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The Dos and Don's of Federal Constitutions: A Case Study on Yemen

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NOTE

THE DOS AND DON'TS OF FEDERAL CONSTITUTIONS: A CASE STUDY ON YEMEN

AYAT MUJ AIS *

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I. INTRODUCTION

Yemen was supposed to be a success story for a transition to federalism, a process that should have brought Yemen out of conflict and into a new age. Yet, the transition to federalism actually heightened the conflict in Yemen and brought about new issues. This is because those pushing for a federalist Yemen did not understand the complexities of federalism and the potential issues a transition to federalism could bring about if implemented improperly. Particularly at issue was the creation but failure to implement a new constitution. Therefore, it is critical that states looking to transition to federalism understand how federalism should be implemented through a constitution, and the consequences of failing to implement it correctly. Yemen is a proper case study for this understanding.

This article will discuss briefly both the recent history of Yemen and its drafting of a federal constitution, as well as various lessons learned from the failed constitution. Part II will discuss Yemen's history relevant to the creation of its new constitution, namely the National Dialogue Conference and the Constitution Drafting Committee, as well as essential elements of a federal constitution. Part III will discuss the lessons learned about drafting a federal constitution from this transition to federalism: the important elements of federalism that must be incorporated into a constitution, the lack of a formal blueprint for a federal constitution, and how Yemen fits into these two lessons. Finally, Part IV will conclude with how states should benefit from these lessons learned.

II. BACKGROUND

Yemen has a complex history. The state has divided, reunified, and challenged with multiple conflicts throughout its history. This section will discuss the history of Yemen as it pertains to its

transition to federalism and the creation of its constitution. First, this section will discuss Yemen's National Dialogue Conference and its outcome. Second, this section will provide information on Yemen's Constitution Drafting Committee, and the draft constitution that it produced. Finally, this background section will conclude with the essential elements of a federal constitution.

A. THE NATIONAL DIALOGUE CONFERENCE

The current civil war in Yemen is the latest in a long history of violent struggle stretching back decades, if not centuries.¹ Yemen, the Arab world's poorest country, became a unified state in 1990 as the previously separate northern and southern states were facing economic collapse.² In 2011, popular protests emerged as part of the "Arab Spring" and called for political change in Yemen.³ However, the protests were soon overshadowed by intra-elite violence, leading to a security vacuum across much of Yemen.⁴ In 2013, the United Nations sponsored an inclusive National Dialogue Conference (NDC) to create a new constitution which would be accepted by the various factions within Yemen.⁵ The NDC was additionally implemented to provide a forum for political negotiations, institutional reforms, and policy issues.⁶ However, the general focus of the NDC was on transitioning Yemen into a federalist system and creating a new constitution.⁷ The NDC Outcome Document was the first official endorsement of instituting a federal structure in Yemen,

1. See Peter Salisbury, *Federalism, Conflict and Fragmentation in Yemen*, SAFERWORLD, 1, 8-9 (Oct. 2015), <http://www.saferworld.org.uk/resources/view-resource/1007-federalism-conflict-and-fragmentation-in-yemen>.

2. See *id.* at 8.

3. *Id.* at 10.

4. *Id.*

5. See generally Zachary Laub, *Yemen in Crisis*, COUNCIL ON FOREIGN REL. (Apr. 19, 2016), <http://www.cfr.org/yemen/yemen-crisis/p36488>.

6. Erica Gaston, *Process Lessons Learned in Yemen's National Dialogue*, U.S. INST. OF PEACE 3, (Feb. 2014), https://www.usip.org/sites/default/files/SR342_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf; see Laub, *supra* note 5 (referring to the warring political factions).

7. See Ashraf Al-Falahi, *Yemen's Fraught Constitution Drafting Committee*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 2, 2014), <http://carnegieendowment.org/sada/?fa=55496>.

which was later codified in Yemen's draft constitution.⁸

The NDC included 564 delegates, made up of 50% southern Yemenis and an overall inclusion of 20% youths, and 30% women.⁹ The NDC focused on central controversies, such as the southern issue, the Sa'ada conflict, transitional justice, state building, good governance, military and security issues, institutional independence, rights and freedoms of citizens, and development, and considered these issues when drafting the Constitution.¹⁰

The international community reacted positively to the outcome of the NDC and viewed it as a positive model of negotiation.¹¹ Some called it an "inspiring and hopeful example" of a successful step in a peace process.¹² The NDC concluded with the creation of the NDC Outcome Document on January 21, 2014.¹³ The NDC Outcome Document outlined recommendations for reforming Yemen's political system, resolving central issues, and transitioning to a federalist system.¹⁴ Further, the NDC implemented the creation of the Constitution Drafting Committee (CDC), which was set to create

8. See *Monthly Forecast*, SECURITY COUNCIL REP., 21 (Mar. 2014), http://www.securitycouncilreport.org/monthly-forecast/2014-03/yemen_14.php; see generally THE CONSTITUTION Jan. 15, 2015 (Yemen), http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015_-_english.pdf (creating a federalist system of governance).

9. Charles Schmitz, *Yemen's National Dialogue*, MIDDLE EAST INST., 6 (Feb. 2014), <http://www.mei.edu/content/yemens-national-dialogue> (explaining that this diversity was in part a push for "present[ing] a progressive face of change").

10. See *id.*; see also *Southern Issue*, NAT'L DIALOGUE CONF. (last visited May 21, 2017), <http://www.ndc.ye/issue.aspx?show=1> (noting that the NDC focused on the nature of north-south relations, the distribution of state structures in north and south Yemen, the cause of grievances, and economic, cultural, educational, health, social, and political development).

11. See Policy Analysis Unit, *Outcome of Yemen's National Dialogue Conference: A Step Toward Conflict Resolution and State Building?*, ARAB CENTER FOR RES. AND POL'Y STUD., 6 (Feb. 27, 2014), <http://english.dohainstitute.org/release/c5b3a33b-644d-47f8-9e03-85fcb852c899> (positing that, regardless of some internal tensions and contentious decisions, the NDC was a beneficial process for most involved, and showed a willingness for progress).

12. Danya Greenfield, *Analysis: Yemen Faces Fresh Challenges as National Dialogue Ends*, BBC (Jan. 28, 2014), <http://www.bbc.com/news/world-middle-east-25928579>.

13. *Monthly Forecast*, *supra* note 8, at 21.

14. See *id.* (explaining that the Document was to be used as a basis for the new Draft Constitution).

Yemen's new constitution based on the NDC's recommendations.¹⁵

B. THE CONSTITUTION DRAFTING COMMITTEE

President Hadi formed the CDC on March 8, 2014 and gave the CDC one year to create a constitution based on the NDC's recommendations, to be confirmed by the National Body and ratified through a public referendum.¹⁶ The CDC was made up of 17 panel-members including diplomats, lawyers, judges, and other professionals reflecting Yemen's geographic, ethnic, and political diversity.¹⁷ Even so, there were various objections regarding lack of representation and expertise in federalism.¹⁸

The CDC focused on constitutional requirements to form a federalist system, specifically including articles outlining a federal state and the relationship between the regional areas; articles formulating judiciary, public revenue, and natural resource acquisition; and articles transferring financial power from presidential control to the federal legislative branch.¹⁹ The CDC created a new constitution based on the NDC's recommendations, and the draft constitution was finalized on January 15, 2015.²⁰

15. See Al-Falahi, *supra* note 7; see also Jason Gluck, *Constitution-Building in a Political Vacuum: Libya and Yemen in 2014*, in ANNUAL REVIEW OF CONSTITUTION-BUILDING PROCESSES 43, 50 (Melanie Allen, et al., eds., Int'l Inst. For Democracy and Electoral Assistance, 2015), <http://www.constitutionnet.org/sites/default/files/annual-review-of-constitution-building-processes-2014-pdf.pdf>; Office of the Special Advisor to the Secretary-General on Yemen, *Yemen Constitutional Support*, in 3 UN CONSTITUTIONAL 12, 12-13 (2014), http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional_Issu e3.pdf.

16. Office of the Special Advisor to the Secretary-General on Yemen, *supra* note 15, at 13 (mentioning further that the CDC was tasked with ensuring the Draft Constitution was created from the NDC Outcome Document and consistent with the Document).

17. Gluck, *supra* note 15, at 50; YemenSource, *Constitution Drafting Committee Established*, ATLANTIC COUNCIL (Mar. 10, 2014), <http://www.atlanticcouncil.org/blogs/menasource/yemensource-constitution-drafting-committee-established>.

18. See Al-Falahi, *supra* note 7 (stating that some political groups protested the lack of their specific representation in the process and that those included in the CDC did not have enough experience in federalism).

19. See *id.*

20. See THE CONSTITUTION, *supra* note 8.

Unfortunately, while the Chief of Staff, Ahmed Awad bin Mubarak, was on his way to deliver the constitution to the National Body in Sana'a Houthi rebels kidnapped him.²¹ The Houthis did not agree with the new constitution and believed it was a "violation of the NDC outcomes."²² As a result, the new constitution was not formally adopted. This has contributed to the ongoing conflict today.²³

C. ELEMENTS OF A FEDERAL CONSTITUTION

At the outset, it is worth noting the difficulty of discussing federalism and its application in a specific context. Although federalism experts have had years of experience and capacity building on the implementation of federalism, there is no formal blueprint or handbook detailing how to implement it, or even where to begin.²⁴ A state cannot apply another state's model of federalism, due to the different circumstances and conditions of each state.²⁵ Further, there is no firm set of criteria to judge the success or failure of a federation.²⁶ However, Ronald Watts, a leading scholar of federalism, provides a basic definition that is useful. For Watts, federalism "refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule . . . [T]he essence of federalism as a normative principle is the perpetuation of

21. See Scott Neuman, *Gunmen Kidnap Top Official In Yemen*, NPR (Jan. 17, 2015, 9:08 AM), <http://www.npr.org/sections/thetwo-way/2015/01/17/377936813/gunmen-kidnap-top-official-in-yemen>.

22. Shuaib Almosawa, *Houthi Rebels Abduct Aide to Yemen's President*, N.Y. TIMES (Jan. 17, 2015), <http://www.nytimes.com/2015/01/18/world/middleeast/houthi-rebels-abduct-yemeni-presidential-aide.html>; Bassam Al-Khameri, *Hadi's Office Silent on Bin Mubarak Kidnapping*, YEMEN TIMES (Jan. 19, 2015), <http://www.yementimes.com/en/1852/news/4815/Hadi's-office-silent-on-Bin-Mubarak-kidnapping.htm/>.

23. See generally Laub, *supra* note 5 (discussing the fall of the Hadi government in 2014).

24. See generally Salisbury, *supra* note 1, at 4 (referencing how federalism in each state is unique).

25. See Raoul Blindenbacher & Cheryl Saunders, *A Global Dialogue on Federalism: Conceptual Framework*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES 3, 4 (John Kincaid & G. Alan Tarr eds. 2005).

26. See MICHAEL BURGESS, *COMPARATIVE FEDERALISM: THEORY AND PRACTICE* 269 (2006).

both union and non-centralization at the same time.”²⁷ Critically, federations emphasize the use of a constitution as the highest authority for the central and sub-state units.²⁸

Some scholars suggest the drafting of a constitution is just as important as the content within the constitution.²⁹ Therefore, the following subsections will outline a brief framework for understanding the essential elements of federal constitutions. The framework is broad and should not be considered exhaustive of all the elements of federalism. Rather, the subsections below outline key variables for a federal constitution, with particular focus on the NDC Outcome Document and the draft constitution.

1. Constitutional Framework

The “constitutional architecture” influences the success of a federal state.³⁰ A federal constitution is critical to the functioning of a state because it outlines the legal division of powers as agreed to by the sub-state units of a federal system, as well as the legal and social relationship between the people and their government.³¹ The legal divisions within a particular federal state are likely to differ from other federal states given the range of topics a constitution covers and the various alternatives that exist.³² Indeed, the form a federal constitution takes is a reflection of the unique history, and political and religious culture of the populace seeking to transition to a federal

27. RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 6 (2nd ed. 1999).

28. See WATTS, *supra* note 27, at 99 (establishing a constitution as essential for a successful federation).

29. See John Kincaid, *Comparative Observations*, in *CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES* 409, 444 (John Kincaid & G. Alan Tarr ed. 2005) (highlighting the importance of the constitutional drafting process).

30. Michael Burgess & G. Alan Tarr, *Introduction: Sub-National Constitutionalism and Constitutional Development*, in *CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS SUB-NATIONAL PERSPECTIVES* 3, 3-4 (Michael Burgess and G. Alan Tarr ed., 2012).

31. THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM: A SYSTEMATIC INQUIRY* 43 (2nd ed. 2006).

32. G. Alan Tarr, *Introduction: Constitutional Origins, Structure, and Change*, in *CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES* 8, 8-9 (John Kincaid & G. Alan Tarr eds., 2005).

state.³³

States have a wide range of discretion when drafting a federal constitution due to the variety of federal structures that exist and the specific state's history and culture.³⁴ However, a state's constitution for a transition to a federal government should include, at minimum, a guide to institutional design.³⁵ This includes a guide to the division of regions; allocation of power; how financial, political, and administrative institutions will be implemented; protection of individual rights; economic considerations; and guidance on the implementation of the new federal structure.³⁶ Critically important is the Constitution's role in establishing mechanisms for intergovernmental and inter-institutional obligations, particularly to prevent instances of conflict.³⁷ Moreover, the constitution should be supported by sufficient political will and capacity.³⁸ Further, the drafters of a constitution should ensure the constitution is not excessive in nature as the inclusion of too many ideas could prevent it from being successfully implemented.³⁹

a. Institutional Design

A critical component of transitioning to a federal system is institutional design.⁴⁰ To successfully implement a federalist structure, a state will need to create a blueprint - a constitution - tailored to its needs and challenges.⁴¹ The state must address the elements of institutional design critical to resolving problems within the constitution.⁴² Unfortunately, there is no general blueprint for a

33. *Id.* at 9.

34. *See id.* at 8-9 (discussing that federal systems differ in terms of the structure of the government, the allocation of powers, whether they are two-party or multi-party systems, made up of independent or centralized states, etc.).

35. *See* Kincaid, *supra* note 29, at 412 (finding institutional designs necessary because they frame federal constitutions).

36. *See* Tarr, *supra* note 32, at 8; Kincaid, *supra* note 29, at 419.

37. *See* Kincaid, *supra* note 29, at 419.

38. *See id.* at 445 (stating trust and good-faith deliberations are essential elements for success).

39. *See infra* Section III(A)(3).

40. *See* Kincaid, *supra* note 29, at 412.

41. *See id.* at 413 (finding constitutions are patchworks of compromises made during drafting).

42. *Id.* at 412-13.

federal constitution.⁴³ However, if the constitution is missing critical elements or is not specific enough, the chance of having a failed federal state is greater.⁴⁴

Federations require several institutional elements. One of the most important elements of a state's constitutional blueprint is the division of regions.⁴⁵ While designing this section of a constitution, drafters should keep a number of considerations in mind. The division of regions is often a contentious element; therefore, drafters should ensure there is complete consensus on the number and borders of the regions, and ensure equality among the regions.⁴⁶ This equality should take into consideration access to resources and major urban areas.⁴⁷

A second element of institutional design is the State's institutional framework, specifically financial, administrative, and political institutions. The State and its newly divided regions require infrastructure in the form of institutions to successfully function.⁴⁸ Further, these institutions require guidance on their relationship to the government and society, as well as the division of power among the institutions.⁴⁹

A third element of institutional design is political and economic foundations. When transitioning to a federal government, a key element within a successful constitution is the political foundation because it is a source of energy and resources for the restructuring of the state.⁵⁰ Furthermore, such a foundation can ensure inclusive participation in national policy, which lends legitimacy to the federal

43. Blindenbacher & Saunders, *supra* note 25, at 4.

44. *See id.*

45. *See* Tarr, *supra* note 32, at 8-9 (citing the importance of how a state allocates power).

46. *See id.*

47. *See id.*

48. *See* Yara Bayoumy, *Exclusive: Civil War Costs Yemen \$14 billion in Damage and Economic Losses*, REUTERS (Aug. 17, 2016), <http://www.reuters.com/article/us-yemen-security-damages-idUSKCN10R2B7>; *see generally* Gaston, *supra* note 6, at 4.

49. *See* Bayoumy, *supra* note 48.

50. *See* Astri Suhrke, *Restructuring the State: Federalist Dynamics in Nepal*, CHR. MICHELSEN INST., 7 (2014), <http://www.cmi.no/publications/file/5171-restructuring-the-state.pdf> (describing the political energy necessary to restructure a state and support the overall political process).

system.⁵¹ Having a strong economic foundation is another key element for a successful constitution.⁵² In most federal states, one of the government's main functions is to regulate and ensure the stability of the economy.⁵³ A strong economy requires a well-designed economic system, and therefore efficient institutions to support the system.⁵⁴ When this section is lacking in detail, the constitution is likely to fail.⁵⁵

Finally, the last relevant element of institutional design is the coordination of regional and central authorities and the division of power. Since constitutional distribution of powers between two or more levels of government is an essential characteristic of federations, the supremacy of the constitution as a source of governmental authority is imperative.⁵⁶ Often, constitutions will provide an explicit list of concurrent powers for the central and regional governments.⁵⁷ Further, a constitution must provide mechanisms for the facilitation of central and regional government

51. See *id.* at 7; see also Balveer Arora, *Foundations and Development of Indian Federalism: Lessons Learnt and Unlearned*, CTR. FOR SOUTH ASIAN STUD. AT UNIVERSITY OF EDINBURGH, 6 (Feb. 2015), http://www.csas.ed.ac.uk/_data/assets/pdf_file/0010/172576/Arora_Foundations_and_Development_of_Indian_Federalism_Yojana2015.pdf.

52. See generally Arora, *supra* note 51, at 6 (discussing why historical institutions made the creation of a common market easier than political integration in India).

53. See Kim R. Holmes and Matthew Spalding, *Why Does Economic Freedom Matter?*, THE HERITAGE FOUND. (Apr. 7, 2011), <http://www.heritage.org/research/reports/2011/04/why-does-economic-freedom-matter>; see also Karen A. Campbell, *The Economic Role of Government: Focus on Stability, Not Spending*, THE HERITAGE FOUND. (Sept. 17, 2009), <http://www.heritage.org/research/reports/2009/09/the-economic-role-of-government-focus-on-stability-not-spending>.

54. Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. OF L., ECON. & ORG. 1, 1 (1995), http://web.stanford.edu/~jrodden/oslo/weingast_mpf.pdf.

55. *Id.*

56. See generally WATTS, *supra* note 27, at 99 (discussing constitutions and state succession); see also Kincaid, *supra* note 29, at 422 (detailing that constitutions determine the distribution of powers, in particular relating to trade, commerce, tax, foreign affairs, natural resources, etc.).

57. See Kincaid, *supra* note 29, at 422 (listing that the constitutions of Russia, India, and Nigeria have these explicit lists).

cooperation and coordination across sectors.⁵⁸

The importance of institutional design should not be overstated, however. A survey of conditions for successful federal arrangements notes that institutional design matters, but is not sufficient alone and does not guarantee success or failure.⁵⁹ It is important to recall that whether a political structure is properly classified as federal “depends not so much on the arrangement of the institutions within it as it does on the manner in which those institutions are employed . . . the essence of federalism lies not in the institutional or constitutional structure but in the society itself.”⁶⁰

b. Political Will and Capacity

Along with institutional design, a federal constitution must be supported by political will and requires capacity to implement it.⁶¹ It is true that divergent political outlooks and interests are typical of all federations. Indeed, it is often because of these divergent interests that federalism is seen as a solution.⁶² However, popular buy-in and establishing the will of the sub-state units ensures legitimacy of government policy.⁶³ In short, popular buy-in and collective political will to make the new federal system work are crucial elements of a federal arrangement in post-conflict societies.⁶⁴

Alongside popular buy-in, the capacity of the state can help or hurt the implementation of the Constitution. Capacity refers to a base level of infrastructure that allows sub-state units to exercise their

58. See Kincaid, *supra* note 29, at 432 (explaining that most constitutions forget this element, and only focus on judicial dispute resolution).

59. Richard Simeon & Daniel-Patrick Conway, *Federalism and the Management of Conflict in Multinational Societies*, in MULTINATIONAL DEMOCRACIES 338, 361 (Alain-G. Gangon & James Tully eds., 2001).

60. William S. Livingston, *A Note on the Nature of Federalism*, 67 POL. SCI. Q. 81, 84 (1952).

61. See Kincaid, *supra* note 29, at 444 (detailing that the attitude and behaviors of political actors must support the constitution to facilitate success).

62. See, e.g., Watts, *supra* note 27, at 110 (finding that political divisions often lead to the formation of federations).

63. See Kincaid, *supra* note 29, at 444 (noting that legitimacy also requires transparency, as well as public participation through all the stages of the constitution drafting process).

64. Salisbury, *supra* note 1, at 7.

new-found powers.⁶⁵ If the necessary institutions and personnel exist, sufficient financial resources - either raised locally or transferred from the central state - are required to maintain the institution and carry out policy.⁶⁶

III. ANALYSIS

This section will detail the lessons learned about drafting a constitution for the transition to federalism through a case study on Yemen. The international community's approach, as well as the Yemeni approach, was ad hoc in nature. As discussed above, states should follow a few general steps when implementing federalism, such as creating institutional design and ensuring buy-in from all relevant stakeholders, but there is no consensus on the importance, method, or hierarchy of these steps.⁶⁷

In theory, Yemen had two blueprints for its constitution - the NDC Outcome Document and the CDC's Draft Constitution. However, as explained below, both proved to be insufficient and in fact were the main drivers of the current conflict. This section will discuss Yemen's specific constitutional blueprints in the form of the NDC Outcome Document and the CDC's Draft Constitution. It will further discuss how both were inadequate to guide Yemen into implementing a successful federal structure, and how they could have been improved. States should use this example of an inadequate constitution when crafting their own state specific constitution in the transition to a federal government.

A. YEMEN'S NDC OUTCOME DOCUMENT WAS AN INADEQUATE BLUEPRINT FOR THE CREATION OF A FEDERAL CONSTITUTION

Yemen created a blueprint for the creation of their new constitution and to transition to a federalist state through the

65. Jan Erk, *Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution*, 24 REGIONAL & FED. STUD. 535, 539 (2014), <http://rsa.tandfonline.com/doi/pdf/10.1080/13597566.2014.971769>.

66. *Federalism and Peace Mediation*, PEACE MEDIATION ESSENTIALS (Jan. 2009), http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PME_Federalism.pdf.

67. See *supra* Section A(2).

production of the NDC Outcome Document.⁶⁸ However, the Outcome Document was inadequate in achieving the goal of implementing federalism because it lacked the most basic outline of how the federal state would be built and the contents of the constitution.⁶⁹ Specifically, the Outcome Document's recommendations as to the division of regions and the implementation of financial, administrative, and political institutions were inadequate and led to conflict.⁷⁰ Moreover, the Outcome Document was formed with very little preparation, which resulted in an attempt to create a draft constitution and impose it before a referendum could be held.⁷¹

1. Division of Regions

As mentioned above, one of the most important elements of a state's constitutional blueprint is the division of regions.⁷² Yemen's NDC Outcome Document did not include this element in its recommendations.⁷³ Instead, the NDC committee responsible for this decision, under the sponsorship of President Hadi, made the final decision on the number of regions that Yemen would be split into.⁷⁴ They determined that Yemen would be split into six federal

68. See *Monthly Forecast*, *supra* note 8.

69. See Gluck, *supra* note 15, at 50; see also Office of the Special Advisor to the Secretary-General on Yemen, *supra* note 15, at 13; Yara Bayoumy, *Yemen's federal plan a bold idea, but hurdles remain*, REUTERS (Feb. 23, 2014), <http://www.reuters.com/article/us-yemen-politics-analysis-idUSBREA1M05720140223>.

70. See Office of the Special Advisor to the Secretary-General on Yemen, *supra* note 15, at 13 (discussing that the Document did not provide sufficient guidance on the actual structures of the federal state, as was required to draft a new constitution).

71. See Farea Al-Muslimi, *Why Yemen's Political Transition Failed*, CARNEGIE MIDDLE EAST CTR. (Apr. 16, 2015), <http://carnegie-mec.org/diwan/59803>.

72. See Tarr, *supra* note 32, at 8.

73. See Reidar Visser, *The Federalism Dimension in Yemen's Draft Constitution*, IRAQ AND GULF ANALYSIS (Jan. 20, 2015), <https://gulfanalysis.wordpress.com/2015/01/20/the-federalism-dimension-in-yemens-draft-constitution/>.

74. See generally Schmitz, *supra* note 9; see also Policy Analysis Unit, *supra* note 11.

regions.⁷⁵ When making this decision, the committee ignored many of the key interests expressed by other parties to the NDC.⁷⁶ Although the regions had been discussed in committees throughout the NDC process, there was no political consensus on the number of regions or on how the boundaries should be decided.⁷⁷ Thus, the decision to split Yemen into six sections was highly unpopular within Yemen, particularly among the Houthis and the parties in South Yemen.⁷⁸ The Houthis and southern Yemenis believed this decision did not implement the agreed upon reforms from the NDC.⁷⁹ This led to an increase in tension between the political parties locally and nationally, resulting in a number of social and political consequences that eventually fueled the current conflict.⁸⁰ It is therefore a requirement in any constitutional blueprint to have full consensus on the issue of the division of regions - otherwise, it is likely that conflict will arise by those parties who are dissatisfied with the decision.

75. See Bayoumy, *supra* note 69.

76. See Salisbury, *supra* note 1, at 3; see also Schmitz, *supra* note 9, at 2 (explaining that the committee focused on the elite and their economic means rather than the needs of local groups, which led to a scarcity of basic goods and services).

77. See Schmitz, *supra* note 9; *Outcome of Yemen's National Dialogue Conference*, *supra* note 11; Fernando Carvajal, *What Happened to Yemen?*, FAIR OBSERVER (Mar. 4, 2016), http://www.fairobserver.com/region/middle_east_north_africa/what-happened-to-yemen-32320/ (contending that despite the fact that establishing a six-region federal state in Yemen was discussed in committees, the plan was forged behind closed doors sponsored by President Hadi and therefore intensified tensions among political parties).

78. See Ali Saif Hassan, *Yemen*, 25 ACCORD (LEGITIMACY AND PEACE PROCESSES: FROM COERCION TO CONSENT) 50 (2014), <http://www.c-r.org/accord/legitimacy-and-peace-processes/yemen-national-dialogue-conference-managing-peaceful-change.>; GINNY HILL, *YEMEN ENDURES: CIVIL WAR, SAUDI ADVENTURISM AND THE FUTURE OF ARABIA* 264 (2014).

79. See Salisbury, *YEMEN: STEMMING THE RISE OF A CHAOS STATE* 19 (Chatham House ed., 2016), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-05-25-yemen-stemming-rise-of-chaos-state-salisbury.pdf> (revealing that the president came under fire by Southerners and Houthis for pushing a plan to split the country into federal regions of his own division).

80. See generally Rafat Al-Akhali, *THE CHALLENGE OF FEDERALISM IN YEMEN* 2 (Atlantic Council ed., 2014), http://www.atlanticcouncil.org/images/publications/The_Challenge_of_Federalism_in_Yemen.pdf; Carvajal, *supra* note 77.

Yemen is a perfect example of how a lack of consensus over this important issue can lead to conflict. The NDC's division of regions left many Yemenis in regions that lacked resources, and basic services such as hospitals, water, and electricity.⁸¹ This led to violence between local communities over the sparse resources available to them, particularly those situated outside of the major urban areas.⁸² This lack of resources further displays a lack of security or justice mechanisms.⁸³ Thus, these local conflicts have evolved into entrenched violence that fuels the larger conflict on the national level.⁸⁴

The most detrimental effect of Hadi's decision on dividing the regions pertains to the Houthis and Al-Hiraak, the group that represents South Yemen. Specifically, the Houthis were not given any access to the major political and urban centers such as Sa'ada or Aden, access to oil fields, or to the valuable seaports.⁸⁵ The dissatisfaction with the division of the regions, coupled with the dissatisfaction that the decision was made solely by President Hadi, led the Houthi leadership to claim the new transitional government was illegitimate.⁸⁶ This fueled the Houthi coup and takeover of Yemen.⁸⁷ Indeed, one of the driving factors for the Houthi's was the push to redraw the federal regions to allow them access to the

81. See Salisbury, *supra* note 1, at 13.

82. See *id.* at 5.

83. See *id.*

84. See generally *id.*

85. See Thania Paffenholz & Nick Ross, *Inclusive Political Settlements: New Insights from Yemen's National Dialogue*, 6 PRISM 205 (2016), <https://www.inclusivesecurity.org/publication/inclusive-political-settlements-new-insights-from-yemens-national-dialogue/>.

86. See Salisbury, *supra* note 1, at 15 (identifying the moment when the Houthis began to contest the way the decision was made to divide the six regions as the agreement to see Sa'dah land-locked and cut off from resources or the coastline).

87. See *id.* at 18; see also Eleonora Ardemagni, *The Yemeni Conflict. Genealogy, Game-Changers and Regional Implications*, ITALIAN INST. FOR INT'L POL. STUD., no. 294, Apr. 2016, at 1, 7, <http://www.ispionline.it/en/publicazione/yemeni-conflict-genealogy-game-changers-and-regional-implications-14950>; see also BERTELSMANN STIFTUNG, BTI 2016 - YEMEN COUNTRY REPORT 34 (2016), https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Yemen.pdf; Paffenholz & Ross, *supra* note 86, at 201-02.

valuable natural resources and ports.⁸⁸ Al-Hiraak, on the other hand, saw the unilateral decision by Hadi as further encouragement for secession, as it increased their fears of having other decisions imposed on them.⁸⁹ One of the reasons Al-Hiraak became involved, albeit limitedly, in the NDC process was the belief that it would bring a positive change to their situation.⁹⁰ Because this major decision was made without their full consensus, the failure to consider the Southern opinion on the division of regions was seen as a failure of the NDC to implement measures to improve the situation.⁹¹

Therefore, drafters of a constitutional blueprint, when dealing with the division of regions, can learn from Yemen and ensure that: there is complete consensus on the number and borders of the regions; the regions are equal, or as close to equal, in regard to access to resources and major urban hubs; and that the interests of each party are considered and respected. Although there is no guarantee that the new division will not lead to conflict, following these basic guidelines when drafting this section of the constitutional blueprint may increase the likelihood of success.

2. Implementing Financial, Administrative, and Political Institutions

Although the NDC specified in their blueprint the number of regions that Yemen would be split into, the NDC Outcome Document failed to outline the infrastructure of the regions - specifically financial, administrative, and political institutions, the nature of the relationship between the government and these regions, and the division of power and authority within these regions.⁹² In a constitutional blueprint, it is essential to lay out how these institutions will function and the levels of power within and between them. When a constitution does not provide for stable institutions,

88. See Patryk Pawlak, *Yemen: at a Political Crossroads*, EUROPEAN PARLIAMENT RES. SERV. 2 (Apr. 2015), [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/554178/EPRS_ATA\(2015\)554178_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/554178/EPRS_ATA(2015)554178_EN.pdf).

89. See Gaston, *supra* note 6, at 6.

90. See BERTELSMANN STIFTUNG, *supra* note 88, at 34 (revealing how Hirak's refusal to participate in the NDC in 2013 brought to light the extent of anti-northern feelings).

91. See *id.*

92. See Bayoumy, *supra* note 69; see generally Gaston, *supra* note 6, at 4.

often the public becomes frustrated, which leads to polarization of groups, as well as increased violence and distrust in the newly formed government.⁹³ The NDC merely granted each region local autonomy and control without settled levels of government or commitment.⁹⁴ Specifically, the NDC did not provide guidance for implementing the proposed institutions, such as institutions for state authorities, basic services, or the economy.⁹⁵

In general, when a newly implemented federal system does not lead to political reforms that provide basic resources or strong institutions, public support for that federal system becomes weak.⁹⁶ Therefore, a constitutional blueprint that lays out how these institutions will function and their balance of power is essential. Without a strong constitution that guides these institutions, the new government will fail in implementing whatever benefits that should stem from these institutions. This then leads to criticism and lack of trust towards the government.⁹⁷ The lack of basic services provided by the NDC's transitional government, such as security, healthcare, education, etc., led to public distrust of the transitional government.⁹⁸ This allowed groups such as the Houthis and al Qaeda to gain more support and therefore take more territory.⁹⁹ The Houthis obtained political support by providing security and justice to areas where the transitional government failed to implement them.¹⁰⁰ Some citizens within those regions claimed that the Houthis worked with the people where the government did not and solved issues most pressing to the

93. See Pawlak, *supra* note 89, at 1; see also Gaston, *supra* note 6, at 8-9 (explaining how the Yemeni population did not have a strong level of confidence in its new government).

94. See *id.*; see also Al-Akhali, *supra* note 80, at 2.

95. Bayoumy, *supra* note 69.

96. See generally Salisbury, *supra* note 1, at 18-19.

97. See Gaston, *supra* note 6, at 8-9.

98. Salisbury, *supra* note 1, at ii; see *Bombing Businesses: Saudi Coalition Airstrikes on Yemen's Civilian Economic Structures*, HUM. RTS. WATCH 1 (July 10, 2016), <https://www.hrw.org/report/2016/07/10/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures#page> (detailing that the lack of basic services was due to coalition bombing of hospitals, commercial enterprises, schools, and power plants).

99. See *The Huthis: From Saada to Sanaa*, INT'L CRISIS GROUP, June 10, 2014, at 5-6, <https://d2071andvip0wj.cloudfront.net/the-huthis-from-saada-to-sanaa.pdf>.

100. See *id.* at 6.

population in those regions, such as revenge killings and security measures.¹⁰¹

In Yemen, the NDC essentially promised the public and political parties that their recommendations for the new federal system would benefit them; however, this clearly was not the case.¹⁰² In fact, the NDC failed to bring any actual structural improvements to the local governments through their recommendations and left some within Yemen in a worse situation than they were in before the NDC was held.¹⁰³ For example, many Yemenis were left with a lack of electricity, no viable economy, no security, and no rule of law.¹⁰⁴ Comparing what the NDC promised Yemen to the reality of what was implemented has further fueled the Houthis and the overall conflict as well as increased the distrust of the transitional government.¹⁰⁵

In addition to the NDC failing to outline how the regions within Yemen would function, the NDC Outcome Document failed to resolve economic considerations.¹⁰⁶ The Document did not outline the management of natural resources or the allocation of revenue.¹⁰⁷ This was a major failure as it was the lack of economic and resource equality that fueled the Houthi uprising.¹⁰⁸

Although there is no blueprint on how to ensure that the above institutions are implemented correctly and benefit the population, drafters of a federal constitution should learn from Yemen and include, in detail, ways to implement functional political, administrative, and financial institutions. If the drafters fail to do so,

101. *See id.* at 6 (recounting a statement from a tribesman from Jawf explaining that the Houthis received mass political support because they provided security and justice in areas where the state was unable to do the same).

102. Salisbury, *supra* note 1, at 21 (highlighting how the Yemeni population during the transition were given promises for the future instead of solutions for current issues).

103. *See, e.g.,* Gaston, *supra* note 6, at 8-9.

104. *See id.* at 8.

105. *See generally* Salisbury, *supra* note 1, at 21.

106. Al-Akhali, *supra* note 80, at 3.

107. *See id.*; *see also* *Obstacles to a Federalist System in Yemen*, STRATFOR, (Feb. 5, 2014, 4:47 PM), <https://www.stratfor.com/analysis/obstacles-federalist-system-yemen>.

108. Salisbury, *supra* note 1, at 18.

or fail to establish how to make these institutions functional, consequences could include a rise in conflict or distrust in the government, both of which could lead to a failure of the newly implemented federal system.

3. *Excessive Recommendations*

Even if the NDC Outcome Document had been an adequate constitutional blueprint to successfully create a federal constitution, the sheer number of recommendations would prohibit it from being effective. The NDC Outcome Document contained 1800 recommendations, all of which the CDC were expected to include in the draft constitution.¹⁰⁹ The amount of recommendations may lead one to believe that the NDC was a brainstorming session instead of a true national dialogue. This is not how a state should craft a constitution for the transition to federalism.

If a state is going to have a process similar to Yemen's NDC, the number of recommendations given should be limited in order for any constitution to be effective and useful. Having too many recommendations that all must be included in a draft constitution is an impossible feat. Moreover, it may have been beneficial for Yemen to include the CDC process within the NDC, so that the recommendations could be narrowed and tailored to the constitution drafting process.

B. YEMEN'S DRAFT CONSTITUTION WAS ALSO AN INADEQUATE BLUEPRINT

The CDC's Draft Constitution was produced from the NDC Outcome Document and therefore followed the NDC Outcome Document's inadequacies as a federal blueprint. Not only did the CDC have the difficult task of incorporating numerous recommendations from the NDC, but the recommendations were often contradictory, causing a greater lack of consensus.¹¹⁰ Because of the numerous recommendations from the NDC, the Draft

109. Gaston, *supra* note 6, at 4, 10.

110. See Salisbury, *supra* note 1, at 19 (explaining how the 'Consensus Committee,' tasked with harmonizing the proposals, was unable to ensure this happened due to the eventual four-month overrun).

Constitution is seventy pages.¹¹¹ To compare, Lebanon's Constitution is twenty-three pages, Australia's forty-four, UAE's thirty-eight, and Iraq's forty-three.¹¹² Further, this expansive document and lack of guidance from the NDC led to additional gaps in the constitutional blueprint on important issues central to implementing federalism, such as the structure of political and economic institutions, division of natural resources, and regional authorities, to name a few. Although some sections appear to be well-developed, such as the section on social and cultural foundations, and the section on rights and freedoms, the overwhelming majority are vague and lack detail.¹¹³ This is particularly a problem for sections that should include greater detail to guide the new government, such as the division of natural resources and the structure of regional authorities.¹¹⁴

A constitution, particularly for a post-conflict state looking to transition to a new form of government, should ensure that it is concise, detail-oriented, and provides guidance for all sectors of the government. Yemen's Constitution found itself with two major faults—it lacked enough detail in some sections and had too much information in others.

1. The Critical Sections on the Political and Economic Foundation did not Include Enough Detail

Yemen's Constitution provided a vague, detail-limited blueprint for its political foundation. For example, the Constitution gave power to the people to choose their own political parties, but no description

111. THE CONSTITUTION Jan. 15, 2015 [Yemen], http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015-_english.pdf.

112. See CONSTITUTION 1926, rev. 2004, (Leb.), https://www.constituteproject.org/constitution/Lebanon_2004.pdf?lang=en; *Australian Constitution* rev. 2010, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution; CONSTITUTION, 1971, rev. 2004, (U.A.E.), https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf; Article 3, Section 2, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005, https://iraqmission.us/wp-content/uploads/2014/11/iraqi_constitution.pdf.

113. See generally THE CONSTITUTION Jan. 15, 2015, art. 43-101 [Yemen], http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015-_english.pdf.

114. See *id.* ch. III, VIII.

of how to do so.¹¹⁵ Further, the section on political foundation contained very vague language; for instance, it notes that the “political system shall be based on separation of powers,” but did not discuss what that separation is.¹¹⁶

Similarly, the section on economic foundation is vague and confusing. For example, Article 15 provides that Yemen’s economy is a “free social economy,” as well as details the foundation on which it is based, but it does not explain or give details on how the economy will work.¹¹⁷ Equally obscure, Article 18 explains that each region will have a role in regional economic development, but not what that role entails.¹¹⁸ To have been an effective blueprint for political and economic foundations, Yemen’s Constitution should have been more specific.

2. The Critical Sections on Division of Powers and Regional Authorities Were Detailed, but Lacked Guidance on the Cooperation of Regional and Central Governments

In contrast to the Constitution’s limited guidance on the political and economic foundations of Yemen, the articles on the regional authorities are extensive.¹¹⁹ Many sections provide the specific roles, responsibilities, authorities, and objectives of the various levels of government.¹²⁰ Unfortunately, even with the extensive amount of information, the Constitution fails to provide how the levels of

115. *Id.* art. 6.

116. *Id.* art. 8.

117. *Id.* art. 15.

118. *Id.* art. 18.

119. Visser, *supra* note 73 (noting that there are almost too many concepts included in the Constitution for it to function).

120. *See generally* THE CONSTITUTION Jan. 15, 2015, art. 139-42, 180, 183, 185-86, 205, 238, 244-45 [Yemen], http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015_english.pdf (For example, the House of Representatives shall assume the following functions: (1) Proposal and discussion of federal Bills and initial adoption of such Bills; (2) Discussion and adoption of the federal public budget; (3) Discussion and adoption of closing accounts of the State; (4) Proposal of constitutional amendments; (5) Approval of borrowing; (6) Approval of international agreements and treaties; (7) Oversight over the performance of the federal executive authority and independent institutions as set forth in the Constitution; (8) Any other functions pursuant to the provisions of this Constitution or a federal law.).

authority relate to the federal government or the division of power.¹²¹ The Constitution includes many levels of government, but with no explanation of how these levels relate to one another. Therefore, the Constitution is rendered almost useless.

As discussed above, most constitutions include an exclusive list of powers for both the central and regional governments.¹²² However, the CDC's Draft Constitution discusses the division of powers in various articles that are scattered throughout the Constitution, and not in a cohesive manner.¹²³ Although in theory having separate and specific articles detailing each level of government's explicit powers would be beneficial, the Draft Constitution lists the powers in these articles but fails to connect them or explain away any contradictions between the articles.¹²⁴ For instance, regarding the powers of the central and regional governments over public services and natural resources, there are contradictions over who has power over these resources and the Constitution provides no guidelines for resolving this contradiction.¹²⁵ It seems that the Constitution implies that future legislation will be needed to resolve these issues.¹²⁶

It is absolutely critical for a state to have a functional and effective constitution before embarking on the implementation of a federalist structure. As seen in Yemen, when a state does not have a thorough constitution, critical elements of federalism that must be addressed fall through the cracks and inevitably lead to a failure of the state and its institutions.

121. See AL-AKHALI, *supra* note 80, at 2.

122. See *infra* Section II.C.1.i; Visser, *supra* note 73 (clarifying that the residual powers are applied by implication).

123. Visser, *supra* note 73 (finding that there are six main sections where the division of powers are discussed).

124. *Id.*; THE CONSTITUTION Jan. 15, 2015, ch. III, V [Yemen], http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015-_english.pdf (listing articles on the enumerated powers of the central and regional governments, on the powers of subunits, on shared areas of governments, and on the other regions, particularly in the south).

125. THE CONSTITUTION Jan. 15, 2015, ch. VIII [Yemen], http://d6.constitutionnet.org/sites/default/files/yemen-draft_constitution-15jan2015-_english.pdf; Visser, *supra* note 73.

126. Visser, *supra* note 73.

IV. CONCLUSION

Federalism is a popular idea; it is a method that is going to reappear again and again, so understanding how an effective implementation should proceed is critical. The nature of conflict and structural international policy favoring territorial integrity have limited the options for experts and practitioners, leaving federalism as one of the few policy options to end internal conflicts and civil wars. War will continue and the international structural biases remain; thus, federalism will continue to be advocated for.

The lessons learned above regarding federal constitutions should be read and understood as a guide to prevent future conflicts, as in Yemen, from occurring during the transition to a federal government. The various elements of federal constitutions must be understood before a transition is even considered, particularly to ensure that the state has institutional design, political will, and public buy-in. Regarding institutional design, a specific and detailed blueprint must be drafted to guide the state through the transition. This blueprint must be agreed upon through full consensus.

Federalism does not work for every state, regardless of its perceived efficiency and ability to end conflicts. Choosing federalism for Yemen helped lead to its current conflict, one that has killed thousands of people and has left Yemen with destroyed infrastructure. There is a new wave of support for the transition to federalism that is occurring based on the lessons learned discussed above. States should look to these lessons learned, and the current status of Yemen, to aid their potential transition. Federalism is a complex entity, and must be treated as such.

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