



## Fighting Terror By Indictment: A Review of How the Yemeni Justice Sector is Facing Salafi Jihadist Violence

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Four years after the devastating attacks of September 11, it appears increasingly clear that in addition to the significantly stepped-up military and intelligence efforts devoted to hunting down al-Qaeda and its affiliates, Washington will have to invest significant resources to pursuing these groups through greater law enforcement cooperation across the globe. U.S. military and intelligence assets might still be effectively deployed against top leadership targets or other key al-Qaeda assets that can be located in remote areas, but the networks these groups have established in some forty countries involve far more operatives than the U.S. can take down through politically-costly and logistically-difficult renditions. In addition, these individuals usually live or operate in population-dense locations where air strikes would necessarily incur great civilian casualties. Since experience has shown that these individuals often are involved in the full gambit of terrorist operations—from fundraising and recruiting to military training and attacks—disruption through law enforcement activities would appear to be the most effective remaining option.

Launching a successful law enforcement “front” against al-Qaeda poses an immediate challenge in that it will require the United States to develop a body of expertise in the diverse legal systems of much of the Muslim world—a topic U.S. embassies and federal agencies cared little about in the heyday of the Cold War and its aftermath. This

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article seeks to help build this expertise by providing an initial review of the legal system and recent counterterrorism track record of Yemen, one of several key Muslim-majority states involved in the war against the al-Qaeda network. It concludes that Yemen has a strong legal system on paper to fight crimes of terrorism, but has largely undercut this potential by skirting these laws in a short-term bid to get suspected terrorists off the streets, which in turn has discredited its efforts and led to the release of many terrorist suspects. The paper argues that, despite these setbacks, Washington has much to gain from pushing for a renewed law enforcement-led counterterrorism effort in Yemen and should invest time and people toward this goal.

### Yemen’s Legal System in Brief

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The Republic of Yemen is a relatively modern creation, established in 1990 through a unification of North Yemen—a one-time territory of the Ottoman Empire that adopted a republican form of government in 1964 under the heavy influence of Egyptian President Nasser—and South Yemen—a British protectorate and later Soviet-backed socialist state.<sup>1</sup> Despite years of civil war between north and south, modern Yemen largely adopted the late constitutional structure of the north, which combined a parliamentary system with a strong presidency. While a largely free press and opposition parties have emerged in united Yemen, its President, Abi Abdallah Salih, is a former Army officer who rose to power in North Yemen in 1978 and continues to dominate Yemen’s nascent democratic institutions to this day.

The country’s legal system, again drawn mostly from North Yemen, incorporates both

Islamic law (*shariah*) and civil law traditions.<sup>2</sup> Yemen's *shariah* tradition dates back to the time of the Prophet in the seventh century. North Yemen's adoption of a constitutional republic in 1964 kept *shariah* as a fundamental source of law, but framed it for the first time in a civil law judicial structure modeled on the Egyptian (and thus French) system. As is common in areas of Southwest Asia, Yemen's more remote tribal areas have practiced a form of customary law (*urf*) that incorporates pre-Islamic, Islamic, and unique cultural norms. *Urf* settlements in local civil disputes continue to this day, but they have little impact on the country's counterterrorism efforts and are thus beyond the scope of this study.

### Sources of Law

Amendments to the Yemeni Constitution in 1994 changed the status of *shariah* from "a major source" to "the (single) source" of all domestic law, although there is little indication that this had a significant impact on the status of legislation already in force. The jurisprudence in modern Yemeni courts is predominantly Sunni, although the Islamic leadership of Yemen prior to the republican revolt was Zaydi, a Shi'i-based school. Jurisprudence during this era was a mix of both Zaydi and Shafi'i perspectives. In the last several years, Salafi principles—which share roots with the early Zaydi school—have emerged, in part due to a growing number of Saudi-funded schools.

Law journal reviews indicate Yemeni courts continue to base decisions on positivized law, both the Constitution and a series of civil, criminal, and procedural codes ostensibly based on established *shariah* rules. While most statutes originate from Yemen's legislature, the country's executive branch also can enact legislation—another mark of its French-influenced Constitution. Executive law takes the form of presidential decrees, government regulations and emergency statutes issued when parliament is not in session. Yemen's prime minister and council of ministers may also issue regulations.<sup>3</sup> The theory is that these laws are not supposed to override prior legislative statutes, although historically presidents have often abused their lawmaking powers. Yemen's constitution also asserts that the Republic "confirms its adherence to the UN Charter, the International Declaration of Human Rights, the Charter of the Arab League and dogma of international law which are generally recognized." While this provision does not clearly state that international law is a source of law in municipal courts, the door seems to be open for Yemeni judges to draw that conclusion in the future.

### Judicial Structure

Like the French system, Yemen's prosecutor's office is an extension of the courts. Yemen reportedly once allowed for investigating judges,<sup>4</sup> although this practice has been abandoned. Yemen's judicial system is broadly divided into ordinary and administrative courts. Ordinary courts have two levels—those of first instance and appeal—with both levels having internal divisions between criminal, civil, family, and commercial law. President Salih, by decree in 1999, created an additional special panel in the first instance and appeals court in the capital of Sana'a in order to try suspects accused of terrorism offenses and crimes against the state. Appeals courts in both countries can effectively retry cases heard in the lower courts at the request of either party (including the prosecution in criminal matters) on points of law or fact. Appeals panels consist of three judges. Yemen's constitution provides that all court hearings should be open to the public unless a court decides otherwise based on considerations of security or "morals." Finally, this system does not recognize the concept of *stare decisis*, or precedent, in court rulings with the exception of instances of judicial review.

A Supreme Court sits at the top of this structure.<sup>5</sup> At this level, five-judge panels can overturn a lower court decision if they find that the law was applied incorrectly. The court consists of several dozen judges and is divided into substantive divisions. Yemen's Supreme Court in 1991 obtained the added power of constitutional judicial review for existing laws.<sup>6</sup> A Supreme Court general assembly, consisting of the entire court and the Minister of Justice, can be called if a Supreme Court appeals panel wants to overturn a prior decision of the court.<sup>7</sup> Constitutional judicial review includes the authority to hear both concrete cases referred by parties and abstract review on questions submitted by either parliament or the executive branch. Yemen's Supreme Court is charged with additional duties including trying high crimes committed by the president or vice president.

The Yemeni constitution states explicitly that the judiciary is to be independent of other branches of government, going so far as to criminalize interference with a judicial decision.<sup>8</sup> A Judicial

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Councils nominally independent of the executive, but in fact led by the president is charged with overseeing the hiring, disciplining, and firing of judges.

Yemen's adoption of a civil law structure marks a significant departure from the traditional practice of *shariah* in at least two respects. The provision of a multi-layered court system that allowed for appeals and multi-judge panels is considerably different than the practice in traditional *shariah* courts. Historically a single judge would issue a unique ruling which carried the weight of divine provenance and was therefore not subject to appeals.<sup>9</sup> Secondly, by creating a system of positivized law contained in the constitution and legislative codes, traditional textualist scholars might complain that Yemen has replaced acceptable sources of Islam (most importantly the Quran and Hadith) with manmade law.

### Fighting Terror in Theory: Criminal Court Structure and Laws

Yemen boasts a fairly progressive criminal procedure on paper. The Constitution vests powers of arrest and pre-trial detention almost entirely with the judge, allowing the prosecutor (as an officer of the court) a maximum of seven days to detain a suspect, and requires court approval for any additional detention beyond this. Police may arrest an individual caught in the commission of a crime, but any other arrest on their part must be approved by a warrant given by a prosecutor or judge. The constitution provides for *habeas corpus* review within 24 hours of an arrest and stipulates that law should establish a maximum detention period—which appears to have been done in the Yemeni criminal code of procedure, according to a 2003 Amnesty International report.<sup>10</sup> Yemen's penal code makes arbitrary arrest punishable by a five-year maximum jail sentence.<sup>11</sup> The Constitution explicitly prohibits physical or psychological torture (which is criminalized), forced confessions or interrogating a suspect without the presence of an attorney. In language that mirrors Article I of the modern German constitution, Article 47(b) of the Yemeni constitution stipulates that anyone whose freedom has been restricted must have his "dignity" protected. The constitution establishes that an accused is to be considered innocent until proven guilty and prohibits the application of law retroactively. As is common in the civil law tradition, there is no right against self-incrimination.

Yemen's conviction and evidentiary standards are firmly rooted in *shariah* norms.<sup>12</sup> This

standard in most cases views the testimony of two upright Muslim males as sufficient for conviction. A woman's testimony carries half the weight of a man's. Press reports of Yemeni terrorism trials suggest the courts allow most types of physical evidence and expert testimony.

Yemen's Justice Minister in April 2004 told journalists that his country was drafting a special terrorism law, but to date the country has depended on provisions in the penal code and other existing laws.<sup>13</sup> Press reports and law journals indicate these provisions include several crimes that result in capital punishment, including leading a group formed to conduct a kidnapping or armed attack. Other possibly useful prohibitions include additional kidnapping charges, hijacking, sabotage or destruction of oil or economic assets, and accomplice provisions including document fraud and transferring funds used in an attack. Suspects may be charged with plotting or attempting an attack.

Yemen's Constitution allows judges to try suspects for crimes committed either in codified law or the *shariah*, meaning in principle that prosecutors could also try terror suspects for Quranic prohibitions against "making war" (*hiraba*), rebellion (*baghy*), or "sowing corruption in the earth", which has been defined in Saudi Arabia as sabotage or bombing and is the most commonly used charge against terrorist suspects there. Under *hiraba*, a judge has the option of sentencing a convicted party to banishment (imprisonment), amputation of the opposite hand and foot, beheading, or crucifixion (usually performed after beheading). *Baghy* is not punishable once the rebellion is quelled, in part because the concept defines the crime as one based on an incorrect but not un-Islamic belief. Finally, "sowing corruption in the earth" has been treated as a crime of *ta'zir*, or sin, which allows a judge to issue a discretionary sentence against the accused—usually death. Under *hiraba* and the "sowing corruption" charge, a defendant may avoid sentencing if he repents.<sup>14</sup> Yemen's constitution requires the president to approve all sentences of capital punishment.<sup>15</sup> As of 2001, execution was carried out in public by placing the convict on the ground and shooting him in the back.<sup>16</sup>

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## Yemen's Track Record: Excesses, Successes, and Failures

Yemen has suffered a series of terrorist-style attacks, including some against U.S. targets, that have been attributed to al-Qaeda affiliates called at different times the "Aden-Abayan Army" and, more recently, the Islamic Jihad Movement. Once considered tolerant of or sympathetic to Salafi jihadist groups, the Salih government vowed its cooperation with Washington after September 11, in part out of fear that the participation of Yemeni al-Qaeda members in that attack might prompt a U.S. invasion of the Arab republic, according to press reports. Despite this commitment, suspicions remain that al-Qaeda has influence in official circles in Yemen. In May 2005, the country's ambassador to Syria, who was also its former chief naval commander, fed these fears after he defected to the United Kingdom and asserted publicly that "al-Qaeda cells in the Yemeni military" helped execute the bombing of the U.S.S. Cole in October 2000.<sup>17</sup>

In a telling sign of President Salih's real power behind Yemen's democratic structure government authorities quickly dispensed with the human rights protections afforded in the Constitution and criminal code of procedure in pursuing terror suspects. Salih's Political Security Organization, an intelligence vice law enforcement agency which reports directly to him, rounded up hundreds of suspected al-Qaeda sympathizers, many of whom were alumni of the Afghan *jihad* against the Soviets. These individuals were detained in secret facilities without warrant or court approval for periods lasting over a year. Several allegations of torture have emerged. In August 2002, Salih created by decree another security agency, the National Security Organization, charged with "discovering and fighting hostile terrorist activities" and taking any other measures necessary to "protect state security."<sup>18</sup>

Sana'a in mid-2004 tried some of these detainees for two key terrorist attacks, but not without considerable controversy stemming in large part from the extensive and secretive pre-trial arrest periods of the defendants, which gave credibility to allegations of torture and forced confessions. The Sana'a special lower court panel on terrorism and crimes against the state convicted Abd al-Rahim al-Nashiri and Jamal al-Badawi for helping to orchestrate the bombing of the Cole. The court initially sentenced both to death, although al-Nashiri was tried *in absentia* and is in U.S. custody. Al-Badawi's sentence was later reduced to 15 years for reasons not apparent in the limited press coverage of the appeal. Four others were convicted as accomplices, receiving sentences ranging from

five to ten years in jail for roles that included document forgery and filming the attack. Prosecutors presented several sworn confessions and an impressive array of physical evidence in court, including purchase orders, licensing agreements, permit requests and expert reports. Defense lawyers, however, claimed the trial to be a farce and boycotted most of the hearings based on the state's failure to grant them access to the defendants before trial began or access to evidence prior to its submission in court.

The same court convicted 15 other defendants for the bombing in late 2002 of the French tanker M/V Limburg and related attacks, including the murder of a police officer, an attack against an oil company helicopter, and plots to kill the U.S. Ambassador and attack four embassies and the civil aviation authority. Two of the convicted received death sentences, one again *in absentia*, while others were ordered to serve between three to ten years for directly or indirectly facilitating the acts.

Unfortunately, 23 of Yemen's convicted al-Qaeda operatives—including al-Badawi and Limburg co-conspirator Fawaz al-Rabeei—escaped from jail on February 3, 2006 after digging a tunnel under a detention center in Sana'a.<sup>19</sup> The prison break was not the first involving al-Qa'ida suspects; 10 alleged to have been involved in the Cole attack slipped out of a prison in Aden in 2003.<sup>20</sup> The 2006 escape came just before the planned indictment of another 16 Yemeni detainees for being members of al-Qa'ida. One defendant, Muhammad Hamdi al-Ahdal al-Makani, is suspected of involvement in the Cole and Limburg attacks. Others are accused of plotting future attacks either in Yemen or against Western targets in Iraq. One of the defendants, Ali Sufyan, confessed directly to the judge of plotting attacks in Iraq, possessing six kilograms of explosives, and forging travel documents. The 15 others denied the charges against them, although prosecutors read several confessions made during interrogations. At least one press report suggest defense attorneys still were not getting access to prosecution files until after the beginning of trial.<sup>21</sup>

Salih has reportedly used his renewed campaign against terror to target internal enemies. In 2004, he directed government forces to assault followers of a Zaydi cleric, Badr al-Din al-Huthi.

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While the initial justification for the military engagement is murky, authorities by late 2005 had arrested hundreds of alleged al-Huthi supporters. As was the case with the arrests of suspected Salafi terrorists, all of the al-Huthi supporters have been held outside of normal criminal procedure. The Sana'a special court as of October 2005 had sentenced one al-Huthi supporter to death for "incitement" and conspiracy to overthrow the government. The court as of this writing was trying two more for "rising sectarian strife" and "plotting" with a foreign country, ostensibly Iran. In what appears to be a related case, prosecutors in December indicted a group of 36 others for an unspecified bombing in Sana'a in April 2005—a likely reference to a grenade attack against a senior Yemeni military official.<sup>22</sup> As with the other trials, the state's evidence appears to consist mostly of detainee statements and press coverage of court proceedings has been very limited.

Growing criticism of Salih's counterterrorism policy by domestic press agencies, NGOs, legislators, lawyers, and even judges—plus the inherent difficulty in processing several hundred detainees through the courts with little evidence of their involvement in specific terrorist acts—appears to have prompted the creation in August 2002 of a Religious Dialogue Committee. This committee, led by Humud al-Hattar, a prominent

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Supreme Court justice and *shariah* jurist, has engaged both Salafi and Zaydi detainees in an epistemological and legal dialogue intended to disprove the ideologies of these movements and thereby convert the detainees into law-abiding citizens. The process mirrors a voluntary mediation, where a panel of judges and Islamic scholars invite the detainees to engage, then ask them to prove the basic tenants of their

ideologies.<sup>23</sup> Some 360 detainees have been released under this program.

As noted in the section on Yemeni penal provisions, this process is generally compatible with the *Shariah* injunctions against "making war" (*hiraba*) and "sowing corruption in the land." While Justice al-Hattar suggests this concept has considerable merit, especially with foot soldiers of terrorist groups whose indoctrination is steeped in isolation from opposing viewpoints, some pundits wonder if the government is overselling the

program. Officials including al-Hattar claimed that by mid-2004 that the program had achieved "90 percent success" in "eliminating" the ideology behind terror and that there were no remaining al-Qaeda cells in Yemen.

## Conclusion

While additional detailed analysis is needed, an initial review of the effectiveness of Yemen's record in prosecuting crimes of terrorism suggests the country has a long way to go. President Salih has chosen to largely ignore the judiciary, and at times violate the constitution, despite relatively clear provisions against terrorism in domestic law. It does not appear that Yemen's judiciary exacts exceedingly high evidentiary standards, nor has media coverage of the few trials that have occurred revealed a debilitating lack of evidence available to the state. While some might argue that Salih's heavy-handed tactics took terrorists off the street quickly, his methods later discredited the few prosecutions pursued and appear to have forced the creation of the Religious Dialogue Committee—a mechanism that has merit in "turning" foot soldiers and recent recruits, but which seems to have been too eager in claiming victory and releasing detainees quickly. Finally, the escape in February of most of the few al-Qaeda associates Sana'a has actually convicted casts an even darker shadow on the Yemeni effort.

Despite this problematic track record, the U.S. and its allies should encourage greater legal efforts against remnant al-Qaeda groups in Yemen. As this review has shown, Yemen has a strong system of laws, procedures, and legal expertise drawn from both *shariah* and civil law traditions, and several specific penal provisions that should allow the state to try both terrorist operatives involved directly in attacks as well as leaders and support personnel. A stronger emphasis on transparent arrests and prosecutions is likely to meet with greater credibility at home and abroad and could serve as a example for other Muslim-majority states struggling with al-Qaeda associates of their own.

The U.S. and other countries fighting al-Qaeda also should seek to learn as much as possible from Yemen's Religious Dialogue Committee, not only as a sign of respect to the country's Islamic legal scholars, but also to gain a better standing of the specific "weak points" in the terrorists' jihadist ideology from a *shariah* perspective. Understanding these nuances at minimum would better inform our diplomatic relations with Muslim countries fighting terror, and it also may give us a better chance of success in suggesting to the Committee that its incorporate some measure of retributive justice into its program

by requiring, for example, that a participant serve a minimum jail sentence or perform some community service. If the Dialogue Committee proves to have a low rate of recidivism, Washington should consider working with Yemen and other countries to promote the concept as a potentially effective model of countering al-Qaeda's recruiting and propaganda operations in the Muslim world.

Finally, as this paper first argued, Washington would be well advised to invest some resources in building expertise within the federal government on the Yemeni legal system, particularly in the area of criminal law, which has not attracted much attention historically in Western academic circles. As a first step, this means training or hiring a few FBI agents or federal prosecutors

who can speak Arabic, paying for English translations of relevant Yemeni codes and law journal articles, and sponsoring bilateral or multilateral working-level exchanges with Yemeni judges and prosecutors. Such investments would undoubtedly pay significant dividends to U.S. interests in the (unfortunately likely) event of another major attack against Western interests in this key Muslim state.

*The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program for Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.*

<sup>1</sup> Richard Nyrop, ed., *The Yemens: Country Study*. (Washington: American University, Foreign Area Studies, 1986), 78-79.

<sup>2</sup> Contrary to a claim in the 2004 CIA World Factbook, Yemen's legal system does not appear to have incorporated any aspect of British common law, despite Great Britain's past colonial rule over the port city of Aden and its protectorate status of neighboring territories that would later comprise South Yemen.

<sup>3</sup> Shamiri, Nageeb, "Country Survey: Yemen," *Yearbook of Islamic and Middle Eastern Law*, vol. 1 (1994): 369-383.

<sup>4</sup> Al-Hubaishi, Husain Ali. *Legal System & Basic Law in Yemen*. Worchester, United Kingdom: Billing & Sons, 1988.

<sup>5</sup> North Yemen's first high court was called a court of cassation identical to the French model; but this was changed in the 1970 Constitution.

<sup>6</sup> Constitution of the Republic of Yemen, 1994, Art. 151.

<sup>7</sup> Shamiri, Nageeb, 372-3.

<sup>8</sup> Constitution of the Republic of Yemen, Art. 147.

<sup>9</sup> According to traditional Sunni jurisprudence, a party is required to disregard a ruling from an Islamic court if he knew that the decision was based on false information critical to the decision, or if the judgment was not based exclusively on the judge's exercise of his scholarly knowledge and application of appropriate sources of law and religious reasoning (*ijtihad*), which would be the case, for example, if he was bribed. I do not want to overstress this point; even Saudi Arabia, which holds the *Quran* as its constitution and practices *shariah* according to the extremely textualist Hanbali school of jurisprudence, has established a limited court of appeal in modern times, although this court's purpose is largely to reinforce lower court rulings. An excellent summation of this role was stated by a Saudi justice in an interview in September 2005: "The judiciary issues judgments, which are subject to study afterward either to confirm them or to reinforce their strictness." Abdallah Al-Urayfij, "Shaykh al-Luhaydan: Anyone Whom Kills Himself is Not a Martyr," *Ukaz*, September 14, 2005.

<sup>10</sup> Constitution of the Republic of Yemen, Art. 47.

<sup>11</sup> Amnesty International. "Yemen: The Rule of Law Sidelined in the Name of Security" (September 2003)

<sup>12</sup> Said Hasson Sohbi. "Women's Rights in Yemen Today," *Yearbook of Islamic and Middle Eastern Law*, vol. 6 (1999-2000): 82.

<sup>13</sup> "Yemen to Enact Anti-Terror Law," *Arab News*, April 21, 2004, internet edition

<sup>14</sup> Frank Vogel, "The Trial of Terrorists Under Classical Islamic Law." *Harvard International Law Journal*, Winter 2002.

<sup>15</sup> Art. 123.

<sup>16</sup> Yemen Gateway Website.

<sup>17</sup> Paris AFP, "Al-Qa'ida in Yemen Army Behind USS Cole Bombing: Former Envoy," 4 May 2004.

<sup>18</sup> Nageeb Shamiri, "Country Survey: Yemen," *Yearbook of Islamic and Middle Eastern Law*, vol. 9 (2002-03): 315-16.

<sup>19</sup> Al-Haj, Ahmed, "Plotter in USS Cole Attack Flees Jail," *Washington Post*, 6 february 2006, p. A10.

<sup>20</sup> BBC News Online, "Yemen arrests al-Qaeda members," 4 March 2004.

<sup>21</sup> Makaram, Faysal, "The trial of cell members accused of attacks against foreigners begins," al-Hayah, 5 February 2005, as translated by the U.S. Open Source Center.

<sup>22</sup> Saba, "Trial of Sana'a Bombing Suspects Adjourned," 6 February 2006, as translated by the U.S. Open Source Center.

<sup>23</sup> Yemeni Judge on Dialogue With al Qaeda Supporters, Change in Convictions." *Al-Quds al-Arabi*, 18 December 2004, 4.