

Constitutional Options for Bahrain

7. Rights and Limiting Language¹

A. Introduction

While the current constitution grants a range of basic political, civil, and economic rights, neither the scope of these rights nor the remedies are sufficient. In addition, many of the articles concerning rights and liberties are associated with limiting language, allowing laws to infringe on rights and protections. Further work could help to address grievances related to discrimination and rights in relation to citizenship and political rights, equal protection under the law, international obligations, personal freedoms and the criminal process, religions freedom, freedom of speech and association, and military service. The constitution could provide for stronger economic and social rights as well as mechanisms to ensure enforcement of rights and equal access to state services. In addition to addressing rights generally and sectarian grievances, the Constitution could provide mechanisms to improve women's political participation, for instance through a quota system for certain positions, as well as disability-related dispositions.

B. Limiting Language

i. Analysis

Constitution drafting seeks to balance general descriptors with explicit language used to define institutional structure and procedure. Oftentimes, sweeping principles of social justice, liberty, and non-discrimination are expressed in vague wording and preface limiting language that permits derogation from these basic rights. Varying phraseology relates the same idea that application of the preceding provision is subject to an undefined set of rules. "Provided by law", "except by law", "provided that", "prescribed by law", "regulated by law", and "in accordance with the law" are frequently used terms. It is important to note that these limiting clauses do not automatically render the constitutional article susceptible to derogation or vulnerable to abuse, but they may, especially in a constitution that lacks other protections or a strong democratic structure.

A survey of the 125 articles of the 2002 constitution found 51 instances of limiting language. High priority articles are those where the limiting language may likely impinge on a fundamental right such as the right to civil participation or freedom from arbitrary arrest. Medium priority articles involve secondary rights that might come under the purview of an administrative body controlled by the King. Because the Shi'i majority in Bahrain has specifically protested, among other things, discrimination, it is of the utmost importance that a modified regime is accompanied by a constitution that staunchly protects individual rights. The use of limiting language is found in many constitutions around the world, and they raise especially serious

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concern when they qualify human rights.² Among those issues where the 2002 constitution provides weaker rights than the 1973 Constitution, National Action Plan are non-discrimination for employment, freedom of association, and freedom of religion and conscience. Additionally, the Constitution's anti-corruption protections are weakened by allowing exemptions "as prescribed by law".³

ii. Survey of Articles Containing Limiting Language

- **Article 1** [Sovereignty, Constitutional Monarchy]: No citizen can be deprived of the right to vote or to nominate oneself for elections except by law.
- **Article 5** [Family]: The family is the basis of society, deriving its strength from religion, morality and love of the homeland. The law preserves its lawful entity, strengthens its bonds and values, under its aegis extends protection to mothers and children, tends the young and protects them from exploitation and safeguards them against moral, bodily and spiritual neglect.
- **Article 7** [Education]: Education is compulsory and free in the early stages as specified and provided by law. The necessary plan to combat illiteracy is laid down by law.
 Individuals and bodies may establish private schools and universities under the supervision of the State and in accordance with the law.
- **Article 8** [Health Care]: Individuals and bodies may establish private hospitals, clinics or treatment centres under the supervision of the State and in accordance with the law.
- **Article 9** [Property]: Ownership, capital and work -- in accordance with the principles of Islamic justice -- are basic constituents of the social entity of the State and the national wealth, and are all individual rights with a social function regulated by law.
 Private ownership is protected. No one shall be prevented from disposing of his property within the limits of the law. No one shall be dispossessed of his property except for the public good in the cases specified and the manner stated by law and provided that he is fairly compensated.
 The relationship between the owners of land and real estate and their tenants shall be regulated by law on economic principles while observing social justice.
 The State shall make the necessary arrangements to ensure the exploitation of land suitable for productive farming, and shall strive to raise the standards of farmers. The law lays down how small farmers are to be helped and how they can own their land.
- **Article 10** [Economy]: The national economy is based on social justice, and it is strengthened by fair cooperation between public and private business. Its objective, within the limits of the law, is economic development according to a well-ordered plan and achievement of prosperity for the citizens, all within the bounds of the law.

² *Post-Conflict Constitution Drafter's Handbook*, The Public International Law and Policy Group, Jan. 2007, available at <http://www.publicinternationallaw.org/areas/peacebuilding/consthandbook/PILPG-PostConflictConstitutionDrafterHandbook-Jan07.pdf>.

³ BAHRAIN CONSTITUTION, art. 98(1).

- **Article 13** [Work]: Every citizen has the right to work and to choose the type of work within the bounds of public order and decency.
Compulsory work cannot be imposed on any person except in the cases specified by law for national exigency and for a fair consideration, or pursuant to a judicial ruling.
- **Article 15** [Taxes]: Taxes and public costs are based on social justice, and their payment is a duty under the law.
- **Article 16** [Public Jobs]: Foreigners shall not be entrusted with public posts except in those cases specified by law.
Citizens are equal in the assumption of public posts in accordance with the conditions specified by law.
- **Article 17** [Citizenship]: Bahraini nationality shall be determined by law. A person inherently enjoying his Bahraini nationality cannot be stripped of his nationality except in case of treason, and such other cases as prescribed by law.
- **Article 19** [Personal Freedom]: A person cannot be arrested, detained, imprisoned or searched, or his place of residence specified or his freedom of residence or movement restricted, except under the provisions of the law and under judicial supervision.
A person cannot be detained or imprisoned in locations other than those designated in the prison regulations covered by health and social care and subject to control by the judicial authority.
- **Article 20** [Criminal Trials]: An accused person is innocent until proved guilty in a legal trial in which he is assured of the necessary guarantees to exercise the right of defence at all stages of the investigation and trial in accordance with the law.
- **Article 22** [Conscience, Religion]: Freedom of conscience is absolute. The State guarantees the inviolability of worship, and the freedom to perform religious rites and hold religious parades and meetings in accordance with the customs observed in the country.
- **Article 23** [Expression]: Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed, the unity of the people is not prejudiced, and discord or sectarianism is not aroused.
- **Article 24** [Press]: With due regard for the provisions of the preceding Article, the freedom of the press, printing and publishing is guaranteed under the rules and conditions laid down by law.
- **Article 25** [Home]: Dwellings are inviolate. They cannot be entered or searched without the permission of their occupants except[ion] in cases of maximum necessity as laid down and in the manner provided by law.
- **Article 26** [Communication]: The freedom of postal, telegraphic, telephonic and electronic communication is safeguarded and its confidentiality is guaranteed. Communications shall not be censored or their confidentiality breached except in

exigencies specified by law and in accordance with procedures and under guarantees prescribed by law.

- **Article 27** [Associations, Trade Unions]: The freedom to form associations and unions on national principles, for lawful objectives and by peaceful means is guaranteed under the rules and conditions laid down by law, provided that the fundamentals of the religion and public order are not infringed. No one can be forced to join any association or union or to continue as a member.
- **Article 28** [Assembly]: Public meetings, parades and assemblies are permitted under the rules and conditions laid down by law, but the purposes and means of the meeting must be peaceful and must not be prejudicial to public decency.
- **Article 30** [Military Service]: Peace is the objective of the State. The safety of the nation is part of the safety of the Arab homeland as a whole, and its defence is a sacred duty of every citizen. Performance of military service is an honour for citizens and is regulated by law.

Only the State may establish the Defence Force, National Guard, and Public Security services. Non-citizens are assigned such tasks only in case of maximum necessity and in the manner prescribed by [law].
- **Article 31** [Restrictions]: The public rights and freedoms stated in this Constitution may only be regulated or limited by or in accordance with the law, and such regulation or limitation may not prejudice the essence of the right or freedom.
- **Article 32** [Separation of Powers]: The system of government rests on a separation of the legislative, executive and judicial authorities while maintaining cooperation between them in accordance with the provisions of this Constitution. None of the three authorities may assign all or part of its powers stated in this Constitution. However, limited legislative delegation for a particular period and specific subject(s) is permissible, whereupon the powers shall be exercised in accordance with the provisions of the Delegation Law.
- **Article 36** [Declaration of War]: A state of national safety or martial law shall be proclaimed only by Decree. In all cases, martial law cannot be proclaimed for a period exceeding three months. This period may not be renewed except with the consent of the majority of the members of the National Assembly present.
- **Article 37** [Treaties]: (1) The King shall conclude treaties by Decree, and shall communicate them to the Consultative Council and the Chamber of Deputies forthwith accompanied by the appropriate statement. A treaty shall have the force of law once it has been concluded and ratified and published in the Official Gazette.
- **Article 38** [Decrees]: (1) If between the convening of both the Consultative Council and the Chamber of Deputies sessions, or during the period in which the National Assembly is in recess, any event should occur that requires expediting the adoption of measures that brook no delay, the King may issue relevant Decrees that have the force of law, provided they do not contravene the Constitution.

- **Article 39** [Administrative Decrees]: a. The King shall lay down the regulations for implementation of the laws, by Decrees which shall not include amendment or suspension of those laws or exemption from their implementation. The law may prescribe a lower instrument than a Decree for promulgation of the regulations necessary for their implementation.
 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.
- **Article 40** [Officers]: The King shall appoint and dismiss civil servants, military personnel, and political representatives in foreign States and with international organizations, within the bounds and on the conditions prescribed by law, and shall accredit the representatives of foreign States and organizations.
- **Article 41** [Pardon, Amnesty]: The King may abate or commute a sentence by Decree. A total amnesty may be granted only by law, and shall apply to offences committed before the amnesty was proposed.
- **Article 42** [Electoral Orders]: The King shall issue the Orders for elections to the Chamber of Deputies in accordance with the provisions of the law.
- **Article 45** [Eligibility] a. The incumbent of a Ministry must be a Bahraini, aged not less than 30 years by the Gregorian Calendar and must enjoy full political and civil rights. Unless otherwise provided, the provisions pertaining to Ministers apply also to the Prime Minister.
- **Article 50** [Supervision of Self-Government]: The law shall regulate public institutions and municipal departmental bodies so as to ensure their independence under State direction and supervision. The law shall ensure the municipal departmental bodies can administer and oversee the services that have a local character and are within their area.
 The State shall direct public welfare institutions for the public good in a manner consistent with general State policy and the interest of its citizens.
- **Article 56** [Composition]: The Chamber of Deputies comprises forty members elected by direct, secret general ballot in accordance with the provisions of the law.
- **Article 62** [Electoral Jurisdiction]: The Court of Cassation shall have jurisdiction to rule on challenges relating to elections to the Chamber of Deputies, in accordance with the relevant law.
- **Article 70** [Legislation]: No law shall be promulgated unless approved by both the Consultative Council and the Chamber of Deputies, or the National Assembly as the situation demands, and ratified by the King.
- **Article 93** [Ministerial Right to Speak, Duty to Attend]: The Prime Minister and Ministers may attend sessions of the Consultative Council and Chamber of Deputies, and both chambers shall listen to the Prime Minister and Ministers whenever they ask to speak. They may co-opt such senior officials or their deputies as they may wish.
- **Article 94** [Regulations]: a. The regulations for the course of business in both the Consultative Council and the Chamber of Deputies and their committees, and the

principles governing debate, voting, questioning, cross-examination and all the powers prescribed in the Constitution shall be prescribed by law, and similarly the penalties for a member being in breach of the regulations or failing to attend chamber or committee sessions without acceptable excuse.

b. Each chamber may add to the law that regulates it such supplementary provisions as it sees fit.

- **Article 97** [Incompatibilities]: Membership of the Consultative Council and Chamber of Deputies may not be combined, nor may membership of either chamber be combined with the assumption of public office.

Other cases of non-combination shall be prescribed by law.

- **Article 98** [Economic Incompatibilities]: (1) During his period of membership a member of the Consultative Council or the Chamber of Deputies may not be appointed to the board of directors of a company or participate in contracts concluded by the Government or public institutions except in those cases prescribed by law.

- **Article 104** [Independence, Public Prosecutor]: b. No authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with. The law guarantees the independence of the judiciary, and the law shall lay down the guarantees of judges and the provisions pertaining to them.

c. The law shall lay down the provisions pertaining to the Public Prosecution Office, the tasks of the office for delivery of formal legal opinions, the preparation of legislation, State representation before the law, and personnel employed on such matters.

d. The provisions governing advocacy shall be regulated by law.

- **Article 105** [Courts]: a. The various types and degrees of the courts shall be regulated by law, and the law shall state their functions and jurisdiction.

b. The jurisdiction of military courts shall be confined to military offences committed by members of the Defence Force, the National Guard, and the Security Forces. It does not extend to other persons except when martial law is declared and within the bounds prescribed by law.

c. Court hearings shall be held in public except in exceptional cases prescribed by law.

d. A Higher Judicial Council shall be established by law to supervise the smooth running of work in the courts and their supporting organs. The powers of the Higher Judicial Council in the functional affairs of judicial personnel and the Public Prosecution Office shall be prescribed by law.

- **Article 106** [Constitutional Court]: (1) 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. The court's area of competence is to watch over the constitutionality of laws and statutes.

(2) The law shall state the regulations that ensure that the members of the Court are not liable to dismissal, and specifies the procedures that are followed before the Court. The law shall guarantee the right of the Government, Consultative Council, the Chamber of Deputies and notable individuals and others to challenge

before the Court the constitutionality of laws and statutes. A ruling by the Court that a text in a law or a statute is unconstitutional shall have a direct effect, unless the Court specifies a subsequent date for the purpose. Thus if the Court's rule on unconstitutionality is related to a text in the penal code then the convictions made on the basis of such a text are deemed null and void.

- **Article 107** [Taxes]: a. Public taxes shall only be established, amended and abolished by law, and persons shall only be exempted from paying them wholly or in part in those cases prescribed by law. A person may only be instructed to pay other taxes, duties and costs within the bounds of the law.
 - b. The provisions governing the collection of taxes, duties and other public monies, and the procedures for their disbursement, shall be prescribed by law.
 - c. The provisions governing the maintenance and management and the terms for the disposition of State property, and the limits within which any part of such property may be assigned, shall be prescribed by law.
- **Article 108** [Public Loans]: a. Public loans shall be contracted by law. The State may lend or guarantee a loan by law within the credit limits prescribed for the purpose in the Budget Law.
- **Article 109** [Budget]: a. The financial year shall be prescribed by law.
 - d. The State general budget shall be promulgated by law.
- **Article 114** [Accounting Procedures]: The provisions pertaining to independent public budgets, their appendices, and their final accounts, shall be laid down by law, and they shall be subject to the provisions governing the State budget and its final account. The provisions governing the budgets and final accounts of municipalities and local public institutions shall also be laid down by law.
- **Article 116** [Financial Control Office]: A Financial Control Office shall be established by law, and the law shall guarantee its independence. It shall assist the Government and the Chamber of Deputies in controlling the collection of State revenues and the disbursement of its expenditure within the budget limits.
- **Article 117** [Concessions, Monopolies]: a. Any commitment to exploit a natural resource or a public utility shall be only by operation of law and for a limited time. The preliminary procedures shall ensure that the search and exploration work are facilitated and that openness and competition are realized.
 - b. Any monopoly shall only be awarded by law and for a limited time.
- **Article 118** [Currency, Banking, Standards]: The law shall regulate cash and the banks, and shall regulate weight, measures and standards.
- **Article 119** [Public Salaries]: The law shall regulate emoluments, pensions, compensation, relief and remuneration being a charge on the State Treasury.
- **Article 122** [Promulgation of Laws]: Laws are published in the Official Gazette within two weeks of their issue, and are enforced one month after the date of their publication, and this period may be shortened or prolonged if the law specifically prescribed it.
- **Article 123** [Martial Law]: It is impermissible to suspend any provision of this Constitution except during the proclamation of martial law, and within the limits

prescribed by the law. It is not permissible under any circumstances to suspend the convening of the Consultative Council or the Chamber of Deputies during that period or to infringe upon the immunity of their members, or during the proclamation of a state of national safety.