

RESEARCH ARTICLE

# A Legal Perspective on Yemen's Attempted Transition from a Unitary to a Federal System of Government

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Yemen's 2013–2014 National Dialogue Conference paved the way for Yemen to transition from a unitary to federal system of government. This is a common trajectory for States emerging from conflict as federalism offers the hope for greater democratic governance and inclusivity. Nevertheless, there is a danger in assuming that there is an ideal federal model to emulate or that federalism is itself a guaranteed remedy for political dysfunction and authoritarianism. Transitioning to federalism is an arduous, expensive, and technically complicated process. Such transitions can also renew conflict if, prior to the drafting of the federal constitution, key issues related to the design of the new system are not addressed or there is a lack of consensus on how to address those issues. Indeed, this was the case in Yemen. Prior to drafting its new federal constitution, Yemen struggled to reach sufficient political consensus on three key issues: (1) the formation of federal regions; (2) the structure of the new federal system; and (3) how powers were to be distributed in the State, including over natural resources management. This lack of consensus during the National Dialogue Conference resulted in the Constitution Drafting Committee having the responsibility of making highly controversial political decisions about Yemen's future as a federal State. This article examines how Yemen's transition to federalism was undermined by the inability to reach sufficient consensus on three key transition issues prior to the drafting of the 2015 federal constitution.

**Keywords:** Federalism; Unitary; Yemen; Post-conflict; Political transition; Decentralisation; National Dialogue Conference; Constitution-drafting; Arab Spring

## I. Introduction

In 2011, Yemen joined in the wave of Arab Spring revolutions sweeping across the Middle East and North Africa. Mounting resistance to the regime of former President Ali Abdullah Saleh resulted in a negotiated political settlement brokered by the Gulf Cooperation Council (GCC) with the support of the European Union and the five permanent members of the United Nations Security Council. In November 2011, the National Coalition (the General People's Congress<sup>1</sup> and its allies) and the National Council (the Joint Meeting Parties<sup>2</sup> and their partners) signed the Gulf Cooperation Initiative and the Implementation Mechanism (together the Gulf Initiative).<sup>3</sup> The Gulf Initiative signalled the beginning of Yemen's transition period, but

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<sup>1</sup> The General People's Congress is the ruling party in Yemen, which under Saleh had privileged access to State resources. Its members are not united by ideology, but represent a broad array of interest. 'Islamists, former socialists, merchants, tribal leaders, moderates, hard-line religious conservatives and some genuinely progressive reformers all exist side by side under the GPC umbrella'. Sarah Phillips, *Yemen and the Politics of Permanent Crisis* (IISS 2011) 116–117.

<sup>2</sup> *ibid* 105. The Joint Meeting Parties is an alliance of six opposition parties to the GPC. Its largest members come from the Islamist Islah Party and the Yemeni Socialist Party.

<sup>3</sup> Gulf Cooperation Council Initiative (UN Translation) (2011) <[https://osesg.unmissions.org/sites/default/files/gcc\\_initiative\\_yemen\\_english.pdf](https://osesg.unmissions.org/sites/default/files/gcc_initiative_yemen_english.pdf)> accessed 2 March 2017; Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (UN Translation) (2011) <<http://peacemaker.un.org/yemen-transition-mechanism2011>> accessed 2 March 2017, see part I para 3(c).

focused on halting any further escalation of violence—not on reforming Yemen’s State structure.<sup>4</sup> Envisioned in the Gulf Initiative was a two-phased political transition that would conclude with a referendum vote on a new Yemeni constitution and the inauguration of a President elected under the new constitution.<sup>5</sup> After much debate during the National Dialogue Conference, it was determined that Yemen would become a federal State. Rather than unify Yemen, federalism helped unravel an already fragile peace. The decision to restructure Yemen into a six-region federal State was highly politicised, and the attempt to draft a federal constitution without sufficient political consensus on key transition issues further destabilised the country.

Countries like Yemen, marred by significant corruption, the over centralisation of power, and pernicious social fragmentation envision a transition to federalism as a gateway to accountable government.<sup>6</sup> The perception is that federal States often have more inclusive and democratic governments, which in turn promotes government accountability and greater public confidence in constitutionally guaranteed self-rule.<sup>7</sup> Post-conflict unitary States in particular tend to view federalism as a pathway to peace, as implementing a federal structure often produces an inclusive government that incorporates previously marginalised voices into the political process. Such inclusion can provide added protections to minority groups and help to ensure various ethnic groups are able to co-exist in a State structure that accommodates their differences.<sup>8</sup>

In Yemen, the hope was that the decentralisation of the State structure would help remedy the political and social ailments amassed under former President Saleh—including corruption, poor social services, and a lack of government accountability.<sup>9</sup> Under Saleh, institutional development was inhibited for the purpose of concentrating power in the presidency. Key government positions, especially in the military, security, and police forces, were given to allies of the regime and members of the ruling party. Revenues from Yemen’s natural resources were mostly diverted to those within Saleh’s patronage network, to solidify allegiance to and reliance on the Saleh regime.

The danger of treating federalism as a guaranteed solution to political dysfunction, however, becomes particularly apparent once States realise how technically complex a process it is to transition from a unitary to federal system of government. There is no pure model of federalism to strive for. Unitary States become federal by implementing a series of decisions ultimately related to how power is shared in the State, but there is tremendous variation in how power can be diffused and thus, how federal States are structured. Furthermore, implementing a transition to federalism becomes even more complicated when there is a lack of consensus on highly political decisions around which durable peace is being built, as in Yemen.

The Public International Law & Policy Group (PILPG) was involved in the early stages of Yemen’s attempt to transition to federalism. After the Gulf Initiative was signed in 2011, PILPG began providing legal assistance to the Minister of Local Administration in preparation of Yemen’s transition to federalism. Specifically, PILPG advised on policy planning, provided options on structuring the to-be-formed federal State, and presented comparative practices of other countries’ transitions from unitary to federal systems. Eventually, PILPG was involved in the provision of legal assistance to the United Nations—in particular to the UN Special Advisor to Yemen—on matters related to the National Dialogue Conference and the status of southern Yemen in a future federal State. PILPG also provided technical experts during the constitution-drafting process itself and advisors during the Peace and National Partnership Agreement negotiations.

As lawyers present during the planning stages of Yemen’s transition to federalism, members of PILPG observed exactly what it took to lay the groundwork for such a transition. Thus, this article is written with an acute awareness of the tremendous accomplishment the Yemenis tried to achieve during their political transition, as well as the steep hurdles they faced. The three issues discussed in this article represent just a small portion of the choices that have to be made when transitioning from a unitary to federal system.

<sup>4</sup> See Peter Salisbury, *Yemen: Stemming the Rise of a Chaos State* (Chatham House 2016) 15.

<sup>5</sup> Agreement on the Implementation Mechanism (n 3) part IV para 22, 24.

<sup>6</sup> When South Sudan seceded from Sudan in 2011, it considered federalism as a panacea for its governance problems, see Douglas H Johnson, *Federalism in the History of South Sudanese Political Thought* (Rift Valley Institute 2014). Also, federalism has been touted as a way to create greater political inclusivity and promote regional autonomy in Libya, see Karim Mezran and Mohamed Eljarh, ‘The Case for a New Federalism in Libya’ (2014) Atlantic Council Issue Brief <[http://www.atlanticcouncil.org/images/files/Issue-BriefFederalismInLibya\\_Hariri\\_5.pdf](http://www.atlanticcouncil.org/images/files/Issue-BriefFederalismInLibya_Hariri_5.pdf)> accessed 2 March 2017.

<sup>7</sup> See eg Nancy Bermeo, ‘A New Look at Federalism: The Import of Institutions’ (2002) 13 *The Journal of Democracy* 96, 97–98; Alemante G Selassie, ‘Ethnic Federalism: Its Promise and Pitfalls for Africa’ (2003) 28 *The Yale Journal of International Law* 51, 57–58.

<sup>8</sup> See eg Alfred C Stepan, ‘Federalism and Democracy: Beyond the U.S. Model’ (1999) 10 *The Journal of Democracy* 19, 19, 21–25; Selassie (n 7) 99–101.

<sup>9</sup> See Rafat Al-Akhali, ‘The Challenge of Federalism in Yemen’ (2014) Atlantic Council Issue Brief <[http://www.atlanticcouncil.org/images/publications/The\\_Challenge\\_of\\_Federalism\\_in\\_Yemen.pdf](http://www.atlanticcouncil.org/images/publications/The_Challenge_of_Federalism_in_Yemen.pdf)> accessed 2 March 2017.

This article examines how the lack of political agreement on three key transition issues prior to the drafting of Yemen's federal constitution undermined Yemen's ability to adopt a federal system during its 2012–2014 transitional process. To this end, after first providing relevant historical background on Yemen (Part II) the article outlines the variations in unitary, decentralised unitary, and federal State structures (Part III), and explains why unitary States such as Yemen gravitate towards federalism as a solution for political dysfunction (Part IV). The article then discusses the mechanics of implementing a transition from a unitary to federal system, exploring the contention over and lack of clarity on: (1) the formation of Yemen's federal units; (2) the structure of the new federal system; and (3) the distribution of State powers (Part V). Finally, the article puts forward some concluding thoughts on Yemen's attempted transition to federalism (Part VI).

## II. Relevant Background on Yemen

Since this article focuses on the attempt by modern-day Yemen to transition from a unitary to federal system of government, only a condensed history of Yemen is provided—one that begins with the unification of the Yemeni Arab Republic (North Yemen) and the People's Democratic Republic of Yemen (South Yemen) to form modern-day Yemen.<sup>10</sup>

Prior to the unification of Yemen in 1990, North and South Yemen were two different States, frequently clashing with one another violently. North Yemen was predominately backed by the United States and Saudi Arabia, while South Yemen received support from the USSR.<sup>11</sup> Noel Brehony characterises the country's unification as North and South Yemen 'fleeing into union'.<sup>12</sup> Unification happened quickly, so much so that even senior figures in South Yemen were surprised that Ali Salem al-Beidh, the leader of South Yemen, and Ali Abdullah Saleh, the leader of North Yemen had agreed to full union after a private meeting in late November 1989.<sup>13</sup> When the two States finally united in 1990, Saleh, the military officer who ruled North Yemen since 1978, became the President. The former ruler of South Yemen, Ali Salem al-Beidh, in turn became the Vice-President.

Although unified on a map, North and South Yemen maintained distinct identities and retained many of their rivalries. The 1993 parliamentary elections confirmed the dominance of northern parties in Yemen's political sphere; even in the South both *Islah* and the General People's Congress (GPC) won more seats than the Yemen Socialist Party (YSP).<sup>14</sup> Widespread discontent among southerners eventually erupted into the 1994 civil war and cumulated in the southern leadership calling for secession.<sup>15</sup> The North crushed southern efforts at self-determination through a brutal military campaign.<sup>16</sup> As a consequence, southerners harboured intense hostility towards the North, and this lingering animosity 'creat[ed] the resentments that fed the growth of al-Hirak after 2007'.<sup>17</sup>

Following the 1994 civil war, Saleh began centralising power even further, specifically in the hands of a small group of elites in Sana'a.<sup>18</sup> Under Saleh, positions of power, including military posts, were traditionally assigned based on tribal and kinship ties.<sup>19</sup> He remained in power by relying on a 'neo-patrimonial patronage

<sup>10</sup> Though it should be noted that many of the power struggles prominent during the 2012–2014 transitional process are rooted in events that predate the unification of North and South Yemen.

<sup>11</sup> See Paul Dresch, *A History of Modern Yemen* (CUP 2000) 149–150.

<sup>12</sup> Noel Brehony, 'The PDRY and South Yemeni Identity' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 135.

<sup>13</sup> *id*; Stephen W Day, *Regionalism and Rebellion in Yemen: A Troubled National Union* (CUP 2012) 114. There were a number of factors, especially economic ones, which provided the necessary incentives for both North and South Yemen to be willing to unify. As Brehony explains: 'Saleh offered the PDRY a tempting deal: the YSP and the YAR party, the General People's Congress (GPC), would share power equally until elections scheduled for 1992, despite the fact that the PDRY had only 20 per cent of the country's population. Sana'a was to pay for the cost of retaining the PDRY's state employees'.

<sup>14</sup> Helen Lackner, 'Introduction' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 8. The YSP was a political party formed in 1978 to govern South Yemen. Dresch (n 11) 149, 194.

<sup>15</sup> See Salisbury (n 4) 7–8; 'Although the war was not North versus South but rather between parties, the effect was felt by Southerners to be a Northern invasion: "from hurried unity to internal colonialism"'. See also Dresch (n 11) 197.

<sup>16</sup> See Dresch (n 11) 196–197; Brehony (n 12) 137.

<sup>17</sup> Brehony (n 12) 122, 136–137. Al-Hirak is synonymous with the Southern Movement. Al-Hirak:

(...) asserts that there is a distinctive South Yemeni identity that must be given political expression within a reconstituted Yemen, either as a separate southern state or as a federal region in a united Yemen. Even the many South Yemenis who do not want to go that far argue that unity can only be maintained if the special grievances of the south are addressed in a new political arrangement.

These sentiments played a significant role during the National Dialogue Conference.

<sup>18</sup> See Adam C Seitz, 'The "Arab Spring" and Yemeni Civil-Military Relations' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 56–57.

<sup>19</sup> *ibid* 52–53.

system' that rewarded a small group of elites.<sup>20</sup> While in power, Saleh relied primarily on a close-knit circle of advisors to make decisions—which operated as a shadow State.<sup>21</sup> The network of tribal and military elites favoured by Saleh's patronage network<sup>22</sup> played a crucial role in helping him maintain control over the country, in particular with respect to the economy, as well as the military and security forces.<sup>23</sup>

In the early 2000s, another resistance movement formed in response to Saleh's marginalisation of dissidents and zealous grip on power at the expense of other Yemeni identity groups. This time in the North, the Houthis, a Zaydi revivalist movement went to war with the Saleh regime, resulting in a series of brutal conflicts over a period of six years.<sup>24</sup> The Houthis were not the only ones pushing back against the Saleh regime. During the 2000s, there was also armed resistance by tribes in the southern governorates of Hadramawt and Mar'ib.<sup>25</sup>

The 2011 uprising in Yemen was fuelled by the momentum of the Arab Spring and grievances against the Saleh regime, which had been building for decades. Though the uprising was gradual, it was clear by late February that it would be a struggle for Saleh to remain in power. Eventually, regional and international actors intervened to deescalate the situation and to facilitate a transfer of power—which was outlined in the Gulf Initiative. Although many were exuberant over the possibility of change in Yemen following the 2011 popular uprising, there was also discontent over Saleh's receipt of immunity from prosecution.<sup>26</sup> Nonetheless, the Gulf Initiative did include a transfer of power from President Saleh to his Vice-President, Abd-Rabbu Mansour Hadi, who remains President of Yemen today.<sup>27</sup>

For many, the moment felt primed for a renegotiation of the power arrangements that Saleh had constructed during his more than three-decade long reign. There was however the concern that elites in Yemen would use the political transition as an opportunity to preserve the existing patronage system while simultaneously competing with each other for power within that system.<sup>28</sup> The legitimacy of this concern grew with the progression of the 2012–2014 transitional process, which became consumed by 'political power-balancing at the elite level'.<sup>29</sup> This elite infighting was also present at the Gulf Initiative guaranteed National Dialogue Conference.<sup>30</sup> Nonetheless, the National Dialogue Conference provided a rare opening in Yemen's historically insular political sphere, allowing previously excluded groups to participate in decision-making processes.<sup>31</sup> Yemen's future as a federal State was one of several highly controversial topics negotiated during the National Dialogue Conference.

### **A. The Role of the National Dialogue Conference**

The Gulf Initiative sought to guarantee a transfer of power that would be 'based on national consensus in order to avoid a descent into anarchy and violence'.<sup>32</sup> The Gulf Initiative's Implementation Mechanism explicitly called for a 'comprehensive Conference for National Dialogue for all forces and political actors, including youth, the Southern Movement, the Houthis, other political parties, civil society representatives, and women'.<sup>33</sup> Configured into nine Working Groups and a Plenary, the 565 participants of the National Dialogue Conference—drawn from multiple constituencies—discussed the issues listed in the Implementa-

<sup>20</sup> id; Phillips (n 1) 23–24.

<sup>21</sup> ibid 58–59, 87–92.

<sup>22</sup> This network of co-opted tribal leaders, powerful merchants, and military leaders 'had their hands in each other's pockets', see Seitz (n 18) 53, citing Isa Blumi, *Chaos in Yemen: Societal Collapse and the New Authoritarianism* (Routledge 2011) 176.

<sup>23</sup> See Phillips (n 1) 51, 58, 100–101.

<sup>24</sup> Tribes were eventually dragged into the conflict—some allied with the government and others the Houthis. According to Marieke Brandt, 'the brutalization of the [Sa'ada wars] was not caused by tribal norms, but rather by their erosion'. Marieke Brandt, 'The Irregulars of the Sa'ada War' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 105–117.

<sup>25</sup> Salisbury (n 4) 8–9.

<sup>26</sup> See Kareem Fahim and Laura Kasinof, 'Yemen's Leader Agrees to End 3-Decade Rule' *The New York Times* (New York, 24 November 2011) <[http://www.nytimes.com/2011/11/24/world/middleeast/yemen-saleh-transfer-power-deal-saudi-arabia.html?\\_r=0](http://www.nytimes.com/2011/11/24/world/middleeast/yemen-saleh-transfer-power-deal-saudi-arabia.html?_r=0)> accessed 2 March 2017.

<sup>27</sup> Though Saleh formally relinquished his role as President of Yemen, he maintains a following within Yemen and continues to wield power and influence in Yemeni affairs.

<sup>28</sup> See Ginny Hill and others, *Yemen: Corruption, Capital Flight and Global Drivers of Conflict* (Chatham House 2013) 2.

<sup>29</sup> Salisbury (n 4) 4.

<sup>30</sup> The Gulf Initiative was negotiated in the absence of both the Houthis and the youth that had taken to the streets and propelled the 2011 uprising. Christina Murray, 'Yemen's National Dialogue Conference' (2013) ResearchGate Paper, 4 <<https://www.researchgate.net/publication/277009442>> accessed 2 March 2017.

<sup>31</sup> See eg Atiaf Z Alwazir, *Yemen's Independent Youth and Their Role in the National Dialogue Conference* (German Institute for International and Security Affairs 2013) <[https://www.swp-berlin.org/fileadmin/contents/products/comments/2013C23\\_wzr.pdf](https://www.swp-berlin.org/fileadmin/contents/products/comments/2013C23_wzr.pdf)> accessed 2 March 2017; Murray (n 30) 1, 6–7.

<sup>32</sup> Gulf Cooperation Council Initiative (n 3).

<sup>33</sup> Agreement on the Implementation Mechanism (n 3) part IV para 20.

tion Mechanism.<sup>34</sup> Overall, the National Dialogue Conference focused on discussing underlying causes of persistent tension and conflict in Yemen,<sup>35</sup> in addition to State-building and development issues. The Working Groups developed proposals on each of the issues, and these reports formed the basis of the National Dialogue Conference's approximately 1,800 recommendations.<sup>36</sup> These recommendations would later be incorporated into the new constitution.

### **B. The Role of the Constitution Drafting Committee**

The Constitution Drafting Committee was a 17-member commission established to transform the National Dialogue Conference outcomes into a federal constitution. Within less than a year the Constitution Drafting Committee was able to draft the constitution and prepare it for review.<sup>37</sup> Despite its approximately 1,800 recommendations, the National Dialogue Conference provided mostly vague guidance on certain issues, such as the structure of a federal Yemen. Consequently, it became the responsibility of the Constitution Drafting Committee not only to draft the new constitution but also to make key political determinations about Yemen's future.

## **III. Variations in State Structure: Federal, Unitary, and Decentralised Unitary**

State structures exist on a spectrum with unitary systems residing on one end and federal systems on the other. Unitary States are the most centralised, federal States the most decentralised, and decentralised unitary systems exist somewhere in between. Where States fall on this spectrum dictates the degree to which power is dispersed, as well as the exact nature of the power-sharing arrangement between the central government and subnational units.<sup>38</sup> A greater diffusion of power to lower tiers of government results in increased sharing of governing authority between the central government and subnational units, and thus a more decentralised system of government.

There is no single definition or 'pure model' for federalism,<sup>39</sup> and it would be a mistake to assume that federal States are less prone to centralisation than non-federal States.<sup>40</sup> There are, however, characteristics that together manifest the spirit of a federation. For instance, federal States always have a minimum of two levels of government and are organised into self-governing federal units that are united through the central government.<sup>41</sup> This organisational structure allows federal States to impart a degree of regional autonomy to federal units, while also reserving control over certain areas of governance, like foreign affairs, for the central government. Federal constitutions usually outline the different tiers of government and describe the relationship between the legislative, executive, and judicial authorities at the central and subnational levels. As federal systems tend to be more participatory, it is generally the case that subnational units receive representation in the national legislature.<sup>42</sup>

Unitary systems, on the other hand, are characterised by the concentration of governing power in the central government. The central government can opt to confer some of its governing authority to subnational units, but typically retains the authority to both dictate the scope of those powers and to have final authority

<sup>34</sup> Murray (n 30) 6–7. The Implementation Mechanism enumerated eight broad categories of issues to be discussed by the National Dialogue Conference, which covered such matters as 'the structure of the State and political system', the South, reform of the judiciary, and transitional justice. Agreement on the Implementation Mechanism (n 3) part IV para 21.

<sup>35</sup> There was a Working Group to address the sources of tension in the governorate of Sa'ada, as well as one to address southern grievances.

<sup>36</sup> Murray (n 30) 8.

<sup>37</sup> Stephanie Koury, 'Yemen Constitutional Review' (2015) 4 *The UN Constitutional: A Newsletter on United Nations Constitutional Support* 1, 15.

<sup>38</sup> Decentralisation is sometimes erroneously used synonymously with federalism, but it is a term that can take on several different meanings. To clarify, for purposes of this article, the term decentralisation refers to a process of devolving political, administrative, and/or fiscal responsibility and authority to subnational units in an effort to move away from a centralised system of government (to a decentralised one). A decentralised system of government refers to a State where substantial power is shared with subnational units. There are three forms of decentralisation: (1) deconcentration; (2) delegation; and (3) devolution.

<sup>39</sup> Ronald L Watts, *Comparing Federal Systems in the 1990s* (Institute of Intergovernmental Relations 1999) 1.

<sup>40</sup> Although Malaysia is constitutionally set up as a federal structure, it is considered by some to be a *de facto* unitary State because power is highly centralised and the subnational units exercise minimal authority. Harihar Bhattacharyya, *Federalism in Asia: India, Pakistan and Malaysia* (Routledge 2010) 118. See also United States Agency for International Development, *Democratic Decentralization Programming Handbook* (USAID 2009) 19 (USAID Handbook).

<sup>41</sup> See Sujit Choudhry and others, *Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa* (Center for Constitutional Transitions 2016) 11–12.

<sup>42</sup> *id.*

on most State issues.<sup>43</sup> The specific powers and authorities conferred to lower tiers of government by the central government are typically not enshrined in a unitary State's constitution in any tremendous detail.<sup>44</sup>

Decentralised unitary States are unitary States that incorporate federal elements through the establishment of subnational units, which have functional autonomy deriving from powers granted to them in the State constitution.<sup>45</sup> As such, decentralised unitary State constitutions expound in greater detail the powers and authorities of each level of government. However, for both unitary and decentralised unitary States, subsequent implementing legislation is generally enacted to either realise any calls for a decentralisation process or ensure constitutional guarantees of a decentralised form of government.<sup>46</sup>

#### IV. Why Do States Gravitate Towards Federalism?

The appeal of federalism is multi-fold. Through the dispersion of power and expansion of space for political participation, federal systems may be able to neutralise authoritarianism. In addition, in unitary States where there exist ethnic, cultural, or linguistic divisions, federalism has emerged as an attractive alternative system of government due to its capacity to balance unity and diversity.<sup>47</sup> Many argue that federalism provides space for regional or cultural differences under a unified national identity and common set of national interests.

For all the advantages of federalism, there are just as many complications for unitary States to consider before restructuring.<sup>48</sup> Under certain circumstances, federalism can also foster political division, reinforce political dominance by ethno-nationalist groups,<sup>49</sup> and introduce inefficiencies into government decision-making. Federal States formed from previously existing polities and without sufficient time to develop national integration are particularly prone to dissolution.<sup>50</sup> Though some champion federalism as a solution to States contending with internal secessionist movements, others have observed that it is equally likely to ignite ethnic violence.<sup>51</sup> Furthermore, in federal systems, agreement among multiple levels of government is usually required in policy-making. As such, a lack of coordination can introduce inefficiencies into decision-making processes and delay outcomes.

Transitions to federalism can in fact trigger renewed conflict. To minimise the likelihood of this, States should examine how others in similar contexts designed their transitions to avert conflict. Post-conflict countries and countries transitioning to peace rest on a delicate fault-line, making it especially important for transitions to address underlying causes of violence when restructuring the State. To do this effectively, States like Yemen would more likely benefit from an examination of how other modern-day post-conflict States, such as Bosnia and South Africa,<sup>52</sup> have tailored their transitions and constitutions to maximise the

<sup>43</sup> See USAID Handbook (n 40) 3, 9, 17, 26. See also Denis Derbyshire and Ian Derbyshire, *Political Systems of the World* (2nd edn, Palgrave Macmillan 1996) 19–20.

<sup>44</sup> Some unitary State constitutions, such as the current Constitution of the Czech Republic, include a general reference to the decentralisation of powers and authorities to subnational units. The Constitution expressly provides that territorial units are 'communities of citizens who have the right to self-government', and grants autonomy to local governments in a broad manner. Constitution of the Czech Republic [1993, as amended in 2002] ch I art 8, ch VII arts 99, 100. By comparison, the Peruvian Constitution provides greater constitutional guidance in how the unitary State is to be decentralised, see Constitution of the Republic of Peru [1993, as amended in 2009] ch I art 43, ch XIV.

<sup>45</sup> Ronald L Watts, 'Models of Federal Power-Sharing' (International Conference on Federalism, Mont-Tremblant, Canada, October 1999) 2 <<http://www.forumfed.org/pubs/Models-of-Federal-Power-Sharing-e.pdf>> accessed 2 March 2017.

<sup>46</sup> In the case of Peru, a 2002 constitutional amendment specified that decentralisation was to be 'a form of democratic organization', and that the 'decentralisation process is [to be] carried out in stages'. Constitution of Peru, ch XIV art 188; Law No 27680 on the Constitutional Reform of Chapter XIV of Title IV on Decentralisation (7 March 2002). To establish the decentralised State championed in the Constitution, the government subsequently enacted several pieces of legislation to bring into effect a gradual process of political, administrative, and fiscal decentralisation. See Oscar Calvo-Gonzalez and others, 'Peru: The Decentralization Process and Its Links with Public Expenditure Efficiency' (2010) World Bank Report No 52885-PE, 15–17 <<http://documents.worldbank.org/curated/en/703371468076130584/pdf/528850ESW0P1130ation0English0final.pdf>> accessed 2 March 2017.

<sup>47</sup> See Bhattacharyya (n 40) 8, 14–15; Watts, 'Models of Federal Power-Sharing' (n 45) 2.

<sup>48</sup> For additional commentary on the advantages and complications of transitioning to a federal system, see Stepan (n 8).

<sup>49</sup> In his book examining the restructure of India, Pakistan, and Malaysia into federal States, Bhattacharyya (n 40) discusses how federalism can exacerbate the political and social problems it initially sought to address when federal structures and institutions are not adequately designed to for instance, increase political participation of minority groups.

<sup>50</sup> See Gregory S Mahler, *Comparative Politics: An Institutional and Cross-National Approach* (2nd edn, Prentice Hall 1995) 33.

<sup>51</sup> Sujit Choudhry and Nathan Hume, 'Federalism, Secession & Devolution: From Classical to Post-Conflict Federalism' in T Ginsburg and R Dixon (eds), *Research Handbook on Comparative Constitutional Law* (Edward Elgar 2011) 364.

<sup>52</sup> In negotiating a peaceful resolution to the Bosnian War, the Dayton Peace Agreement established the Federation of Bosnia-Herzegovina and the Republika of Srpska as two entities of the Republic of Bosnia and Herzegovina. A federal constitution was also drafted as part of the peace process—which is part of the Dayton Peace Agreement—to decentralise the existing government and articulate how power would be shared in the federal State. The General Framework Agreement for Peace in Bosnia and

benefits a federal system can offer while minimising the drivers of internal conflict.<sup>53</sup> Highly developed federal countries like the United States, Canada, Germany, and Switzerland serve as poor examples for States transitioning out of conflict to emulate. Over-reliance on these examples can even risk misleading States into believing that federalism is an *instant* remedy for corruption, a lack of democratic institutions, and overly centralised power. In fact, such federal systems developed slowly to meet evolving needs different than those faced by Yemen immediately after the 2011 uprising.

During the National Dialogue Conference and Yemen's constitution-drafting process, there was greater showcasing of highly developed federal systems like those of Germany and Canada than more contemporary federal States as examples to draw from. Studying older federal systems that have been able to evolve over decades of relative peace reveals a different set of lessons learned than examining States that undertook more recent transitions to federalism, such as Bosnia, South Africa, and Nigeria. Although there is value in drawing from a range of federal systems, States emerging from conflict that focus too heavily on imitating the structures of highly developed federal States risk trying to exceed what can be accomplished in the early stages of a restructure.

### **A. Understanding the Impetus for a Federal Yemen**

Southern demands for greater autonomy underpinned support for federalism as the way forward for Yemen. The focus on decentralising Yemen, and indeed even the notion of a federal Yemen, predates the 2013–2014 National Dialogue Conference.<sup>54</sup> Prior to the 1994 civil war, in a failed effort to prevent an outbreak of violence along the north-south line, the very parties that had negotiated the unification of Yemen in 1991 reached an agreement to undergo fiscal and administrative decentralisation.<sup>55</sup> In fact, the Document of Pledge and Accord (DPA) called for Yemen to be divided into relatively autonomous regions.<sup>56</sup> However, as Stephen Day has pointed out, this compromise between the Yemen Socialist Party and the General People's Congress was in fact 'a document of divorce'.<sup>57</sup> Allegedly, President Saleh signed the document with no intent to implement it.<sup>58</sup> Full out civil war erupted between northern and southern Yemen only months after the DPA was signed.<sup>59</sup>

In 2009, again in an attempt to quell rising discord, President Saleh agreed to sponsor a national dialogue process that would examine Yemen's electoral framework.<sup>60</sup> When he failed to follow up on his promise, the Joint Meeting Parties<sup>61</sup> launched an independent national consultation process to bring about 'peaceful change' in Yemen.<sup>62</sup> The development of the 'national salvation plan'<sup>63</sup> was in part an effort to generate

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Herzegovina (adopted 14 December 1995) <[http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380)> accessed 2 March 2017, Annex 4 (Dayton Peace Agreement). Although South Africa has characteristics of a federal system, federalism is neither referenced in its Constitution nor was it mentioned during political discussions and debates prior to the drafting of its Constitution. South Africa's Constitution disperses power among three levels of government, and the Constitutional Court has characterised the 1996 Constitution as representative of 'cooperative government', rather than 'competitive federalism'. Nico Steytler, 'South Africa's Negotiated Compromise' in R Blindenbacher and A Ostien (eds), *Dialogues on Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press 2005) 36–38.

<sup>53</sup> Valuable lessons can be drawn from both the successes and failures of different transitional processes.

<sup>54</sup> Stephen W Day, 'The Federal Plan in Yemen: History of an Idea and Its Current Development' in N Brehony and S Al-Sarhan (eds), *Rebuilding Yemen: Political, Economic and Social Challenges* (Gerlach Press 2015) 29–32.

<sup>55</sup> Political Forces Dialogue Committee, 'The Document of Pledge and Accord' (18 January 1994) part II s 1(g) <<http://al-bab.com/document-pledge-and-accord-1994>> accessed 2 March 2017 (Unofficial English Translation) (Document of Pledge). See also Day, *Regionalism and Rebellion* (n 13) 127.

<sup>56</sup> Document of Pledge (n 55) part II s 4 para 2–2–1.

<sup>57</sup> Day, *Regionalism and Rebellion* (n 13) 127.

<sup>58</sup> id.

<sup>59</sup> Stephen W Day, 'Can Yemen be a Nation United' (2013) POMEPS Briefings on Arab Uprisings: Yemen's National Dialogue, 10 <[http://pomeps.org/wp-content/uploads/2013/03/POMEPS\\_BriefBooklet19\\_Yemen\\_Web.pdf](http://pomeps.org/wp-content/uploads/2013/03/POMEPS_BriefBooklet19_Yemen_Web.pdf)> accessed 2 March 2017.

<sup>60</sup> See Ginny Hill, 'Democracy on Hold in Yemen' (13 July 2010) Carnegie Endowment for International Peace <<http://carnegieendowment.org/sada/41191>> accessed 2 March 2017. During this time the Sa'ada wars were still ongoing.

<sup>61</sup> The alliance between the six opposition parties to the GPC emerged as one of necessity, not of ideological similarity, and was solidified by the signing of the Program of the Joint Meeting for Political and National Reform in November 2005, in anticipation of mounting a viable opposition to Saleh for the 2006 presidential election. See Michaëlle Browers, 'Origins and Architects of Yemen's Joint Meeting Parties' (2007) 39 *International Journal of Middle East Studies* 565, 565.

<sup>62</sup> Hill (n 60).

<sup>63</sup> 'Summary: Vision for National Salvation' (*Yemen's Vision for National Salvation*, 21 March 2010) <<https://yemenvision.wordpress.com>> accessed 2 March 2017 (semi-official blog of the Preparatory Committee for National Dialogue (PCND) in Yemen).

sufficient opposition to pressure President Saleh to implement the promised electoral reforms.<sup>64</sup> Notably, a federation was one of the State structures proposed by the national salvation plan meant to achieve 'a democratic state that promotes the values of freedom, social justice and national independence'.<sup>65</sup>

The motivations driving the push for the decentralisation of the Yemeni State after the 2011 uprising differ slightly from those underlying the aforementioned events. However, the centralisation of power under Saleh over the course of three decades was certainly a fundamental driving force behind the calls for change—even though the groups that participated in the uprising were not completely aligned in their views on what Yemen's future should look like. Once the 2011 uprising began gaining momentum,<sup>66</sup> many elites formerly allied with Saleh joined the opposition against him.<sup>67</sup> Those within the Islah network,<sup>68</sup> such as General Ali Mohsen and Sheikh Abdullah al-Ahmar saw the uprising as an opportunity to attempt a seizure of power 'under the guise of supporting the 2011 protestors'.<sup>69</sup> A mass shooting of peaceful protestors in Change Square on 18 March 2011 prompted resignations from those in the armed forces, the foreign service, the civil service, and the GPC.<sup>70</sup> At this point, federalism had not yet risen to the fore, but many Yemenis going into the National Dialogue Conference were united in their desire to undo Saleh's centralisation of power.

To dismantle Saleh's regime and provide the foundation for a democratic State, participants of the National Dialogue Conference had to determine what type of State structure Yemen would have. Because of entrenched southern grievances rooted in events before and after the 1994 civil war, the National Dialogue Conference's discussions of a federal Yemen were intertwined with resolving the southern issue. Whether or not Yemen *should* become a federal State was less contentious than *what* a federal Yemen would look like—in particular, how many regions there would be.<sup>71</sup> The Southern Working Group spent considerable time debating the number of regions that should exist.<sup>72</sup> To the al-Hirak delegates that participated in the National Dialogue Conference, federalism was an opportunity for southerners to increase their regional autonomy.<sup>73</sup>

## V. Mechanics of Transitioning from a Unitary to Federal System

Carrying out a transition from a unitary to federal system involves implementing a series of decisions. These decisions shape what the newly realised federal State will look like—whether it will encompass three or four tiers of government, have a parliament, and be an asymmetric or symmetrical federation. There are dozens of issues that must be decided to implement a transition to federalism; for instance, States must make decisions regarding taxation authorities, electoral laws, revenue raising authority, and whether there will be an executive, legislative, and judicial branch at each level of government. States emerging from recent conflict may find it especially difficult to attempt a transition to federalism without first achieving sufficient buy-in on these issues. Without consensus, particularly around politically contentious issues, it would be extremely challenging to carry out the logistics of transitioning to federalism. The sections below examine the decisions that were made in Yemen with regards to the following three key issues: (1) the formation of federal

<sup>64</sup> See Leslie Campbell, 'Yemen: The Tribal Islamists' Woodrow Wilson International Center for Scholars <<https://www.wilsoncenter.org/yemen-the-tribal-islamists>> accessed 2 March 2017.

<sup>65</sup> Vision for National Salvation (n 63).

<sup>66</sup> The uprising began in early February 2011 as a rebellion led by students and recent graduates of major urban areas. By late February, the movement had grown to include a greater range of voices, including tribal figures, Islah, representatives of rebel groups like al-Hirak and the Houthis, and some members of the ruling party. Laurent Bonnefoy, 'Politics and the Islamists in the Yemeni Revolution' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 93.

<sup>67</sup> It should be noted that many who benefitted from Saleh's patronage system were less eager to dismantle it, but were instead more interested in co-opting it. As such, competition between the elites was happening just below the surface throughout the Gulf Initiative negotiations and National Dialogue Conference. See Hill and others (n 28) 2; Salisbury (n 4) 3–4.

<sup>68</sup> Within the Islah party are several Islamist schools of thought. Islah has a strong grassroots base, and '[r]eligion provides more of a vocabulary to the party than a framework for decision-making or policy formation'. See Phillips (n 1) 106.

<sup>69</sup> Salisbury (n 4) 9.

<sup>70</sup> On the topic, see eg Sheila Carapico, 'Yemen Between Revolution and Counter-terrorism' in H Lackner (ed), *Why Yemen Matters: A Society in Transition* (SAQI 2014) 34–37.

<sup>71</sup> President Hadi, the GPC, internationals, and most minority groups at the National Dialogue Conference, supported a unified federal Yemen. Islah was for the most part ambivalent on the matter. The Houthis and al-Hirak, however, had real concerns about how a six-region federal Yemen would affect their constituents' interests. See Hill and others (n 28) 14; Day, 'The Federal Plan in Yemen' (n 54) 25, 38–39.

<sup>72</sup> The National Dialogue Conference also had a State-building Working Group to reach consensus on nation-building matters and the constitution-drafting process. Some of the work of the State-building Working Group was dependent on the outcomes of the Southern Working Group, specifically consensus on the structure of the State.

<sup>73</sup> In fact, it was al-Hirak representatives that initially put federalism on the National Dialogue Conference agenda. Day, 'The Federal Plan in Yemen' (n 54) 24.

regions; (2) the structure of the new federal system; and (3) how powers were to be distributed in the State. Due to a lack of consensus and sufficient clarity on these issues prior to the drafting of the federal constitution, the Constitution Drafting Committee had to make political determinations that a technical drafting body should not be responsible for.

The inability to secure sufficient resolution, resulting in insufficient details, during the National Dialogue Conference of the three issues discussed below compounded the challenge of transforming Yemen into a federal State.<sup>74</sup> These three decisions represent some of the most basic components needed to build a federal system of government. For without at least the creation of federal units, some decreed power-sharing among multiple levels of government, and guidance on powers allocated to subnational units, a State is merely federal in name.

### **A. Formation of New Federal Units**

For many States, including Yemen, the formation of federal units can be a highly contentious process because of the impact on existing socio-economic structures, political power bases, and land disputes. Although all groups are rarely satisfied with the modification of internal borders,<sup>75</sup> to minimise the escalation of tensions, States often attempt to reconcile as much as possible the competing demands of various social, ethnic,<sup>76</sup> and political groups during the delimitation process.<sup>77</sup> The location of natural resources can, as one undoubtedly expects, further complicate the process of redrawing internal boundaries because access to revenue from those resources often impacts political power dynamics. Since asymmetrical resource distribution can result in local conflicts, States sometimes centralise the allocation of natural resources revenue to ensure the equal redistribution to local governments.<sup>78</sup> However, the redistribution of revenues generated by resource-rich regions of the State to resource-poor regions can likewise incite tension.

There are several methods that States can use to draw new internal boundaries and form regions; one option is a boundary commission. To take into account the various social, ethnic, and political factors that could impact the redrawing of its internal boundaries, South Africa, like many States, chose to create a boundary commission. Deference to these factors can help ensure a more seamless integration of new federal units into the State structure.<sup>79</sup> South Africa's Commission on the Demarcation, Delimitation of States,

<sup>74</sup> At the conclusion of the National Dialogue Conference, several other issues were also left unsettled, resulting in a lack of extensive details for the Constitution Drafting Committee to base the draft constitution on. There was insufficient clarity on such issues as the State's financial system, the composition and structure of the national legislature, the authorities and structure of the judiciary branch, and the guarantees relating to the establishment of an independent and inclusive executive branch. Consequently, it was left to the Constitution Drafting Committee to more fully address those issues, and to do so within the scope of the approximately 1,800 National Dialogue Conference outcomes. This task was especially challenging because the Yemenis serving on the Constitution Drafting Committee did not have considerable expertise in federalism or familiarity with the technical nature of implementing a transition from a unitary to federal system.

<sup>75</sup> Nigeria's adoption of a federal system of government in 1967, which divided the State into twelve new federal units led to a three-year civil war. The Igbo did not want their region divided to accommodate the new structure, and consequently used force to secede and form the Republic of Biafra—which at the end of the conflict was forced back into the federation. Siri A Rustad, *Power-sharing and Conflict in Nigeria: Power-sharing Agreements, Negotiations and Peace Processes* (CSCW 2008) 10–11. In South Africa, some groups wanted regional borders drawn according to ethnicity, which would strengthen their political bases, but in turn reinforce existing divisions. Like in Nigeria, those groups threatened violence to get their way. Tuni Makgetla and Rachel Jackson, 'Negotiating Divisions in a Divided Land: Creating Provinces for a New South Africa, 1993' (2012) Princeton University Innovations for Successful Societies, 4–5 <<https://successfultsocieties.princeton.edu/publications/negotiating-divisions-divided-land-creating-provinces-new-south-africa-1993-0>> accessed 2 March 2017.

<sup>76</sup> A careful drawing of internal borders can help to coalesce ethnic or minority groups that have previously been segregated or engaged in fighting. In Sri Lanka, several delimitation processes attempted to provide for fairer representation of the Tamils and other ethnic minority interests by accounting for ethnicity in the redrawing of internal boundaries. See eg Robert N Kearney, 'Sri Lanka' in M Weiner and E Ozbudun (eds), *Competitive Elections in Developing Countries* (Duke University Press 1987) 82; Amita Shastri, 'The Material Basis for Separatism: The Tamil Eelam Movement in Sri Lanka' (1990) 49 *The Journal of Asian Studies* 56, 66–67.

<sup>77</sup> The process by which States delineate federal units consists of two steps: (1) delimitation—the drawing of lines on a map or in a description within the text of a law or treaty; and (2) demarcation—physically marking the lines between subnational units.

<sup>78</sup> See Joseph Siegle and Patrick O'Mahony, *Assessing the Merits of Decentralization as a Conflict Mitigation Strategy* (USAID 2006) 11–12, 50–51. Also, greater local autonomy over natural resources can trigger disputes that explode into full-blown conflicts when there is an absence of local infrastructure and regulation.

<sup>79</sup> Even when States undertake a delimitation process that does not involve a boundary commission, it can instruct its central legislatures to consider specific criteria when drawing new internal boundaries and forming regions. For instance, the German Constitution provides that the central government consider 'regional, historical, and cultural ties, economic efficiency, and the requirements of local and regional planning'. Constitution for the Federal Republic of Germany [1949, as amended in 2012] art 29. Similarly, the Ethiopian Constitution created nine federal States based on such factors as language, identity, and the consent of the communities. Constitution of the Federal Democratic Republic of Ethiopia [1994] arts 46(2), 47.

Provinces, and Regions (the Commission) was established upon the abolishment of apartheid to provide recommendations on the number of new federal regions, and their location.<sup>80</sup> To develop its recommendations, the Commission also took into account existing ecological details and considered the possibility of inequality among the new regions with regards to infrastructure, health, education, and institutional and administrative capacity.<sup>81</sup> As a result of its work, the Commission was able to present a nine-region plan that sought to appease several political parties while also taking into account social, racial, economic, and historical factors that could spark disputes on the ground.<sup>82</sup>

Yemen did not establish a boundary commission, and the primary factor considered when determining whether Yemen would become a two, four, five, or six region federation was finding a compromise that both the northern and southern delegates would agree to. As such, the National Dialogue Conference did not consider the multitude of factors that boundary commissions like the one in South Africa were able to when deliberating over how to redraw a State's internal boundaries.

## 1. Controversy over Regions in Yemen

One of the last remaining issues to be decided during the National Dialogue Conference concerned the number of regions Yemen would come to have. Without an answer to this question, not much progress could be made in deciding, among other matters, upon the framework for the legislative, executive, and judicial branches of government.<sup>83</sup> Eventually, the National Dialogue Conference delegates authorised President Hadi to form a small subcommittee of the Southern Working Group, the 8 + 8 Committee, to define the new federal State.<sup>84</sup> The 8 + 8 Committee eventually put forth a 'just solution' document settling on a federal structure for Yemen, but deadlock persisted on whether Yemen would be divided into two, four, five, or six regions.<sup>85</sup> The compromise was to form another committee (the Committee) 'to define the number of [federal] regions' that should be established.<sup>86</sup> This Committee was granted the authority to determine the number and boundaries of the regions Yemen would have after the National Dialogue Conference had officially concluded, and its decision was binding.<sup>87</sup> The members of the Committee<sup>88</sup> were primarily chosen by President Hadi. In February 2014, the Committee announced that Yemen's existing governorates would be organised into six regions.<sup>89</sup> The boundaries of the regions were later codified in the 2015 draft constitution.<sup>90</sup>

Although it appeared that Yemen would on paper become a six-region State, discontent over the decision continued to mount. Some criticised the new regional units because of the absence of a cross-boundary region tying northern and southern Yemen together. Many disapproved of the method by which the regions were created—outside the National Dialogue Conference consensus-building process and without popular consultations or a referendum. The sentiment was that the six-region design was simply 'rubber-stamped'.<sup>91</sup> Additionally, both al-hirak and the Houthis continued to view a six-region Yemen as counter to their

<sup>80</sup> Yvonne G Muthien and Meshack M Khosa, 'The Kingdom, the Volkstaat and the New South Africa: Drawing South Africa's New Regional Boundaries' (1995) 21 *Journal of Southern African Studies* 303, 304–305.

<sup>81</sup> *ibid* 304, 307–308.

<sup>82</sup> No party or interest was satisfied with the Commission's recommendations. In fact, the Commission recommended an extended process to allow for further deliberation on contested demarcation issues. Nonetheless, '[t]he final decisions on the regional map of South Africa were not in the Commission's hands, but were taken by political parties behind close doors'. *ibid* 314, 320.

<sup>83</sup> Such issues were under the purview of the State-building Working Group. See also Murray (n 30) 8.

<sup>84</sup> Erica Gaston, 'Process Lessons Learned in Yemen's National Dialogue' (2014) United States Institute of Peace Special Report, 3–4 <[https://www.usip.org/sites/default/files/SR342\\_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf](https://www.usip.org/sites/default/files/SR342_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf)> accessed 2 March 2017.

<sup>85</sup> *id.*

<sup>86</sup> 'The committee shall consider the option of six (6) regions (four (4) in the North and two (2) in the South), the option of two (2) regions, and any option between these two options that can achieve consensus'. Agreement On a Just Solution to the Southern Question, Outcome of the Subcommittee of the Southern Working Group (2013) part III.

<sup>87</sup> *id.*

<sup>88</sup> President of the Republic of Yemen, 'Presidential Decree Forms Committee to Determine Regions' (Sana'a, 17 January 2014) <<http://presidenthadi-gov-ye.info/en/archives/presidential-decree-forms-committee-to-determine-regions/>> accessed 2 March 2017.

<sup>89</sup> Gaston (n 84) 4.

<sup>90</sup> Draft Constitution for the Federal Republic of Yemen [2015] art 391.

<sup>91</sup> Peter Salisbury, *Federalism, Conflict and Fragmentation in Yemen* (Saferworld 2015) 12. For many Yemenis, the decision of whether Yemen was two or four or six regions was not on the forefront because it did not immediately translate into the resolution of the lack of basic services being provided. See also Khalil Al-Khaubari, 'Committee Created to Determine Number of Regions for Future Republic' *The Yemen Times* (Sana'a, 30 January 2014) <<http://www.yementimes.com/en/1751/news/3413/Committee-created-to-determine-number-of-regions-for-future-republic.htm>> accessed 2 March 2017.

interests.<sup>92</sup> The boundaries disadvantaged the Houthis because it left them with neither access to the oil fields and infrastructure nor to the sea—both highly valued economic assets. Southern secessionists disapproved of only having two southern regions because it would complicate future efforts to secede.

In a defiant move rejecting the federal model of government, including the six-region structure, the Houthis kidnapped President Hadi's Chief of Staff in January 2015 while he was *en route* to present the draft constitution to the National Authority for Monitoring the Implementation of National Dialogue Conference Outcomes.<sup>93</sup> Shortly thereafter, the Houthis escalated violence around Sana'a and attempted a coup in February 2015 that resulted in them issuing a declaration dissolving parliament and appointing a new Houthi-led presidential council.<sup>94</sup> The Houthis had already seized control of most of the capital by September 2014,<sup>95</sup> but by February 2015 the group had completely taken over Sana'a and was holding President Hadi and his cabinet under house arrest.<sup>96</sup> These events launched a civil war that has lasted two years, and as of the writing of this article, parties to the conflict continue to battle for control across Yemen.

### **B. Structure of the New Federal System**

Besides forming new federal units, unitary States in transition must consider how many levels of government will be established and what the structure of the subnational units will be. A government's sovereignty is split, typically constitutionally, between a central governing authority and constituent political units (*e.g.* regions). Although federal systems by nature have at a minimum a central government and a regional government, some States have up to four tiers of government.<sup>97</sup> Spain, for instance, has a central government, autonomous communities, provinces, and municipalities.<sup>98</sup> Having fewer layers of government can limit the touch points the public has with its government, potentially undermining the perception that a government sufficiently encourages democratic participation.<sup>99</sup> Conversely, the creation of too many tiers without providing for effective resource allocation and for coordination between the different levels of government could worsen corruption and incite conflict.<sup>100</sup>

Generally, either the central government or the subnational units themselves determine the specific structure of governance at the subnational levels. Accordingly, legislation supplemental to the federal constitution, or some other legal framework, is needed to elucidate the structure of these subnational units. Although subnational units may be given considerable autonomy to develop the structure of their governments, federal constitutions or central governments may still provide rough parameters for what those structures should look like. In Ethiopia, the federal constitution requires that there be a central government and nine regional governments,<sup>101</sup> but grants each of the nine regions considerable freedom to establish a local governance structure that best suits their constituencies.<sup>102</sup> The Spanish Constitution provides some instruction on how to set up the federal State's subnational units.<sup>103</sup> It established standardised rules for the governance

<sup>92</sup> Mohammed Ghabari and Agnus McDowall, 'Houthis Abduct Yemeni Official Amid Wrangling over Constitution' (*Thomson Reuters Africa*, 17 January 2015) <<http://af.reuters.com/article/commoditiesNews/idAFL6N0UW06N20150117>> accessed 2 March 2017.

<sup>93</sup> Scott Neuman, 'Gunmen Kidnap Top Official in Yemen' (*National Public Radio*, 17 January 2015) <<http://www.npr.org/sections/thetwo-way/2015/01/17/377936813/gunmen-kidnap-top-official-in-yemen>> accessed 2 March 2017; Bassam Al-Khameri, 'Hadi's Office Silent on Bin Mubarak Kidnapping' *The Yemen Times* (Sana'a, 19 January 2015) <<http://www.yementimes.com/en/1852/news/4815/Hadi's-office-silent-on-Bin-Mubarak-kidnapping.htm>> accessed 2 March 2017. Despite the kidnapping, the National Dialogue Conference reported on its website that the National Committee for Monitoring the Implementation of the National Dialogue Conference had in fact received the Constitution Drafting Committee drafted constitution in an earlier meeting with President Hadi. See National Dialogue Conference, 'NDC Outcomes Monitoring Committee Receives Constitution Draft from CDC' (17 January 2015) <<http://www.ndc.ye/news.aspx?id=4040>> accessed 2 March 2017.

<sup>94</sup> 'Yemen's Houthis Form Own Government in Sanaa' *Al Jazeera* (Doha, 6 February 2015) <<http://www.aljazeera.com/news/middleeast/2015/02/yemen-houthi-rebels-announce-presidential-council-150206122736448.html>> accessed 2 March 2017 (Al Jazeera Houthi Declaration).

<sup>95</sup> Iona Craig, 'What the Houthi Takeover of Sanaa Reveals about Yemen's Politics' *Al Jazeera* (Washington, 25 September 2014) <<http://america.aljazeera.com/articles/2014/9/25/houthi-yemen-takeover.html>> accessed 2 March 2017.

<sup>96</sup> Al Jazeera Houthi Declaration (n 94).

<sup>97</sup> Siegle and O'Mahony (n 78) 14–15.

<sup>98</sup> Constitution of the Kingdom of Spain [1978, as amended in 2011] art 137.

<sup>99</sup> According to some qualitative research though, more tiers do not necessarily result in greater representation, see Siegle and O'Mahony (n 78) 1, 7, 9, 16.

<sup>100</sup> *ibid* 8, 12, 41, 46, 57.

<sup>101</sup> Constitution of Ethiopia, arts 47, 50.

<sup>102</sup> The Constitution grants the nine regions significant autonomy to establish additional subnational units (ie local government); each region established almost identical local governance structures consisting of three tiers. Zemlak A Ayele, 'The Politics of Sub-national Constitutions and Local Government in Ethiopia' (2014) 6 *Perspectives on Federalism* 89, 91, 104.

<sup>103</sup> Additionally, the parliament approved the national statute of autonomy for each territory. Robert Agranoff, 'Federal Evolution in Spain' (1996) 17 *International Political Science Review* 385, 387.

of each of the autonomous communities—requiring for instance that each have a unicameral legislature body, cabinet, and administrators.<sup>104</sup>

An often little discussed complication is the cost of becoming a federal State. During the transition, unitary States typically have to mobilize resources to, at a minimum, create new institutions, enhance the functionality of those institutions, and employ individuals to staff newly created subnational governments.<sup>105</sup> Such financial expenditures depend in part on the condition of the State's existing infrastructure and public sector.<sup>106</sup> In highly centralised unitary States the lack of existing institutional capacity can further complicate a transition to federalism because of the time and resources needed for capacity-building. On the other hand, some unitary States may already have existing local governance structures upon which a federal system can be built. If the State already has functioning local governance structures, then those can be co-opted into the new federal system.

Having a clear vision of what levels of government will exist in the federal State and how their specific structures will be determined provides at least a basic framework for where powers and authorities can be allocated in the new federal system. Without such a framework before drafting a constitution, it can be unclear which State entities can be assigned the powers described below. Moreover, without clarity on the tiers of government and the basic structure of subnational units, there is no reference point for States to hold on to when crafting the intergovernmental relationships that will exist under the new federal system. The overall functionality of the devised State structure is ultimately dependent however on the capacity of State institutions at each level of government to carry out their duties and responsibilities.

### 1. Yemen's New Federal Structure

The National Dialogue Conference Working Groups had provided minimal guidance in their reports regarding the overall structure of a federal Yemen. Accordingly, the Constitution Drafting Committee had to determine the number of tiers of government and how to structure subnational units in the constitution.<sup>107</sup> Notably, however, the National Dialogue Conference outcomes suggested three tiers: the central government; regional governments; and wilayas.<sup>108</sup> The 2015 draft constitution, on the other hand, established four tiers of government—or five if the cities of Aden and Sana'a are included. The State was to have a central government, regional governments, and two levels of local governments (wilayas and districts).<sup>109</sup> Under the draft, the cities of Aden and Sana'a have special status and are distinct territorial units with devolved authorities equivalent to regions.<sup>110</sup>

The draft constitution outlines how the different tiers of government should be structured, including the regional governments, and the wilayas and districts.<sup>111</sup> Moreover, it clarifies that the districts are to be considered sub-units of the wilayas.<sup>112</sup> In that regard, the draft previews the intergovernmental dynamic that might have been established in Yemen; it places the districts within the regions' scope of authority.<sup>113</sup> Furthermore, Article 263 provides that 'a regional law shall determine [the cities] exclusive powers within the scope of the powers' provided for in the constitution.<sup>114</sup> Therefore, had the constitution been enacted, the regions would have been required to also comply with a regional law providing additional guidance on the structure and authorities of the lower levels of government.

Although local governance structures existed in Yemen prior to 2012, the over-centralisation of power under Saleh atrophied State institutions. Saleh's reliance on a strong patronage system to govern Yemen resulted in the continued abandonment of official State processes, which inhibited the development of

<sup>104</sup> *ibid* 387.

<sup>105</sup> See Marcus Brand, 'Nepal: Constitution Building, Federalism, and Peace – Managing the Transition to Federalism and Implementation of the New Constitution' (2010) United Nations Development Programme Nepal, 22 <[http://www.un.org.np/sites/default/files/attachments/transition\\_and\\_state\\_restructuring.pdf](http://www.un.org.np/sites/default/files/attachments/transition_and_state_restructuring.pdf)> accessed 2 March 2017.

<sup>106</sup> In South Sudan, when the State was decentralising, it had to overcome its lack of institutional capacity at all levels of government. This meant that significant financial resources would be required to fully implement the process, including for such things as training personnel to manage the public sector.

<sup>107</sup> Koury (n 37) 15.

<sup>108</sup> See Agreement On a Just Solution (n 86).

<sup>109</sup> Yemen Draft Constitution, ch III.

<sup>110</sup> *ibid* ch III s IV.

<sup>111</sup> *ibid* ch III, ss II–III.

<sup>112</sup> *ibid* art 258.

<sup>113</sup> *ibid* art 262. The draft constitution also granted regions the authority to adopt regional constitutions.

<sup>114</sup> *ibid* art 263.

effective State institutions.<sup>115</sup> In fact, stunting institutional development in Yemen was a deliberate attempt by Saleh to retain greater power and influence by making the country more dependent on the presidency.<sup>116</sup> This severe lack of institutional capacity meant that the success of Yemen's transition to federalism was also dependent on its ability to bolster the capacity of State institutions at all levels of government. During the 2012–2014 transitional process though, a clear plan for how to ensure capacity-building did not emerge from any decision-making processes. Nor was there any conceptualisation of how such efforts would be funded.

### **C. Distribution of State Powers**

States must also consider the allocation of powers among the different levels of government and whether powers assigned to subnational units will be dispersed symmetrically or asymmetrically. In most federal systems, the central government is empowered to handle issues related to foreign policy, defence and national security, citizenship, monetary policy, customs, management of the national economy, interstate transportation, and other administrative matters necessary for the functioning of the State as a whole. Regional governments, on the other hand, are typically granted concurrent or exclusive powers—over such matters as education, family life, health, social welfare, police, local taxes, and regional transportation—which facilitates effective governance and enable them to provide services within their localities.<sup>117</sup> Regional governments may also exert control over local natural resources and local economic development.<sup>118</sup> Determining a scheme for the management of natural resources can be one of the most controversial power dynamics to negotiate during a political transition.<sup>119</sup> Federal structures bear the risk that, even for issues entirely within the central government's control, opposing regional interests may complicate the central government's agenda on those issues.

Sometimes, the central and regional governments exercise concurrent power over policies that the central government standardises, but the regional governments implement.<sup>120</sup> These powers are often useful tools for the development of policies and the administration of governance in areas where both the State and the regional government have a significant interest. For instance, regional governments may have the administrative power to set up and manage the local school system, but they must do so within the national policies set forth by the central government. In this case, the regional governments would have the power to determine the size and location of a school, but they would have to hire teachers based on criteria set forth by the central government or use a curriculum that the central government creates.

Some powers are not specifically allocated to either the central government or regional governments. Where States only list some powers, they often also provide that any powers that are not mentioned, known as reserve or residual powers, will be left to either the central or regional governments.<sup>121</sup> Giving the central government control over any unlisted powers may help reduce the potential for overlap of and conflict between regional and central government laws. When States give unlisted powers to the regional governments, they often retain some form of legislative or judicial supremacy to ensure that regional governments do not exceed their authorities. Some State constitutions provide for situations in which the central government may assume powers otherwise granted to the regions.<sup>122</sup> In such situations, the central government may need to act quickly for the preservation of the State, such as when regional governments are unable or unwilling to meet certain obligations or when uniform laws are necessary for effective governance.<sup>123</sup>

In a symmetrical federal structure, each region within the State has the same constitutionally embedded obligations and rights. The State devolves power equally to all regions and each region has an identical relationship with the central government. Such arrangements are often useful when a country is divided between strong regional groups, each desiring a certain degree of power. An asymmetrical federal structure, on the other hand, does not provide equal rights to each region. One or more regional governments

<sup>115</sup> Charles Schmitz, 'Building a Better Yemen' (2012) Carnegie Endowment for International Peace, 4, 7 <[http://carnegieendowment.org/files/building\\_better\\_yemen.pdf](http://carnegieendowment.org/files/building_better_yemen.pdf)> accessed 2 March 2017.

<sup>116</sup> *id.*

<sup>117</sup> Constitution of the Republic of South Africa [1996, as amended in 2012] schs 4–5.

<sup>118</sup> Constitution of the Republic of the Philippines [1987] art X s 20.

<sup>119</sup> Frameworks for determining how resource management authority will be allocated between the federal government and regional units can be incorporated into State constitutions, implementing legislation, or both.

<sup>120</sup> See Constitution of the Italian Republic [1948, as amended in 2012] art 117.

<sup>121</sup> See Constitution of the Philippines, art X s 17. See also Federal Constitution of the Swiss Federation [1999, as amended in 2014] art 43(a).

<sup>122</sup> See Constitution of South Africa, s 100.

<sup>123</sup> *id.*

are vested with unique powers not granted to others. Different regions will thus exercise varying levels of authority over their internal affairs. When transitioning to a federal State structure, States may incorporate an asymmetrical structure in their constitutions to address ethnic or regional tensions, economic management, administrative coordination, or the differing resources of the subnational units.<sup>124</sup> Generally, States may implement asymmetrical constitutional status by providing for differing degrees of autonomy or powers, representation in the federal institutions, or application of federal laws.

### 1. Distribution of State Powers in a Federal Yemen

Considering how centralised Yemen had become under Saleh, one of the most important issues discussed during the National Dialogue Conference was how to devolve power from Sana'a to the subnational units. The National Dialogue Conference outcomes however did not provide extensive details for how powers and authorities would be dispersed to the subnational units. Accordingly, it was up to the Constitution Drafting Committee to enumerate those specific powers and responsibilities for each level of government in the draft constitution. The Agreement on a Just Solution to the Southern Question presented by the 8 + 8 Committee approved the Constitution Drafting Committee as responsible for determining the specific division of powers and responsibilities for each level of government, including which powers would be exclusive or concurrent.<sup>125</sup> The document emphasises the need for regional autonomy, but at the same time relinquishes to the drafters of the federal constitution responsibility for determining the exact parameters of subnational authorities.<sup>126</sup>

The 2015 draft constitution, as such, delineated the powers and responsibilities of the central and regional governments by describing the specific functions and powers of the executive, legislative, and judicial bodies for each level.<sup>127</sup> The draft also described the powers of subnational units below the regional level—the wilayas and districts.<sup>128</sup> As in many other countries, the Yemeni draft constitution allocated powers to the central government that would not be shared with the regional governments; *e.g.* powers related to foreign affairs, military matters, and the approval of international agreements and treaties were to be reserved for the central government. The draft constitution did, however, grant significant autonomy to the wilayas and districts, including financial independence.<sup>129</sup> Special status was given to the cities of Sana'a and Aden, to guarantee their autonomy; they would have had their own independent legislative and executive authorities.<sup>130</sup> Sana'a and Aden in effect would have many of the same powers entrusted to regions and wilayas.

The 2015 draft constitution established an asymmetrical structure. Although each region is structured identically and the regions' institutions serve the same functions, the southern regions of Aden and Hadhramout were to be given a level of influence in national politics that other regions were not. For instance, the draft constitution stipulated that in the first legislative cycle, the regions of Aden and Hadhramout would be represented in the House of Representatives 'based on the land and population formula at a share of 40 %'.<sup>131</sup> Additionally, the South was granted unique constitutional protections.<sup>132</sup> Aden and Hadhramout were, furthermore, guaranteed 50 % representation in 'all leadership structures in the legislative, judiciary and executive bodies including the army and security'.<sup>133</sup>

<sup>124</sup> See Richard M Bird and Robert D Ebel, 'Fiscal Federalism & National Unity' (2005) Urban Institute Research Report, 9 <<http://www.urban.org/sites/default/files/publication/51376/1000803-Fiscal-Federalism-and-National-Unity.PDF>> accessed 2 March 2017.

<sup>125</sup> See Agreement On a Just Solution (n 86) part II (3).

<sup>126</sup> *ibid* part II. For instance, Principle Five provides that '[p]owers unallocated to the federal authorities shall be presumed powers of other levels of government as provided for by the federal constitution. The competent judicial body defined in the federal constitution shall adjudicate on any dispute over the competencies of the central government, regions and wilayas'. The phrasing of this and other Principles left the Constitution Drafting Committee with the responsibility of determining how power would actually be balanced between the central government, regions, and other subnational units.

<sup>127</sup> Yemen Draft Constitution, ch III.

<sup>128</sup> *ibid* ch III s III.

<sup>129</sup> *ibid* arts 250 (wilayas enjoy 'legal personality and financial and administrative independence') and 258 (districts enjoy 'legal personality and financial and administrative autonomy').

<sup>130</sup> *ibid* arts 264, 266, 273–274.

<sup>131</sup> *ibid* art 139.

<sup>132</sup> Although several articles of the draft constitution provide additional protections to minority groups, specific protections were given to the southern regions. For instance, the federal executive, along with the legislature, is tasked with ensuring 'fair representation of the South to achieve participation in federal executive authorities and institutions'. *ibid* art 204.

<sup>133</sup> *ibid* art 424.

## 2. Powers Over Natural Resources Management in a Federal Yemen

Delineating the powers of the different levels of government inevitably required consideration of how Yemen's natural resources, in particular oil and natural gas, would be managed. As in many States, whoever controls the flow of revenue from Yemen's oil and gas yields power. For this reason, Saleh built a patronage system that would guarantee a monopoly by the central government over the State's natural resources revenue.<sup>134</sup> In Yemen, most of the resource-rich areas, like Hadramawt, Mar'ib, and Shabwah are located in southern Yemen. After the 1994 civil war, Saleh and other influential northerners began exploiting natural resources located in southern Yemen, sometimes without compensation.<sup>135</sup> Many southerners thus remember Saleh's consolidation of power over oil and gas revenues as an exploitation of southern resources—one that mostly benefitted elites from northern areas of the country.

The historical imbalance of revenue-sharing and the politicisation of natural resources management in Yemen permeated discussions about federalism during the National Dialogue Conference, including what role each level of government would have in Yemen's new natural resources management scheme. Southerners participating in the National Dialogue Conference carried with them the collective memory of a strong central government—dominated by northern elites—controlling most of Yemen's natural resources revenue for decades.<sup>136</sup> As such, southerners were adamant about renegotiating control over natural resources to end the disproportionate profiting off southern oil fields.

Since the National Dialogue Conference failed to produce a cohesive framework for managing and developing Yemen's natural resources, the Constitution Drafting Committee was responsible for doing so.<sup>137</sup> The 2015 draft constitution created a National Revenue Fund, in which the revenues from oil and gas sales would be deposited.<sup>138</sup> The Revenue Division Act was to govern withdrawals from the Fund.<sup>139</sup> As with revenue-sharing, the draft constitution attempted to establish an equitable arrangement of control over natural resources management and development. Several constitutional provisions emphasise that the wilayas, regions, and central government are to coordinate and work together to formulate natural resource policies and manage Yemen's natural resources,<sup>140</sup> but at the same time the document also gives considerable control to local authorities over some aspects of resource management such as the award of local service contracts for oil and gas.<sup>141</sup> The draft constitution essentially provided each level of government overlapping rights and responsibilities, which on its face appears equitable, but in all likelihood would have been extremely difficult to implement.

## VI. Conclusion

The three issues discussed above are skeletal in comparison to the comprehensive framework of decisions that unitary States have to settle before and in order to implement a transition to federalism. They are however critical to developing even a basic framework for a federal State. Yemen's attempt to transition to federalism was complicated by the lack of resolution and sufficient clarity on key and controversial issues prior to the Constitution Drafting Committee beginning its work on the new federal constitution, and the expedited timeline for producing that constitution. As a State that was highly centralised and lacking in institutional capacity, Yemen could have benefitted from a phased approach to its restructuring. Such an approach could have even involved drafting an interim constitution to govern Yemen, thus allowing Yemenis the necessary time to draft a federal constitution with sufficient buy-in, increase institutional capacity, and transform politically. For many countries it took years of negotiating core constitutional principles and issues to reach agreement on the language of specific constitutional provisions.<sup>142</sup> Constitution-drafting, especially

<sup>134</sup> See Day, 'The Federal Plan in Yemen' (n 54) 37.

<sup>135</sup> *id.*

<sup>136</sup> Al-Hirak emerged from continued southern frustration over Saleh and his allies enriching themselves from southern natural resources, and at the cost of local development. See Salisbury, *Yemen: Stemming the Rise of a Chaos State* (n 4) 12.

<sup>137</sup> The Agreement on a Just Solution to the Southern Question document explains that '[t]he management and development of natural resources, including oil and gas, and the award of exploration and development contracts, shall be the responsibility of the authorities of producing wilayas, jointly with the regional and federal authorities'. Moreover, '[a] federal law developed in consultation with the regions and wilayas shall define the criteria and formula for the sharing of revenues from natural resources, including oil and gas'. Agreement On a Just Solution (n 86) part II (8).

<sup>138</sup> Yemen Draft Constitution, art 356.

<sup>139</sup> *ibid* art 357.

<sup>140</sup> *ibid* arts 357, 387–390.

<sup>141</sup> *ibid* art 389.

<sup>142</sup> For instance, in South Africa, India, and Namibia.

post-conflict constitution-drafting is an arduous process that requires technical expertise, institutional capacity, and significant resources.

If Yemen is ever to become a federal State it will need to design decision-making processes that deliver sufficient consensus on key issues, around which a federal constitution can be drafted. Moreover, it should examine the successes and failures of more contemporary States and focus less on immediately emulating highly developed federal systems. How the current conflict unfolds in Yemen will determine what additional key issues will require consensus-building prior to a renewed constitution-drafting process. Depending on the political outcomes of peace talks in Yemen the regional boundaries, federal structures, allocation of powers, and natural resources management scheme established in the 2015 draft constitution may need to be amended. Significant changes to any of the three issues discussed in this article will likely have implications for the other two issues.

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