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The Judiciary in Yemen: The Status Quo, Current Challenges and Post- Conflict Considerations

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Table of Contents

Executive Summary	3
Part 1: The Judiciary Before the Conflict	4
1.1. Levels of Court	5
1.2. The Attorney General	8
1.3. The High Judicial Institute	9
Part 2: NDC Outcomes on Judicial Reform and the Draft Constitution	10
2.1. An Overview of Relevant NDC Outcomes	10
2.2. The Draft Constitution and Federal and Regional Judicial Authorities	11
Part 3: Conflict-Related Challenges Facing the Judiciary	13
3.1. The Split of the Judiciary and Political Polarization	13
3.2. Lack of Security	15
3.3. The Absence of Judicial Authority	16
3.4. Physical Destruction of Judicial Institutions	17
3.5. Budgetary Issues	18
Part 4: Post-Conflict Challenges and Recommendations	20
4.1. Overview of Key Issues	20
4.2. Recommendations	20

Executive Summary

A common demand among the Arab Spring countries in 2011 was the call for justice and freedom; Yemen was no exception. In fact, the judicial system in Yemen is among the most corrupt and inefficient systems in the region. Although Yemen's Constitution theoretically guarantees an independent judiciary, in practice the executive branch exerts considerable influence over judicial authorities. Consequently, some of the most fundamental outcomes of Yemen's post-uprising National Dialogue Conference (NDC), held in 2013, were those insisting on the separation of powers and judicial reform. Most importantly, the NDC put forth the notion of reshaping the State through transition to a federal system and the decentralization of power and authority structures, which has a significant impact on the judiciary. The Constitution Drafting Committee (CDC), formed by President Hadi after the close of the NDC in early 2014, created a Draft Constitution that reflected the NDC outcomes as part of the transitional political process. However, due to conflicts of interest and lack of experience, the CDC encountered numerous challenges in arranging a transformation of the state structure into a federal system.

The armed conflict that began in 2014 has persisted ever since, stalling Yemen's political transformation and creating one of the world's worst humanitarian crises. The country's infrastructure, including its judicial institutions, has been severely damaged. Due to the precarious security situation, many judges have fled or been killed, which has created a vacuum filled either by inexperienced judges or unauthorized adjudicators and courts. Furthermore, the opposing parties to the conflict have divided the judiciary and its institutions, creating parallel systems that do not recognize each other's legitimacy. The UN and international and local NGOs are continuously working to mitigate the effects of the conflict and plan for the eventual post-conflict period. However, consideration of the judiciary and its importance in establishing the rule of law in the Yemeni context has been limited to date.

The purpose of this paper is to provide an overview of the judicial system in Yemen, discuss the most relevant provisions of the Draft Constitution, explain the effects of the conflict on the judiciary, and offer recommendations for the future. Rebuilding and implementing the Yemeni judicial system after protracted conflict will require carefully dealing with the new reality and enforces the rule of law to maintain sustainable peace. Accordingly, a number of legislative and other measures must be implemented in the post-conflict period to establish the basis for a strong judicial system. The independence of the judiciary is a hallmark of the rule of law. As such, striving for an independent judiciary through concerted efforts to avoid political polarization within judicial structures will be of fundamental importance. Learning from the experiences of countries that have emerged from conflict and acknowledging local dynamics and the role of domestic actors will also be significant factors in strengthening judicial authorities and institutions.

This paper is meant to serve as a basis for further study on the judiciary in Yemen. Primarily, it wishes to draw attention to the importance of considering judicial authorities in seeking sustainable peace post-conflict. Thus, the paper is divided into four main sections: 1) the judiciary prior to the conflict; 2) the NDC outcomes on judicial reform and the Draft Constitution; 3) current difficulties facing the judicial system as a result of the conflict; and 4) post-conflict challenges and recommendations.

Part 1: The Judiciary Before the Conflict

Officially, the Yemeni Constitution provides for the independence of the judiciary from the executive and legislative branches of government. Chapter III of the Constitution considers the judiciary to be “an autonomous authority in its judicial, financial and administrative aspects” and states that judges shall not be subjected to interference by any other authority.¹ Nonetheless, true judicial independence has not occurred in practice.

In the past, in accordance with article 104 of the 1991 Judicial Authority Law, the President of the Republic was the head of the Supreme Judicial Council (SJC),² which conferred him the authority to appoint, promote, transfer and retire judges. Pursuant to this law, the President also presided over the sessions of the SJC or had authority to appoint another person to do so. Article 104 has been amended twice; in 2006, the SJC gained more independence from the executive branch. In accordance with the 2006 amendment, the President of the Supreme Court became the head of the SJC, through appointment by the President of the Republic. In 2012, the SJC was separated from the Supreme Court. Since then, two different people have occupied the leadership of the Supreme Court and the SJC. It is important to note that these amendments did not change the manner in which the President of the Supreme Court and his deputies are appointed; this continues to be done by the President of the Republic, who selects the appointees from a list of names drawn up by the Judicial Inspection Authority and approved by the SJC.³ The President of the SJC also continues to be appointed by the President of the Republic.

¹ The Constitution of the Republic of Yemen, article 149.

² The SJC is the highest judicial authority in Yemen. It consists of the following members: the President of the SJC, the President of the Supreme Court, the Minister of Justice, the Attorney General, the Head of the Judicial Inspection Authority, the Secretary General of the SJC and three judges, each of whom must be at least a Supreme Court judge, appointed by the President of the Republic upon the nomination of the SJC.

³ Judicial Authority Law (1991), article 59.

Another example of executive influence over the judiciary concerns enrolment in the High Judicial Institute (HJI)⁴ and the appointment of judges. Though the Ministry of Justice is part of the executive branch, it exerts influence over the judiciary. The Judicial Authority Law articulates the rules regarding judges' circuits (*Alharaka Alqadayiah*); unless there are extraordinary circumstances, judges should not be transferred to another court for at least six months and should not remain in the same court for more than five years. However, the Minister of Justice has authority to temporarily delegate judges to undertake other administrative work. Furthermore, it is widely recognized that corruption permeates the judiciary, which diminishes judicial independence, access to justice and the legitimacy of judicial authorities.⁵

Thus, the power of promoting, transferring or dismissing judges has been used as a tool to interfere in their decision-making.

Info box: Levels of Law in Yemen

Yemeni laws are divided into three levels. The first level includes the Constitution (*dustoor*). The Constitution is the supreme law and is enacted by the legislative branch, the House of Representatives (*Majlis Al-Nuwwab*). Laws at the second level (*qawaneen*), including the Code of Civil Procedure, the Commercial Law and the Judicial Authority Law, are also enacted by the legislative branch. These laws must comply with the Constitution and can be challenged for non-compliance. The third level encompasses regulations (*lawa'eh*) that are not always enacted by the legislative branch.

1.1. Levels of Court

Courts of First Instance (*Mahakim Ibtidayya*)

The Courts of First Instance administer all civil and family cases, as well as all other cases in governorates in which there are no Special Courts available.⁶ Courts of First Instance are structured based on location and specialization. Typically, a court will be based in the district it oversees, but some courts may be located outside their districts for reasons related to logistics, access, facilities or security. For instance, the Courts

⁴ As will be discussed in a following section, law graduates are required to complete a course at the HJI in order to qualify as judges.

⁵ See, for example, GAN Integrity, "Yemen Corruption Report," August 2016. Accessed October 2019: <https://www.ganintegrity.com/portal/country-profiles/yemen/>

⁶ According to the most recent figures provided by the SJC in Sana'a, there are 248 Courts of First Instance located in all 22 governorates (*muhafadhat*). Note that the reference to 22 governorates includes the capital Sana'a (*Amanat Al-Asimah*). Supreme Judicial Council, [AR] "Courts of the Republic," Accessed September 2019: <http://www.ysc.org.ye/Courts.asp>.

of First Instance of Hamdan and Bani Hushaysh, which are districts within Sana'a governorate, are located in the Capital Secretariat (*Amanat Al-Asimah*).

Special Courts (*Mahakim Khasa*)

There are various categories of Special Courts, which are all Courts of First Instance that issue decisions subject to appeal.

Public Funds Courts: There are six Public Funds Courts located in six governorates: the Capital Secretariat, Sana'a, Aden, Taiz, Hadhramout and Hodeidah. In the capitals of governorates where there are no Public Funds Courts, Courts of First Instance have jurisdiction over public funds matters.⁷

Commercial Courts: There are five Commercial Courts in five governorates: the Capital Secretariat Commercial Court has jurisdiction over the Capital Secretariat, Sana'a, Amran, Dhamar, Al-Baydha, Sa'ada, Marib and Al-Jawf. The Aden Commercial Court has jurisdiction over Aden, Lahj and Abyan. The Taiz Commercial Court has jurisdiction over Taiz, Ibb and Al-Dhale. The Hadhramout Commercial Court has jurisdiction over Hadhramout, Shabwa and Al-Mahra. The Hodeidah Commercial Court has jurisdiction over Hodeidah, Hajjah and Al-Mahwit. In governorates where there are no Commercial Courts, Courts of First Instance have general jurisdiction over commercial disputes, with the exception of bankruptcy, banking and trademark cases and when foreign companies or parties are involved.

Juvenile Courts: There are seven Juvenile Courts in seven governorates: the Capital Secretariat, Aden, Taiz, Hadhramout, Ibb, Hodeidah and Dhamar. Other governorates do not have Juvenile Courts; rather, the Minister of Justice, after consultation with the Minister of Social Affairs, designates one of the Courts of First Instance in each of these governorates to exercise the competence of the Juvenile Court in accordance with the provisions of the Juvenile Welfare Law.⁸

Tax Courts: There are only two tax courts: one in the Capital Secretariat and one in Aden. The Public Funds Courts have jurisdiction over tax cases in the governorates that do not have Tax Courts. If there is no Public Funds Court, the case is heard by a Court of First Instance.

Press and Publications Court: Only one Press and Publications Court exists, located in the Capital Secretariat.⁹

⁷ National Information Center, [AR] "The Supreme Judicial Council Restructures the Public Funds Courts' Jurisdiction," July 2008. Accessed October 2019: <http://www.yemen-nic.info/news/detail.php?ID=17960>.

⁸ Juvenile Courts Law (2003), articles 1, 2.

⁹ Established in 2009 by Supreme Judicial Council Resolution No. 130 (2009).

Administrative Courts: There are two Administrative Courts: one in the Capital Secretariat and the other in Aden. Courts of First Instance have jurisdiction over administrative matters where no Administrative Court exists.¹⁰

Traffic Courts: These courts are located in the Capital Secretariat, Aden, Taiz, Hadhramout, Hodeidah and Dhamar. Courts of First Instance have jurisdiction over traffic disputes in governorates that do not have Traffic Courts.¹¹

Military Courts: The Military Courts fall within the Military Justice circuit of the Ministry of Defense.

Violations Courts: There are only two Violations Courts, one in the Capital Secretariat and the other in Aden.

Courts of Appeal (*Mahakim Ist'ena'fiyya*)

The Courts of Appeal have jurisdiction over appeals from the Courts of First Instance and offer the last opportunity for both the plaintiff and the defendant to stand before the judges. There are 22 Courts of Appeal, most of which are located in governorate capitals (with the exception of the Al-Jawf Court of Appeal, which is located in the Sana'a Capital Secretariat). Additionally, Socotra Island was part of Hadhramout governorate until it was declared an independent governorate in October 2013. The Courts of Appeal are divided into ad hoc branches depending on the types of cases that are heard.

The Supreme Court (*Mahkamah Oliya*)

The Supreme Court is the final forum for justice and the highest court that hears appeals. It is the highest judicial body in the country¹² and is located in the Capital Secretariat,¹³ in the same building as the Ministry of Justice. The Supreme Court has jurisdiction over constitutional cases, disputes over conflicts of jurisdiction and appeals referred by the House of Representatives in regards to membership of that body. It rules on appeals of final judgments in all court disputes and disciplinary cases. The Supreme Court also has authority to try high executive officials, including the President, the Vice President, the Prime Minister and his deputies and other ministers and their deputies.¹⁴

With the exception of matters concerning the Constitution or the Civil Procedure Law, the Supreme Court is not a trial court and does not investigate the facts of each case. Rather, the role of the Supreme Court is to examine and declare how the law should

¹⁰ Supreme Judicial Council Decision No. 177 (2010), article 2.

¹¹ Traffic Courts Resolution No. 27 (2003), articles 1, 2.

¹² The Constitution of the Republic of Yemen, *supra* note 1, article 153.

¹³ Judicial Authority Law (1991), *supra* note 3, article 10.

¹⁴ The Constitution of the Republic of Yemen, *supra* note 1, article 153.

be interpreted and applied. Cases are submitted to the Secretariat of the Supreme Court, which categorizes them according to the specific competence of the specialized divisions. One judge in the division then studies the case, creates a summary and presents it to the rest of the committee members, who also study the case and offer their views. The judges within the division then arrive at the final decision.

Pursuant to article 17 of the Judicial Authority Law, the Supreme Court is comprised of eight chambers: the Constitutional Chamber, the Civil Chamber, the Commercial Chamber, the Criminal Chamber, the Personal Chamber, the Administrative Chamber and the Appeals Inspection Chamber. The Supreme Court has the ability to create sub-chambers for those chambers facing severe case backlogs.

Article 17 also states as follows: “The Judiciary in each Chamber of the Supreme Court shall be composed of five or more judges, except the Constitutional Chamber, which shall consist of seven judges, judgments and decisions shall be made by an absolute majority.” The law permits some judges to be members of more than one chamber.¹⁵

Despite the 2006 and 2012 amendments to the Judicial Authority Law,¹⁶ the President has retained the authority to appoint Supreme Court judges, who are nominated by the SJC from a list of names prepared by the Judicial Inspection Authority.¹⁷

1.2. The Attorney General

The Attorney General and the First Advocate General are appointed by Presidential decree.¹⁸ The Public Prosecution is part of the judicial branch and the Attorney General is a member of the SJC.

During the 2011 uprisings, former President Ali Abdullah Saleh, who was accused by opponents of orchestrating the Friday of Dignity Massacre on March 18, 2011, dismissed Attorney General Abdullah Alolufy and appointed a new Attorney General while the investigation was ongoing.¹⁹ Regardless of the accuracy of the accusations, the ability of a President to dismiss an Attorney General during the course of an investigation into that President’s own conduct is highly problematic for the rule of law and raises serious questions of political interference.

¹⁵ Supreme Judicial Council Decision No. 65 (2006).

¹⁶ See pg. 6.

¹⁷ Law Regarding the Judicial Authority (2013), article 59.

¹⁸ Judicial Authority Law (1991), *supra* note 3, article 60.

¹⁹ Human Rights Watch, “Yemen: Political Interference in Massacre Probe,” February 12, 2013. Accessed October 2019: <https://www.hrw.org/news/2013/02/12/yemen-political-interference-massacre-probe>.

1.3. The High Judicial Institute

Article 57 of the Judicial Authority Law specifies the conditions for the nomination of judges and the qualifications they must possess. After completing a university degree in law or Sharia and law, each judicial candidate must undertake three years of training at the HJI, which is located in Sana'a. Graduates of the HJI then go on to work in the judicial field for approximately two years before being appointed to the bench.

Before there were sufficient graduates from the HJI, many judges were traditional judges who were appointed based on their reputation of knowledge and background in Sharia law. Moreover, restricting the appointment of judges to those from certain social classes was strictly enforced. The number of traditional judges has gradually decreased as they have retired and been replaced by HJI certified judges and law professors.²⁰

²⁰ In addition to HJI certified judges, some law professors have been appointed to the judiciary.

Part 2: NDC Outcomes on Judicial Reform and the Draft Constitution

The National Dialogue Conference (NDC) was meant to establish a new social contract and address the corruption within governmental authorities and institutions, which was a key driver of the 2011 uprising. Within this context, the NDC was also tasked with reforming the judiciary.

2.1. An Overview of Relevant NDC Outcomes

The events of 2011 led to the adoption of a political agreement brokered by the Gulf Cooperation Council, known as the GCC initiative. The agreement included four steps for a peaceful transition of power: a national dialogue; the creation of a Constitution Drafting Committee (CDC) to draft a new constitution reflecting the national dialogue outcomes; a constitutional referendum; and a general election.

The NDC outcomes reiterated the importance of judicial independence, as well as the need for judicial reform and rule of law enforcement. A main feature of judicial reform included in the NDC outcomes was the notion of a multi-judicial system, which would be created by establishing an independent administrative judiciary body that exclusively deals with administrative disputes. This is reflected in article 225 of the Draft Constitution, which states that a law shall be drafted to regulate the composition of the administrative judiciary.

The NDC outcomes also emphasized the independence of the judiciary by upholding the theory of total separation between the executive, legislative and judicial branches of government.²¹ Consequently, the NDC outcomes stated that SJC members should be elected according to the following special distribution mechanism that is issued by presidential decree: 70 percent of SJC members should be elected by the General Assembly of Judges, 15 percent by the Bar Association and 15 percent by law professors.

The provisions of the Draft Constitution form the basis for a future restructured judiciary. The Draft Constitution reflects the NDC outcomes in terms of the formation of the SJC, with article 219 stating that the SJC should be composed of the following individuals: one member each from the Constitutional Court, the Federal Supreme Court and the High Administrative Court; one member from the Public Prosecution whose rank is equal to that of the Attorney General; one member from the High Court of each region; two members from the group of lawyers qualified to come before the Supreme Court; and two law professors from State universities who possess at least associate professorship.

²¹ Development (Inclusive, Integrated and Sustainable) Group, Decision 17; Good Governance Group, Decision 31.

The NDC outcomes also supported the establishment of an independent Constitutional Court, elected by the same mechanism as the SJC. Unfortunately, the creation of a Constitutional Court was not provided for in the Draft Constitution; instead, article 209 states that a further law is required to establish such a body: “A federal law regulates the establishment of courts, types, levels and competences. The establishment of extraordinary courts is prohibited.” The Draft Constitution does reflect the NDC outcomes regarding the establishment of an administrative judiciary to deal with administrative disputes, which is independent from the ordinary judiciary.²²

2.2. The Draft Constitution and Federal and Regional Judicial Authorities

The Draft Constitution stipulates the establishment of a federal judicial authority as well as regional judicial councils.²³ Pursuant to article 222, the SJC has authority over a number of areas related to the operation of the judiciary, including the development of plans and public policies for judicial reform; the drafting of opinions on legislation relevant to judicial authorities; the formulation and oversight of a draft budget for the judiciary; the appointment of the head and deputies of the Judicial Inspection Authority; the monitoring of results of inspections of judges and members of the Public Prosecution; and the oversight of training and development of judges and judicial education. The Draft Constitution stipulates that the SJC shall include a judge from each regional Supreme Court. Moreover, the SJC must ensure representation from the different regions when appointing the head and deputies of the Judicial Inspection Authority.²⁴

Article 223 of the Draft Constitution indicates that the Judicial Authority Law is the applicable legislation for the regulation of the SJC and the Regional Judicial Councils. It should be noted that although a Judicial Authority Law is currently in existence, a new law regulating the federal and regional judicial authorities would have to be enacted after the promulgation of the new Constitution. Pursuant to article 223, in

²² Draft Constitution, article 225: “The administrative judiciary is an independent judiciary body and shall exclusively assume the adjudication on administrative disputes and enforcement thereof. The law regulates the composition of the administrative judiciary, levels, competence and procedures to be followed before such judiciary.”

²³ The NDC delegates agreed on transitioning the State to a federal system, but the number and shape of the regions has been a major sticking point. As a result, while the Draft Constitution indicates that Yemen will be divided into six regions, this issue is still subject to debate. Article 1 of the Draft Constitution states that “The Federal Republic of Yemen is a federal State,” while article 391 is written as follows: “The Federal Republic of Yemen consists of six regions, four in the North and two in the South, they are: Hadhramout region, Sheba region, Aden region, Aljanad region, Azal region and Tahamh region and as follows: 1. Hadhramout region consists of the following wilayas: Al Mahrah, Hadhramout, Shabwah and Socotra. 2. Sheba region consists of the following wilayas: Al Jawf, Ma’rib and Al Bayda’. 3. Aden region consists of the following wilayas: Aden, Abyan, Lahaj and Al Dali. 4. Aljanad region consists of the following wilayas: Taiz and Ibb. 5. Azal region consists of the following wilayas: Sa’ada, Amran, Sana’a, and Dhamar. 6. Tahamh region consists of the following wilayas: Al Hudaydah, Raymah, Al Mahwit and Hajjah.”

²⁴ Draft Constitution, *supra* note 22, article 222(4).

addition to having a mandate over any other function provided by law, the responsibilities of the Regional Judicial Councils include the management of regional level courts and Public Prosecution offices; the development of plans and public policies on judicial reform; and the formulation of the draft budget and oversight of its implementation.

Consequently, new judicial authorities will be created at the regional level. Article 226 states that Courts of First Instance will be established in the districts, with Courts of Appeal in the governorates (*wilayas*)²⁵ and Supreme Courts in the regions, as well as the establishment of a Federal Supreme Court. Regional Supreme Court rulings will be final, except for matters falling within the jurisdiction of the Federal Supreme Court in accordance with regulations of the law.

In accordance with the Draft Constitution, the entire State structure would transition to a federal system, resulting in the addition of regional authorities to bridge the gaps between the supreme authority in the capital and the authorities at the governorate level.

²⁵ While the Draft Constitution uses the term *wilayas* for the governorates, *muhafadhat* is the term that is currently used.

Part 3: Conflict-Related Challenges Facing the Judiciary

The ongoing conflict in Yemen has greatly disrupted the functioning of the judiciary. Although several challenges predate the conflict, such as a weak and biased system and interference by the executive, years of armed conflict have exacerbated these issues and created many more. There was a degree of optimism during the transitional process that the NDC would address the historical imbalances and result in substantive judicial reform to create a stronger and more independent judiciary. However, this hope was not realized, as the instability that would eventually culminate in the ongoing civil war plagued efforts to achieve concrete reforms. This section presents the key conflict-related challenges facing Yemen's judiciary, many of which are likely to persist to some degree in the transitional and post-conflict periods.

3.1. The Split of the Judiciary and Political Polarization

The parties to the conflict have established parallel State institutions as a result of the ongoing hostilities. In the initial phase of the conflict, the Houthis advanced into Sana'a and signed the Peace and National Partnership Agreement with the government on September 21, 2014, leading to the formation of a short-lived consensus government. President Hadi fled to Aden in February 2015, resulting in military intervention in March 2015 by the Saudi Arabian and UAE-led coalition to reinstate his government. Since then, State institutions have increasingly become divided. In the context of the judiciary, a dual system has been created in which there are two SJs, two Supreme Courts, two Ministries of Justice, two Attorney Generals and two HJIs. One judicial system operates under the de facto authority in Sana'a, while the other functions under the de jure government in Aden.

In Sana'a, the former de facto president, Saleh Al-Sammad, appointed Judge Ahmed Al-Mutawakkel as the President of the SJC in September 2017.²⁶ Most of the eight members of the current SJC – including the Attorney General, the Minister of Justice, the President of the Judicial Inspection Authority, the Secretary General of the SJC and the deputy of the SJC – were appointed after the Houthis took over Sana'a, with four of them coming from Hashemite families.²⁷ The de facto authority in Sana'a also appointed judges to the Supreme Court, yet the President of the Supreme Court, Judge Esam Alsamwi, was appointed in 2006 and remains in his position to this day. The Minister of Justice and the leading officials within the Ministry of Justice were also

²⁶ Supreme Judicial Council, [AR] "The President of the Supreme Judicial Council Takes the Oath Before the President of the Republic," September 2017. Accessed September 2019: <http://www.sjc-yemen.com/NewPages/showOneArchNews.aspx?NewsId=555&category=1>.

²⁷ Hashemites consider themselves to be descendants from the lineage of the Prophet Mohammed. Hashemites in Yemen can be either: Zaydi, primarily located in the northern governorates of Sa'ada, Hajja, Sana'a and Dhamar; or Shafi'i, located mostly in the rest of the country. Zaydi doctrine states that the ruler should be a Hashemite. Hashemites ruled North Yemen before they were overthrown in the 1962 revolution. Houthis, Northern Zaydi Hashemites, are accused of seeking to regain the political and social power lost after 1962.

replaced by either Hashemite family members or those loyal to the Houthis, in what is widely alleged to be a systematic practice undertaken by the de facto authorities in Sana'a across all government departments. The HJI in Sana'a continues to accept new candidates; local sources have claimed that many are from Hashemite families or are affiliated with the Houthis.²⁸

The work of the SJC resumed in the interim capital of Aden. Judge Ali Naser, from President Hadi's Abyan governorate, was appointed by Hadi in 2012 and remains in his position as the President of the SJC.²⁹ Hadi appointed Ali Altboush, also from Abyan, as Senior Attorney³⁰ and Judge Hamood Alhitar as President of the Supreme Court.³¹ The SJC in Aden appointed several judges to the Courts of Appeal, Courts of First Instance and Public Prosecutions in Aden and Hadhramout, Al-Mahra, Socotra, Taiz and Marib, as well as other district courts in the regions under its control.³² The SJC in Aden has also prohibited the work of some judges who were appointed by the Houthis to replace former members of the Supreme Committee for Elections and Referendums, a body that existed prior to 2014, as the SJC in Aden does not consider the new appointments to be legitimate.³³

The SJC in Aden has stated that it will not accept the latest graduates from the HJI in Sana'a, as it considers their certificates to be null.³⁴ Instead, in 2019 it established another HJI in Aden and formed a new Board Committee, accepting 23 candidates. Unfortunately, a number of applicants filed complaints alleging that they were not fairly considered for acceptance due to nepotism.³⁵ As a result, the SJC in Aden has reconsidered some of the applicants.

Using the judiciary to achieve political means in the conflict significantly diminishes trust in judicial officials and challenges their independence. Amnesty International has accused the Houthis of "using the judiciary to settle political scores," referring to

²⁸ The authors were unable to find the most recent HJI candidates list. However, a schedule of lectures posted on the HJI's unofficial Facebook page indicates that half of the teachers and professors are Hashemites. Also see the following list, published by Qpost, of over 200 senior positions, including judges from specific Hashemite families: QPost, [AR] "Names and locations of Houthis Appointed to Top Positions," August 2018. Accessed September 2019: <https://www.qposts.com/-/بالأسماء-والمواقع-هكذا-سيطر-الحوثيون/>.

²⁹ Alkawqea Post, [AR] "President Hadi Appoints New Attorney General and Restructures the Supreme Judicial Council," August 2017. Accessed September 2019: <https://almawqea.net/news/22610>.

³⁰ The Senior Attorney acts as a deputy of the Attorney General.

³¹ Ibid.

³² Yemen Shabab [AR] "Supreme Judicial Council Approves Judges' Circuits," December 2017. Accessed September 2019: <https://yemenshabab.net/news/30819>.

³³ Alkawqea Post, [AR] "Supreme Judicial Council Ceases Judges Appointed by Houthis to Supreme Committee for Elections and Referendums," March 2019. Accessed October 2019: <https://almawqea.net/news/39081>.

³⁴ Alghad Almushriq Channel, YouTube, [AR] "News: The Supreme Judicial Council Transfers the High Judicial Institute to Aden," May 2018. Accessed September 2019: <https://www.youtube.com/watch?v=113R-OF4jek>.

³⁵ Almasdar Online, [AR] "Applicants to the High Judicial Institute Complain of Manipulation of the Admissions System," May 2019. Accessed September 2019: <https://almasdaronline.com/articles/167886>.

a court decision to hand out death sentences to 30 academics and political opponents as a “sham trial.”³⁶ The UN has urged the Houthi authorities to review the death sentences of these individuals.³⁷ Sadly, this is not the only example of using the judicial system to suppress journalists and others. The judiciary has also been used as a means to convey political propaganda. In 2019, the Specialized Penal Court of First Instance issued a judicial declaration, ordering 52 respondents to stand before the court for their participation in the killing of Sana’a-based president Saleh Al-Sammad, including President Donald Trump, former Prime Minister Theresa May, Prime Minister Benjamin Netanyahu, President Hadi and other international and Yemeni officials.³⁸

In Aden, judicial authorities (including the Attorney General) belonging to the de jure government turned a blind eye to the existence of illegal detainees and credible allegations of torture in detention centers run by government officials or members of the Arab Coalition. Notably, multiple international reports present evidence of torture and sexual abuse in secret prisons operated by the United Arab Emirates.³⁹ The Public Prosecutor did not investigate these allegations. According to Human Rights Watch, “[none] of the warring parties carried out credible investigations into their forces’ alleged laws-of-war violations.”⁴⁰

3.2. Lack of Security

The dire security situation has cost several members of the judiciary their lives through targeted attacks. According to the Ministry of Justice in Sana’a, 13 judges and 37 employees have been killed throughout the country since the war erupted.⁴¹ For example, Judge Mohsen Alwan, the President of the Specialized Penal Division Court in Aden, was assassinated along with five of his guards.⁴² On a separate occasion, Judge Jala Abdullah Salem, a member of the Penal Division specialized in terrorism in

³⁶ Amnesty International, “Yemen: Houthi-run court sentences 30 political opposition figures to death following sham trial,” July 2019. Accessed September 2019:

<https://www.amnesty.org/en/latest/news/2019/07/yemen-houthi-run-court-sentences-30-political-opposition-figures-to-death-following-sham-trial/>.

³⁷ Reuters, “U.N. urges Yemen Houthi court to review 30 death sentences,” July 2019. Accessed September 2019: <https://www.reuters.com/article/us-yemen-security-un/u-n-urges-yemen-houthi-court-to-review-30-death-sentences-idUSKCN1U718H>.

³⁸ Althawrah, [AR] “Resuming the Trial of the Defendants in the Assassination of President Al-Samad,” June 2019. Accessed September 2019: <http://althawrah.ye/archives/582219>.

³⁹ Amnesty International, “Timeline: UAE’s role in southern Yemen’s secret prisons,” July 2018. Accessed September 2019: <https://www.amnesty.org/en/latest/news/2018/07/timeline-uaes-role-in-southern-yemens-secret-prisons/>.

⁴⁰ Human Rights Watch, “Yemen: Events of 2018,” Accessed October 2019: <https://www.hrw.org/world-report/2019/country-chapters/yemen>.

⁴¹ Almasirah Net, [AR] “Minister of Justice: The Cost of Destruction to Judicial Institutions by the Coalition is \$100 Million,” April 2019. Accessed September 2019: http://mail.almasirah.net/details.php?es_id=38734&cat_id=3.

⁴² Saba Net, [AR] “Yemen’s Association of Judges Condemns the Assassination of Judge Mohsen Alwan,” December 2015. Accessed September 2019: <https://sabaanews.net/news411817.htm>.

Hadhramout, was also assassinated in Aden.⁴³ In Sana'a, Judge Ahmed Al-Ansi was killed inside the court for refusing the release of a defendant accused of murder.⁴⁴ Judge Abdu Al-Zubaydi was detained and tortured by the Houthis in Sana'a, having been falsely accused of involvement in establishing the Northern Resistance, a group that is not known to even exist.⁴⁵ Judge Yahya Mohammed Rabeed, the head of the Specialized Criminal Division in the Capital Secretariat Court, who was in charge of President Hadi's trial for treason, was killed along with six of his family members by an airstrike that targeted his house.⁴⁶ Many other judges have had to flee the country for political or other reasons. The judicial system has suffered as a result, as there are no longer enough experienced judges practicing in Yemen. New judges have been hired to fill the vacuum, but many of them are under-qualified, which is having a further negative impact on the administration of justice.

3.3. The Absence of Judicial Authority

The deficiencies in the judicial system as a result of the conflict have amplified the lack of trust in the judiciary and undermined the rule of law. In some areas there is a complete absence of judicial and law enforcement institutions, while other regions are suffering from weak administration of justice and biased or corrupt judicial authorities. The reality of the situation is grave.

In short, a de jure judicial authority exists without judicial institutions in Aden, while judicial institutions exist without legitimacy in Sana'a.

It should be noted that even before the conflict, a long history of traditional mediation and arbitration existed in Yemeni society. In tribal areas, senior tribesmen continue to play a significant role in solving all types of disputes, including disagreements regarding land, family and criminal matters. In many cases, people may prefer traditional arbitration because it offers faster and more practical solutions. This is also

true in urban areas, where people may choose public figures, neighborhood leaders or religious leaders to solve disputes through arbitration. In recognition of the role of arbitration, in which disputing parties give consent to a third party to reach a decision without going to court, a 1992 law was enacted to formally regulate arbitration proceedings. Since then, a number of arbitration firms have been established.

⁴³ Yemeress, [AR] "Yemen's Association of Judges Condemns the Assassination of Judge Jalal Abdullah Salem in Aden," December 2015. Accessed September 2019:

<https://www.yemeress.com/altagheer/84912>.

⁴⁴ Akhbar Alyom, [AR] "The Assassination of the President of the Court of Bani Harith," January 2015.

Accessed September 2019: https://www.akhbaralyom-ye.net/news_details.php?lng=arabic&sid=85591.

⁴⁵ Human Rights Watch, "Yemen: Houthi Hostage-Taking," September 2018. Accessed September 2019:

<https://www.hrw.org/news/2018/09/25/yemen-houthi-hostage-taking>.

⁴⁶ Althawrah, [AR] "The Martyrdom of Judge Yahya Rabeed and Six of his Family Members in their Home by a Targeted Airstrike," January 2016. Accessed September 2019: <http://althawrah.ye/archives/374188>.

In the areas under their control, the Houthis have established Revolutionary Committees within most government institutions, including the courts. They have also appointed so-called supervisors (*mushrifeen*), who are usually Hashemite, powerful, loyal and directly connected to the office of Houthi leader Abdulmalik Al-Houthi, to take over roles previously ascribed to the courts. Nonetheless, governing institutions – including the judiciary – in Houthi-controlled areas continue to operate in a relatively more functional manner than in areas under the control of the de jure government.

3.4. Physical Destruction of Judicial Institutions

Fighting between the parties to the conflict has led to widespread destruction of judicial institutions. According to the Ministry of Justice in Sana'a, the coalition has attacked 47 judicial institutions in 15 governorates in the course of the conflict. The de facto authority in Sana'a and local media have reported approximately 100 million dollars in damage and the complete destruction of numerous judicial institutions, including seven courts in Sa'ada, three courts in Taiz and two courts in each of the following governorates: Hajjah, Aden, Shabwa, Amran, Lahj, Abyan and Hodeidah.⁴⁷ Another 26 judicial institutions were reportedly partially damaged, including the Ministry of Justice headquarters, the Judicial Press, three courts in the Capital Secretariat, five courts in Hadhramout, three courts in Hodeidah, one court in Al-Baydha and two courts in each of the following governorates: Hajjah, Dhamar, Abyan, Ibb, Sana'a and Al-Jawf.⁴⁸ Regardless of the estimated cost of damage and which actors have been responsible for targeting judicial institutions,⁴⁹ the scale of destruction has had a huge impact on the functioning of the judiciary and many important documents have been lost. Moreover, the infrastructure necessary for effective judicial procedures and investigations has been greatly damaged. For instance, power outages have resulted in the rotting of stored corpses, making it impossible to verify the cause of death in a number of cases.

Despite the damage to the court buildings, the de facto authority in Sana'a has found some alternative buildings and the work of the Administrative Court, Tax Court and Customs Courts has resumed.

⁴⁷ Aden Times, [AR] "Statistics on the Loss of the Judiciary During the Four Years of the War in Yemen," May 2019. Accessed September 2019: <https://adentimes.net/2019/05/19/-إحصائية-جديدة-بخسائر-السلطة-القضائية/>; Almasirah Net, April 2019, *supra* note 41.

⁴⁸ Ibid.

⁴⁹ The authors were unable to find further reliable statistics on the number of judicial buildings specifically targeted during the conflict.

A closer look: Impediments to reinstating the judiciary

In central Yemen, the governorate of Taiz provides an example of the obstacles facing a judiciary caught directly in the crosshairs of the conflict. Straddling the frontline for four-and-a-half years, many court buildings in Taiz have been destroyed, partially damaged or looted in the absence of protection by the State. Due to the displacement of the majority of judges, the courts stopped functioning and were replaced by private tribunals set up by troops who emerged to fill the power vacuum. The Abu Al-Abbas Battalions, led by Salafi sheikh Abu Al-Abbas and formerly based in the Old City of Taiz, established a Judicial Committee (*Lajnah Adlieh*) headed by Radwan Kuti and appointed a group of lawyers to solve disputes between adversaries. Another group that has named itself the Legitimacy Supporters set up courts presided over by Abu Albra'a. Al-Qaida in the Arabian Peninsula has also formed its own courts, headed by Harith Al-Azi, which issue death sentences and engage in violent forms of retributive justice. Another arbitration committee was founded by Judge Lutf Al-Azzi, composed of several lawyers and set up to quickly resolve disputes.⁵⁰

By 2017, State institutions run by the de jure government began to resume their activities in Taiz, including those of the official courts. However, destruction of many court buildings meant the government had to rent properties in which to establish the courts, which came with a number of challenges. Private landlords refused to rent to the government as they did not trust its ability to pay rent, so the government was forced to find co-signers. Eventually, the government was able to rent a large building to serve as the judiciary complex for the Court of Appeal and the West Taiz, Saber and Al-Salam courts. Another significant challenge was the refusal by some judges to return to Taiz because of security issues, so the SJC in Aden appointed newly graduated judges to courts in Taiz. Now, most of the courts, including the Specialized Penal Court, the Civil Court, the Commercial Court and the Public Funds Court are operating in Taiz.

3.5. Budgetary Issues

In 2014, the estimated budget for operating the judiciary and judicial institutions was 27 billion riyals (approximately \$125 million). In the present context, the government has not been able to provide a stable monthly salary to governmental employees, including judges and employees of judicial authorities and the Ministry of Justice. The International Monetary Fund has urged the Yemeni government to “extend its payments of public sector salaries to the whole country to help the war-shattered

⁵⁰ Sam Rights and Liberties, [AR] “The Forgotten Land 2,” September 2018. Accessed October 2019: <https://www.samrl.org/ar/sam-launches-its-second-report-on-human-rights-situation-in-yemen/>.

economy to recover.”⁵¹ The instability created by the absence of a monthly salary has not only impacted judicial institutions, but has also damaged the exercise of judicial independence.

⁵¹ Reuters, “IMF Urges Yemen Government to Pay Public Sector Wages Across Country,” July 2019, Accessed September 2019: <https://www.reuters.com/article/us-yemen-economy-imf/imf-urges-yemen-government-to-pay-public-sector-wages-across-country-idUSKCN1UE2GE>.

Part 4: Post-Conflict Challenges and Recommendations

4.1. Overview of Key Issues

As illustrated in Part 3, the conflict has created significant obstacles that are hindering the effective functioning of the judiciary. This section will look at challenges that are likely to arise in the post-conflict period. Broadly speaking, there are two overarching issues that must be taken into consideration in the Yemeni context. The first is the existence of two sets of judicial bodies set up by the de facto and de jure governments in Sana'a and Aden, respectively, which will have to be addressed in the post-conflict transitional period. Second, in accordance with the NDC outcomes and Draft Constitution, the structure of the executive, legislative and judicial branches is likely to shift away from a unitary system to a federal system, which will impact the administration of justice in the longer term.

In addition to these issues, a number of specific challenges will continue to affect the judicial system in the post-conflict era. This is likely to be true regardless of the type of agreement negotiated to end the conflict. These challenges may include, but are not limited to, a lack of trained and qualified judges and staff, an unstable security situation, political interference, diminished judicial independence, corruption, ineffective administration of justice, lack of timely access to justice and insufficient financial resources.

4.2. Recommendations

Without knowing the exact form that any post-conflict negotiated settlement or transitional government could take, it is difficult to make tailored recommendations on judicial reform at this stage. However, based on the current situation on the ground, previous research into establishing the rule of law in post-conflict settings and the experience of other countries that have emerged from civil war, it is possible to offer suggestions for judicial reform that may be applied to post-conflict Yemen.

Reshaping the Judicial System During the Transitional Phase

In the immediate post-conflict period, it is highly probable that some form of transitional government will be appointed for a set period of time. During this transitional phase, it will be important to lay the groundwork for a restructured judiciary. For the purposes of this analysis, it is assumed that the provisions of the Draft Constitution relating to the judiciary will remain unchanged, despite the fact that other more politically contentious aspects of the Draft Constitution (such as the shape and number of regions) may change before a final constitution is brought into force.

As mentioned above, a principal concern is the present existence of dual judicial systems run by the de facto and de jure governments, neither of whom recognize each

other's legitimacy. In the immediate post-conflict period and during the transitional phase, finding a way to unify these systems to create new, single entities is likely to present challenges. With this in mind, one approach could be to consider returning to the judicial structures that were in place during 2014, prior to the establishment of parallel judicial institutions. At that time, the membership of the SJC – which included the current President of the SJC in Aden, Judge Naser, and the current President of the Supreme Court in Sana'a, Judge Alsamwi – was not a matter of contention between the opposing parties to the evolving conflict. The re-establishment of the SJC as it was in 2014 could provide a more politically neutral basis on which to move forward with longer term judicial restructuring.

Another option for consideration is that put forth by Judge Ahmed Al-Dubhani, the head of the administrative department of the Association of Judges, who suggested the formation of a transitional SJC elected by members of that body.⁵²

Irrespective of the judicial structures' specific configuration, the notion of judicial independence must underpin efforts to establish the judiciary during the transitional period. For example, any future peace agreement may involve power sharing of the executive branch between the parties to the conflict, as was the case during the transitional period after 2011. In such a situation, the judiciary should remain independent from political affiliations to the greatest extent possible. The actors involved in post-conflict restructuring will also need to focus primarily on laying the groundwork for a new federal system and decentralizing the judiciary. Importantly, this process will involve drafting new federal legislation to comply with article 209 of the Draft Constitution and reformulating the existing Judicial Authority Law.

In preparation for an expanded judiciary, training for judges and court staff will be essential during the transitional phase and beyond. As noted earlier in this paper, there have been documented cases of judges in Yemen being targeted and killed during the conflict. As a result, qualified judges are likely to be in short supply. To set up the judiciary for success in the long-term, it is important not only to provide legal training to current judges, but also to focus on legal education for those who wish to become judges in the future.⁵³

There will also be practical considerations, such as determining how and where to reconstruct damaged courthouses, assessing the financial resources required to staff new regional courts and providing security for the judiciary. First steps in this regard will include gathering data on the extent of the damage and drafting a budget for reconstruction, staffing and security measures.

An important factor in setting the stage for effective judicial reform is the extent of internal actors' involvement in rebuilding the system. It has been widely

⁵² Yemeress, December 2015, *supra* note 43.

⁵³ Richard Sannerholm, "Rule of Law Reforms in Post-Conflict Societies," *Journal of Conflict and Security Law* (2007) 12(1), 65-94 at pg. 83.

acknowledged that internationally mandated rule of law initiatives in countries emerging from conflict should take into account local dynamics, engage with national actors and genuinely involve domestic leadership and personnel to improve the sustainability of reforms.⁵⁴

Further Considerations for Judicial Reform

It is outside the scope of this paper to engage in a complete review of judicial reform methods. Therefore, the purpose of this section is to briefly highlight factors that could inform further discussion of judicial reform and promotion of the rule of law in Yemen.

Recent research suggests that the existence of power sharing arrangements in countries emerging from internal armed conflict can benefit the exercise of judicial independence and the promotion of the rule of law.⁵⁵ In particular, empirical analysis has shown that “countries that adopt a range of power-sharing institutions have higher de facto judicial independence scores following the end of their respective civil wars than those countries that include no or few such measures.”⁵⁶ Liberia, which endured years of civil war that ended with a comprehensive peace agreement in 2003, is an example of a country that used political, military and economic power sharing measures to transition from conflict to peace.⁵⁷ Despite a history of executive branch interference in the judiciary, which external rule of law reform programs were generally unable to address in the post-conflict period, power sharing measures seemed to help address the power imbalance between the executive and the judiciary and “[appear] to have helped secure a degree of independence for the judiciary.”⁵⁸

In relation to any future transitional government in Yemen, it has been recommended that an independent oversight mechanism be formed to monitor the performance of the government and individual ministers, thus ensuring transparency and accountability.⁵⁹ The establishment of a similar independent monitoring body for the judiciary could prove useful, not only to observe the actions of individual judges, but also to gauge the functionality of the newly established judicial system and

⁵⁴ See, for example, Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict states: mapping the justice sector*, HR/PUB/06/2 (2006); Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict states: vetting: an operational framework*, HR/PUB/06/5 (2006) at pg. 7; Hiram E. Chodosh, “Reforming Judicial Reform Inspired by U.S. Models,” *DePaul Law Review* (2002) 52(2), 351-382 at pg. 360-61 (referring to judicial reform in general, not necessarily in the post-conflict context); Caroline A. Hartzell and Matthew Hoddie, “Power Sharing and the Rule of Law in the Aftermath of Civil War,” *International Studies Quarterly* (2019) 63, 641-53 at pg. 642-43.

⁵⁵ Hartzell and Hoddie, 2019, *supra* note 54.

⁵⁶ *Ibid.* Pg. 652.

⁵⁷ *Ibid.* Pg. 650.

⁵⁸ *Ibid.* Pg. 651.

⁵⁹ Rafat Al-Akhali, Osamah Al-Rawhani and Anthony Biswell, “Transitional Government in Post-Conflict Yemen,” Policy Brief, Rethinking Yemen’s Economy, 5 August 2019 at pg. 9.

recommend modifications as and when necessary. Oversight and independent assessment of the structure of the judicial branch itself may also prove particularly significant in the context of a shift from a unitary to a federal system. Moreover, a monitoring mechanism may be useful in evaluating levels of judicial independence, one of the fundamental components of the rule of law. Respect for judicial independence and neutrality will be essential if the judiciary is to achieve and maintain legitimacy in the post-conflict era.

The challenges in securing meaningful and sustainable judicial reform after the conflict ends should not be underestimated. In one empirical study that assessed conflicts that ended between 1970 and 1999, it was found that civil liberties, judicial independence and restraints on executive authority only improved modestly after the cessation of conflict, and often only returned to the pre-war status quo rather than demonstrating any meaningful progress.⁶⁰ Moreover, overcoming some of the barriers to an effective judiciary, such as corruption and lack of access to justice, will require sustained legal, political and behavioral change, and should not be expected to diminish significantly in the short term post-conflict.

⁶⁰ Stephan Haggard and Lydia Tiede, "The Rule of Law in Post-Conflict Settings: The Empirical Record," *International Studies Quarterly* (2014) 58, 405-417.



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