

BAHRAIN

With his accession to power as Amir in March 1999, Sheikh Hamad began an unprecedented process of political reform. In a 2001 open national referendum, the population voted overwhelmingly in favour of a new National Charter calling for the establishment of a constitutional monarchy, respectful of the principles of separation of powers and the rule of law, and the establishment of a Constitutional Court. The National Charter also provides for a legislative system consisting of two chambers, including one with legislative attributes, to be elected directly and freely by the citizens by 2003. The most remarkable development related to the judiciary in Bahrain was the abolition of both the Decree Law on State Security Measures and the State Security Court Measures. In 2000, a Supreme Council of the Judiciary was established for the first time.

BACKGROUND

The State of Bahrain consists of an archipelago of islands in the shallow waters of the central Arabian Gulf, with a population of some 700,000 inhabitants, about one third of them expatriate workers. The hereditary rule of the Al-Khalifa extended family, exercised since the latter eighteenth century, is endorsed by article 1 of the 1973 Constitution. In 1975, the Government suspended some provisions of the 1973 Constitution, including those articles providing for an elected legislature, which was dissolved and never reinstalled. Following unrest in 1996 (*See Attacks on Justice 1999*), the political situation has returned to a state of general calm.

Political reform

With his accession to power as Amir in March 1999 following the death of his father, Sheikh Hamad began a process of political reform. In an open national referendum on 14-15 February 2001, the population overwhelmingly endorsed the Amir's proposed National Charter. The National Charter calls for the establishment of a constitutional monarchy respectful of the principles of separation of powers and the rule of law, and elevates the ruler's title by constituting him as the country's first king. It provides for a legislative system consisting of two chambers. The first chamber, which will come into existence by 2003, is to consist of members directly and popularly elected. The second chamber, *Majlis al-Shura*, will have members appointed by the Amir and is to include citizens and experts competent to give advice on matters of state and policy. The Charter guarantees the rights of male and female citizens to participate in public life and to vote. The endorsement of the principle of universal popular political suffrage may serve as an example for the rest of the Persian Gulf region. As will be discussed in the section on the judiciary, the Charter endorses the principle of the independence of the judiciary and provides for the establishment of a constitutional court.

The National Charter will not replace the 1972 Constitution. Rather, the Preamble of the Charter recognises that "implementation of some of the essential ideas included shall require constitutional amendments" and specifies, in particular, those articles connected with the composition of the legislative power. The vagueness of the provisions, especially in regard to the eventual role and powers of the legislature, have led to concern as to whether genuine reforms will in fact proceed. The Charter is silent as to the number of members of either chamber and fails to indicate how

disputes between them will be resolved. Although it commits the Government to promote division between executive, legislative, and judicial branches, it also provides that the Amir is the head of all the branches, with the power to appoint and dismiss the Prime Minister. Finally, it is not clear as to what power, if any, will be accorded the legislature.

HUMAN RIGHTS ISSUES

The National Charter guarantees most fundamental human rights, including, *inter alia*, the principle of equality and non-discrimination, personal freedoms, freedom from torture and degrading and inhuman treatment, freedom of religion and conscience, and freedom of expression. Particularly notable in this regard is the Charter's endorsement of women's rights and the State's commitment to consolidate the rights of women and to issue necessary legislation to protect the families. Another quantum advance is the Charter's provision that "personal freedoms are guaranteed in accordance with the law. No person shall be arrested, detained, imprisoned, searched, confined to a residence, or have his freedom of residence or movement impounded, except in accordance with the law and under the supervision of the judiciary". The Charter establishes religious equality between Sunni and Shia Muslims, thereby ending restrictions on access for Shia to the military, security forces and senior positions in politically sensitive government departments. However, instead of defining human rights by reference to internationally acknowledged standards, the Charter defines them by reference to national law, which poses a risk of a diminution of international human rights standards.

Another positive development is the Charter's endorsement of the right to set up NGOs. Thus, the Charter provides that "in order for the society to benefit from all potentials and from civilian activities, the State guarantees the right to set up private, scientific, cultural, and vocational associations and syndicates on a patriotic basis, for legal purposes and through peaceful means in accordance with conditions and situations stated by the law. No person shall be coerced into joining, or remaining in, an association or a syndicate". On 3 March 2001, the Bahraini Association of Human Rights (BAHR), Bahrain's first independent human rights group, gained legal status.

A number of additional extraordinary developments have occurred since the beginning of 2000 in respect of human rights. All political prisoners and detainees were released, and hundreds of Bahraini citizens returned following years in forced exile. The Bahraini authorities invited the United Nations Working Group on Arbitrary Detention to visit the country between 25 February and 3 March 2001. Amnesty International visited the country in March 2001.

JUDICIARY

Chapter IV of the Constitution concerns the judicial branch of power. Article 101(a,b) provides: "(a) The honour of the judiciary and the integrity and impartiality of judges are the bases of rule and a guarantee of rights and liberties. (b) In the administration of justice judges shall not be subject to any authority. No interference whatsoever shall be allowed in the conduct of justice. The law shall guarantee the independence of the judiciary and shall state the guarantees and provisions relating to the judges". Despite these provisions, the Bahraini judiciary has typically been subject to inappropriate Governmental influence. In the past, some attorneys and family members involved in politically sensitive criminal cases have argued that the Government intervenes in court

proceedings to induce the result or to obstruct rulings from being carried out. There are also occasional allegations of corruption in the judicial system.

The most recent remarkable development related to the judiciary in Bahrain is the abolishment of both the Decree Law on State Security Measures and the State Security Court Measures (see *Attacks on Justice 1999*).

Structure

Legislative Decree No. 13 of 1971, regarding the organisation of the judiciary establishes courts of first instance (lower and higher courts and courts of enforcement, higher civil courts of appeal and the Court of Cassation). There are two classes of courts: Civil courts, which have jurisdiction over civil and criminal cases, and the *Shari'a* courts, which rule on issues of personal status.

The *Shari'a* courts, which are subdivided into Sunni and Jaafari branches, have the power to adjudicate on personal status conflicts relating, *inter alia*, to marriage, divorce, inheritance and child custody. These courts rule on matters of personal status in accordance with the rules of law of the particular branch of Islam to which the concerned individual belongs. Disputes among Muslims in this regard are adjudicated by the *Shari'a* courts, while those between members of other religions are judged under civil courts.

There is no administrative court system in Bahrain, and, according to the Judiciary Act of 1971, courts are forbidden to review acts of State. However, the Court of Cassation has ruled that the civil courts are competent to hear petitions against administrative decisions. Any citizen may also submit a complaint against administrative authorities with their senior officials, including the competent Ministers. Another administrative remedy is that any citizen has the right to submit a complaint personally to the Amir, the Prime Minister or the Crown Prince, during the weekly audiences held by these authorities to receive citizens and others.

The Bahrain Defence Force maintains a separate court system for military personnel accused of offences under the Military Code of Justice. Military courts do not review cases involving civilian, criminal, or security offences. However, article 102 (b) of the Constitution provides for the possibility to extend such jurisdiction "during the time of martial law and within the limits determined by law."

Administration and Security of Tenure

Judges are appointed by the Amir upon recommendation of the Ministry of Justice and Islamic Affairs, headed currently by a member of the ruling Al-Khalifa family. Article 102 (d), which has been suspended since 1975, provides for the establishment of a Supreme Council of the Judiciary, which shall supervise the functions of the courts and the offices relating thereto. "The law shall specify the jurisdiction of the said Council over the functional affairs of both the judiciary and the public prosecution". At the beginning of 2000, Decree Law No. 19/2000 set up for the first time a Supreme Council of the Judiciary and the body, headed by the President of the Court of Cassation, began to function in September 2000. The Supreme Judicial Council's mandate includes the supervision of the good functioning of the courts, the promotion and transfer of judges and other issues relating to the welfare of judges. However, the Council is not empowered to appoint judges, but only to look into nominations made by the Ministry of Justice and Islamic Affairs relating to the appointments to judicial positions. Moreover, the Council does not have its own independent budget. Its work falls under the budget of the Ministry of Justice and Islamic Affairs, a condition

which raises serious questions about the extent of its independence. Additionally, the Supreme Judicial Council has no authority over the Public Prosecution, which remains under the control of the Ministry of Interior, also headed by a member of the Khalifa ruling family.

Concerns have arisen that, in the absence of constitutional accountability, the recently established Council will not adequately protect the security of tenure needed in Bahrain to achieve a fully independent judiciary. Many of the high-ranking judges in Bahrain are either members of the ruling family or non-Bahrainis (mainly Egyptians) with 2-year renewable contracts. To secure renewal of these contracts, judges may be prone to consider it necessary to take decisions not unfavourable to the wishes or interests of the Government.

Abolition of State Security Measures and State Security Courts

The most encouraging recent development related to the judiciary in Bahrain is the abolition of both the Decree Law on State Security Measures and the State Security Court Measures (See *Attacks on Justice 1999*). On 18 February 2001, the Amir of Bahrain, issued Decree 11 of 2001 abolishing the Decree Law on State Security Measures, in force since 1974, which empowered the Minister of the Interior to detain individuals without charge or trial for up to three years.

In another decree (No. 4 of 2001) signed the same day, the Amir removed the power of the High Civil Court of Appeal, in its capacity as a State Security Court, to consider offences relating to internal and external state security. The State Security Courts, which were established in 1975, maintained procedures that fell short of international standards of fair trial. Detainees judged before the State Security Court were denied access to legal counsel from the moment of arrest until they were brought to court. Furthermore, defence lawyers were not granted access to court documents before trial and, even after the first session, defence lawyers had only limited access to their clients. Trial hearings were often held *in camera*. During the case, the State Security Court was not obliged to convene witnesses to give evidence or for cross-examination. Defendants could be convicted solely on the basis of unverified confessions given to police or security officials, even in cases in which the eventual final outcome was the death penalty, and even when there was credible indication that such "confessions" had been obtained through torture. Finally, there was no right to appeal to a higher tribunal against conviction and sentencing by the State Security Court. The defendant could only request clemency from the Amir.

National Charter and the Judiciary

As noted above, the Charter does not replace the Constitution, but rather establishes the foundations of a new political framework to be concretised by the authorities through subsequent constitutional amendments and with the legitimacy granted by the popular referendum. It is still not clear whether the necessary amendments will be carried out by the eventually partly elected legislature or whether they will be carried out through Amiri decrees.

Chapter II of the Charter provides for the separation of powers between the three branches, which nevertheless co-operate among themselves. While the Charter stipulates that democracy is the system of rule in Bahrain and that the people are the source of all powers, it also establishes the Amir as the head of the three branches. In this context, Chapter II (6) of the National Charter states: "The sovereignty of the law is the basis of ruling in the State, and the independence and the immunity of the judiciary are two essential warranties to protect rights and liberties. The State is entrusted with completing the judiciary commissions stipulated by the Constitution and with

appointing the judicial authorities that have jurisdiction over disputes on the constitutionality of the laws and regulations"

This provision of the National Charter should be read in the light of Chapter IV of the 1973 Constitution of the Bahrain, which describes the judiciary as being independent and provides for the establishment of a Supreme Council of the Judiciary and a body "competent to decide upon disputes relating to the constitutionality of laws and regulations and [which] shall determine its jurisdiction and procedure. The law shall ensure the right of both the Government and interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body decides that a law or a regulation is unconstitutional it shall be considered null and void"

In addition to the Supreme Council of the Judiciary, described above, the Charter refers to a body with powers equivalent to a Constitutional Court, which would control the actions of the Government and be open for the use of the Government and "interested parties". Currently, the Court of Cassation exercises this mandate. Although not mentioned in Chapter II of the National Charter, in the final communiqué the Amir expressed "the ambition to achieve (...) the establishment of the constitutional court". Such a Court is necessary not only to rule on the constitutionality of laws and official acts but also to resolve constitutional conflicts.

CASES

Abdul Amir Al-Jamri {former judge}: In July 1999, the Amir pardoned Mr. Al-Jamri, who had been in detention since 1996. Following his release, the Government monitored Mr. Al-Jamri's movements. Since January 2001, the Government has ceased conducting surveillance of his residence. A former member of the dissolved National Assembly and a judge of the Bahrain courts, he had been suspended from duty in July 1988. He was then arrested on 1 April 1995 and subsequently released again on 21 January 1996. His detention seemed to be related to the fact that he had supported pro-democracy petitions calling mainly for the restoration of the National Assembly and all constitutional provisions relating to parliamentary life. (see *Attacks on Justice 1999*)