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Yemen's National Dialogue Conference

Christina Murray
October 2013

On 18 March 2013, the second anniversary of a vicious crackdown on protesters in Yemen's capital, Sana'a, the Yemeni National Dialogue Conference (NDC) was convened by President Hadi. Among the participants, alongside representatives of the formal political parties, were representatives of the South and the Huthi, two groups that been in conflict with the central government for decades, as well as youth, women and representatives of civil society. In the ensuing plenary meetings, which were broadcast on national television, many speeches contained fiery allegations of historical wrongs and ongoing oppression. Remarkably, these presentations were not disrupted and representatives of diametrically opposed groupings, some with violent histories, listened relatively quietly to one another, perhaps for the first time in such a setting. Public voicing of grievances in a formal setting is not the only thing that is different about the NDC for Yemenis. Although Yemen has a long tradition of dialogue, a meeting with almost 30% of its membership women and about 25% youth (people under the age of 40) is a clear break from the past.¹

The NDC is critical part of the arrangements for Yemen's transition and to have avoided civil war and reached this stage is an achievement on its own. Another achievement is that the NDC has continued to function since March. Its composition is imperfect, it has faced frequent boycotts, protests, and delays, attendance has varied, discussion has not always been cool, and its outcomes remain uncertain but, at the time of writing in late October, its third and final Plenary is underway and four of nine Working Groups have agreed on their final reports. This in itself justifies the positive comments of Jamal Benomar, Special Adviser to the United Nations Secretary-General on Yemen, in his September report to the Security Council. Then he said:

“The Dialogue has made extraordinary progress since it was launched on 18 March. The 565 delegates, representing a wide cross-section of Yemeni society, have over the past six months, engaged in constructive, open and substantive deliberations on the key challenges facing the country. The focus on principal and controversial issues relevant to Yemen’s governance have laid the foundation for a new social contract, as well as a legal framework based on dignity, equality, human rights and the rule of law. In fact, the work of the National Dialogue is nearly 90 per cent completed. Six of the nine Working Groups have completed their work.”²

Many local and foreign commentators take a very different view. The NDC has been described as self-indulgent, a process limited to the hotel in which it is taking place, and out of touch with ordinary

¹See Atiaf Zaid Alwazir “The Myth of the ‘Yemen Model’” *Huff Post World* 29 May 2013 http://www.huffingtonpost.com/atiaf-zaid-alwazir/the-myth-of-the-yemen-mod_b_3352795.html; Robert D. Burrowes “Prelude to Unification: The Yemen Arab Republic, 1962-1990” (1991) 23 *Int. J. Middle East Stud* 483 at 493 for a description of the national dialogue of 1980; and April Longley Alley “Yemen’s Multiple Crises” (2010) 21 *Journal of Democracy* 72 for discussion of attempts to set up a dialogue in the 2000s. For the participation of youth in the NDC see Atiaf Zaid Alwazir *Yemen’s Independent Youth and Their Role in the National Dialogue Conference: Triggering a Change in Political Culture* SWP Comments (August 2013) German Institute for International and Security Affairs.

²Statement by Mr. Jamal Benomar Special Adviser to the Secretary-General on Yemen, 7037th meeting of the Security Council 27 September 2013 New York para 3.

Yemenis;³ it has been accused of paralyzing government,⁴ and the involvement of the international community has raised suspicion in some quarters.⁵ When asked informally what they expect of the NDC, many locals are skeptical – they have seen too little change since President Saleh left power. One of the greatest challenges to the NDC is that activists from the Southern Peaceful Movement (the Hiraak) have not been prepared to participate and the Hiraak is instead represented by moderates with limited following in the South. Appropriately, the bulk of Benomar's September presentation draws attention to a formidable set of challenges facing Yemen generally and the transition process of which the NDC is a part. The list includes desperate poverty; the security threat posed by Al-Qaeda in the Arab Peninsula (based in the South), activity by armed groups in the North, the frequent sabotage of infrastructure and, in relation to the NDC, the difficulty of reaching agreement on the most fundamental issues in the face of the tardy implementation of agreed confidence-building mechanisms by the government of national unity. Indeed, as Benomar emphasized, the NDC itself cannot resolve all the problems facing Yemen.

Thus, the transition process is at a difficult juncture.⁶ The conclusion of the NDC, scheduled for mid-September, has been delayed to provide more time for the hardest decisions about the past (transitional justice) and the future structure of the state to be made. This note cannot predict the outcomes and it is premature to assess the success of the process. Instead, following a brief background to the conflict in Yemen, it explains the process up to now, including the settlement brokered by the Gulf Cooperation Council in 2011 and its elaboration in the Agreement on the Implementation Mechanism for the Transition Process,⁷ describes the NDC process and indicates some of the issues that remain to be resolved.

The background

Yemen is frequently discussed together with the other Arab Spring countries and, certainly, the massive protests across the country that led to President Saleh's November 2011 agreement to step down were inspired by those in Tunisia and Egypt and, particularly, the ouster of Egypt's President Mubarak.⁸ But, many of the problems of the Saleh regime were different from those in other parts of the Arab world.⁹ In addition to growing resentment about the centralization of power, rampant corruption and deepening poverty (Yemen ranks 143 out of 186 countries on the UNDP Human Development Index),¹⁰ the Saleh regime confronted a strengthening secession movement in the South and rebellion by the Huthi in the highlands of north-western Yemen.

³See, for example, Fatima Abo Alasrar "Yemen's Fitful Dialogue" The Middle East Channel 6 September 2013 http://mideast.foreignpolicy.com/posts/2013/09/06/yemen_s_fitful_dialogue.

⁴Farea al-Muslimi "Yemen's National Dialogue Paralyzes Government" *Al-Monitor* 10 July 2013 <http://www.al-monitor.com/pulse/originals/2013/07/yemen-national-dialogue-conference-problems.html>.

⁵See, for example, Atiaf Zaid Alwazir "The Myth of the 'Yemen Model'" note 1 above.

⁶See, for example, "Yemen stands at dangerous crossroads" PressTV 11 October 2013 <http://www.presstv.ir/detail/2013/10/10/328649/yemen-stands-at-dangerous-crossroads/>.

⁷"Agreement on the implementation mechanism for the transition process in Yemen in accordance with the initiative of the Gulf Cooperation Council (GCC)" (Implementation Agreement) 21 November 2011. http://www.mpil.de/files/pdf1/agreement_on_the_implementation_mechanism_for_the_transition_process.pdf.

⁸International Crisis Group "Popular protest in North Africa and the Middle East (II): Yemen between Reform and Revolution" Middle East/North Africa Report N°102, 10 March 2011, p. i.

⁹See, for example, Sarah Phillips *Yemen and the Politics of Permanent Crisis* (International Institute for Strategic Studies, London: 2011) and Thomas Juneau "Yemen's Prospects for State Failure: Implications and Remedies" (2010) 10 *Middle East Policy* 134.

¹⁰United Nations Development Programme *Human Development Report 2013 The Rise of the South Human progress in a Diverse World* (2013) p 143 <http://hdr.undp.org/en/reports/global/hdr2013/> and see UN Office for the Coordination of Humanitarian Affairs (OCHA) *Humanitarian Bulletin Yemen* No 19, 5 Sept –5 Oct 2013 <http://www.unocha.org/where-we-work/yemen> reporting that 43% of Yemenis suffer from food insecurity.

Yemen saw a growing protest movement in the South from 2007.¹¹ By the end of that year, “tens of thousands of protesters gathered daily in several Yemeni cities denouncing the government ... and calling for an end to corruption and regional discrimination inside the country”.¹² A principal cause of the protests was unresolved grievances linked to the unification of the Yemen Arab Republic – the North – and the People's Democratic Republic of Yemen – the South – in 1990. It was not ever a happy union and led to a bloody civil war in 1994. The central government won, beating the secessionists in the South, but, as the International Crisis Group has commented, “this hardly closed the chapter. In the wake of the conflict, two profoundly different narratives took shape. Under one version, the war laid to rest the notion of separation and solidified national unity. According to the other, the war laid to rest the notion of unity and ushered in a period of Northern occupation of the South.”¹³ These two narratives have been repeated multiple times in the NDC and by the southern activist who refuse to participate. The position of many southerners is most starkly reflected in arguments that the Union of 1990 itself was not ever legal under international law. Whatever the legality of the union, the central government did little to win southern support after the 1994 war. Among other things, property of southerners was confiscated; civil servants and members of the military lost their positions; and it is argued, the wealth of the South was steadily siphoned off by the North. Southerners claim with some justification that their standard of living, including educational standards, have deteriorated badly since union.

As in the South, the conflict in the North has a long history and multiple causes linked to the changing political influence of leaders from the northern province of Saada, the stronghold of the Huthis, the region's marginalization and underdevelopment, and, increasingly, the mobilization of religious differences as the Huthis fear “the dilution of [their] ancient Zaydi sect and culture”.¹⁴ The 2004 – 2007 war between Huthi rebels and the Sana'a government with high casualties, the destruction of homes, mosques and schools, and the displacement of tens of thousands of people, deepened grievances but also left the central government with limited authority over the region.¹⁵ Huthis now control the province of Saada and some districts in neighbouring provinces.

Then, in addition, as if inviting discontented Yemenis to unite against the regime, at the end of 2010 the ruling party proposed removing presidential term limits, in effect to permit Saleh to become president for life.¹⁶ With lessons learned from Egypt and Tunisia, protests rapidly spread throughout the country and drew different groups together – the youth on the streets, southern activists, Huthis and formal opposition parties coordinated their activities. The violence of the response by security forces simply intensified the resolve of those in the streets and squares.

The 18 March 2011 protests and the transition agreement

On 18 March 2011 security forces killed 52 protesters and wounded many more in Sana'a.¹⁷ This proved a tipping point. Shortly after, a number of senior military commanders defected to the

¹¹The population of Yemen is estimated to be about 25 400 000 <https://www.cia.gov/library/publications/the-world-factbook/geos/ym.html>. Estimates of the population of the South vary between 5 and 6 million.

¹²Stephen Day “Updating Yemeni National Unity: Could Lingering Regional Divisions Bring down the Regime?” (2008) 62 *Middle East Journal* 417 p. 8.

¹³International Crisis Group “Breaking Point? Yemen’s Southern Question” Middle East Report N°114, 20 October 2011 p. i.

¹⁴Khaled Fattah “Yemen’s spaces of disorder” *World Politics Review* 8 August 2012, 13 at 15.

¹⁵International Crisis Group “Yemen: Defusing the Saada Time Bomb” Middle East Report N°86, 27 May 2009.

¹⁶International Crisis Group “Popular protest in North Africa and the Middle East” (note 8) p. 1.

¹⁷For a succinct account of the lead up to President Saleh's departure see Thobias Thiel *Yemen's Arab Spring: From Youth Revolution to Fragile Political Transition* (no date) http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR011/FINAL_LSE_IDEAS__YemensArabSpring_Thiel.pdf.

opposition and the Gulf Cooperation Council (GCC) intervened, proposing to President Saleh that he should resign and hand power over to his deputy, Abd Rabbu Mansour Hadi, in return for domestic immunity. Under the GCC proposal, on Saleh's resignation, the formal (parliamentary) opposition would form a government of national unity (GNU) with positions shared equally between it and the ruling General People's Congress (GPC), and presidential elections would take place within two months, with Hadi as the agreed, unopposed candidate.¹⁸ Despite apparently agreeing to the deal on a number of occasions, Saleh did not sign until 23 November. By this point, Security Council Resolution 2014 had stipulated that the political transition required the participation of all groups, including those not party to the GCC initiative,¹⁹ and a further agreement, the “Agreement on the Implementation Mechanism for the Transition Process in Yemen”, fleshing out the GCC proposal with more detail on the political transition, had been prepared. The Implementation Agreement was signed by Vice-President Hadi for the GPC (exercising powers delegated to him by President Saleh) and by the parliamentary opposition.

The Implementation Agreement sets up a two-phase transition. The first phase, from the signature of the Implementation Agreement itself to the inauguration of the President after presidential elections (within 90 days), ended on 27 February 2012 with the inauguration of President Hadi. During this period, as the Implementation Agreement required, a GNU and a Committee on Military Affairs for Achieving Security and Stability were established. Importantly, the Implementation Agreement stipulated that the GNU was to operate by consensus. If this was not possible, Vice-President Hadi was to take the final decision. The second phase is intended to be two years, to end with general elections held under a new constitution. The arrangements for government established in the first phase continue, now with Hadi as president, as do the government's obligations to attend to security, good governance and so on. But the main objectives of the second phase are the six-month NDC, drafting a new constitution for approval in a referendum, and elections under that constitution.

Both the GCC initiative and the Implementation Agreement were deals between elites concluded in the absence of the youth in the streets who had precipitated the transfer of power and the Huthis and southerners who aligned with them. Unsurprisingly, the political arrangements for the transition that they established also involved only the former ruling party and the parliamentary opposition. The Implementation Agreement's mechanism for redressing this is the NDC. The Agreement states “The President-elect and the government of national unity shall convene a comprehensive Conference for National Dialogue for all forces and political actors, including youth, the Southern Movement, the Huthis, other political parties, civil society representatives and women. Women must be represented in all participating groups.”²⁰ As I suggest above, to some extent the NDC meets the expectation of the Agreement.

Setting up the National Dialogue Conference

The Technical Committee to Prepare for the Comprehensive National Dialogue Conference was established by Decree in July 2012.²¹ Despite its designation as a technical body, it confronted a number of difficult political questions: the membership of the NDC and, closely linked to this, decision-making procedures, its format and the programme. In addition, expanding its mandate, the Technical Committee paid attention to the broader question of what needed to be done to establish a

¹⁸“Yemen peace plan requires Saleh to resign” FT.com <http://www.ft.com/cms/s/0/023cf1da-6d05-11e0-83fe-00144feab49a.html>.

¹⁹ Security Council Resolution 2014 (2011) adopted by the Security Council at its 6634th meeting on 21 October 2011.

²⁰Implementation Agreement Article 20.

²¹President of the Republic Decree No. 14 of 2012 regarding the establishment of the technical committee to prepare for the all-inclusive National Dialogue Conference, 20 July 2012.

political climate conducive to a successful conference. At its first meeting it identified a set of issues summed up as 20 points.²² In essence, in the view of the Committee, addressing the 20 points would confirm the commitment of the central government to change. Their emphasis on the South and Saada signaled the significance that these two matters had to the successful conclusion of the NDC. Eleven of the 20 points relate to the South and include requiring an official apology for the 1994 war, reinstating people who lost jobs in the aftermath of that war, the return of property seized after the war, the release of detained members of the Southern Peaceful Movement and the employment of southerners in central government institutions. Nine points concern the situation in Saada and, similarly, include a demand for an official apology for the damage caused by the conflict in Saada and the release of detainees, among other things. The Committee's Report recognizes that fulfilling all 20 points before the NDC would not be possible. Under the heading "Guarantees", it spells out action needed immediately. However, although President Hadi received the 20 points enthusiastically,²³ progress on them has been extremely slow and, as the NDC was drawing to an end, over a year after he received them, few had been addressed in any way.

In December 2012, the Technical Committee finally presented a substantial report to the President who implemented it in a set of Decrees.²⁴

The National Dialogue Conference²⁵

The Decree that established the Technical Committee stipulated that the NDC was to be managed in accordance with four "primary principles": Inclusive representation; actual participation ("all participating groups shall be entitled to full participation ... without prior conditions"); transparency; and real outcomes ("The government and all parties must implement the outcomes of the ... Conference").²⁶ None of these is easy to fulfill in Yemen's complicated political and security context. In particular, although the principle of transparency was intended to contribute to drawing all Yemenis into the debates at the NDC, the security situation made public outreach difficult and arrangements for access to the NDC, particularly as it draws to a close and tough decisions are to be made, became tighter.

Formal arrangements for the NDC

The NDC operates principally in Plenary and through nine Working Groups with a nine-member Presidium headed by President Hadi serving as a form of executive committee. Although the Presidium consists of the leaders of important constituencies, another, more inclusive committee, the Consensus Committee, is mandated to reconcile differences and promote agreement.

The Plenary has convened three times, first in a two and a half week session to open the NDC, then half way through its term to consider progress and discuss and adopt those resolutions that Working Groups had already adopted and, finally, on 8 October, at the end of the NDC's term, to agree to a final report.

²² See, Republic of Yemen *Final Report of the Technical Committee to Prepare for the Comprehensive National Dialogue Conference (Technical Committee Report)* 12 December 2012, Sana'a, Yemen, Annex 2.

²³"Hadi OK's Points Crucial to Productive Dialogue, Urges Team Work, Al-Basha" *Yemen Post English Newspaper Online* 1 September 2012 <http://yemenpost.net/Detail123456789.aspx?ID=3&SubID=5917>.

²⁴Presidential Decree No 5 of 2013 establishing the General Secretariat of the Comprehensive National Dialogue Conference; Presidential Decree No 10 of 2013 on the Rules of Procedures of the Comprehensive National Dialogue Conference (Dialogue Controls); Presidential Decree No 11 of 2013 establishing the Comprehensive National Dialogue Conference; and Presidential Decree No 12 of 2013 naming the members of the Presidium of the Comprehensive National Dialogue Conference.

²⁵The NDC website is <http://www.ndc.ye>.

²⁶Decree 14 of 2012 Article 3 incorporated in the Rules of Procedure for the Comprehensive Dialogue Conference in Article 5.

That final Plenary is underway at the time of writing.

Representation on the NDC

Responsibility for translating the Implementation Agreement's promise of an inclusive conference into concrete terms fell to the Technical Committee. The Committee's mandate expanded on the Implementation Agreement by adding that “each region and other concerned group must be properly represented in the delegations of the participating groups.”²⁷ In reporting on its proposals for representation, the Technical Committee noted that the “transition requires entrenchment of the principles of reconciliation and a true partnership in building the new Yemen and in providing the necessary guarantees to the various forces”.²⁸ Pursuant to this and in an evident attempt to draw the Hiraak fully into the process, the Committee proposed that 50% of the seats in the NDC be allocated to the southern population. In addition, the provisions in the Rules concerning decision-making discussed below were intended to provide guarantees to all groupings.

The question of representation itself had a number of dimensions: First, representation in the NDC as a whole; second, membership of the various Working Groups in which the initial decision making was to take place; and thirdly, representation on the bodies set up to manage the process (the Presidium and the Consensus Committee). In each context, the NDC arrangements shift markedly from the arrangements for government during the transition.

The NDC is large with 565 participants drawn from 11 “constituencies”. The Technical Committee set two broad principles for determining membership.²⁹ First, a formula was to be used. Fifty percent of the membership was to be drawn from the “southern population”, and representation in each “constituency” was to include 30 percent women and 20 youth (ie people under the age of 40). Second, participation was to be balanced to reflect “all segments of Yemeni society”.³⁰ But these principles did little to assist with the deeply controversial decision of how many seats each of the 11 constituencies should receive. This was ultimately resolved with the intervention of Benomar. 263 seats went to the five constituencies consisting of political parties.³¹ The Hiraak (Southern Peaceful Movement) has 85 seats and the Huthis, 35. In addition, three non-partisan constituencies, youth, women and civil society, have 40 seats each, and the President appointed an additional 62 members to ensure balance. The overall goal was to have 145 seats (25 percent) for youth made up of both youth affiliated to parties and unaffiliated youth and for 30% of the participants to be women.

Political parties, the Hiraak and the Huthi selected their own representatives. But, identifying participants for the constituencies for youth, women and civil society to recommend to the President for appointment fell initially to the Technical Committee. It set up two committees, one to identify southerners and one northerners for each of these constituencies, and invited applications. Over 10 000 were received, some through the web page designed for these applications. Perhaps inevitably, agreement on these positions was difficult and there are allegations that many of them were filled by representatives of political parties.

The second dimension of representation concerned the membership of the Working Groups that the Technical Committee proposed. A principle of balanced membership was applied with two important exceptions: 50% of the members of the Working Group on the South are southerners and that, of that

²⁷Decree 14 of 2012 Article 3(a)(i).

²⁸Technical Committee Report p.16.

²⁹Loc cit.

³⁰Loc cit.

³¹This figure includes representatives of Rashad and the Justice and Construction Party.

50%, three-quarters are representatives of the Hiraak. Similarly, a special dispensation was made for the Huthi in the Saada Working Group: the Rules permitted up to ten of its 50 members to be Huthi.³²

Thirdly, the composition of the two “executive bodies”, the Presidium and the Consensus Committee needed to be determined. On the Presidium, the Technical Committee made two proposals to the President, either that the Plenary of the NDC be asked to endorse the Committee's proposal for membership of the Presidium or that the President determine the composition of the Presidium by Decree. The latter route was followed and the 9-member Presidium consists of leaders of the major constituencies and one woman drawn from the women's list with the President himself as chairperson. The Consensus Committee is made up of the Presidium, the chairpersons of each Working Group and six additional members drawn from the Technical Committee to ensure balance. It is considerably more representative than the Presidium because the chairs of the Working Groups were selected in a manner that ensured the inclusion of women and representatives of the youth.

Decision-making

Decision-making in the NDC is intended to come from the bottom up. In other words, decisions are initially made by the separate Working Groups and then ratified by a plenary meeting of the entire body. The goal is decision-making by consensus. In the absence of consensus an elaborate process comes into effect with the Consensus Committee, comprised of the Presidium of the NDC (in effect the major political leaders), the chairs of each of the nine Working Groups and additional members drawn from the Technical Committee, acting as facilitator or mediator.

First, in the Working Groups, agreement of 90% of the members present is necessary for a resolution to pass. If this is not possible, the matter is passed on to the Consensus Committee which is expected consult the different constituencies in the Working Group “to reconcile the divergent opinions”. If consensus remains impossible, a resolution passes with support of 75% of the members of the Group who are present.³³ Without Working Group support, a proposal cannot be submitted to the Plenary.

The second level of decision-making occurs in the Plenary. The procedure is similar to that for Working Groups. Again, 90% is sought and, again, if a resolution does not secure the approval of 90% of the members, it is referred to the Consensus Committee which must seek to reconcile different interests. Finally, a 75% majority is sufficient to adopt a resolution. It is here that the reassurance for the different constituencies lies. If 142 members object, a resolution is lost. In addition, in a late addition to the Rules that offered additional reassurances to larger groupings, if every member of two constituencies, each of which has more than 5% of the seats in the NDC, object to a proposal, it fails.

Substantive issues: outcomes

The mandate of the NDC in the Implementation Agreement includes the two issues that challenge the integrity of the state itself, the South and Saada, as well as reconciliation and transitional justice, constitutional reform, good governance and rights, and determining priorities for development.³⁴ But the Agreement leaves the role of the NDC in relation to these issues somewhat unclear stating only that the NDC is to discuss the listed issues. Again, using rather broad terms, the Decree establishing the

³²Rules Article 10. Note, the English version of the Rules that is currently available excludes amendments made after the Technical Committee Report was issued. Among other things, they do not include special representation for Huthi on the Saada group.

³³Rules Article 41.

³⁴ Implementation Agreement Article 21.

Technical Committee to prepare the NDC describes the NDC as an institution through which “all sectors of Yemeni society will be empowered to participate in formulating a new vision for the future of the country.”³⁵ These formulations pose two further questions that became more acute as the work of the NDC increasingly focused on constitutional issues: “How specific should the NDC resolutions be?” and “Will the NDC decisions be binding on the constitution drafting commission?”³⁶ The scale and duration of the NDC, the importance that the President and others place on it, and its careful, inclusive decision-making procedures have led many to assert that the decisions of the NDC are binding. The principle of “real outcomes” in this view would not merely mean that the NDC would direct the President and government to address certain problems and consider certain proposals but would bind the Constitution Drafting Commission.

Against this background, early on Working Groups were encouraged to focus on preparing proposals that would have implications for the future constitution. Nonetheless, directed in part by the list of issues allocated to each Group in the Technical Committee Report, Working Group discussions covered a wide range of matters. The draft final report of the Working Group on the independence of special entities and special social and environmental matters is illustrative. It proposes that declarations of assets by employees of the state should be public, an independent entity to control political parties, and transparency in party funding, all matters that are now commonly covered in constitutions. But, in addition, it considered the social problems posed by the widespread use of qat in Yemen and weapons control.

By the end of September, four Working Groups had completed reports and, as mentioned above, in his September report to the Security Council, Benomar noted the “extraordinary” progress of the NDC. Nonetheless, key political issues remained undecided, notably, the issues of the South and Saada. Over six months, the Working Group on the South had discussed the roots and content of the problems in the South. Its work was interrupted by boycotts as southerners pressed for the 20 points to be implemented and there was some movement on this matter. But, by the end of September, already past the date on which the NDC was scheduled to close, the South Working Group was far from ready to report. There had been movement on the most fundamental issue: the structure of the state. Opposition to a federal solution had receded and discussion had moved to the structure of a federal Yemen: Should it consist of two units or five or six, or some other configuration? Nonetheless, much remains unresolved and lack of decisions concerning the South have prevented the Working Group on Building the State (mandated to propose the system of government, legislative, executive and judicial arrangements, the electoral system and so on) from completing its work. The Saada issue also remained outstanding, in part because the Huthis, interested in greater autonomy, were waiting to hear what had been resolved in relation to the South. In addition, representatives of the Hiraak, concerned that they should retain the influence that they had in the NDC and mindful that they needed to deliver something to those in the South who opposed participation in the NDC, demand both proper guarantees concerning their role in government and other parts of public life for the remainder of the transition period and power-sharing arrangements in the future.

Among other unresolved issues, at least three should be mentioned. First, opposition to the immunity granted to Saleh and members of his regime as a result of the GCC Initiative has continued and a proposal has been tabled that beneficiaries of the immunity should be isolated politically – barred from

³⁵Decree 30 Art 2(b)(ii).

³⁶The larger question here concerns the sovereignty of the NDC. Some members insist on its sovereignty. The first test of this was whether it would use the Rules issued in a Decree by the President or insist in establishing its own rules. The President's Rules (prepared by the Technical Committee) have been used. Nonetheless, claims that the NDC is a sovereign conference remain and may be relevant to its proposals concerning the post-NDC period.

holding office in a political party or government. The GPC is not expected to agree and resolution of the issue is likely to be very difficult. In late October, a member of the Transitional Justice Working Group was abducted, assaulted and issued a warning that if he or any other member of the NDC persisted in demanding political isolation, their lives would be in danger.

Second is a dispute about the relationship between religion and the state. The Working Group on State Building has been unable to secure the required 90% agreement on any proposal and so the matter has been referred to the Consensus Committee. A substantial majority in the Working Group (including the Huthi) currently supports a description of the State as (in a rough translation) civil, sovereign and independent, the religion of which is Islam, based on the will of the people. Among other proposals is that the constitution should establish Yemen as an Islamic state with all laws based on Islam.

Thirdly, the Implementation Agreement expects the NDC to consider the future constitution-making process. The Agreement itself contains detail little on this merely stipulating that the NDC should be followed by a Constitution Drafting Committee which should complete a constitution within three months and that a referendum should follow. It is now likely that the NDC will develop a relatively detailed proposal to cover the constitution-making process, including criteria for membership of the Drafting Commission and steps to be taken once a draft is complete. This task is more complicated than it may appear as it has been linked with government arrangements during the constitution-drafting period. It is unlikely that all the constituencies of the NDC will be satisfied with an extension of the exclusive power-sharing agreement that the GCC Initiative put in place and alternatives will not easily be agreed.

Constitutionalism during the transition

There is a further issue for constitutionalists. The Implementation Agreement states that it overrides the 1990 Constitution, signaling some sort of rupture with the past.³⁷ This is reflected in the arrangements concerning the President and government which are outside the framework of that Constitution and the process that the Agreement establishes for adopting the new constitution (it would not go to the House of Representatives as required by the 1990 Constitution but be adopted by the people in a referendum. However, the Constitution has not been formally abrogated and existing laws remain in place. Moreover, the House of Representatives has not been dissolved although elections have not been held since 2003 and its legitimacy is very limited. And so, the country operates in part under the old constitutional arrangements and in part outside them.

Obviously, the special circumstances of the transition are taken to justify the special arrangements but the delay in the transition process, which is now openly acknowledged, raises a related legal question: President Hadi was elected for a two year term – as agreed in the Implementation Agreement signed by the opposition parties and Hadi himself. This period expires at the end of February 2014. What should happen to the presidency at that point? In other contexts an election may be the answer and the GPC is pushing strongly for this. But, although not impossible, it is unlikely that another non-competitive election would be politically acceptable and other parties in the process are unwilling to go to election in a context in which, they argue, the cards are stacked in favour of the GPC as a result of its long grip on power. Some argue that Hadi's term should be extended but, if so, how should it be done? There are a number of possibilities such as passage of a law by the House of Representatives, a Decree issued by Hadi himself, a further agreement among the key parties (now presumably a broader group than those party to the GCC Initiative), or a decision by the NDC (which may be difficult to secure). None of

³⁷Article 4 states “The GCC Initiative and the Mechanism [the Implementation Agreement] shall supersede any current constitutional or legal arrangements. They may not be challenged before the institutions of the State.”

these options is particularly satisfactory and the problem reflects the gray and vulnerable constitutional context in which Yemen, like other states in times of transition, is currently operating. Exactly at the time that the rule of law should be clearly asserted, the foundation of the law itself is insecure.

Conclusion

In May 2013, Thomas Friedman published an op-ed piece in the *New York Times*, holding up the process in Yemen as a model.³⁸ The piece provoked a number of angry responses including allegations that Friedman's understanding of the problems of Yemen is superficial and his assessment premature.³⁹ Certainly, it is far too early to declare the Yemen process a success. But, equally clearly, it has not yet failed. Currently the NDC is the face of the transition in Yemen and, as I indicate at the beginning of this note, it is controversial. As with other transitions, it is very difficult to predict the outcome and the participants in the NDC, political elites and the activists who triggered the process face difficult questions and bear huge responsibilities.

³⁸Thomas L Friedman "The Yemeni Way" *New York Times Sunday Review* 11 May 2013
http://www.nytimes.com/2013/05/12/opinion/sunday/friedman-the-yemeni-way.html?_r=1&.

³⁹See, for example, Atiaf Zaid Alwazir "The Myth of the 'Yemen Model'" note 1 above.