. Non-democratic governments that do not respect the desire of its citizens for credible elections have been shown to run a higher risk of driving the country towards civil conflict<sup>10</sup>. Moving slowly towards multi-party elections may be an option for now, but the failure to make any progress at all, is likely to generate more problems than it solves.

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<sup>10</sup> ACSS (2021).



*Non-democratic governments that do not respect the desire of its citizens for credible elections have been shown to run a higher risk of driving the country towards civil conflict.*

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