

Constitutional Options for Bahrain

III. Background Papers

1. The Executive¹

A. Overview

The Constitution of Bahrain formally describes the extent to which the King is the source of political power. The scope of this concentration of power is formidable. While the government is nominally separated into legislative, executive and judicial authorities,² 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.³ The Constitution also grants him the power to influence the judiciary through the appointment of judges.⁴ Although these powers are shared on paper, they effectively rest with the King.

The King's power as Head of State is near-absolute; the Constitution expressly states that his person is "inviolable."⁵ There are few theoretical checks on his executive power, and perhaps none that are meaningful in practice. He appoints and dismisses Ministers by decree, and they are answerable only to him.⁶ He may unilaterally declare war⁷ and martial law.⁸ There is no real external check on the King's enforcement of the laws, informal policymaking, and in fact outright lawmaking.

The King's legislative authority is sweeping. He may amend the Constitution⁹ or even suspend it, simply by proclaiming martial law.¹⁰ He may issue decrees carrying the force of law when the National Assembly is not in session.¹¹ Even when it is in session, he may issue any law regulating economic or financial matters if the assembly cannot agree within a circumscribed time period,¹² which effectively gives him the power of the purse and all the concomitant ancillary controls over the rest of government. Not only does he have appointment and dismissal authority over the entire Consultative Council,¹³ which makes those legislators accountable only to him, but he can also dissolve the elected Chamber of Deputies,¹⁴ which severely undercuts its democratic accountability.

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² CONSTITUTION OF THE KINGDOM OF BAHRAIN, 14 Feb. 2002 (official English translation) [hereinafter BAHRAIN CONSTITUTION], art. 32. 33 – 34

³ *Id.* at art. 32(b).

⁴ *Id.* at art. 33(h).

⁵ *Id.* at art. 33(a).

⁶ *Id.* at art. 33(c)-(d).

⁷ *Id.* at art. 36(a).

⁸ *Id.* at art. 36(b).

⁹ *Id.* at art. 35(a).

¹⁰ *Id.* at art. 123.

¹¹ *Id.* at art. 38(a).

¹² *Id.* at art. 87.

¹³ *Id.* at art. 33(f).

¹⁴ *Id.* at art. 64(a)– (b). While the Constitution suggests that the unilateral dissolution should last no longer than four months, the King may further defer elections if there are "compelling circumstances." Deferring elections requires

There are two themes that must be considered in developing alternatives to the King's omnipotence. The first lies in the currently diminished role of the Prime Minister and the extent to which he is unaccountable to the National Assembly. The second lies more formally in analyzing how political outcomes can be altered by legally empowering other institutions to compete with the King's sweeping constitutional prerogatives.

B. Enhancing the Duties of the Prime Minister

The constitutional role of the Prime Minister faces the dual problem of complete accountability to the King and no accountability to the legislature—and thereby to the people of Bahrain. On the one hand, the King has unchecked authority to appoint and dismiss the Prime Minister at any time and without stated reason by Royal Order, as outlined in Article 33(D). Although appointment of the Prime Minister required “appropriate consultation” in the 1973 Constitution, this requirement is absent from the 2002 Constitution. The Prime Minister's dismissal triggers removal of all ministers by Article 47(D). Because the Prime Minister serves at the pleasure of the King to whom he swears an oath of loyalty, he has no independent political authority.

On the other hand, the legislature has weak constitutional checks on the Prime Minister. Whereas Article 66 grants the Chamber of Deputies the power to put a question of confidence to a Minister, which may precipitate the latter's dismissal; Article 67 prohibits the Chamber of Deputies from putting a question of no confidence to the Prime Minister. Instead, if two-thirds of the lower house 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 object or the instigator of the complaint—either the Prime Minister or the Chamber of Deputies. Not only does this mechanism complicate and slow attempts at removal, but the risk of dissolution that it presents to the Chamber also chills attempts to initiate such action.

These dual problems of accountability are compounded by the Prime Minister's poorly defined role. The Constitution does not explicitly place the Prime Minister in charge of the Council of Ministers. It does not define his portfolio. Although it grants the Prime Minister a supervisory role, the Constitution does not direct the Prime Minister to chair meetings. The King, however, by Article 47, eclipses the Prime Minister at Council of Minister meetings by chairing those meetings that he attends.

i. The Role of the Prime Minister

Problems posed by the constitutional definition of the Prime Minister's role should be addressed by constitutional amendments that shield the Prime Minister from the King's control on the one hand and expose him to popular oversight on the other. They may also seek better constitutional definition of the PM's role on the Council of Ministers. Such solutions would shift the Prime Minister's political space out of the Royal Court and into the legislature. The appointment or the dismissal of the Prime Minister could be informed by, contingent on the approval of, or entirely

that the Council of Ministers consider that holding elections is “not possible.” As noted, the Council of Ministers serves entirely at the pleasure of the King, so this requirement is hardly a constraint.

transferred to the legislature. The Prime Minister's role can also be opened to popular election. This section outlines three approaches:

1. *The Chamber of Deputies elects the Prime Minister:* The power to appoint and dismiss the Prime Minister could be transferred entirely from the King to the legislature. This gives the legislature the power not only to vet and confirm, but also to select the prime ministerial candidate. The power of appointment can be located in the upper chamber, lower chamber, or both. The greater the role the lower chamber plays in the appointment of the Prime Minister, the more credibility the PM gains in his political interactions.

The three main advantages of electing the Prime Minister through the lower chamber are separation of executive power, added accountability of the prime minister to the public, and strengthening of the Chamber of Deputies vis-à-vis the executive and the upper house. If the King lacks the power to appoint and dismiss the Prime Minister, then the PM no longer serves at the King's pleasure. He has greater latitude to engage in political dialogue with the King without fearing retribution. His accountability shifts from the Royal Court to the legislature—and thereby to the people. The ability to hold the PM accountable strengthens the role of the Chamber of Deputies by making it an intermediary between the people and the executive branch. The Prime Minister's power to propose ministers to the King for dismissal effectively makes the power of dismissal shared among the legislature (which selects the PM), the PM (who proposes the dismissal) and the King (who must approve it).

The Constitution currently prohibits questions of confidence to the Prime Minister to be raised by the Chamber of Deputies in Article 67(A). Because a PM's resignation triggers the dismissal of the entire Council of Ministers, this prohibition essentially prevents the lower house from forcing an election. This restriction no longer makes sense if the lower chamber elects the Prime Minister. Therefore, this option requires removal of Article 67(D). Further, the disposition of the question of no confidence should not rest in the King. If it does, then a Prime Minister could retain power indefinitely by courting the King's favor.

2. *Requiring Confirmation:* Another option would require legislative confirmation of the Prime Minister proposed by the King. The level of intrusion of the King's prerogative is determined by the selection of which chamber confirms and the threshold required for confirmation. The least intrusive option is confirmation by the majority of the Consultative Council, as the King appoints this chamber in its entirety.¹⁵ Confirmation by Consultative Council would be the substantive equivalent of the King's decree. The most intrusive option is confirmation by two-thirds of the Chamber of Deputies because that chamber is elected.¹⁶ Securing two-thirds of the votes of both chambers will likely be easier to achieve than two-thirds of the lower house alone.

Germany and Spain both confirm their prime ministers by majority of their lower houses of parliament. The German Bundestag elects its prime minister by majority¹⁷ following proposal

¹⁵ *Id.* at 33(f).

¹⁶ *Id.* at 56.

¹⁷ Basic Law for the Federal Republic of Germany, 23 May 1949, art. 63(b).

by the Federal President.¹⁸ The Spanish House of Representatives similarly “grants its confidence” to its President by majority vote after the King proposes him or her.¹⁹

3. *Requiring consultation:* The least intrusive option would revive the consultation requirement from the 1973 Constitution. Article 33(B) of the 1973 Constitution reads, in part, “The Amir shall, *after the traditional consultations*, appoint the Prime Minister or relieve him of office by an Amiri decree” (emphasis added). This poorly-defined consultation requirement barely restrains the King’s discretion over the appointment process. Stronger consultation language would specify the body the King should consult, the exact form consultation would take, and the amount of time allocated for the consultation process.

C. Contesting Royal Will and Political Competition

This section provides an overview of the current nature of political competition in Bahrain and potential avenues for reform. Over the past ten years, the Constitution has allowed the King to disproportionately accumulate power relative to other institutions that could provide competitive alternatives to royal prerogatives. As a result, other institutions and stakeholders have limited the extent to which political institutions reflect the will of the people. This is due to the fundamental conflict between monarchism and democracy inherent in the Constitution.

As a political ideology, monarchism holds that the authority of government derives from a King—with political legitimacy resting in the exercise of this authority. Throughout the Constitution, monarchist tendencies trump democratic ones. For example, the King is given certain law-making prerogatives that allow him to issue royal decrees and orders at his will. This is particularly acute for issues related to national security. The King is also responsible for appointing the Prime Minister and the upper house of the legislature, creating a patron-client relationship between the King, the National Assembly, and the Prime Minister. These institutions derive their authority from the King and are unable to offer viable alternatives to his initiatives.

Despite monarchism’s privileged status throughout the Constitution, there are areas where undeveloped constitutionalist tendencies demonstrate potential. The National Assembly must approve laws proposed by the King by a simple majority of both houses. This is positive, but there are still mechanisms available to the King to sidestep the Assembly’s legal ability to limit the exercise of royal power.

These competing tendencies have obfuscated efforts to guarantee a true constitutional monarchy and enhance political competition in Bahrain. The National Action Charter indicates a willingness to enhance this cooperation, as the relationship between the King and his people is described as one of “cohesion, direct contact and mutual understanding.” The formal powers of the King, as described in the 2002 Constitution, fall dramatically short of reflecting this proposition. With respect to the structure of government, there are two key principles described in the National Action Charter that have been ignored: separation of powers and people’s right to participate in politics.

¹⁸ *Id.* at art. 63(a).

¹⁹ SPANISH CONSTITUTION, 27 December 1978, art. 99(c).

The following sections outline the question of royal authority in the context of two key areas: royal decrees and ministerial institutions. A number of proposals or options are introduced as well.

i. Royal decrees and royal orders: Appointments and Article 33

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. These decrees are particularly problematic with respect to appointments and sunset clauses.

Article 33 allows the King to appoint the Prime Minister, the Council of Ministers, and the Royal Court by royal order. Although the Prime Minister proposes ministers, the final decision to appoint them rests constitutionally with the King. This expansive ability to appoint the Prime Minister, as well as half the legislature, severely undercuts their independence. As a result, the King exercises de facto control of key government ministries by decree.

Since these ministries are effectively beholden to the King, their ability to act independently and in tandem with the National Assembly is weakened. Rethinking appointments in terms of the King's ability to unilaterally issue decrees might be necessary. Article 33(D) states that "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." The options below provide an outline of the ways in which Article 33 can be amended.

1. *Require the approval of the National Assembly for all appointments.* The Constitution can be amended to require the Assembly's approval by simple majority. If the bicameral assembly endures, the lower house can be given the sole responsibility to approve appointment. If the National Assembly is unicameral and elected entirely by popular vote, appointments could be approved by a simple majority of the entire Assembly.
2. *Give the National Assembly the ability to appoint.* Certain appointments could originate in the National Assembly, such as the Prime Minister. For example, the Prime Minister could be nominated by a majority of the National Assembly and submitted to the King for approval. This shifts the burden of selection to the Assembly, with the King retaining a veto.
3. *Require the Prime Minister's approval for all appointments.* If the Constitution is amended to allow for a more democratic selection of the Prime Minister, he or she alone could be required to approve certain royal appointments.
4. *Implement a pure parliamentary system.* In many parliamentary systems, the legislature elects the Prime Minister, who then appoints all the ministers (who may or may not require legislative approval). Even if this system were implemented, there are a number of formal royal powers that could check the Assembly's power. For example, even if the Assembly is

given this independence, it would be possible to keep the same number of appointed members and allow the King to influence the selection of the Prime Minister in this way.

ii. Royal decrees and royal orders: Sunset Clauses and Postponements

Select articles of the Constitution indicate that if certain actions do not occur within a certain time, the King can act by decree. This is particularly true for the budget. Article 87 describes the process for submitting budgets to the National Assembly. The lower house is given fifteen days to review the budget, after which the upper house is given an additional 15 days to review it. After that, the two houses must jointly adopt the budget. If they fail, after 15 days, the budget (or any bill that regulates economic or financial matters) can be adopted by decree.

Similarly, the King can use his power to postpone action in the National Assembly. For example, he can delay votes on constitutional amendments. According to Article 35, Section C, the King is required to return a rejected constitutional amendment to the Assembly with his justification. Although the veto can be overturned by a two-thirds vote, the King can force the Assembly to consider the amendment in the following session. The options below provide an outline of the ways in which sunset clauses and postponements can be amended.

1. *Abolish all sunset clauses and postponements from the Constitution.* This option would involve curtailing the King's ability to delay action on Assembly initiatives and abolishing the King's ability to issue decrees premised on the passage of time.
2. *Limit sunset clause and postponement decrees.* This option would force the King to limit the practice of issuing decrees. For example, the use of decrees could be limited to a certain number per year. The window of time required to elapse before a decree is issued could also be extended.
3. *Require the approval of the Prime Minister to delay or postpone votes.* The Constitution could be amended in order to require the Prime Minister to approve of those instances where the King issues a decree in light of a sunset clause or postponement mechanism.

iii. Institutional Unaccountability: The Council of Ministers

Political institutions in Bahrain operate according to the King's whim. Article 32, Section B describes the scope of the King's power in making and executing laws:

Legislative authority is vested in the King and the National Assembly in accordance with the Constitution. Executive authority is vested in the King together with the Council of Ministers and Ministers, and judicial rulings are issued in his name, the whole being in accordance with the provisions of the Constitution.

The Council of Ministers is thus vested with the authority to implement government policy and supervise the apparatus of government. Legally, the ability to implement royal decrees and acts passed by the National Assembly falls to the relevant ministries. These ministries must also

report their work to the National Assembly. The following paragraphs detail specific problems associated with the lack of political competition caused by weak institutions.

Article 47 consolidates the King's power and effectively brings the Council of Ministers under his control. The Council oversees state interests and implements government policy, but the King serves as chair. This effectively eliminates the authority and influence of the Prime Minister, who is responsible only for supervising performance and coordinating communication. The Prime Minister does not have a constitutional responsibility to set the agenda in any way—despite the fact that he proposes ministers and the ministers are to be removed in the event he relinquishes his position.

The options below provide an outline of the ways Article 47 can be amended:

1. *Allow the Prime Minister to set the agenda and chair the Council of Ministers.* This option empowers the Prime Minister to play a greater role in implementing policy. If the King retains his ability to issue decrees, the Prime Minister could be responsible for using the apparatus of government to implement policy.
2. *Make the deliberations of the Council of Ministers public.* Section E describes Council deliberations as confidential. Opening up the Council's deliberations could lead to a healthier, more transparent political discourse. In January, for example, a member of the Shura Council accused one minister of misinforming the Assembly by providing different views to the upper and lower house. 'This is not a healthy sign and disrupts the legislative work and puts off the enactment of laws,' the representative said.²⁰
3. *Ensure transparency and accountability by requiring the Council to submit reports and recommendations to the National Assembly.* The National Assembly must be given some power to compete with the Council of Ministers. Policies must be contested and ministries must be held more accountable to the people.

iv. Institutional Unaccountability: Countering Parallelism and Article 39

The Constitution gives the King the power to create boards and commissions that mimic key functions of certain ministries by decree. Article 39(B): "The King shall lay down the control regulations and the regulations necessary for the organization of public directorates and departments, by Decrees in a manner which does not conflict with the laws." Consequently, the King has created several institutions that do not report to any ministry and are not required to report to the National Assembly. The Economic Development Board is one such example. The Board is described as a semi-private autonomous agency responsible for formulating Bahrain's economic development strategy. It reports directly to the Crown Prince and it is exempt from inquiries by the Assembly.

The options below propose a number of strategies designed to reduce this parallelism:

²⁰ Habib Toumi, *Bahrain ministries accused of double standards*, GULFNEWS.COM (1 JANUARY 2011), <http://gulfnews.com/news/gulf/bahrain/bahrain-ministries-accused-of-double-standards-1.744414>

1. *Require that all organizations, commissions, and boards created by decree be approved by the National Assembly.* This option permits the King to continue issuing these decrees while requiring him to obtain Assembly approval.
2. *Require all institutions to report to a particular ministry.* This could include moving existing bodies to relevant ministries.
3. *A deputy minister from the opposition could serve to shadow the appointment ministers.* In fact, this has already happened. In 2006, Nazar al Baharna was appointed to serve below the Minister of Foreign Affairs as Minister of State for Foreign Affairs. Although he currently serves as Minister of Health, he was at the time a member of the opposition Wifaq party. Creating competition within the ministries might reduce corruption and ensure that ministries are implementing programs for the benefit of all Bahrainis.

Appendix: Key Suggested Amendments²¹

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 Part 2.*]

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.

Article 47

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

(e) ~~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 favour. 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.

Article 67

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

²¹ Formatting Methodology: Strikethroughs of text suggest language to be removed. Text in all-caps suggest language to be added. Italicized text in brackets provides explanatory notes.

(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.