

Constitutional Options for Bahrain

III. Background Papers

5. Process of Constitutional Change¹

A. Introduction

Demands for more democratic governance are not new to the Bahraini people. In fact Bahrain, more than its Gulf State neighbors, has a standing tradition of highly developed civic engagement.² The question that remains in Bahrain is how effective the process of constitutional change can be in developing lasting and meaningful reform to the governmental system and meeting the desires of the people demanding that change. This paper recommends that the process of constitutional change should be carefully considered so as to create a final document that is accountable to the people. One option is the concept of ‘new constitutionalism,’ which values public participation and civic education as central components. A document that reflects and embraces the need for inclusiveness, accessibility, and transparency has the most likelihood of lasting success for the Bahraini people. Furthermore, such a process may help solve some of the problems currently facing the government of Bahrain, namely a lack of both participation and legitimacy.

B. Background on Bahrain’s Constitution

In order to understand the potential for a future inclusive constitutional process, it is necessary to look at the history of constitutionalism in Bahrain. This history started in 1972, a year after Bahrain gained independence from the United Kingdom. Sheikh Isa al-Khalifa, the country’s first Amir, moved the newly-independent Bahrain toward a constitutional monarchy, and formed a Constituent Council to explore a draft constitution. This elected council³ created a constitutional system with many components of a democracy, including a democratically elected legislature and an independent judiciary, though the Amir retained power over the former and was given extensive control as head of state.

Two years after the 1973 Constitution was ratified, the Amir dissolved the legislature and suspended section 65 of the Constitution, which declared that upon dissolution, new elections must be held within two months. This suspension continued until Sheikh Isa al-Khalifa’s death in 1999, upon which his son, Sheikh Hamad al-Khalifa, took control. Sheikh Hamad, who was declared the first King of Bahrain in 2002, also initiated a reform process intending to create a new constitutional system that would revise the partially suspended 1973 document.

This process involved a three-step approach. In 2000, a committee, composed of a number of government officials, professionals, civil society representatives, and more, all appointed by the Sheikh, created a draft National Action Charter (NAC), aimed at revitalizing the constitutional project and including the Bahraini public. Their first draft, when presented to the nation, was

¹ Prepared by Sam Chapple-Sokol and Elizabeth Reese.

² Jane Kinninmont, *Bahrain’s Re-Reform Movement Will Bahrain’s Protesters Still Accept a Constitutional Monarchy?*, FOREIGN AFFAIRS, February 28, 2011.

³ Suffrage was limited to males aged 20 years or older.

highly criticized – it did not allow for final approval by the people, but instead by the Sheikh. The committee’s second draft allowed for a referendum by the people, which was undertaken in February of 2001. More than 98% of voters approved of the Charter, which called for a second house of the legislature to be created. This all-appointed body, the Shura Council, was added for the purpose of providing consultation to the democratically-elected Chamber of Deputies, which was given the sole right to enact laws. In 2002, despite the popularity of many aspects of the NAC, the Sheikh issued a new amended constitution that ignored the NAC’s more liberal tendencies by giving the appointed Shura Council the same powers as the elected chamber, as well as retaining control of all three branches for the King himself. Notably, all three constitutional documents include the right of citizens to participate in public affairs, leading to the conclusion that Bahrain has a history of civic engagement in the democratic process.⁴

Looking at this history of intermittent periods of democratic inclusiveness, separated by long swathes of exclusionary power practiced by the Sheikhs, demonstrates the potential capacity and enthusiasm for Bahraini civic participation in the constitutional reform process. This civically-engaged reform process has been pursued in nations around the world, and is known as ‘new constitutionalism.’

C. New Constitutionalism

In the past twenty years, this new paradigm of constitutional drafting has arisen. New constitutionalism stresses the importance not only of the substance of a document, but of the process by which that substance was reached.⁵ The process is distinguished by its emphasis on public participation, which leads to greater inclusiveness, accessibility, and transparency, three key factors leading to a constitution’s legitimacy in the eyes of the people.⁶

Perhaps the best historical precedent for new constitutionalism was set in South Africa in the early 1990s. South Africa provides a good foil for Bahrain in that both nations are divided, with the minority group ruling the majority; and the process was initiated in a period of uprising. The South African process is a model for the potential successes that new constitutionalism can bring. The process was inclusive, bringing together all major political and racial parties, and open to the public – there were two phases of public commentary, both for input into a draft and for responses to the draft. Finally, there was a measure of transparency to the process – although drafting of a first text was done in private by elites, much of the work was done in public.

There are a number of important lessons to be learned from the South African process. First of all, the parties involved worked hard to ensure the legitimacy of the final product, through the abovementioned steps. This went a long way to creating respect and deference for the new document, and therefore for the creation of this new paradigm in rule of law. The public input process was also key for allowing people to feel like they were heard, and for the drafters to get

⁴ See CONSTITUTION OF THE KINGDOM OF BAHRAIN, 14 Feb. 2002 (official English translation) [hereinafter BAHRAIN CONSTITUTION], art. 1(e).

⁵ In the words of Vivien Hart, “How the constitution was made, as well as what it says, matters.” VIVIEN HART, DEMOCRATIC CONSTITUTION MAKING: UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT 107, 4 (July 2003).

⁶ Hassen Ebrahim and Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid* in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, 112 (Laurel E. Miller ed., 2010).

an idea of the collective goals and wishes of the people. While the South African process was responsible for creating a completely new constitution, the process itself could also be modified and applied to a more limited revision, as may be more appropriate in the Bahraini context.

Beyond the historical precedent for new constitutionalism, there is a growing attitude in international human rights law that the public has a right to participate in such processes.⁷ The UN Human Rights Committee recently called upon Article 25 of the International Covenant on Civil and Political Rights (ICCPR) to claim that citizens have the right to “choose or change their constitution or decide public issues through a referendum or other electoral process,”⁸ though “it is for the legal and constitutional system of the State party to provide for the modalities of such participation.”⁹ Bahrain, a recent signatory to the ICCPR,¹⁰ has successfully created such a process historically. The next section will expand on the importance and viability of an endogenous process in Bahrain, highlighting the precedent set in the 1973 Constitution and 2001 National Action Charter processes and suggesting that a similar course could be followed in the future.

D. Precedents for Public Engagement

The 1973 Constitution and the 2001 National Action Charter processes set a strong precedent of public engagement that could be an effective example for the current constitutional reform movement. The 1973 Constitution, written shortly after Bahrain received independence from Great Britain, was initially hailed by democracy activists as ushering in a new era of pluralistic politics.¹¹ This was evident in two important efforts. First, the government decreed that an elected body be responsible for drafting and ratifying a constitution. Second, the constituent assembly comprised an inclusive section of society including twenty-two elected delegates, twelve members of the Council of Ministers, and eight members directly appointed by the amir Shaikh Isa. This pluralistic political direction resulted in a unicameral legislature consisting of 30 elected members, plus fourteen royally-appointed government ministers.¹² Unfortunately, these civic engagements were negated when the parliament was later dissolved.¹³

The 2001 National Action Charter also furthered a Bahraini tradition of civic engagement in three crucial ways. First, the charter was developed by an appointed committee that comprised a wide aspect of Bahraini society, including members of the ruling family, ministers, and

⁷ See FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller ed., 2010).

⁸ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

⁹ *Marshall v. Canada*, Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986, 40 (1991).

¹⁰ *Torture Redux*, HUMAN RIGHTS WATCH, February 8, 2010, available at <http://www.hrw.org/en/node/88200/section/6>

¹¹ Frederic Wehrey, *Bahrain protests: A point of no return for ruling family—and Obama*, CHRISTIAN SCIENCE MONITOR, February 23, 2011.

¹² See Nadeya Sayed Ali Mohammed, *Political Reform in Bahrain: The Price of Stability*, 4 MIDDLE EAST INTELLIGENCE BULLETIN (September 2002), available at http://www.meforum.org/meib/articles/0209_me1.htm

¹³ Wehrey, *supra* note 10.

government officials, as well as civil society and university professors.¹⁴ Allowing more participation in the process allowed the group involved to have a vested stake in the outcome and prevented a quick descent into bickering over explicit terms, or worse, abandoning the reform process altogether. Second, the Amiri order establishing the committee explicitly stated that the charter should be presented to a public conference of society to approve it before the government ratified it. Although it has been suggested that the NAC was just an attempt to amend the constitution without referring the proposed changes to an elected body, the government deserves credit for listening to public outcry and submitting the proposed changes to a public referendum. Third, the governmental systems outlined by the charter and approved by the Bahraini people advanced a democratic government, by creating a bicameral parliament with one democratically elected chamber with a legislative role; granting full suffrage to male and female citizens; creating an independent judiciary; and transforming Bahrain into a constitutional hereditary monarchy.¹⁵

These governmental reforms, deemed by many to be better than the status quo,¹⁶ were widely approved by the Bahraini population. However, several opposition groups believed these changes did not go far enough and regarded the reforms as an impetus for more substantial structural reforms. Unfortunately, those more substantial changes did not develop after the promulgation of the 2002 Constitution.

From this historical review we can glean an important lesson. Bahrain has the capacity to engage its citizens in an inclusive and open constitutional reform process. The NAC and the successful public referendum that led to its ratification prove that there is a process upon which the current reforms can build if it can reestablish trust. If a similar process took root in present day Bahrain, real, lasting and substantial structural constitutional change is possible. This change could nurture a legitimate constitution that the rest of the world would widely recognize as an advancement of democratic principles.

E. Conclusion and Recommendations

The National Action Charter process can be reasonably placed within the greater constellation of participatory constitutional processes dominating the last two decades. From South Africa in the early 1990s, to other African processes throughout the 1990s and 2000s,¹⁷ to the attempted projects in Iraq and Afghanistan in the last ten years, Bahrain's 2001 experiment does not look out of place. For a population knowing only two years of constitutional control out of the past forty, there was a remarkable amount of constitutional energy, and a real desire to bring about reform. To this day, that energy persists and has gotten stronger, with protesters lining the streets of Manama to call for real and lasting change. To be sure, each one will want to have a say in the process to create a new constitution, and each will want to have his or her voice heard. A participatory model will be necessary for a result to be viewed as legitimate. To achieve such an end, we recommend a number of optional steps to be taken:

¹⁴ See *Legal Opinion Concerning the Constitutional Matter of the Kingdom of Bahrain*, Mahmood's Den, available at <http://mahmood.tv/bahrain/bahrain-politics-2/bahrain-constitution/legal-opinion/>.

¹⁵ See Mohammed, *supra* note 11.

¹⁶ See *id.*; Kenneth Katzman, *Bahrain: The Political Structure, Reform And Human Rights*, EURASIA REVIEW (February 28, 2011), available at <http://www.eurasiareview.com/analysis/bahrain-the-political-structure-reform-and-human-rights-28022011/>.

¹⁷ Examples include Eritrea (1994-1997), Rwanda (1999-2003), and Kenya (2003). HART, *supra* note 4, at 7-9.

- In order to re-establish the trust of the people, and their faith in a constitutional process, the King can convene another Constituent Assembly with the input of leading members of the Opposition [including a significant Shi'i presence] to create a transitional document. This Assembly would be responsible to listen to the demands of the protestors and incorporate them into a transitional document, aiming to re-draft the 2002 constitution. The process for listening to these demands should be structured, including ways for individual voices to be heard (mail-in letters of recommendation, internet capabilities, etc.). This option would have the advantage of the King stepping back and showing that he is once again willing to listen to the people. It may feed public suspicions, though, that the King will again ignore what they have to say.
- Should one be drafted, this transitional document would be presented to the public as a part of a civic engagement and education program. The engagement and education process would manifest itself in a series of public campaigns – drafts of the document could be distributed to the population with annotations and explanations by the drafting committee. There would then be an opportunity for the public to ask questions about and give feedback on the transitional document, educating the drafters about the issues that concern the population.
- After a period of education, the transitional document could be put to a public referendum, which would be responsible for either approving or disapproving of its plan for proceeding. Even without a formal referendum, the civic engagement and education program would have a beneficial effect, as the drafters and King would be able to get a good sense of public support for the document, while building public engagement.
- Whether or not a transitional document is drafted and approved, the King should publicly convene a constitutional drafting committee from the members of the Council of Deputies and the Shura Council to put the document's recommendations into a final document. This committee should be composed of as wide a swathe of Bahraini society as possible – men and women, Sunni and Shi'i, those educated in law and those in other disciplines, and a significant percentage should be outside of the royal family. Should the King not be able to form such a diverse group from within the Council of Deputies and the Shura Council, he should look to universities, civil society, the judiciary, and local government to build the team.
- A similar education and engagement project should be undertaken as above, especially if a transitional document is not drafted. Copies of the draft constitution should be widely disseminated and the public should be given ways in which they can contact the committee to provide input.
- Upon completion, the draft amended constitution could be put to a public referendum, which would indicate whether or not the public feel that their input

was transferred to the new document. The hope is to avoid a similar situation as happened in 2001-2002. Another option would be to have the National Assembly vote on the amended constitution. According to Article 120 of the current constitution, amendments must be approved by a two-thirds majority of both chambers.

- If approved, the newly amended constitution would come into effect. If not, the drafting committee will go through a new round of drafting and public input, in order to ensure full public support.

If these steps are followed, and the King, the judiciary, the government, and the people of Bahrain work together to create an inclusive, accessible, and transparent process, the promises of new constitutionalism can be met, and the nation will be rewarded with a constitution marked by legitimacy and accountability.

At all stages, trust that the process is engaged in good faith, and that the transition is not conducted for the mere sake of procrastination, requires a new trusted government that includes a large Bahraini oppositional representation and is perceived to be irreversibly engaged in meaningful democratic change.