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Essay

Constitutional Options for
Bahrain

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I. THE CONSTITUTIONAL BACKGROUND OF BAHRAIN

On February 17, 2011, protestors asleep in Pearl square were attacked by government forces, and at least five people were killed.¹ The King of Bahrain apologized for the use of force, and troops were withdrawn.² A political deadlock followed, during which leading parties from Bahrain on both sides rallied in favor of the usefulness of a constitutional dialogue for which this Essay was written. On Sunday, March 13, however, the situation suddenly deteriorated. The government declared martial law, called in a contingent of forces from Saudi Arabia and neighboring Gulf Cooperation Council (GCC) countries, and suppressed demonstrations.³ At this moment, the 2002 Constitution remains in force as does the political status of members of the royal family — the King and the Prime Minister, his uncle. Meanwhile, all eighteen members of the main opposition group, the Al-Wefaq National Islamic Society, have resigned from the lower house of Parliament.⁴

The Bahraini situation is in flux. The various parties involved advocate a range of constitutional solutions. These span the continuum from maintaining the structure of the monarchy under the 2002 Constitution, while making small concessions to appease protesters, to abolishing the monarchy and replacing it with a republic.⁵

It is against this complex background that this Essay is offered. By exploring a number of routes to be discussed, refined, and eventually incorporated in a new constitution or in amendments to the existing one, the Essay offers a modest contribution to the philosophy of nonviolence on the march in the ongoing Middle East revolution. These suggestions are informed by Bahrain's background environment. Bahrain has three characteristics that any constitutional process must address: the constitutional monarchy; the sectarian agency; and the constitutional and human rights demands that culminated in the Pearl Revolution.

The first characteristic that a constitutional process must address is the constitutional monarchy. In the context of the Middle East revolution of 2011, there are two identifiable models of change. The first model affects "monarblics," that is, republics that have morphed into absolute monarchies with long-term leaders who have raised their sons to succeed

1. *Bahrain: End Deadly Attacks on Peaceful Protestors*, HUMAN RIGHTS WATCH (Feb. 17, 2011), <http://tinyurl.com/3sg2hn3>.

2. *Bahrain News — The Protests (2011)*, N.Y. TIMES (Apr. 7, 2011), <http://tinyurl.com/36ah6zz>.

3. *Id.*

4. W.G. Dunlop, *Thousands Protest in Bahrain as MPs Resign*, AFP (Feb. 27, 2011), available at <http://tinyurl.com/65ogb3h>. Bahrain's parliament has accepted the resignation of eleven of those members. Alaa Shahine & Vivian Salama, *Bahrain Accepts Resignation of 11 Opposition Lawmakers*, BLOOMBERG (Mar. 29, 2011, 5:54 AM), <http://tinyurl.com/6xyr8tb>.

5. *Hardline Shi'ite Groups Demand Republic in Bahrain*, REUTERS, Mar. 8, 2011, available at <http://tinyurl.com/69p8knp>.

them. Examples include Egypt,⁶ Syria, Tunisia, Yemen, Iraq until 2003, and in other more complex forms Mauritania, Somalia, Djibouti, Algeria, and Sudan. The second model, and that studied here, is that of monarchies. In addition to the Arab Gulf states (Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, and Oman), this includes Jordan and Morocco. Within this model, Bahrain is important because of its long tradition of constitutionalism.⁷ The concept of a “constitutional monarchy” has been consecrated in two of the three main texts of post-independence Bahrain: It appears in Article 1(b) of the 2002 Constitution, which states, “The regime of the Kingdom of Bahrain is that of a hereditary constitutional monarchy,”⁸ and in the National Action Charter of December 2000, the Preamble of which refers to a “democratic, constitutional monarchy.”⁹ The Constitution of 1973¹⁰ does not include a direct reference to “constitutional monarchy,” but stipulates that while “Bahrain shall have a democratic form of government with the supremacy vested in the people,”¹¹ rule shall be hereditary.¹² The Bahraini Constitution of 2002 also recognized that “[t]he system of government in the Kingdom of Bahrain is democratic, sovereignty being in the hands of the people, the source of all powers.”¹³ A clear understanding of what is meant by “constitutional monarchy” is therefore key. The set of options in this Essay is informed by the understanding that republics are the normal form of democracy, and that monarchies are constitutional only insofar as they are democratic.

The second Bahraini characteristic that a constitutional process must address is the sectarian agency. Sectarianism is common to several countries in the Middle East, but the Kingdom of Bahrain is unique in the region for the sociopolitical and religious composition of its population, generally considered to consist of some seventy percent Shia and thirty

6. For Egypt’s revision of its Constitution, see Chibli Mallat, *Revising Egypt’s Constitution: A Contribution to the Constitutional Amendment Debate*, 52 HARV. INT’L L.J. ONLINE 182 (2011), <http://tinyurl.com/3k8ceg9>.

7. For an excellent description of the extent and the sophistication of the fight for democracy in Bahrain, including an impressive collection of texts from women, workers, religious leaders, professionals, and human rights activists, see generally AHMAD AL-SHAMLAN, AL-HARAKA AL-DUSTURIYYA: NIDAL SHA’B AL-BAHRAIN MIN AJL AL-DIMUQRATIYYA [THE CONSTITUTIONAL MOVEMENT: THE STRUGGLE OF THE PEOPLE OF BAHRAIN FOR DEMOCRACY] (1997).

8. CONST. OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, art. 1(b) (official English translation) [hereinafter BAHRAIN CONST.], available at <http://tinyurl.com/3pszn9z>.

9. BAHRAIN NATIONAL ACTION CHARTER, 23 Dec. 2000, prml. [hereinafter NATIONAL ACTION CHARTER]. See <http://tinyurl.com/3lrsxa9> for an English translation.

10. CONST. OF THE STATE OF BAHRAIN of 1973, 26 May 1973 [hereinafter 1973 CONST.], English translation available at <http://tinyurl.com/3un3977>.

11. *Id.* art. 1(d).

12. *Id.* art. 1(b).

13. BAHRAIN CONST., art. 1(d).

percent Sunni, including the ruling family.¹⁴ For the purposes of this Essay, sectarianism works as a constitutional agency whereby a member of a given community, defined in Bahrain as Muslim Shia and Muslim Sunni, sees his or her participation in the state through the agency of that community. Because people have many allegiances, including a desire to see themselves as free autonomous citizens, the sectarian agency raises issues of immense constitutional complexity. The Sunni-Shia agency should therefore not mask the dynamic and fluid competition between many identities, including, among other things, gender, birth, and national origin. Even in terms of religious communities, the picture in Bahrain is not restricted to Sunnis and Shia. Human rights leaders also insist on the need to be also attentive to other small minorities, including a thriving and ancient Jewish community.¹⁵

There is no constitutional magic wand to solve the sectarian conundrum, and no country in the Middle East has yet found the definitive solution to this vexing problem of constitutional science,¹⁶ but there are mechanisms that allow it to be tempered. It is hard to deny that in Bahrain, like elsewhere, the sectarian dimension exists, and that it plays an important, often negative role. The Bahraini divide is amplified by the larger regional context of Sunni Saudi Arabia against Shiite Iran. Even when they do not explicitly refer to the sectarian agency, the options offered in this paper are therefore constantly informed by its reality, and by the conscious efforts to prevent it from undermining the constitutional future of the country.

The Pearl Revolution offers the third trait that marks the trigger to constitutional reform: its nonviolent character. The nonviolent character of the Pearl Revolution, like other protests prevailing elsewhere in the Middle East, cannot be emphasized enough. Despite the use of force by the government, the protestors throughout the Middle East have adhered to a nonviolent philosophy of change.¹⁷ Nonviolence is critical for the normal functioning of a working constitution.

14. *Bahrain: International Religious Freedom Report 2007*, U.S. DEP'T OF STATE (last visited Apr. 11, 2011), <http://tinyurl.com/3tr4mtw>.

15. Telephone interview with Dr. Mansoor al-Jamri, Editor-in-Chief, Al-Wasat (Mar. 3, 2011.)

16. *See generally* CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 171–79 (2009) (comparing sectarianism and a Rawlsian view of constitutional equality).

17. The Revolution under way in Libya is an exception of sorts, but despite their resort to force, the nascent Libyan opposition continues to adhere to a language of human rights in contrast to the absolute brutality it faces from the government. *See* Chibli Mallat, *Comparing the Middle East in 2011 and Europe in 1989: Nonviolence and Democratic Strategy*, Lecture Before the Harvard Middle East Center (Mar. 4, 2011) (transcript available at <http://tinyurl.com/3efw9ur>).

II. CONSEQUENCES FOR CONSTITUTIONAL REFORM

The options offered to address the themes outlined above are informed by a number of related principles.

First, in this context constitutional monarchy means democracy that preserves the hereditary monarchy. This form recognizes that history plays a legitimizing role for an individual or a family around whom affinities have been built over time. While monarchies trump the very principle of democracy as the rule of the people, accommodation is sought in an equation whereby the monarch retains a modicum of power, including a share in state revenues. This equation needs to be accommodated in the constitutional text without emptying the meaning of democracy, which is the self-rule of people by their freely chosen representatives in all three branches of power: the legislative, the executive, and the judiciary. If the monarchy is to be preserved, then it is entitled to retain a minimal say in the affairs of government.

Second, the sectarian issue contributes to the need for a constitutional monarchy in Bahrain, insofar as the King represents a safety valve for a significant section of the Sunni community. The fear of losing the power of the King is real for a number of Sunni Bahrainis, because the King epitomizes the community in the same way that leading clerical leaders in the Usuli tradition of Twelver Islam epitomize the community for many Bahraini Shia. In both cases, nuances must be observed, for not all Bahraini Sunnis are existentially attached to the monarchy, nor are all Shia absolute followers of their clerical leaders in the Usuli tradition, especially since Bahrain is also unique for the continued allegiance of some Shia to the Akhbari tradition.¹⁸ Nevertheless the agency is important, and once democratic power is defined in a majoritarian manner, Sunnis perceive their long-standing power to be structurally undermined. A democratic constitution cannot ignore this intimate connection between sectarianism and the monarchy, even if it is reluctant to acknowledge it in the text. To accommodate this reality, mechanisms which are offered in some of the options articulated in this Essay translate the protection and representation of the minority into prerogatives of the King. This takes the shape, essentially, of three sets of prerogatives: (1) a qualified veto by the monarch over legislative action, which can be set aside by a special majority; (2) appointment to some key positions in the three branches of government and in the administration; and (3) special powers in times of emergency attaching to him rather than exclusively to the Cabinet, including in the constitutional amendment process.

18. *See generally* CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHI'I INTERNATIONAL 23–79 (1993) (Explaining how the division between Akhbaris and Usulis came about doctrinally and its modern manifestations).

Third, the philosophy of nonviolence requires willingness to engage in democratic reforms. Without trust in constitutional reform, violence in the street will prevail.

Fourth, Bahrainis must decide the pace and form of the exercise of these options. Those who are not willing to abandon active demonstrations until reform is secured in an agreed and effective formula fear procrastination. At the same time, all Bahrainis know that a constitution requires elections, and that elections take time to organize. The transition is therefore important, and presupposes a new government headed by a trusted reformist that includes as large a representation of the people as possible and that carries the trust needed for a genuine and nonviolent deliberative process to enact the legitimate democratic demands of the Pearl Revolution.

III. PROPOSED CONSTITUTIONAL OPTIONS

A. Current Setting

This Essay proposes a number of available compromises that refrain from doing away with a monarchy altogether and focuses on the minimal constitutional arrangements needed for a monarchy to be effectively “constitutional,” with “constitutional” understood as democratic in the pattern of countries like the United Kingdom, Sweden, Spain, and recently Bhutan. In addition to the 2002 Constitution, the 1973 Constitution and the National Action Charter provide a natural source for specific language for a transition to a democratic constitutional monarchy. This Essay has paid particular attention to the deep constitutional tradition of Bahrain as embodied in these three texts.

A variety of grievances have galvanized the opposition to the current state. This Essay focuses on the highest priority issues that have frequently led to tension between the state and the people of Bahrain. These issues include the separation of powers between the executive, legislative, and judiciary branches of government; the distribution of power between the King and the Prime Minister; and making the government representative of the people and their democratic aspirations.¹⁹

19. A second tier of issues, important for any constitutional reform, but beyond the scope of this study, includes enshrining an electoral system that provides for fair representation of diverse interests, guaranteeing women’s rights and full political participation, creating a system of entrenched constitutional rights and equal protection, and addressing the overall idea of constitutional supremacy to which all parts of the state are bound. Additional consideration should be given to the issues of politically motivated naturalization, selection of security personnel, land ownership, and control over the budget, as well as using the best international practices in a range of areas from enshrining disability and antidiscrimination language in the Constitution to enhancing political and socioeconomic representation of the large non-Bahraini working population. The reform process is

The current constitution claims that Bahrain “is democratic,” with sovereignty resting “in the hands of the people, the source of all powers.”²⁰ The recommendations offered suggest the necessary adjustments to fully realize that promise and the promise of the National Action Charter that “Bahrain should join democratic constitutional monarchies with a view to meeting peoples [sic] aspirations to further progress.”²¹

This Essay presents the possible options available to address these high priority items, working from the current Constitution. Should the country turn to a new constitution, this Essay should also be useful for identifying key areas for reform and language that will build a completely new text. A selection of proposed amendments to the current Constitution are discussed below. Though not exhaustive, they provide guidance for addressing the highest priority reforms.

B. Proposed Options: Ensuring Separation of Powers and Democratic Accountability

While the government is nominally separated into legislative, executive and judicial authorities,²² the King exercises formal and informal power over all three branches. The Constitution vests legislative authority in the King and the National Assembly and executive authority in the King and the Council of Ministers.²³ The Constitution also gives the King authority over the judiciary through the power to appoint judges and chair the Higher Judicial Council.²⁴ There are few theoretical checks on his executive power, and perhaps none that are meaningful in practice. He appoints and dismisses Ministers by decree, giving him ultimate authority over the Council.²⁵ He may declare war²⁶ and martial law²⁷ or rule by decree.²⁸ The Constitution does not currently provide any meaningful external checks on the King’s ability to enact and enforce laws and policies at will.

Given the current realities, the reforms needed to create an acceptable and functioning compromise include:

itself important and requires consideration of participatory mechanisms. A number of these issues have been addressed in a series of background papers, available at <http://tinyurl.com/3w59h1b>.

20. BAHRAIN CONST., art. 1(d).

21. BAHRAIN NATIONAL ACTION CHARTER, ch. II(2).

22. BAHRAIN CONST., art. 32(a).

23. *Id.* art. 32(b).

24. *Id.* art. 33(h).

25. *Id.* art. 33(c)–(d).

26. *Id.* art. 36(a).

27. *Id.* art. 36(b).

28. *Id.* art. 35.

- (1) establish a democratically accountable executive role for the Prime Minister;
- (2) balance the powers of the Prime Minister and the King;
- (3) increase democratic accountability through the legislature; and
- (4) ensure judicial independence.

This Section proposes specific language for the constitutional amendments suggested in certain options. It is not intended to present an exhaustive account of necessary or possible amendments. Specific amendments are not presented for all options discussed.²⁹

1. *Creating a Democratically Accountable Prime Minister*

Issue: Currently, the Prime Minister is accountable only to the King, since the King can appoint and dismiss him at any time and without stated reason by Royal Order.³⁰

Recommendation: A majority of the Chamber of Deputies³¹ should elect the Prime Minister. Members of the Council of Ministers³² could be selected either by (1) the Prime Minister alone; (2) the Prime Minister with approval by the King; or (3) the Prime Minister with approval by a majority of the National Assembly. This will make the Prime Minister representative of and accountable to the people. All options could be complemented by the King's ability to veto unfavorable candidates for the Council of Ministers.

Article 33

[Option 1]

(d) ~~The King appoints and dismisses the Prime Minister by Royal Order, and~~ appoints and dismisses Ministers by Royal Decree as proposed by the Prime Minister.

[Option 2]

(d) ~~The King~~ CHAMBER OF DEPUTIES ELECTS ~~appoints and dismisses the Prime Minister, by Royal Order, and appoints and dismisses Ministers by Royal Decree as proposed by the Prime Minister~~ WHO MAY SELECT THE MINISTERS. [*This clause should be moved to Chapter IV, Section 3, Part 2 of the Constitution.*]

Article 49

29. Amendment formatting methodology: Strikethroughs of text suggest language to be removed. Text in all-caps suggest language to be added. Italicized text in brackets provide explanatory notes.

30. BAHRAIN CONST., art. 33(d).

31. *See id.* ch. IV, sec. 3, pts. 2–3.

32. *See id.* ch. IV, sec. 2, pt. 1.

[Option 1]

If the Prime Minister or the Minister relinquishes his position for any reason, he shall continue to discharge urgent business of his function until a successor is ~~appointed~~ ELECTED.

[Add:] (b): IN THE CASE THAT THE PRIME MINISTER RELINQUISHES HIS POSITION FOR ANY REASON, NEW ELECTIONS SHALL BE CALLED WITHIN FIFTEEN DAYS IN ACCORDANCE WITH THE LAW.

Issue: The Chamber of Deputies has the power to put a question of confidence to a Minister, but not the Prime Minister.³³ Instead, if two-thirds of the Chamber of Deputies indicates unwillingness to “cooperate with the Prime Minister,” and then two-thirds of the National Assembly concurs, the issue reaches the King, who may remove either the Prime Minister or dissolve the Chamber of Deputies.³⁴

Recommendation: Give the Chamber of Deputies the power to put a question of confidence to the Prime Minister and restrict the King’s ability to remove either the Prime Minister or the Chamber of Deputies in this instance. This could be done by amending Article 67.

Article 67

(a) ~~The subject of confidence in the Prime Minister shall not be raised in the Chamber of Deputies.~~

...

(d) ~~If the National Assembly decides by a majority of two-thirds of its members that it is not possible to cooperate with the Prime Minister, the matter is submitted to the King for a decision, either by relieving the Prime Minister of his post and appointing a new Government, or by dissolving the Chamber of Deputies.~~ THE PRIME MINISTER SHALL RELINQUISH HIS POSITION.

Issue: There are no term limits for the Prime Minister or members of the Council of Ministers.

Recommendation: Create a term limit for all Ministers. This could be two terms of four years each, and in any case eight years as a maximum limit for ministers in continued tenure. This will help prevent the abuse of power by individuals and encourage a dynamic political process.

Issue: Article 33 allows the King to appoint the Council of Ministers by Royal Decree.³⁵ Although the Prime Minister proposes ministers, the final decision to appoint them rests constitutionally with the King.³⁶

33. *Id.* arts. 66(b)–67(a).

34. *Id.* art. 67.

35. *See id.* art. 33(d).

Recommendation: Require the approval of the National Assembly for all appointments by a majority vote. An alternative structure would place the power to make or propose appointees with one or both houses of the assembly. If the King retains some appointment power or it is transferred to the Prime Minister, the National Assembly should have some voice in the approval of ministers.

2. *Balancing the Powers of the Prime Minister and the King*

The Constitution has allowed the King to disproportionately accumulate power relative to other institutions that could provide competitive alternatives to royal prerogatives. Competing tendencies of monarchism and constitutionalism have obfuscated efforts to guarantee a true constitutional monarchy and enhance political competition in Bahrain. The following sections outline the question of royal authority in the context of two key areas: Royal Decrees and ministerial institutions. The Constitution permits the King to issue Royal Decrees and Royal Orders that do not require formal consultation or approval. These Royal Orders have occasionally promulgated certain liberal programs or initiatives that have been received well by the people. However, they have also been used to confirm unpopular appointments and enact restrictive security laws irrespective of the Assembly's will. Additionally, the King holds authority over political institutions. In particular, the Council of Ministers is vested with the authority to implement government policy as articulated in Royal Decrees or Assembly initiatives.³⁷ To an extent, these ministries report to the Assembly — but parallel institutions and a lack of transparency undermine their independence.

Issue: The King's prerogatives in his constitutional ability to delay and postpone action in the National Assembly allow for domination of the legislative process.

Recommendations: Limit the King's ability to invoke sunset clauses and force postponements. This could be done either by capping the number of decrees or expanding the time required to elapse before a decree is issued. Alternatively, the Constitution could be amended to ban these types of decrees or force another authority to approve them.

Issue: Article 47 consolidates the King's power and effectively brings the Council of Ministers under his authority. This undermines the ability of the Prime Minister to set a national agenda that corresponds to the work of Parliament.

36. *Id.*

37. *Id.* arts. 47(a), 48(a).

Recommendation: To enhance the independence and transparency of the Prime Minister and Council of Ministers the Prime Minister should be given a mandate to chair meetings of the Council of Ministers without the permission and presence of the King. This change could be further augmented by making the Council's deliberations public and requiring the Council to submit reports and recommendations to the National Assembly.

Article 47

(b) The ~~King~~ PRIME MINISTER shall chair THE ~~those~~ meetings of the Council of Ministers ~~which he attends~~.

...

(c) ~~The deliberations of the Council of Ministers shall be confidential. Its~~ THE decisions OF THE COUNCIL OF MINISTERS shall be adopted when a majority of its members attend and there is a majority of those attending in favor. In the event of a tied vote, the side on which the Prime Minister's vote is cast shall prevail. The minority shall abide by the opinion of the majority unless they resign. ~~Council decisions shall be submitted to the King for approval in cases where issue of a relevant Decree is required.~~

Issue: Article 39 permits the King to create boards and commissions that mimic key functions of certain ministries. Consequently, there are several royal institutions that do not report to any ministry and are not required to report to the National Assembly.

Recommendation: It should be required that all organizations, commissions, and boards created by decree be approved by the National Assembly. They should also be required to report to a particular ministry.

Article 39

[*Add:*] (c) THE CREATION OF NEW PUBLIC DIRECTORATES AND DEPARTMENTS MUST BE APPROVED BY THE NATIONAL ASSEMBLY AND EXIST UNDER THE MANDATE OF THE RELEVANT MINISTRY.

3. *Increasing Democratic Accountability Through the Legislature*

Issue: Currently, the King shares legislative powers and has "limited legislative delegation."³⁸ He commands too much influence in the legislative branch because the entire Consultative Council receives its mandate from him. The King appoints all members of the Consultative

38. *Id.* art. 32(a).

Council³⁹ and can appoint and dismiss all members of the chamber by Royal Order.⁴⁰

Recommendation: Alternatives to address this issue are (1) to remove the Consultative Council altogether; (2) to reduce the Consultative Council to twenty members; (3) to have some of the members be chosen either by the Chamber of Deputies; elected by religious, minority, regional, tribal, or other groups; have some members appointed by the King, who would only be able to dismiss those members appointed by him.

Article 52

[*Option 2:*]

The Consultative Council is composed of ~~forty~~ TWENTY members appointed by Royal Order.

Issue: The Bahraini Constitution does not accurately capture the spirit of the National Action Charter of 2001 with regard to the proper role of the Consultative Council.

Recommendation: Article 81 should be amended such that bills that regulate finance or economic matters must originate in the Chamber of Deputies. In light of this, Article 87 should be removed. Ultimately, the Consultative Council should take a strictly advisory role in the drafting and passing of laws. This is the role envisioned by the National Action Charter of 2001, which prescribes that one chamber be “constituted through free, direct elections,” while the second “would give advice as necessary.”⁴¹ Given this, members of the Consultative Council could be brought into the democratic fold by drafting laws alongside the elected delegates of both chambers.⁴² In the event of gridlock, the process used in Article 85 could be preserved. Alternatively, there could be a continuous back-and-forth between both legislative chambers until they have agreed on the bill.

Article 81

The Prime Minister shall present bills to the Chamber of Deputies, which is entitled to pass, amend or reject the bill. In all cases the bill shall be referred to the Consultative Council, which is entitled to pass, amend or reject the bill or to accept any amendments that the Chamber of Deputies had introduced to the bill, or had rejected or amended them [sic]. BILLS MAY ORIGINATE IN EITHER CHAMBER OR WITH THE COUNCIL OF MINISTERS, BUT ALL BILLS THAT REGULATE FINANCIAL OR ECONOMIC MATTERS MUST ORIGINATE IN THE CHAMBER OF DEPUTIES.

39. *Id.* art. 52.

40. *Id.* art. 33(f).

41. NATIONAL ACTION CHARTER, ch. V, para 2.

42. For a helpful model for legislative procedure in a new constitutional monarchy, see CONST. OF THE KINGDOM OF BHUTAN, Jul. 18, 2008, art. 13 (official English translation).

Article 87

~~Every bill that regulates economic or financial matters, and the Government requests its urgent consideration, shall first be submitted to the Chamber of Deputies so that it takes a decision on it within fifteen days. When that period elapses, the bill is presented to the Consultative Council with the opinion of the Chamber of Deputies if there is such an opinion, so that the Consultative Council decides on it within a further period of fifteen days. If the two Chambers should disagree on the bill in question, the matter is referred to the National Assembly for a vote on it within fifteen days. If the National Assembly does not reach a decision on it within that period, the King may issue the bill as a Decree that has the force of a law.~~

Issue: Any legislative power is weakened if National Assembly members cannot express themselves freely under Article 89, which prevents expression that is “prejudicial to the fundamentals of the religion or the unity of the nation, or the mandatory respect for the King, or is defamatory of the personal life of any person.”⁴³

Recommendation: Article 89 should be amended such that this clause is stricken and members are allowed to express opinions freely.

Article 89

~~(b) No member of the Consultative Council or the Chamber of Deputies shall be called to account for expressing his opinions or ideas in the Council or its committees unless the opinion expressed is prejudicial to the fundamentals of the religion or the unity of the nation, or the mandatory respect for the King, or is defamatory of the personal life of any person.~~

Issue: Article 35 permits the King to unilaterally amend the Constitution.

Recommendation: The King should only be permitted to suggest Constitutional amendments to the National Assembly.

Article 35

~~(a) The King may amend the Constitution,~~ SUGGEST CONSTITUTIONAL AMENDMENTS TO THE NATIONAL ASSEMBLY, propose laws, and is the authority for their ratification and promulgation

Issue: Article 35 affords the King six months to act upon a bill.

43. BAHRAIN CONST., art. 89(b).

Recommendation: This should also be amended to a “period of thirty days” as articulated in the 1973 Constitution.⁴⁴ This amendment will prevent undue delay for legislative procedure.

Article 35

(b) A law shall be deemed ratified and the King shall promulgate it if ~~six months~~ THIRTY DAYS have elapsed from the date on which it was submitted to him by the Consultative Council and Chamber of Deputies without it being returned to these Chambers for reconsideration. IT IS CONSIDERED LAW IF PASSED AGAIN BY THE CHAMBER AFTER RECONSIDERATION. [Option: with a larger majority]

Issue: Article 43 allows the King to call for a popular referendum, bypassing the legislature.⁴⁵

Recommendation: Article 43 should be amended to require a two-thirds vote in the National Assembly to launch public referendums. Other options include giving the power of referendum to the Legislature instead or eliminating the option for referendums.

Article 43

The ~~King~~ NATIONAL ASSEMBLY may conduct a popular referendum on important laws and issues connected with the interests of the State. The issue on which the referendum has been held is considered to have been agreed upon if approved by a majority of those who cast their votes. The result of the referendum shall be binding on all and effective from the date it is declared, and it shall be published in the Official Gazette. [Option 1: a higher majority of the popular vote cast.] [Option 2: abolition of such referenda altogether] [*If retained, this article should be moved to Chapter IV, Section 3, Part 3 of the Constitution.*]

Issue: A move toward more democratic institutions raises the question of how to assure that minority groups, as well as the King, may have an adequate ability to prevent objectionable legislation.

Recommendation: One option would be to give the King a veto over legislation. This veto could be overruled by a supermajority of the National Assembly, which would require coalition building across sectarian and party lines. Such language could be added, for example, to the language of the suggested amendments to Article 35 above.

4. Ensuring Judicial Independence

Issue: The Constitution currently provides that the King will chair the Higher Judicial Council and appoint judges by Royal Orders.⁴⁶

44. 1973 CONST., art. 35(b).

45. BAHRAIN CONST., art. 43.

Recommendation: The King should be removed from the Higher Judicial Council in order to establish its independence. The Higher Judicial Council could recommend judges for approval by the Prime Minister and/or the National Assembly.

Issue: Article 106 provides for the King to appoint members of the Constitutional Court for a period specified by law.⁴⁷

Recommendation: The selection process for the Constitutional Court could include reserving a certain number of seats to be nominated by each of the: Higher Judicial Council, National Assembly, Prime Minister, and/or the current membership of the court.⁴⁸ Alternatively, the Constitution could require that the decision-maker consider diversity in its selection of members of the Court.⁴⁹

Article 106

A constitutional Court shall be established, and shall comprise a President and six members, ~~all of whom are appointed by a Royal Order for a period specified by the law~~ CHOSEN BY MAJORITY VOTE FOR A PERIOD OF FIVE YEARS RENEWABLE ONCE BY THE ELECTED MEMBERS OF THE CONSULTATIVE COUNCIL AND THE CHAMBER OF DEPUTIES AFTER SEEKING THE KING'S ADVICE. The court's area of competence is to watch over the constitutionality of laws and statutes.

Issue: The Constitution does not currently specify terms for judges. Terms for members of the Constitutional Court are “for a period specified by the law.”⁵⁰

Recommendation: Terms for all judges on the Higher Judicial Council and members of the Constitutional Court should be specifically mandated by the Constitution and should be for a maximum period of ten years without possibility for further extension. Removal should be prohibited except in cases of criminal or unethical conduct specifically articulated in the law and decided by an impartial body.⁵¹

46. *Id.* art. 33(h).

47. *Id.* art. 106.

48. Other parties such as the Consultative Council and the King could potentially also be reserved seats. *Cf.* 1958 CONST. Art. 56 (Fr.) (allocating three appointments to the Constitutional Council to the President of the Republic, President of the National Assembly, and the President of the Senate each).

49. Reforms may also be considered for the appointment of the Higher Judicial Council.

50. BAHRAIN CONST., art. 106.

51. The current constitution provides that “[t]he law shall state the regulations that ensure that the members of the Court are not liable to dismissal . . .” *Id.*

Issue: Although the Constitutional Court does currently possess some powers of pre-enactment and post-enactment review of laws and statutes, the Constitution lacks a clear mechanism for individuals to challenge the constitutionality of government action.⁵² Constitutional recourse for the citizen is key to the protection of his and her fundamental rights.

Recommendation: The Constitution should also include specific provisions that guarantee the right of individuals to challenge the constitutionality of laws or state action by any government actor. Another option would be to establish a separate right of individuals to appeal decisions from other courts to challenge the constitutionality of the ruling.⁵³

52. *See id.*

53. *Cf.* S. AFR. CONST., 1996, art. 167(6) (“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court, (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.”).