

Background Paper on the Structure of the State for the National Dialogue on Yemen's Future

Modern Constitutions and State Structuring

The National Dialogue will be addressing the full range of important challenges that confront Yemen for the future.. As consensus evolves on how to address these challenges, there will be a need to give constitutional expression to some of the many directions and measures agreed. This will give Yemenis the opportunity to modernize their constitutional arrangements, either with a new or substantially revised constitution.

This paper focuses on the broad “structure of the state”, meaning the fundamental institutional arrangements of government that are a core element of any constitution:

- The central political institutions, including the executive (President and Ministers) as well as the legislature;
- The courts and the administration of justice;
- Regional and local political institutions;
- Principles and institutions governing elections, political parties and referendums;
- Constitutional amendment;
- Emergency powers;
- Public finance;
- The civil service;
- The military, police and security service; and,
- Independent commissions.

Together, provisions around these subjects will determine which actors and institutions—voters, the central executive and legislature, regional and local governments, the courts, and other public institutions—have what powers subject to what principles and possible constraints.

Most recent modern constitutions, e.g. South Africa's of 1996 and Kenya's of 2010, deal with more of these issues (such as public finance, the civil service, the military and security services) and often in more detail than do older constitutions. This has been particularly driven by the desire to be clearer about rights and more protective of the integrity of the democratic institutions established. A major question for the National Dialogue will be to consider what should go into the constitution and what should remain for normal laws and regulations.

These issues of the “structure of the state” need to be seen in the context of other provisions that may be in the constitution. These can include: a preamble about the

nature and values of the country and its people and various populations and languages, and perhaps its religion; symbols, such as the flag and anthem; the national language or languages and recognition of other languages; the territory of the state; certain national holidays; the nature and entitlements of citizenship; long sections on rights and their enforcement (including not just personal liberties and rights, but potentially economic, social and environmental rights). While not normally considered part of the “structure” of the state, these provisions can constrain the powers or define the obligations of governments and other institutions (e.g. in relation to rights) and in that sense they are part of the complex web of arrangements captured in the constitution.

Fundamental Institutional Arrangements

The remainder of this paper provides a quick overview of issues and options related to the fundamental institutional arrangements of the state. While these are discussed one after the other, it is clear that some choices around one set of institutional arrangements, e.g. a parliamentary regime, can have implications for other institutional arrangements, e.g. the role of the upper house.

1. Central Political Institutions

There are three basic models for central political institutions: a Presidential regime; a Parliamentary regime; and a hybrid model. Each of these is capable of many variations and some countries (Switzerland) have unique adaptations.

- In a Presidential regime (e.g. USA, Nigeria, Brazil), the president is directly elected, he has strong powers to initiate legislation and refuse legislation, he may have important special powers (e.g. in foreign affairs and defence, dissolving the legislature, calling referendums); and, he can name ministers (there may or may not be a Prime Minister) who will not sit in the legislature but whose appointment may need some form of legislative approval; the Government (or Cabinet) does not require the “confidence” or support of the legislature to continue in office.
- In a Parliamentary regime (e.g. UK, Germany, India), the Government is formed by the party or group of parties able to win and maintain the “confidence” of the lower house of the legislature (i.e. to win votes on issues such as budgetary matters that are deemed to be critical to whether the Government is capable of governing), notably on budgetary measures; Ministers are normally elected and remain members of the legislature; the Government (Cabinet) is headed by a Prime Minister; the President, who may be elected by the legislature or the population, has weak powers.
- In a hybrid model (e.g. France), there is a popularly-elected President who will have a number of significant powers (especially related to foreign affairs and security), but there is also a Prime Minister who heads a Government that must have the confidence of the lower house of the legislature.

There are pros and cons of each of these models: strong Presidential regimes can lead to “hyper-Presidentialism” and one-man rule and the exclusion of many voices

from government, while weaker Presidential regimes (with strong legislatures) can lead to deadlock when the President and legislature are politically opposed. Parliamentary regimes require a Prime Minister to maintain the support of a majority, so it is more difficult to be autocratic, but they can result in weak governments if the governing coalition is composed of very diverse parties and views. The hybrid model works smoothly if the President and legislature are politically allied, but can lead to awkward “co-habitation” when they are not.

Legislatures in most democracies have two chambers: often called the lower and upper houses. In every case, the lower house is deemed to be the “popular” house, where the allocation of seats amongst parties is meant to reflect their relative support in the electorate. The electoral system will determine how this is done. In the early history of upper houses, they were usually designed to give extra representation to the aristocracy, larger property holders, religious and regional interests. Over time, some upper houses have been abolished and others modified to have a different representative character and powers. Upper houses have been used in federal or decentralized systems to provide a stronger representation for smaller provinces or states; they may be elected directly or indirectly (by regional legislatures) or be representative of the regional governments themselves. An upper house can use a different electoral system than the lower house (which will give each house a different character). They can also provide for special representation of minorities or other groups.

Just as the composition of upper houses varies, so do their powers. Typically, upper houses are relatively weak in Parliamentary and hybrid regimes. For example, they may possess limited powers with respect to bills that would raise or spend money, because the lower house determines who forms the Government. Upper houses in Presidential regimes can be as powerful or even more powerful than the lower house because this does not threaten the stability of the executive which does not depend on the confidence of either house (although there may be legislative deadlock on occasion).

These models are potentially subject to many variations and refinements in their design, e.g. in the extent of Presidential powers.

2. Courts and administration of justice

Courts play a central role in upholding the “rule of law,” which means that governments and government officials must be both guided and constrained by a constitutional and legal framework. In order to play this role, the courts must be professional, independent, and effective.

Their ability to uphold the constitutional and legal framework, including their capacity to protect rights, depends a good deal on whether they have the power to strike down laws or executive actions that violate the constitution. Under a system

of “hard” judicial review, the government is bound by a judicial decision declaring a law or act unconstitutional. Under a system of “soft” judicial review, the government has some ability to override or ignore the decision. The court may be limited to finding a law incompatible with the constitution, in which case the government has the final say over whether to amend or repeal the law. Alternatively, the court may be able to strike down laws, but the legislature may be able to override the court’s decision on a temporary or permanent basis.

The design of court systems varies. There can be a single court system in which courts of general jurisdiction hear every type of case and are subject to control by a single supreme court (a unitary judiciary), or multiple court systems, each with its own jurisdiction and its own head court (a plural judiciary). A judiciary may be divided because some courts specialize in a particular subject matter (e.g., constitutional law, or administrative law, or family law), or because there is a geographical division of labor (e.g., national and regional courts within a federal system). With a plural judiciary, there is always a risk that different court systems may end up rendering conflicting decisions on similar issues.

A central issue in designing a judicial system is the question of how to secure **judicial independence**. If judges fear that their careers or salaries may be affected if they try to enforce the law honestly, this could undermine their fairness and impartiality. However, judicial independence may need to be balanced against **judicial accountability**. The integrity of the judiciary may be threatened if judges are so independent that they cannot be removed even if they are corrupt or incompetent. Countries deal with this trade-off in different ways, and there is no simple answer to how independent the courts should be.

The selection and promotion of judges plays a large role in shaping judicial independence and accountability. Some countries have career judiciaries, with entry into the judiciary at a young age, often on the basis of examinations, and progression to positions of seniority over time. Other countries select judges on the basis of their accomplishments and professional reputation (as private lawyers, prosecutors, or law professors, for example). It is also possible to combine these systems (for example, by combining a career judiciary with a constitutional court whose members are partly or entirely appointed from outside the judiciary). Judges may be selected and promoted on the basis of competitive examinations, or by “merit” commissions consisting of some representative combination of the legal profession, citizens and perhaps political parties, or by political actors, which could mean executive and or legislative involvement, with or without input by the judiciary. Whether judges are appointed for fixed terms, to a certain age, or even indefinitely can also influence their independence. They may be considered less independent if appointed for relatively short fixed terms while being eligible for reappointment. The who, how and for what of removing judges from office prior to the expiration of their term is central to their independence. Does the procedure for removal have clear criteria and is it autonomous from political considerations, or is it essentially political (whether by the executive, legislature, voters or some combination)? Judicial independence may be weakened if the government is free to expand the size

of each court (thus shifting the balance in its favour) or to reduce the age of retirement (thus clearing the way for new appointments). Conversely, judicial independence will be strengthened if such provisions are constitutionalized.

3. Regional and local political institutions

Countries vary in their political centralization or decentralization. On the one hand, centralized government can ensure consistency of treatment and perhaps be less costly; on the other hand, regional governments may permit variations in policy across the country that reflect different regional preferences or priorities. If it is decided to have sub-national governments, there are many different ways to structure arrangements, as well as how many of the provisions around this should be spelled out in the constitution or left to legislation. Both “federal” and “unitary” systems can have regional governments and the powers and resources of regional governments in some so-called “unitary” countries are actually greater than in some so-called “federal” ones. Both “federal” and “unitary” systems may constitutionalize provisions for regional and local government.

Regional government makes most sense in countries with very large spaces or populations, or highly diverse regional populations or economies. Federal countries currently vary from three to over eighty regional units. Experience has shown that managing politics in countries with very few units is more difficult than in those with more units. A very large number of units can pose issues of the cost of running many governments as well as of possible central influence a system of smaller units. Perhaps the most fundamental point in adopting regional government or not is that the arrangements should “feel right” to the population.

A choice to have regional governments requires decisions on:

- *The number and boundaries of the units or of a process for determining this.* In many devolved regimes the definition of the regions has been obvious, but in others it has proven to be a challenge.
- *The form of the regional governments.* In most devolved regimes the regional governments have the same basic structure as the central institutions (Presidential regimes go with Governor-led regions; Parliamentary regimes go with Parliamentary regimes (though usually regional governments will not have upper houses). These different forms can affect how the central and regional governments relate to one another: executive-to-executive relations tend to dominate in Parliamentary regimes, whereas legislatures play can also play a significant role in Presidential regimes.
- *The allocation of legislative and administrative powers.* It is necessary to determine which order of government can pass laws on what subjects as well as who administers what laws. In some cases, there is a clear allocation of exclusive power to the central or regional governments; in other cases, there may be what is called “concurrent power”, where both can pass laws but with national laws being paramount if there are conflicts between the laws (the

central laws may set a national framework which is then filled out by regional laws). In some countries, the regional governments administer national laws in areas of concurrent power. Typically regional governments have their heaviest responsibilities in social, health and educational services, but some of these may be reserved for the national government. Detailed provisions on allocations of powers can be long, with many specific powers. The allocation of powers may be set out in the constitution or left to national legislation.

- *Legal responsibility for local government.* When there are three orders of government, there is a question of the constitutional or legal status of government at the level of municipalities or districts below the regions: some constitutions establish local government as a third order of government, while others simply make it a responsibility of regional governments; responsibility can also be shared between the central and regional governments in various ways. It is normally unwise to specify the physical boundaries of local governments in constitutions, which are harder to amend than laws, because of the need to revise these over time as cities grow.
- The financing of local and regional governments. Constitutions in the more devolved systems, especially federal regimes, typically set out the taxing and revenue-raising powers of the central and regional governments; they may also do so for local government if it is established within the constitution. (The alternative is for the central government to do this by legislation.) Regional and local governments almost always have greater program responsibilities than can be financed through their own source revenues, so some central taxes may be shared (and this could be set down in the constitution) and there may be fiscal transfers from the central government to the regional and local government and from the regional to the local governments; such transfers may be conditional (to be spent in a certain area and even in a certain way) or unconditional. These fiscal arrangements can try to ensure a certain basic level of public services throughout the country, even in very poor jurisdictions.

Normally, devolved systems of government are based on all regional governments having the same legal powers and responsibilities. In federations there can be exceptions: the national capital sometimes has a special status as a territory under the federal government, and there may also be special arrangements for thinly populated large areas or certain tribal areas whereby they are “territories” under the legislative jurisdiction of the central government, with fewer independent powers than the regional governments have. Beyond that, constitutionalized differences in the powers of regional governments have been relatively rare in federations.. However, some unitary countries, notably the United Kingdom, have highly asymmetric arrangements with one or more special regions having their own governments with significant responsibilities while most of the country is directly under the central government.

4. Provisions regarding elections, political parties and referendums

Elections are at the heart of democracy and political parties are the principal institutions through which different currents of public opinion organize and compete. It is important that elections be regular, well managed and fair and conducted by rules that are designed to present a good reflection of public opinion and that political parties are established and managed in an appropriate manner. Modern constitutions can have quite extensive provisions in this regard:

- They may establish principles governing the conduct of elections and the right to vote, and the type of electoral system (proportional representation of a certain kind or single member plurality or majority systems).
- They normally require the establishment an electoral commission and may set out rules regarding how it is to be composed and conducted so as to be neutral and professional. Certain powers and responsibilities of the commission will be set out.
- They will also set out principles regarding the nature of political parties (in some countries regional or sectarian parties are not allowed), their conduct and finances, and perhaps some rules designed to ensure fair competition, e.g. in access to media.

Referendums are used in some countries for certain issues of great importance. They may be required for the approval of (some) constitutional changes, but they can also be used to confirm or defeat laws approved by the legislature or to get public direction on an important question. Referendums can be legally binding or simply a very significant sounding of public opinion that does not ultimately bind the government. Thus, constitutions may indicate whether there may be referendums (especially legally binding ones) and if so on what kinds of questions and subject to what procedures for initiating one: by the president (in a Presidential regime), the president and the legislature, the government (in a Parliamentary regime), or even by a petition signed by a specified, but large, number of citizens. Each of these alternatives about whether there may be referendums and who initiates them has important different implications for relative distribution of political power within the governmental system.

Because there are so many technical issues around elections and referendums, electoral commissions, and political parties, modern constitutions almost always set out some limited principles on these subjects, while calling for a law to set out the details. In devolved systems of government there is a question whether and to what extent elections at the regional level maybe dealt with by the national electoral commission and subject to the national electoral law: there are efficiencies in doing this, but in a number of devolved regimes each order of government deals with these issues on its own.

5. Constitutional amendment

The Constitution is a country's "basic law", which has a special position both as a foundation and a symbol. The drafting of a constitution usually involves a much more elaborate process of consultation and participation than a normal law. Certain provisions of the constitution may be viewed as fundamental to the political compact reached when the constitution was drafted so that they should not be subject to the possibility of an easy amendment by a small, and perhaps transient, majority in the legislature. Even in small, centralized countries there are often special majorities required to amend the constitution. Such special majorities might be in the legislature (or in both houses of the legislature), or a requirement to submit proposed amendments (at least to certain parts of the constitution) to referendum (and even then, a special majority may be required).

In devolved systems, notably many federations some or all constitutional amendments may require the approval of a majority (or special majority) of regional legislatures or populations: there may be a requirement for a particular majority at the national level as well as in a majority (or specified number) of regions. Most federal constitutions require a state or provincial legislature (or population) to agree to a change in state or provincial boundaries, but India is an important exception. Finally, the support needed for constitutional amendments may vary according to the section of the constitution and some constitutions even have fundamental clauses that cannot be amended. .

The rules around constitutional amendment can be a central part of the structure of a state, especially when certain groups or regions may be looking for extra protections as part of a political understanding regarding the nature of the country, Thus there is a need to balance a degree of flexibility with a level of assurance that the constitution will be relatively stable and even, in some cases, very hard to change.

6. Emergency powers

Well-designed constitutions reflect a carefully considered balancing of the roles of the executive (the President or Cabinet), the legislature and the courts. However, there can be circumstances of a national emergency—war with another country, insurgency, natural disaster—when the normal systems and rules of government are ill-adapted to dealing with the crisis and so many constitutions have special provisions for governing in these circumstances: typically, they give the President or Cabinet the authority to rule by decree (i.e. to make laws without the involvement of the legislature). Such an authority sets aside the normal balances and protections within the constitution and in many countries Presidents or Cabinets have abused the emergency power, even in some cases making it the basis for governing by decree for a long time, even when there may be little justification in terms of an emergency. Thus a poorly crafted emergency power can undermine the whole structure of constitutional government.

Thus it is important that emergency powers be subject to appropriate constraints and principles, including limited circumstances when the power may be invoked, a proper process for its coming into force and approval (including a rapid response from the legislature, perhaps subject to a special majority), limits for the period of an emergency, with rules regarding any extensions, and role for the courts to determine the legitimacy and duration of the emergency (because the government may control the legislature). As well, even during an emergency there need to be limits on or rules regarding the possible violations of the various rights set out in the constitution, and these can be elaborated in the constitution.

7. Public Finances

Governments operate on money, so they need powers to raise revenues and spend, but the public has a strong interest in public finances being managed in a responsible way. Thus constitutions often set out principles, rules and powers, and create supervisory or other special offices to promote good financial management. The basic principles can include concepts such as equity, efficiency, prudence, transparency and accountability. There can be quite specific provisions regarding the public accounts and how revenues and expenditures must be recorded. There may be special funds created; petroleum rich countries often have one or two funds to address the issues of revenue stability and longer-term savings; the basic principles and rules governing these may be constitutionalized. A number of countries now have “financial responsibility acts” that deal with transparency, procurement procedures, debt management and limits. The constitution will establish the office of the chief auditor and set out procedures to try to ensure its independence and effective functioning; these auditors need full access to government accounts so that they may report to the legislature (and publicly) on the government’s financial management.

Constitutions in devolved countries can have additional provisions, including the revenue raising powers of the central and regional governments, and sometimes of the local governments. They may also establish the principles that will govern the central governments sharing of taxes or making of fiscal transfers to regional (and sometime local) governments (for example, the factors to be considered in equitable distribution of funds to different regions). Some constitutions specify a precise amount of certain revenues that must go to regional governments, such as petroleum revenues, but such clauses need to be carefully considered to be appropriate to changing prices and levels of production. Less problematic may be an assurance of a specified minimum level of funding for regional governments. Many devolved regimes have special agencies, often called finance commissions, which periodically review and make recommendations regarding the fiscal situations of the different governments. Devolved countries also differ in that some have a national office (with regional branches) for public audit, while others have separate audit offices for each government.

Finally, in addition to establishing an office for a chief auditor, many countries are now establishing by constitution some form of anti-corruption agency, which can have extensive powers to investigate. A key challenge is to ensure the impartiality and independence of such agencies. There is also a need to determine to what extent they have the right to prosecute or if that is left to the senior official within the justice system who normally prosecutes crimes.

8. Civil Service

The quality of government policies and services depends heavily on the professionalism and integrity of the civil service. The civil service forms the largest human component of the structure of the state and its members are responsible for advising ministers on the full range of government policies and for administering the biggest organizations in a country. Civil servants represent virtually the full range of skills and professions in society and they can dominate certain occupations, such as teaching, policing, and various health professions. Civil service jobs are often considered attractive because the work is rewarding and the terms of employment are good; this can be particularly true in less developed and middle-income countries. There is a frequent tension between the goals of a professional civil service and the desires of politicians to use posts for patronage or ensuring partisan loyalty within the civil service.

Given the importance of the civil service, modern constitutions can have a section setting out the values and principles of the civil service and requiring a law to be passed putting these into practice. A constitution may have provisions regarding the representativeness of the civil service—perhaps in general, or with reference to certain categories, such as women, linguistic or regional minorities, the handicapped, and marginalized populations. Some constitutions limit the political rights of civil servants to preserve the neutrality of the civil service while others permit civil servants to be members of a party and require that they not be discriminated against because of this in appointments.

Constitutions can provide for some form of public service commission (or even commissions, with special ones for large, distinct professions such as police and teachers) that has independent powers to oversee the integrity of the appointment process, the respect for other requirements, such as representativeness, and perhaps other aspects of public administration. Most of a commission's specific powers and responsibilities will be determined by a civil service act. While the integrity and efficiency of the civil service is important, there is an important issue how much power to give to arm's length commissions regarding the actual design of organizations versus empowering the Ministers or senior officials responsible for delivering programs to deal with this.

In devolved systems of government, there is also a question whether the regional and local governments have their own civil services or are in some way tied into the national arrangements. There are examples of both approaches and the basic

arrangements will normally be provided for in the constitution. Even when the devolved governments have separate civil services, the national constitution may establish certain principles and requirements governing them.

9. Military, police and security services

A major challenge in many countries is to ensure that the military and security services are subject to appropriate civilian oversight and control within government. Similarly, there is a strong public interest in ensuring the integrity of their operations and that they do not abuse their considerable powers.

Modern constitutions typically have a provision for the establishment of these different services along with some fundamental principles applying to them and the need for a law or laws to elaborate in detail. A key principle can be the limits on the role of the military in internal affairs; another can be the representativeness of these services. Given the sensitivity of these issues, the constitution itself may go into considerable detail regarding arrangements, which can include a national security council, a defence council, a police commission, and an intelligence commission. Defence, policing and intelligence present different governance challenges. With police and intelligence services there can be important issues regarding the nomination and tenure of senior officers, as well as the extent of their investigative powers. There may be a need for oversight bodies to review complaints regarding the abuse of their powers. Intelligence services present a particular challenge in that so much of their work must remain secret so oversight arrangements may be less publicly transparent than those over police.

In devolved systems of government, the structure of policing services and their accountability arrangements can be very important. National police may be mistrusted by certain populations, whereas regional or local police may be not be well coordinated with one another or the national police and they may be subject to undue local pressures. Some constitutions set out precise arrangements for the structuring of the police service or services at the national, regional and possibly local levels, setting out the command structures and accountability relationships to each order of government.

10. Independent commissions

We have seen above references to independent commissions in a variety of areas. Modern constitutions often create several such commissions because of the felt need to ensure a degree of non-partisan neutrality, as well as professionalism, in the oversight of different aspects of government operations. Collectively, these commissions are endowed with substantial powers that limit those of the executive and legislative branches of government; they also often have a significant oversight function regarding government operations. For each commission, there is a question how much the details regarding its composition, nomination and appointment, tenure, and responsibilities should be set out in the constitution or in legislation. To protect the independence of such commissions, appointments to

them can be done by the legislature (perhaps requiring a super-majority) on nomination by the executive or by a nominating body, or by a special committee representing different parties or sectors or some other special device.

In addition to the commissions already mentioned, commissions can be established constitutionally to deal with human rights, judicial services, land issues and other on-going politically sensitive issues/questions. One consideration is the cost of operating a large number of commissions. In devolved regimes, there may occasionally be joint commissions between governments or provision for representation of regional governments on national commissions. Regional governments themselves can have independent commissions as well. Typically, the constitution would not be used to establish short-term commissions on specific time bound issues or processes, including truth and reconciliation.

Conclusion

This paper has tried to provide a very summary overview of the major elements that determine the structure of the state within a country. The drafting of a constitution should be guided by a number of broad principles and objectives that would then be reflected in the precise provisions around these elements.. A constitution should have a coherent architecture, so that its various institutional choices are designed to work logically together.