









## Occasional Paper Series

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Yemen's Failed Constitutional Transition: 2011-15

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#### Introduction

Yemen's constitutional moment started with the exhibitation of the country's Arab Spring and ended with the outbreak of civil war. In 2011 a popular uprising resulted in the resignation of the autocratic president, Ali Abdullah Saleh. Neighbouring Arab countries quickly became engaged in steering the process, which included an election to legitimate the succession of the vice-president to the presidency, a government of national unity composed of old line parties, and, at the urging of the United Nations, a National Dialogue process on national goals and the design of a new constitution. The dialogue process was intended to be highly inclusive and non-partisan, but suffered from its inability to resolve tough questions, the absence of key political players, and the role of spoilers, including Saleh. It recommended a new federal regime, but its design was only partially developed and failed to resolve the critical issue of the number and boundaries of states. The president created a committee that endorsed his preferred scheme, which was deeply resented in the South, where there was strong mobilization around secession, and by the Houthis in the north. A Constitutional Drafting Committee was commissioned to prepare a draft. Thoroughout this process, the government was very dysfunctional, while the economy and security situations were deteriorating. By the summer of 2014, Houthi insurgents had progressed to the edges of the capital Sanaa, when a government decision to end fuel subsidies led to massive demonstrations and the entry of the Houthi into Sanaa, causing a crisis for the government. The Constitutional Drafting Committee finally delivered its document to the president in January 2015 and this became the trigger for civil war. The country has become even more fractured with the humanitarian disaster of the conflict and there is little sign of consensus on its constitutional future.

#### Background

For 33 years, Ali Abdullah Saleh as President of the Republic of Yemen had played off factions in a regime that had the trappings of democracy, but might better be classified as "competitive authoritarian". He had succeeded in uniting the two Yemens in 1990, when the southern People's Democratic Republic of Yemen was badly weakened by the collapse of the Soviet Union. The Southerners felt badly exploited after unification and had revolted in a bloody civil war in 1994, which Saleh ruthlessly crushed. Yemen was already politically stressed when the Arab Spring erupted and quickly brought the fall of the presidents of Tunisia and Egypt. Saleh's rule faced increasing opposition because of economic problems, youth unemployment, falling oil revenues, water and food scarcity, and serious regional alienation in the South as well as in Sa'ada, the Houthi area of the north. Outside regional capitals, the security situation was poor. In the south, state dominance was challenged by Al-Qaeda and the secessionist Southern movement, known as Hirak. In the north, the governorate of Sa'ada was primarily under the control the Zaydi revivalist militias known as the Houthi. While Yemen was the poorest Arab country, its political regime appeared more liberal than most in the region, with a largely free press, significant civil society and competing political parties, but real control was strongly centralized in Saleh through an extensive system of patronage and corruption.<sup>2</sup> Just before the Arab Spring erupted, the political class was divided by the possibility that Saleh might change the constitution to permit his indefinite tenure—and, potentially, pave the way for his son to succeed.

The initial reaction to the Tunisian uprisings was muted, with small student rallies calling for Saleh to step down, while the group of opposition parties in parliament—the Joint Meeting Parties (JMP)—also

<sup>&</sup>lt;sup>1</sup> Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War,* (Cambridge University Press, 2010).

<sup>&</sup>lt;sup>2</sup> Sarah Phillips (2011) Yemen and the Politics of Permanent Crisis, (Routledge, 2011)

held rallies, but with demands for political reform, not Saleh's resignation. With Mubarak's demise demonstrations became much larger, notably in Sana'a, Aden and, especially Taiz. Students and civil society leaders made Saleh's resignation a basic demand prior to dialogue and in March the JMP developed a five-point roadmap for transition, which included Saleh's resignation by the end of the year. Later that month, Saleh's troops killed 52 student demonstrators in Sana'a, which led to the defection of several important supporters of the Saleh regime. By May, fighting had erupted between government troops and fighters loyal to the head of the Hashid confederation, Sheikh Sadiq al-Ahmar, as well as a faction of the First Armoured Division, under the command of Ali Mohsen al-Ahmar. This conflict reflected the deep animosity between the families of Sheikh Al-Ahmar and President Saleh and risked dragging the country into civil war. The politics of transition became dominated by the reconfigured elite groups and armed actors.

The JMP roadmap for transition called for Saleh to be replaced by his Vice-President, Abd Rabbuh Mansur al-Hadi; a transitional government would be formed and elections held. There would be an immediate restructuring of the security forces and an investigation of state-led violence against demonstrators. This plan left open the possibility of Saleh's future prosecution and was firmly rejected by him.

Given its poverty, Yemen had long experienced interventions in its internal politics by outside powers—whether the Egyptians and Saudis in the northern civil war in the 1950s, the Soviets in South Yemen, or the Americans after the attack on the USS Cole in 2000 and the underwear bomber in 2009. The Saudis aided Saleh in his wars with the Houthis and had deep links with many tribal chiefs. Thus it was not surprising that In April 2011, the Gulf Cooperation Council should step in as mediator in Yemen's crisis. While the UAE, Kuwait, Oman<sup>3</sup> and Bahrain have tended to fall in with the Saudis on Yemeni matters, Qatar has been something of an outlier, both in being quite independently active (e.g. in trying to mediate a truce with the Houthis in 2007-08) and in its close relations with the Muslim Brotherhood element within the Islah party. The Arab states provided \$1 billion in aid to Yemen from 1990 to 2004, compared with \$250 million from the EU, and in 2006 they pledged \$2.5 billion in aid, more than half of the total of \$4.7 billion pledged by all donors—though much of this was never delivered.<sup>4</sup>

The GCC proposed an alternative to the JMP plan, which importantly included immunity for Saleh. This was agreed by Saleh's party, the General People's Congress (GPC) and the JMP and indeed by Saleh himself. However, Saleh unexpectedly refused to sign at the absolute last second, according to insiders, because Saleh's son, in particular, flatly rejected the entire deal. This public rejection of the GCC deal heightened the divisions within Yemen, including within the military – and was widely seen as an insult to the Saudis assembled for the signing. The crisis deepened on June 3 when in an assassination attempt Saleh was badly burned and then flown to a military hospital in Saudi Arabia. Vice President Hadi became acting President the next day, but was always in the shadow of Saleh's possible recovery and return. When Saleh did recover, the Saudis apparently kept him under virtual house arrest.

Around the middle of 2011, the Special Representative of the UN Secretary General, Jamal Benomar, became an important actor. He pushed successfully for a national dialogue, which had not been part of the original package. His small team worked to supplement the GCC Initiative with what became

<sup>&</sup>lt;sup>3</sup> Though Oman kept its distance from the recent Saudi-led war against the Houthi-Saleh alliance.

<sup>&</sup>lt;sup>4</sup> Edward Burke, 'One blood and one destiny'? Yemen's relations with the Gulf Cooperation Council, June 2012, www.lse.ac.uk/LSEKP/

the Implementation Mechanism, with significantly more detail on how the transition process would be managed. Remarkably, Benomar's initial involvement was not specifically mandated by the Security Council. In September, protesters marched en masse towards central Sana'a. Allowing them into the city would have cut off regime loyalists from all the key government areas and so the military opened fire on the unarmed protestors, killing scores and wounded hundreds. A week of gunfire and shelling followed, which added to the sense that the crisis was desperate. It seems that this precipitated a sudden and secret decision by Saleh to return to Yemen, despite the Saudis making it clear to him that he was expected to stand down and not return to Yemen. But on September 22, they allowed Saleh to bid farewell to some family at the airport and he somehow eluded his guardians and boarded a private flight to Aden, whence he was driven to Sana'a. On September 23 it was announced that he was back, and taking full control again, completely surprising Hadi.

These events precipated greater international focus and concern. In October 2011, the United Nations Security Council passed resolution 2014 was also the start of a more aggressive international policy on Yemen. It endorsed the GCC Initiative, signalling the Security Council's desire for Saleh to be removed from office, something that it had not done in any other country in the region. It called for a Yemeniled process of political transition and called for a political settlement. The UN's action was sensitive given the GCC's view that it should be the dominant voice in the region.

Saleh again became involved in the discussions being held by Benomar and finally agreed to the GCC initiative plus the supplementary "Implementing Mechanism". This spelled out the process for a transitional government, a national dialogue and a new constitution that would be the basis for countrywide elections. Saleh signed both documents in Riad in November 2011. This was seen as his acceptance of the leadership of the Saudis, who guaranteed his immunity. Importantly, there was to be no legal or other restriction on Saleh's participating in future political processes and he remained head of the GPC (which was also Hadi's party). Most thought he would stay out, but there was no plan for this and he soon returned from medical treatment in the USA, angry and seeking revenge. Equally important, there was no restriction on his son and others in the former leadership; on the contrary, they were expected to be active players. And so Saleh was placed to pull levers as a major spoiler.

The GCC deal and Implementation Mechanism documents dealt with three key issues:

- First, were the terms of Saleh's resignation. The formal transfer came after Hadi's election in an early national vote and parliament had granted immunity to Saleh. He was also explicitly granted immunity by the text of the GCC Initiative.
- Second, were the interim provisions for governance. The presidential election would follow within 90 days. Prior to that, a government of national unity was formed, made up equally of ministers from the GPC and from the Joint Meeting Parties. (The initial GCC proposal for some ministers from civil society groups did not happen.) The Prime Minister was to come from the JMP (in practice, Islah). The government was to operate on the basis of consensus, though Hadi could decide in the absence of consensus and was charged with all functions relating to military and foreign affairs. The government was to deal with day-to-day governance and had no role in the emerging constitutional debate or NDC.
- Third, was the process for the National Dialogue Conference. It was to be very inclusive and had a broad mandate on national goals and the content of a constitution. It was to be followed by a constitutional drafting commission that would implement the results of the conference. The NDC was to conclude within five months and the constitutional drafting four months

after that. The draft would be submitted to a referendum on the constitution and then elections would be based on the new order. In the event, these timetables proved highly unrealistic.

The Friends of Yemen, a body of 39 countries established in 2010, met in Riyadh in September 2012, eight months after Saleh's resignation. A document prepared by the Yemeni government with the World Bank painted a picture of unprecedented deterioration in the economic and humanitarian situations, serious food insecurity, critical fiscal shortfalls, and unemployment over 50 per cent for youth and even over 40 per cent for those of prime working age<sup>5</sup>. Donors responded with pledges of \$6.4 billion in aid for the period up to April 2014, which led the Yemeni government to draft its largest budget in 2012. However, when the Friends met in April 2014, only 36 per cent of the pledged funds (which had grown to \$7.9 billion) had been disbursed, \$1 billion of which was a deposit by Saudi Arabia into Yemen's central bank (though 97 per cent of the pledged funds had been allocated to projects). The original plan had focused heavily on major infrastructure projects, which proved impossible to deliver quickly; the Gulf States, which were to be the key funders, resisted switching to projects that could move more quickly. It emerged that the Yemeni government did not have the capacity to absorb much of the planned aid quickly and efforts by the World Bank and others to build capacity came too late. Thus the economic stimulus that was to have been a central contribution of the international community during the critical first two years of transition largely failed to materialize.

The GCC Initiative was essentially a deal between the GPC and the JMP—the old parties. It excluded the civil society groups that had occupied the public squares, as well as Hirak, the Southern Movement which was agitating for major autonomy or secession, and the Houthis, who had fought six wars against the regime and effectively controlled a significant part of the north. Thus, the leaders of the excluded factions were never full parties to the GCC Initiative or the ensuing steps, which undercut the standing of whatever agreements were reached later on. Both Hirak and the Houthis were excluded from the Government of National Unity. It was not easy to engage with Hirak or the Houthis. Hirak was a loose coalition of at least seven large factions and several smaller ones, whose demands ranged from secession to devolution to the redress of past wrongs. The Houthis were in armed defiance of the government and told they would have to disarm to participate in government. The government never functioned collegially and Hadi had the cooperation of only a few ministers because some of the GPC ministers were Saleh loyalists while still others were on the fence, fearful of his influence. Hadi did not play a forceful role in day-to-day governance, where many issues were allowed to fester and corruption was rampant.

The political configuration was deeply problematic. The elephant, Saleh, was not in the room, but in his private compound in the centre of the capital. The international community shunned contact with him, while he called upon the loyalty or fear of most of the prominent members of the GPC. He had significant influence over parts of the army and the security apparatus and had what was effectively a private militia. He was suspected to be behind targeted assassinations and acts of sabotage on power lines and pipelines, which led to blackouts and lost government revenues. Hadi was no match for Saleh. He had no real political base, weak political skills and little understanding of government. The last parliamentary elections had been in 2003, when the GPC, a ministerialist party of no fixed ideology won two thirds of the seats. Islah, a broadly based Islamic party, was the largest opposition group, while the Socialists and Nasserites harkened back to earlier periods and had very limited support. Thus

<sup>&</sup>lt;sup>5</sup> Ministry of Yemen, Transitional Program for Stabilization and Development, Yemen Donor Conference, Riyadh, September 4-5, 2012

the "government of national unity" was based on a fairly decadent old order. Similarly, those outside government lacked coherence and leadership: Hirak was highly fragmented, as were the street protesters and youth. The Houdis had a strong—even authoritarian—leader in Adbul-Malik al-Houthi, but he stayed in the north and was disengaged from both the government and the NDC. Despite their unity, the Houthis had no clear political agenda, so they were peripheral to political developments in the capital during the early phases of the transition. They continued to fight and gain ground as the transition progressed. While there was a hurried and effectively uncontested national election to ratify Hadi's succession to the presidency, the view of election experts and political advisors was that it would be impossible to hold effective parliamentary elections in the near term given the security problems and lack of a reliable voter registry. Thus it was impossible to say what real support different political factions had within the population.

The National Dialogue Conference (NDC) started with high public expectations as the great set-piece of Yemeni politics, but it moved much more slowly than planned and failed to produce clear decisions on central questions, so the public became progressively disenchanted with it. The dysfunctionality of the government and deterioration of public services and security were equally or more important in causing public disenchantment. The government was caught up with internal politics, patronage, and graft while the basic security and economic situations worsened severely. Because the Houthis had remained outside government, they were able to sell themselves as the enemies of corruption to a deeply disillusioned public.

#### Framing the Constitutional Process

The National Dialogue was to bring "all forces and politics actors" together for a comprehensive discussion of:

- The process of drafting the constitution
- The reform of the constitution to be submitted amendments to the people in a referendum
- The issues of the South and in Sa'ada
- Steps to build a democratic system, including the civil service, judiciary and local government
- National reconciliation and transitional justice and measures to protect human rights
- Legal and other means to protect vulnerable groups, including children, and to advance women
- Measure for economic reconstruction and development

President Hadi, elected in February 2012, took until May before naming a liaison committee to engage potential actors on the NDC and until July before naming the Technical Preparatory Committee. This committee, which included all political factions and constituencies, developed an elaborate agreement on the structure, procedures, and management of the NDC, its secretariat, a Presidium and nine working groups. It reported only in December 2012 and the NDC itself commenced in March 2013, over a year after the election of the president.

The Technical Committee took an unexpected but important initiative by entering into the substance of two major challenges when, in August 2012, it formulated twenty "demands" for the president. Most addressed the southern situation, including the return of property and funds illegally taken, the release of detainees, an official apology for the 1994 civil war, the compensation for those who lost their positions after 1994, and the replacement of senior administrators in the south. Others addressed the

Houthis and the north, including an end to punishment, cessation of hostilities, an official apology, compensation for past damage, and the release of persons being held relative to the Sa'ada wars. The major successful follow-up to these demands was \$350 million in compensation payments for victims of unfair dismissals in the south (thanks to Qatar's contribution). However, the commission to address land and property issues in the south faced a more complicated task and never benefitted from an endowment, so land grievances continued to fester. While Hadi endorsed the 20 demands, his lack of vigorous response missed a key opportunity to improve the political climate.

The NDC had 565 delegates. Parties and other groups, including the Houthis, named their own delegates, subject to the requirement that there be 30 per cent women. There were to be 145 youth delegates, of whom 105 were affiliated with parties and 40 were independent. The President could make additional appointments and final decisions on all appointments. Half of the representatives were nominally southerners, though many represented old-line parties and had been long-resident in the north. Hard-liners from Hirak refused to participate, so Hadi resorted to representatives from Hirak's less extreme supporters. The overrepresentation of southerners, who form about 20 per cent of Yemen's population, caused some resentment, but the more fundamental problem was the lack of truly representative southerners prepared to engage in negotiations.

The NDC Presidium was nominally chaired by President Hadi with broad representation of parties and groups. After the conference had been operating for several weeks, the President also established the Consensus committee, which was to reach consensus on controversial issues and coordinate outcomes of the working groups, also broadly representative but including the chairs of the nine working groups and with 50/50 membership. Benomar of the United Nations attended as well. It met periodically but proved weak and unable to resolve controversial issues. The secretariat was headed by Ahmed Awad bin Mubarak, originally from Aden and a member of the Revolutionary Youth's Coordination Council. It had over 120 personnel and almost 80 volunteers, and it worked closely with the office of the special UN advisor, notably regarding the provision of expertise.

The primary work was done in nine working groups. Each had a balanced membership of about 60 members. The topics were all embracing:

- Southern issue
- Sa'ada issue
- National reconciliation and transitional justice, including previous political conflicts and violations of rights in 2011, displaced persons, combatting terrorism
- State-Building: identity and form of state, electoral system, legislative, judicial and administrative arrangements.
- Good governance: rule of law, accountability and transparency, corruption, popular participation, public administration, parties, foundations of foreign policy
- Army and Security Agencies: national and professional foundations, role of army in political life, security organization as a civil entity
- Independent bodies and special social and environmental issues: civil service, media, religious
  endowments, human rights, Grand Mufti, supervisory agencies, political parties, civil society
  groups, revenge, weapons, armed outlaw groups, qat, diversity and tolerance, water and the
  environment.

- Rights and freedoms: general (political, economic, etc.) and special (women, children, marginalized, marriage of minors, persons with special needs, expatriates, minorities, displaced persons)
- Development: economic, cultural, educational, human, health, social, political, role of state and private sector, use of resources, external support

#### The Progression of the Constitutional Process

The conference was committed to public outreach and received over 1500 submissions from groups all over the country, with working group field trips to 18 governorates. The media provided more than 7,700 hours of television time and hundreds of printed articles, all of which built up public expectations. There were three public plenary sessions which received blanket coverage. The most difficult issues related to the South, Sa'ada, the structure of the state, and transitional justice.

The southern committee was initially chaired by a Hirak supporter, who struggled to maintain his legitimacy with militants. He insisted that a federal Yemen have only two regions—north and south—, with essentially equal power-sharing at the centre, and that after three or five years there should be a referendum in the south on independence. This found no traction with northerners, so he and his allies started boycotting meetings and Hadi eventually replaced them by a more amenable group. The southern issues proved so difficult in the full NDC that eventually a special committee, called the 8+8, (half northerners, half southerners) was struck under the chairmanship of Benomar. The committee met 32 times before concluding in December with a meeting with the President to sign the "Just Solution" document. This addressed southern grievances, proposed a federal regime certain principles, a constituting period for capacity building before implementing federalism. It calls for a more inclusive national government. While it was signed by representatives of 17 parties and civil society groups, it was rejected by most of the Hirak movement, a faction within the GPC loyal to Saleh, and by the Socialist and Nasserite parties.

The issues relating to representation in central institutions, the regional structure, and oil and gas were amongst the most difficult.

- Representation in Central Institutions: While some advocated different representation in the constituting period than permanently, the GPC advocated one permanent arrangement from the outset based on land and population. This would mean 40/60 South/North membership, but with the south having a veto on matters of vital interest. However, Hirak, the Houthis and the Socialists called for 50/50. The committee concluded that the south should have virtually equal weight in the central parliament for several years of transition, with a promise of longer-term overrepresentation.
- Regional Structure: Yemen has 21 governorates, but it was decided that the federal system would have a smaller number of regions (while retaining the governorates). The number and boundaries of regions was deeply divisive. Hirak strongly favoured one southern region (and perhaps one northern region), but this was opposed by the GPC, which feared a united south. Unable to resolve how many regions there should be, two major options were referred to the president to deal with through an additional process.
- Oil and Gas: There was agreement that ownership would be with the people of Yemen and
  that federal legislation would deal with the distribution of revenues, subject to their being a
  special benefit for the producing region. Management arrangements were more contentious:

the GPC favoured strong central authority, with some participation of regions and governorates, while Hirak and the Houthis favoured regional and governorate responsibility in cooperation with the federal government. The ultimate decision on control of oil and gas was ambiguous with considerable overlap regarding the powers for the federal, regional, governorate and even communal governments.

The northern working group had an easier time because the Houthis, perhaps surprisingly, were less radical in their demands. Historically they identified with a strong Yemeni government and they came around to federalism largely in solidarity with the south, with little idea as to what it might mean. Their priority was a more representative and perhaps a more technocratic central government, with an extended transitional period. They astutely declared their support for a secular state, not a return to the imamate. The structure of the state working group eventually pronounced in favor of federalism, but this was a paper-thin consensus with fundamental tensions on the nature of federalism, the religious or secular identity of the state, and the choice between a presidential or parliamentary regime. With a weak chair, the group failed to resolve any of the fundamental federalism design issues around the allocation of powers and central institutions and the consensus committee was unable to resolve these matters as well. The other working groups were less contentious (with the notable exception of that on reconciliation and transitional justice, where the issue of Saleh's immunity was hotly discussed), but they faced a daunting range of complex issues given the limited time and their often-limited expertise. The NDC ended up taking 10 months, rather than the six originally planned. Its final day, January 21, 2014, was clouded by the assassination of a senior Houthi member of the NDC and the bombing of the car of the secretary general of the Islah party, wounding his son.

The 8+8 Committee had been unable to reach agreement on the number and boundaries of the regions of the new Yemeni federation, so shortly after the NDC concluded Hadi created the Regions Committee to choose between the six region and two region options. It was chaired by Hadi and had had 22 members chosen by him and generally sympathetic to his views. It met four times, hearing experts and having special presentations on Sana'a and Aden. By February 10, it reported there was a "consensus of most members" in favor of six regions, four in the north and two in the south, with Sana'a being a federal city autonomous from all regions while the city of Aden would have special status, with independent and executive powers, within the Aden region. This was very much Hadi's preferred option, which many considered he had forced through. The report indicated which governorates would constitute each region, subject to a possible review of borders after one or more electoral terms. It included provisions regarding the representation of all governorates within each region's legislature and executive and called for criteria on equitable distribution of revenues from natural and non-natural resources, with special consideration for producing governorates and regions.

All of the committee's members signed the report, apart from the Socialists (who objected to the division of the south). The decision infuriated Hirak, which insisted on a united southern region. Its most serious political consequence however was its total rejection by the Houthis: their area was to be within a new region of Azal, with no access to the sea, little water, and few resources; the Houthis would be a minority in their own region. They wanted to be united with the resource-rich neighboring Jawf governorate and the Hajjah governorate, which has access to the sea—this would have produced a region on an east-west axis, not a north-south, axis. They viewed the map as designed to disempower and impoverish them, while leaving the GPC and JMP positioned to control the Azal region. This decision on the federal map was a critical breaking-point in the political process.

The NDC was to be followed by a Constitutional Commission, which "shall prepare a new draft constitution within three months" and propose the necessary steps for the submission of the draft for referendum "in order to ensure broad popular support and transparency". Within three months of the adoption of the new constitution by referendum, Parliament was to enact a law convening national parliamentary (and, if provided for in the constitution) presidential elections. In March, 2014, two months after the NDC, Hadi created the Constitution Drafting Commission (CDC). It had 17 members, with 50 per cent from the South and 30 per cent women; the members selected their own chair and two deputies. At least half of those deemed to be from the South had not lived there for years. None was associated with Hirak. One was associated with, but was not a formal member of, the Houthis. Most had backgrounds in the law, government or universities. The CDC was to report in four months. It was to seek to achieve consensus, but when not possible, decisions would be made by a 75 per cent majority.

If a decision on this basis proved not possible, it was to be referred to the National Body for Monitoring the Implementation of the Outcomes of the NDC. This was an entirely unforeseen body, which Hadi created in April 2014. He chaired it and it had balanced membership of 82. The National Body would determine the conformity of the CDC's draft with the decisions of the NDC. It could be referred back and revised until the National Body was satisfied. Should the National Body fail to reach agreement, the President would make the final, binding decision. In fact, the National Body met only once and had no role in approving the final draft.

The CDC met from March until June but worked casually and made little progress so it was decided it would spend three weeks in Berlin in June, with a dedicated team of experts to assist. The focus was on the structure of a federal system, including the division of powers and fiscal arrangements. A final push to conclude came in October in Abu Dhabi. The United Nations (aided by other organizations such as International IDEA) provided substantive advice. Progress on the draft proceeded faster in Abu Dhabi than previously, but the CDC was still confronted by gaps and contradictions in the NDC outcomes and by its own internal structural tensions. For example, the NDC included two different appointment mechanisms to the Constitutional Court: the Good Governance Working Group decided its members should be "elected by a general assembly of judges", 6 while the State Building Working Group decided that 70 percent should be elected by the "general assembly of judges", 15 percent by the Bar Association, and 15 percent by the Council of Faculties of Sharia and Law in state universities.<sup>7</sup> Many CDC members were aware that the judiciary was replete with regressive and corrupt judges, and so either option would result in a new Constitutional Court dominated by those same elements. They therefore decided that "[t]he President of the Republic shall nominate half of the [fourteen] members and the Supreme Judicial Council, universities and the Bar Association shall nominate the remaining half' (Article 329). All nominees would have to be confirmed by a three-fifths majority in the upper chamber of parliament. Thus, in a clear illustration the NDC's weaknesses, its decisions on this issue had close to no impact on the final outcome.

Close to a quarter of the CDC's final draft relates to details of the federal system of government on which the NDC never reached conclusions. Chapter 5 sets out extensive lists of powers for each level of government. Article 335 provides that the federal authorities should be exclusively responsible for

<sup>&</sup>lt;sup>6</sup> See Final Report for the Second Semester of the Working Groups, Working Group on Good Governance, September 2013, paragraph 30.

<sup>&</sup>lt;sup>7</sup> See Final Report for the Second Semester of the Working Groups, Working Group on State Building and Constitution Principles and Foundations, August 2013, 24.

"air navigation, civil aviation, meteorology and regulation of marine navigation", "intellectual property", and "national environment protection and climate change policy", amongst many others; Article 337 provides that the regional governments should be exclusively compete over "lands and real estate in the region", "agriculture", "tourism", and "telecom services", etc.; finally, Article 338 provides that "wilayas (governorates) and localities" are exclusively responsible for "civil defense", "regulation of markets", and "medium and small enterprises", etc. The NDC had never determined how these responsibilities should be allocated in a federal system of government. This was doubly problematic, because the CDC enjoyed less legitimacy than the NDC, but also because the proposed arrangements were probably not workable. The result was that some actors who were not involved at the CDC stage took to alternative means to scuttle the process.

The international community was deeply engaged throughout the period of the NDC and the CDC. The World Bank communique following the donors meeting in April 2014 called on the Yemeni government to deal with "ghost workers" and, particularly, fuel subsidies, whose cost grew to a staggering \$3 billion in the first half of 2014, at a time when oil revenues were plummeting. While the IMF had been negotiating a loan program for a progressive end to subsidies, on 29 July 2014 the government eliminated the subsidies in one fell swoop without any mitigating measures; observers commented that the "rollout was an unmitigated disaster—a perfect case study of how not to introduce subsidy reform". People poured into the streets and the Houthis took advantage of this to rally support, moving their militias into Sana'a and causing a full-scale crisis. On 21 September the Prime Minister resigned and Benomar brokered the formation of a new "unity" government, which had Houthi acquiescence but not their direct participation. In many ways, the collapse of the transition process really began with the public outrage around the end of fuel subsidies, which paved the way for the Houthi take-over of Sana'a.

The UN Security Council had regular sessions on Yemen throughout the transition period. A central preoccupation was what to do about "destabilizing actors", the first of whom was Saleh, who was clearly using his leadership of the GPC to block progress in the NDC but was thought to be engaged in more concrete acts of sabotage. As the Houthis descended from the North, they too became a major concern. Finally, in November 2014 Saleh, Abd-al-Khaliq al-Houthi and Abd-al-Khaliq Badr-al-Din al-Houthi were, by UNSC resolution 2140, put under sanctions, meaning a freeze on their assets and travel ban measures. The Houthis were charged with violence against the army and plotting a coup, while Saleh was charged with undermining the authority of the government, creating discontent within the army, plotting a coup, and using AQAP operatives to conduct assassinations and attacks on the military.

It was in this fraught context that the CDC was working and urged by the international community to report quickly. Ten months after its creation, the CDC submitted a draft to Hadi on 3 January 2015. By this time, the political, economic and security situations in the country had deteriorated dramatically. There was turmoil throughout the autumn, with the government in disarray. The Houthis had agreed

<sup>&</sup>lt;sup>8</sup> Amongst other things, the CDC did not include any official representatives of the powerful Houthi movement. One CDC member was ideologically in agreement with the Houthi movement but had not formally adhered to the movement and did not present himself in the CDC's discussions as a Houthi. Similarly, the southern representatives on the CDC were not representative of the majority of the Southern Movement.

<sup>&</sup>lt;sup>9</sup> Danya Greenfield and Svetlana Milbert, "Protests in Yemen Expose Weak Governance and Poor Economic Planning", 2 September 2014, at Atlantic Council.org

<sup>&</sup>lt;sup>10</sup> Though by July 2015 the Houthis, by then in control of Sanaa, were forced to backtrack and remove the subsidies once again because their ally Saleh was no longer able to pay for them.

to a new Prime Minster, but they and the GPC refused to participate in the new government. The Houthis opposed the appointment of the new army chief and blocked his entry into his office. There were competing demonstrations in the capital. The delivery of the draft constitution has been described as the "trigger for the Houthi final takeover of Sana'a and then the start of full civil war (so) the importance of the constitutional drafting process" cannot be overestimated. Within two weeks the President's chief of staff, Ahmad Awad bin Mubarak, was abducted by the Houthis and on January 22 both the President and the Prime Minister resigned. The GCC and UN sponsored political transition had come to an end.

#### **Outcomes**

A harsh assessment would be that the transitional process in Yemen produced a deeply flawed draft constitution and contributed to the outbreak of civil war. The transition failed for many reasons. The process itself was incredibly complicated and unable to meet any of its deadlines. The original GCC agreement had serious design weaknesses, notably the ill-considered interim governance arrangements and the terms of Saleh's resignation, which permitted him to become a major spoiler. The NDC was ill-equipped to take on the huge responsibilities assigned to it. The necessary measures to stimulate the economy and reform the military were not achieved. However, all of the weaknesses in the original agreement and those which followed were less important than the deep cleavages amongst leading political actors who had little disposition to make the necessary compromises. There was a dire lack of leadership, which Hadi proved incapable of providing. The virtual collapse of effective governance along with deteriorating security, military insubordination, sabotage of electricity and the petroleum sector, and economic and fiscal distress completed the constellation of factors that led to Yemen's breakdown.

The outcomes of the NDC, as confused as they often were, also reflected the fundamental problems with the representativeness of the NDC. The Houthis and Hirak as well as the youth and other civil society groups were not part of the GCC agreement and never endorsed the process. Despite this, most youth and civil society groups in the north were prepared to participate in the NDC as were the Houthis (though their true engagement was limited). However, representation from the south was always a problem in that the more hardline elements from Hirak and civil society stayed away. The Houthis, for their part, played a rather passive role in the NDC, partly because the federal issues were of marginal interest to them. (They showed their hand more clearly in September 2014 when they negotiated the Peace and Partnership Document, but even here they remained outside the new government and therefore in some degree marginal.) One other major actor, Al-Qaeda in the Arab Peninsula, was never considered for inclusion because of its terrorist activities. Even the GPC was divided between loyalists to Saleh, Hadi and fence-sitters, while the Joint Meeting Parties were a heterogeneous lot, some of which had lost any real claim to a popular constituency.

The government started to come apart in the summer of 2014 largely because of the economic situation and the end of fuel subsidies. This opened the way for the Houthis to enter the capital. The delivery of the draft constitution was the *coup de grace*, and within days the president was in exile and Sana'a was in the hands of Saleh, the great spoiler of the transition, and his new allies the Houthis. It was a marriage

<sup>&</sup>lt;sup>11</sup> Lackner, Helen, Yemen's Peaceful' Transition from Autocracy: Could it have Succeeded? International IDEA, p. 58

<sup>&</sup>lt;sup>12</sup> Though Hadi subsequently withdrew his resignation.

that could not last and it found its end with Saleh's murder by Houthis militants. The country in early 2018 is effectively a collapsed state, more deeply fractured than ever.

#### Lessons

There are many lessons, but perhaps the first may be the limits of the possible in deeply divided societies undergoing major political transitions. Could a different process or constellation of actors have reached a happier outcome? Was the part played by outside actors positive? There are three broad kinds of lessons we might draw.

The role and design of sub-national governance arrangements

A central issue relates to how conflicts within the country were addressed—or could have been—by sub-national governance arrangements. Yemen had been highly centralized since unification in 1990, but the state had a limited presence in many regions and Saleh's style of patronage politics progressively lost its ability to "dance on the heads of snakes" and maintain balance between competing forces. The deeply alienated south, crushed in the 1994 civil war, sought regional empowerment, but its favoured option was secession, not federalism, but paradoxically it was the challenge from the south that led to the NDC consensus on the need for federalism. Hirak never bought into Hadi's six-region federal model, though some in Hirak might have agreed to a two-region model, or at least a model in which the south was a single unit. Hadi feared a single-unit south, which would replicate the boundaries of the old People's Democratic Republic, as a way-station to secession. The Houthis, for their part, while in principle not opposed to federalism, also rejected the proposed federal map because of their hostility to the region in which they would be located. The two leading established parties in the north, the GPC and Islah, were both centralist in orientation and resistant to dramatic devolution within a federal structure that might have won some support in the south. Thus, sub-national governance arrangements were certainly at the centre of the political agenda, but the NDC consensus in favour of federalism was very fragile and far from providing the basis for a real and lasting political agreement. The draft constitution—with all its problems—was unable to resolve the divisions and Hadi's imposition of his map of the regions was guaranteed rejection by the Houthis and the South.

Designing federations in deeply divided societies, especially those with significant territorial cleavages, presents major challenges, especially in post-conflict or potentially violent contexts. Most successful federations have emerged in peaceful contexts, either through democratic coming together of formerly separate units, or through a constitutional transition towards devolved arrangements in a functioning democracy. To function well, a federation needs citizens who have a sense of belonging both to the national and their regional communities. Some federations, such as the United States and Nigeria, have survived bitter civil wars once secessionist forces have been defeated militarily, but it took decades to transition to normal, democratic politics and the traces of the conflicts can still be seen in both countries. The victors in Ethiopia's civil war designed a federal regime, but it is effectively a highly-centralized one-party system, which has suppressed dissident voices and failed to deliver truly autonomous self-government to the more dissident regions.

Did the international actors mistakenly steer the Yemenis towards federalism when some better approach might have proven more viable and appropriate? An argument has been made that a strong and effective, centralized state should be established as a first step, before moving to serious devolution

through federalism.<sup>13</sup> As desirable as this might seem, it is hard to imagine it being acceptable in a political context of southern secessionism. Thus, any viable political arrangement in Yemen seemed bound to provide for some significant devolution, at least for the south. The central choice was between an asymmetric arrangement, with the south having devolution while the rest of the country remained under the central government (e.g. as in the United Kingdom) or a federation. Given that there was no appetite for asymmetry amongst northerners, the default option became federalism, which raised myriad questions about the allocation of powers, the definition of the regional units, and key central institutions including the parliament, the executive and the associated electoral laws. In a society with such high mistrust, it was inevitable there would be some power-sharing or "consociationalism" at the centre—at least during an extended transition.

As much as the political geometry seemed to require federalism with some kind of north-south power sharing at the centre, the constitution-making process was inadequate to the challenge of designing such complex arrangements. Moreover, given how weak Yemen's state capacity was, any successful transition to such arrangements would have required a staged process of implementation during which there might have been enhanced power-sharing at the centre and perhaps international guarantees and support regarding the staged implementation <sup>14</sup>. The constitution that was drafted had some of these elements, but it would still have proven inadequate should it had been ratified. While there are lessons about the substantive design of a constitution for Yemen, the major problems in terms of the international role were not in relation to its advisory support regarding specific design features, but in relation to the process—the timetable, sequencing and actors—that was supposed to produce a new constitution.

The NDC, with all its faults, provided a rare opportunity for an inclusive dialogue amongst Yemenis, though some stayed away and others worked to undermine it. It did produce a weak consensus on the need for federalism, but almost none on the precise model: the number and boundaries of regions; power-sharing at the centre; the allocation of powers. The decision to keep the governorates as a separate tier of government while creating the regions could only add to the complexity of the new regime, while taxing the country's capacity beyond the possible. There appeared to be recognition that any move to federalism would have to take place over a period of years, during which capacity would be developed in the regions and the design of the system would be refined. Any such prolonged transition period (which presumably would be as necessary as ever given the devastation of the civil war) will put the issue of the transition arrangements and form of a transitional government front-and-centre. This would suggest a much stronger focus on power-sharing arrangements at the centre, notably within the new government (the executive), not just the legislature. A related question will be whether there should be a new legislature of some kind during the transition and if so, how it might be chosen and constituted. Somali experience in operating for an extended period without elections may prove relevant (if rather sobering).

Hadi's model of six regions—four in the north and two in the south—was probably the most offensive element of the federal design to both Hirak and the Houthis. Moreover, the continuing attachment of Yemenis to the governorates meant that the NDC opted for a three-tier federation—centre, regions

Salisbury, Peter, Stemming the Rise of a Chaos State, Chatham House, 2016, <a href="https://www.chathamhouse.org/publication/yemen-stemming-rise-chaos-state">https://www.chathamhouse.org/publication/yemen-stemming-rise-chaos-state</a>

<sup>&</sup>lt;sup>14</sup> Ethiopia, in a totally different political context, provides an example of the progressive development of regional administrations and governments in a new federation in a country that had extremely low governmental capacity. There was a sophisticated capacity building strategy, led by a senior minister for capacity development.

and governorates—whose design was confusing and whose implementation was probably beyond the human and financial capacity of the country. While in principle there may be some advantages to a federation with a small number of regions, the model that emerged was unacceptable and probably unworkable. This suggests that a model of federalism based on the 21 governorates would prove more acceptable and manageable. It would build on existing governmental infrastructure. While twenty-one units is fairly large for a federation of 25 million people, it is within the bounds of comparative experience (e.g. Kenya's model of devolution). Almost all the governorates have a population of more than half a million. And there could be arrangements to permit or encourage governorates to amalgamate through some kind of bottom-up process.

#### Political legitimacy and process in a constitutional transition

A striking feature of the transition in Yemen was the very low political legitimacy of most of the political actors engaged in the process. Those who represented the GPC and JMP could, at best, claim electoral mandates that were won ten-years before in an entirely different context. The GPC itself was divided between supporters of Saleh and of Hadi and fence-sitters. There was little structure to civil society and Hirak was deeply fractured—with its representatives at the NDC coming from the most accommodationist and least representative groups. The Houthis were united and disciplined, but their leader paid little attention to the issues confronting the NDC. So politics had very little structure and anchorage and this greatly impeded the ability to develop consensus within groups and agreements across groups. President Hadi won a mandate of sorts from his election, but his term was meant to be for only two-years and this became an issue as the transition progressed and his popularity declined.

The classic method to bring greater clarity to such a situation is to hold elections. The GCC Agreement and Implementing Mechanism outlined a series of activities that were to prepare for parliamentary (and possibly presidential) elections within two years. In the event, only the initial presidential election was held. A large international team worked on preparing for further elections, but they were frustrated by the partisan character of the commission for elections, as well as the huge challenges of developing a new voter registry. The GCC Agreement stipulated that new elections were to be held only under a new voter registry, but it was never realistic that this could be done in two years. And as the security situation deteriorated, the option of holding elections became ever more remote.

Might legislative elections have been held at the outset, like the presidential election? And would this have been helpful? Technically it would have been difficult<sup>15</sup>. As well, elections carried the risks of Hirak winning most seats in the south and perhaps of the GPC, with its infrastructure largely in place, winning most seats in the north (and even having an overall majority, with the attendant dangers). Failing new elections, there might have been an attempt to create a more inclusive government of national unity or a government of technocrats (as many called for by 2014). The government that was created was unrepresentative of key groups seeking major change, highly partisan, of very low competence and very corrupt.

In addition, the Yemeni case demonstrates the problems of leaving the former strong man in a position to play a major role. He was excluded from any direct role—the international community would not meet with him—but remained head of the largest political party and controlled much of the activity of its representatives. So by definition he became a spoiler. When the UN Security Council finally imposed

<sup>&</sup>lt;sup>15</sup> International Foundation for Electoral Systems, *The Role of Elections in a Post-Conflict Yemen,* (Arlington, Va: 2016) retrieved at <a href="http://www.ifes.org/publications/role-elections-post-conflict-yemen">http://www.ifes.org/publications/role-elections-post-conflict-yemen</a>

sanctions on him, <sup>16</sup> they proved ineffective. By extension, in a country where the military have traditionally played a central role in politics, a transitional process must give high priority to military reform because otherwise the nostalgia for the old regime in the military may intervene to subvert the transition—as they eventually did in Yemen, as they did in Egypt and as they tried to do in Spain. It became clear in 2014 that Saleh had continued to have high-level military support in significant parts of the army, including elite units

What lessons does this suggest? First, interim governmental arrangements dominated by the old political elite and excluding strong constituencies for change are seriously problematic: there is always a likelihood interim arrangements may last for several years; even if they do not, such arrangements can discredit the larger process of transition and poison the political environment. The structure in Yemen—where the old parties ran the government, while the NDC was meant to be a broader forum—relegated those most ardent for change to the talk shop dealing with the longer-term. A true government of national unity would have been difficult to construct given the Houthis continued belligerency and Hirak's strongly secessionist orientation, but trying to develop a more inclusive government would have been a better than what emerged. For example, some had suggested the alternative of a government of technocrats. When Khaled Bahah was named Prime Minister in 2014 he was seen as a technocrat and there were periodic calls for a transitional government of technocrats. If a more inclusive government of national unity, perhaps with a strong injection of technocrats, could have been achieved, it could not have been worse than the weak and corrupt government made up of the old parties.

Moreover, a heavily bottom-up process such as the NDC needs to be complemented by some top-down arrangements: in some countries, such as Kenya, an arm's length and relatively apolitical group or commission has been charged with developing a draft constitution, which is then referred to the legislature or some popular body; in other countries, such as South Africa, the main negotiations were between a small number of political leaders, with their draft then being subjected to a process of review and revision by a larger body. It is extremely difficult to reach an agreement on a constitution without buy-in from senior political leaders—so identifying and engaging them in the process must be a major objective. The NDC was given an impossibly wide mandate combined with the most difficult decision-rule of all—consensus—and the real political leaders were not there to bargain. The decision-rule within the CDC was more realistic (two-thirds majority). In practice, there must be a balance between a fairly flexible decision-rule and a political recognition that even a super-majority cannot ram through certain changes over an important and deeply alienated minority.

Arguably, the architecture of the transitional process was too ambitious and all-inclusive. In such a highly divided and conflictual environment, it was optimistic to think that a sequence all the way to a new constitution and elections could be set out with a tight timetable. While it is understandable that donors, often for their own ideological, geopolitical or budgetary reasons, look for a complete plan with deadlines, this is often unrealistic. Experience in such cases is that mediators and advisors must pay attention to the importance of sequencing when incremental political agreements and trust-building are required. This implies a clear sense of staging and the need for iteration, with mediation as necessary in brokering agreement at different steps. It necessarily involves elite bargaining as well as securing broader social buy-in. The GCC process made limited progress in achieving some agreements amongst the old parties and some of the civil society participants, but it never truly engaged the Houthis and

<sup>&</sup>lt;sup>16</sup> Final report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140(2014), United Nations, 26 January 2016, S/2016/73

many of the key leaders in Hirak (which was admittedly very fractured), and it dealt with Saleh, the major spoiler, through proxies, but even here without a clear leading representative. Finally, there was no attempt to engage AQAP, which was reasonable given its terrorist activities, but longer-term the issue of how to deal with AQAP will need to be considered.

The priority in ending Yemen's civil war will be to develop initial arrangements for governing the country. It is most unlikely that a peace agreement itself will embed a new constitution (the Bosnian model) because any such constitution would be highly contested. At most, the peace agreement might include certain principles and benchmarks that should inform the process and substance of future constitution-making. Hammering these out would be a major challenge, but the process should avoid the mistake of having completely separate tracks for governance and constitution-making and it should recognize the importance of engaging key leaders in both and having bridges between them. The 8+8 committee was the only forum associated with the NDC in which there was serious bargaining amongst the parties<sup>17</sup>. Its format was totally different: only 16 around the table with Benomar as chair. This brought a focus that was not achieved in the NDC, though even this failed to resolve some of the major questions before it, notably the federal map and petroleum. The President's decision to impose his version of a federal map was disastrous and stands as a lesson on the danger of settlements imposed on powerful, territorially based groups. A new process will need a clear sense of the main bargaining table or tables (the South African model, where the central negotiations were between the ANC and the National Party but there was a second tier table of other key parties might provide some inspiration) as well as a view regarding the broader involvement of the public.

#### A more integrated approach to transitions

The political process in Yemen—notably the NDC and CDC—was complex and time consuming. Even if these processes had been better designed they would have taken a long time to develop a consensus around a constitution. But while the NDC and CDC were working, the economy and security situation deteriorated drastically and this undermined public confidence in both the government and the dialogue process. Arguments have been made that the provision of basic services, security sector and the rule of law should have been prioritized, and that this was the result of a failure of political will, so that any future peace process "must be coupled with genuine attempts to address needs and grievances at the local level or it will be doomed to fail". The story is perhaps more complex, but such transitions do need the international community to make every effort to have a "whole of government" approach, which means conscious linkage and coordination. In Yemen, the different actors operated in quite a siloed fashion, though there were steps in the latter stages to improve coordination, notably in having a World Bank officer assigned to Benomar's team. issues—reform within the military, the Houthi advances—might also have been brought more directly into the general approach of the international community. Security reform was only partial, despite attempts, so Saleh retained sway over key units of the army. There was a failure to improve security in many governorates.

In addition to focusing on the larger issues of economic management, security and service delivery, a strong focus on government can deliver immediate, tangible contributions to a transition process. For example, an opportunity was missed with the relatively weak follow-up to the 20 demands that the

<sup>&</sup>lt;sup>17</sup> Early on the Praesidium was in some ways a tight negotiating group, which did produce the twenty demands, but it never had to resolve major substantive conflicts.

<sup>&</sup>lt;sup>18</sup> Lackner, N12 64-8.

Presidency of the NDC put forward regarding the South and Sa'ada. The lesson here is that there should be focused attention on "quick wins"—tangible measures that address key grievances—early in a transition process. This can help build political capital in favour of the transition and give it momentum.

In other words, the international community needs to recognize that a political process of transition cannot succeed in a climate of economic and security collapse. Those leading the political and economic efforts need to work together. For major donors an important lesson may be the need to give priority early on to shoring up the economy so as to help the political process. This may mean funding projects that may not be the most strategic, long-term economic investments but are designed to provide aid that can be delivered quickly. The donor package of large infrastructure projects largely failed to materialize and donor spending fell well short of pledges. A good example of very targeted aid that was politically helpful was Qatar's contribution for payments to southerners who were dismissed in 1994. This addressed a key grievance and put money quickly into the economy. Unfortunately, no similar funding was available for addressing the land and property grievances, which could have contributed significantly to the political environment in the south. Other short-term priorities to shore up an economy during a political transition can include make-work projects and support for key government services.

Of course, a strong focus on early economic improvement requires an appropriate plan to build delivery capacity as quickly as possible, with the appropriate checks and controls. A major reason why funds did not flow was because donors considered that the delivery capacity was not present, but arguably the focus on big infrastructure projects, which are very complicated to deliver, was an even greater impediment. Finally, when federalism is on the agenda, this should include a plan to start building capacity early on, even if just through pushing administrative decentralization. Yemen did nothing to build up the governorates during the transition and was unable to start building capacity for the new regions because they were not defined yet. This adds to the logic of building transitional devolution on existing structures if possible.

Finally, the Yemeni experience demonstrates how limited the influence of outside powers and advisors may be. Even had they had a better strategy and delivery, it is not clear that there could have been a successful process in Yemen, with its deep divisions, weak leadership, and inadequate capacity.

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<sup>&</sup>lt;sup>19</sup> The author thanks Zaid al-Ali, Christine Bell and Robert Foster for comments and assistance in an earlier version of this paper.

#### CONTRIBUTING ORGANIZATIONS

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