

Constitutional Options for Bahrain

III. Background Papers

4. The Electoral System¹

A. Introduction

Ongoing politics protests in Bahrain have highlighted the urgency for electoral reforms that more consistently reflect the will of the people. The few government positions that are elected privilege some groups over others. This background paper provides an overview of Bahrain's electoral system and options for electoral reform. The 2002 Constitution outlines the designation of powers between the branches of government but leaves specific decisions on eligibility requirements, terms, and election procedures to statute. The Shura Council and Parliament Law of 2002 and Law by Decree for Exercising Political Rights of 2002 contain the extra-constitutional election provisions.

This paper discusses current electoral shortcomings and offers two sets of recommendations: constitutional amendments that prioritize elected, representative leadership; and statutory actions that translate constitutional principles into the protection and enhancement of political participation. Several constitutional provisions on elections, particularly on when elections are called in the case of vacancies, go untreated here. This paper is intended to raise the most important issues and provide initial options. Topics and recommendations may overlap with, and be explained in more detail by, other attached background papers.

B. Candidate Eligibility, Elections, and Appointments

Under the current constitution and laws, the King appoints the Prime Minister, ministers and the 40 members of the Consultative Council. The people elect members for the Chamber of Deputies every four years.

The eligibility requirements for ministers, the Chamber of Deputies, and the Consultative Council are all similar and quite broad. All positions—both elected and appointed—have age and citizenship requirements. The appointed Consultative Council is subject to the greatest eligibility restrictions that emphasize royal standing and prior government service. This list, however, is not exhaustive and allows the consideration of citizens who have “experienced or have rendered distinguished service to the Nation.”

Current Eligibility Requirements:

Prime Minister and Ministers (appointed)

- Must be Bahraini
- At least 30 years old
- Enjoy full political and civil rights²

Consultative Council (appointed)

- Must be Bahraini
- At least 35 years old
- Enjoy full political and civil rights

¹ Prepared by Brian Loeb and Laurel Rapp.

² CONSTITUTION OF THE KINGDOM OF BAHRAIN, 14 Feb. 2002 (official English translation) [hereinafter BAHRAIN CONSTITUTION], art. 45.

Chamber of Deputies (elected)

- Must be Bahraini
- At least 30 years old
- Enjoy full political and civil rights
- Read and write Arabic fluently³
- Membership of the Consultative Council or the Chamber of Deputies must not have been abrogated by decision of the Chamber to which he belonged due to loss of confidence and esteem or for being in breach of duties of membership (with exceptions)
- May not be:
 - ministers of State
 - holders of judicial office
 - prosecutors
 - executives of the Electoral Commission
 - members of the Electoral Commission⁴
- Must be experienced or have rendered distinguished services to the Nation⁵
 - Members of the ruling Family
 - Former minister
 - Those who have worked at the post of ambassadors and ministers pleni-potentiary
 - Former Members of the judicial bodies
 - Retired security officials
 - Former senior government officials
 - Senior scholars, business men and professionals
 - Former members of the Parliament
 - Those who have exceptional popular trust and support⁶

Reform Options:

1. **Transition from an appointment to a hybrid appointment/election process or a full election process for Consultative Council seats.** A fully appointed body is less likely to be representative of the diversity of perspectives in Bahraini society. Jordan's Parliament, like Bahrain's, has an elected and an appointed chamber, though the appointed chamber has fewer members.⁷ Morocco's upper house is elected in part by local communities and in part by professional and workers' organizations.⁸ Either model, or any other, would need to be combined with constitutional changes to the legislative powers of the legislature and the king to improve the power of the people to direct legislation.
2. **Encourage a more representative Consultative Council that draws its membership from a wider segment of Bahraini society.** Encouraging membership from a narrow set of professions and social standings hinders the ability of the body to represent all Bahrainis. This can be achieved by removing the membership guidelines (Constitution, Article 53) or implementing a representative quota that reserves seats based on geographic, socioeconomic, religious, or gender differences.

³ *Id.* at art. 57.

⁴ *Id.*

⁵ *Id.* at art. 53.

⁶ *Shura Council and Parliament Law*, By Decree No. 14, art. 4 (2002) (Bahrain).

⁷ CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 January 1952, art. 63, *available at* http://www.kinghussein.gov.jo/constitution_jo.html.

⁸ CONSTITUTION OF THE KINGDOM OF MOROCCO, 3 September 1996, *available at* <http://www.al-bab.com/maroc/gov/con96.htm>, art. 38.

3. **Reduce the number of members of the Consultative Council.** When the Consultative Council and Chamber of Deputies disagree twice when considering a bill, they meet jointly as a National Assembly (Constitution, Article 85). Tie votes are broken by the Chairman of the Consultative Council. Were the Consultative Council to remain an appointed body, reducing its membership may reduce the possibility of conflict between the chambers and strengthen the legislative powers of the elected Chamber of Deputies. The al-Wifaq party proposed reducing the Consultative Council to 20 members in 2006.⁹
4. **Transition from an appointment to a hybrid appointment/election process or a full election process for ministerial seats.** As with the Consultative Council, an all-appointed cabinet can stifle internal debate and hinder the representation of all Bahrainis' voices. This concern can be resolved through direct elections of the Prime Minister, either by:
 - a. A single election, whereby the leader of the majority party in Parliament or the party that can form a government is the Prime Minister.
 - b. The Prime Minister and Chamber of Deputies' candidates are on separate ballots. With a single ballot, there is more predictability: a candidate representing a major party will be Prime Minister. With separate ballots, voters get two votes. They have the opportunity to have their individual views represented in parliament (with the potential proliferation of minor parties), while also being able to elect a more centrist prime minister. The challenge with this system is that the Prime Minister may face a legislature dominated by a different party, or there may be so many parties that forming a stable government is impossible.

C. Terms

Members of the Consultative Council and the Chamber of Deputies serve four-year terms with no maximum term restriction. No constitutional provision governs the term of the Prime Minister. In practice, there has been only one Prime Minister since 1971, Khalifah ibn Sulman al-Khalifah, the uncle of the King.

Current Term Lengths

Prime Minister and Ministers

- No terms specified

Chamber of Deputies

- 4 years
- May be re-elected
- The King may, when necessary, extend the legislative season of the Chamber of Deputies

Consultative Council

- 4 years
- May be reappointed when their term has expired¹²

⁹ Mansoor al-Jamri, *Are Constitutional Amendments Possible in Bahrain?*, Arab Reform Bulletin, Carnegie Endowment for International Peace, April 2, 2009, available at <http://www.carnegieendowment.org/arb/?fa=show&article=22932>.

¹⁰ BAHRAIN CONSTITUTION, art. 58.

¹¹ CONSTITUTION OF THE STATE OF BAHRAIN [hereinafter 1973 CONSTITUTION], 26 May 1973, art. 45.

by Royal Order for a period not exceeding two years¹⁰ (1973 Constitution: may not be extended except for necessity in time of war and by a law passed by two-third majority of the members constituting the Assembly)¹¹

Reform Options:

1. **Set four-year term lengths for the Prime Minister and ministers. All ministers should serve a maximum of two terms.** A lack of term limits prevents a more dynamic political system open to different perspectives from developing.
2. **Remove Article 58 which grants the king power to extend the Chamber of Deputies' session by two years.** Elections should be regular and unaffected by Royal Order.

D. Election Procedure

Currently Bahraini citizens 21 years and older of sound mind and clean criminal record enjoy the right to vote. Voting is organized by governate (5 total) and electoral district (40 total).¹³ A candidate who receives an outright majority is declared the winner.¹⁴ If no candidate wins a majority, there is a run-off election; in the case of a tie, the local election committee draws lots.

The Constitution makes no mention of electoral districts, only that “The Chamber of Deputies comprises forty members elected by direct, secret general ballot in accordance with the provisions of the law.”¹⁵ District size is not constitutionally specified by population or number of voters, and there is no legal process for drawing district borders or modifying them.

The Chamber of Deputies is not consociational in nature — that is, it does not guarantee representation of women or sectarian groups. The aim is, instead, the representation of a “variety of views of Bahraini electorate,” as set out in the National Charter of 2000.¹⁶

Reform Options:

1. **Reform districting to be more representative of the population. Concerns that districts have been constructed to increase Sunni voting power should be addressed.** Electoral districts vary widely in population, and opposition members say the borders are drawn along sectarian lines. This is a primary source of popular grievance.¹⁷
2. **Change from a first-past-the-post model to an alternative vote model.** The current model allows divisive candidates to win seats if there are two or more opposition

¹² BAHRAIN CONSTITUTION, art. 54.

¹³ The country is divided into five governates and 40 districts: Manama — 8 districts, Muharraq — 8 districts, Northern — 9 districts, Central — 9 districts, Southern — 6 districts.

¹⁴ *Shura Council and Parliamentary Law*, art. 20.

¹⁵ BAHRAIN CONSTITUTION, art. 46.

¹⁶ THE BAHRAIN NATIONAL ACTION CHARTER, 23 Dec. 2000 (official English translation) [hereinafter NATIONAL ACTION CHARTER].

¹⁷ Mazen Mahdi, *Bahrain split by electoral boundaries*, The National, June 3, 2010, available at <http://www.thenational.ae/news/worldwide/bahrain-split-by-electoral-boundaries>.

candidates who split the remaining vote. Changing to the alternative vote model may incentivize parties to run more moderate, less openly sectarian candidates and campaign for the second-choices of voters from other sectarian groups.

3. **Increase the size of electoral districts and make them multi-member.** Small districts have the advantage of encouraging a close connection between the representative and the electorate, whereas larger, multi-member districts lead to greater representation of sectarian groups. Were members of the Consultative Chamber to be elected, this recommendation could apply for that chamber, with smaller, single-member districts retained for the Chamber of Deputies.
4. **Consider advisory selection guidelines, emphasizing diversity of representation, for positions such as Prime Minister, minister, President of either chamber of Parliament, or members of other bodies not directly elected.** Along the lines of the US Supreme Court's ruling in the *Grutter* case¹⁸, appointed or indirectly elected bodies could be required to generally be representative of the population, without resorting to the rigid quotas it found unconstitutional in the concurrent *Gratz* case (see discussion of quotas below).
5. **Alternatively, consider making the Chamber of Deputies in part consociational.** Full consociationalism — the setting of quotas — may be arbitrary or undemocratic, the system may harden and perpetuate divisions in society that were previously more fluid and less conflictual, and the rules may prove inflexible to shifts in demography or political needs. A partly consociational Chamber of Deputies may set aside a small number of seats (for women or certain sectarian groups) and elect the remainder as normal. Afghanistan does something similar. For the Wolesi Jirga: "In the election law measures should be adopted for so the election system shall provide general and just representation for all the people of the country, and at least two female delegate should be elected from each province."¹⁹ For the Meshrano Jirga: "The President from among experts and experienced personalities — including two representatives from the disabled and impaired and two representatives from the Kochis — appoints the remaining one-third of the members for a period of five years. The president appoints 50% of these people from among women."²⁰ Even with just a small degree of consociationalism, rules ensuring transparency and flexibility are essential.
6. **Reduce voting age from 21 to 18 years in order to increase youth participation.**

E. Electoral Disputes

A candidate has the constitutional right to challenge an electoral outcome. The Court of Cassation enjoys "jurisdiction to rule on challenges relating to elections to the Chamber of

¹⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁹ CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 3 January 2004, art. 83(6), available at http://supremecourt.gov.af/PDFFiles/constitution2004_english.pdf.

²⁰ *Id.* at art. 84(5).

Deputies.”²¹ Article 57 of the 1973 Constitution added: “This competence may be transferred to any higher court which may be set up by law,” presumably allowing a decree law to change jurisdiction were a dispute to be settled against the wishes of the King).

The Electoral Commission, which is led by the Justice Minister, oversees questions of eligibility, terms, districts, and procedure. Reforming its leadership will be critical to improving the efficacy of elections in Bahrain.

Reform Options:

1. **Regardless of the procedure for selecting members of the Electoral Commission, it must be an independent and representative body.** It must be shielded from becoming a spoil of electoral victory. Not only would membership have to reflect the population, but internal decision rules would have to allow members from parties in the minority to initiate inquiries and issue findings.
2. **The Electoral Commission could remain an appointed body, with members selected by the Chamber of Deputies.** Albania’s Central Election Commission includes two members elected by the Assembly, 2 picked by the President, and 3 by the High Council of Justice.²² This model of indirect representation would allow for more transparency in general and specific electoral decisions. Instituting these models, or another like them, would be permissible under Art. 69, which allows for ad hoc commissions of inquiry, limited to four months; the time limit for commissions could either be amended, or a commission could be established under the current rules until one defined by statute could take its place.
3. **A reformed Electoral Commission could set eligibility, term, and procedural rules; delineate district boundaries; and serve as the recourse of first instance for disputes, with a right to appeal to the Court of Cassation.**

²¹ *Id.* at 62.

²² CONSTITUTION OF THE REPUBLIC OF ALBANIA, 28 November 1998, art. 154, *available at* <http://www.km.gov.al/skedaret/1231927768-Constitution%20of%20the%20Republic%20of%20Albania.pdf>.