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TOOTHLESS PARLIAMENT, POWERLESS COURTS, AND
OMNIPOTENT INCUMBENTS? THE CASE OF BAHRAIN

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MICHAEL SCHMIDMAYR

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Abstract

Parliaments and courts, while not necessarily deeply rooted in political tradition, have their place in the Arab part of the Mediterranean and adjacent countries. Still, parliamentarianism and increased prominence of concepts such as the rule of law have not turned these countries into democracies at all. Rather, the Arab world has remained largely authoritarian, in spite of increased space for popular participation. The present study endeavours to look into the practice of the law—both in its elaboration and its application—by using the example of Bahrain. After a short but aborted parliamentary experience between 1973 and 1975, Bahrain reintroduced parliamentary practice in 2002. Yet institutional settings still provide the impression of a ‘blocked’ system. In the first place, then, it is rather striking to observe a very active opposition in Bahrain.

This study holds that in spite of legal restrictions, there actually is quite some space for opposition activity within the system. This means calling into question the paradigm according to which parliaments and judicial systems in authoritarian regimes remain toothless and totally deprived of any influence. The facts show that the opposition has actually learned to play with the system’s limits.

Still, there is reason to believe that the ‘real’ processes might also take place in more informal settings. Therefore, legislative and judiciary assembly rooms actually seem to be mere theatres, concealing privy dealings that are the true manifestation of government–opposition relations. In this sense parliaments and courtrooms can serve as places where pressure is built and the price for subsequent bargaining processes, driven up.

Keywords

Authoritarianism, parliament, Bahrain, opposition, political participation

Introduction*

This paper starts off with the blunt assumption that most Arab states today are authoritarian.¹ Despite apparent reforms and tendencies of liberalisation and ‘increased democracy,’ as put frequently put forward by the incumbents of the different polities, Arab regimes have not given up their authoritarian character. While some of them might actually be viewed as more and others, as less, authoritarian, all prerequisites of democracy have not been met in any one of them and might not be so in the near future.² There is no doubt that Syria’s small-scale reforms have not yielded any more democracy in the country; likewise, Egypt, despite having allowed multi-candidate presidential elections and an enhanced role for political party activism, still remains clearly authoritarian. The same holds true for the smaller Gulf states, their ostensibly displayed will to further democratise notwithstanding.

Bahrain is no exception to this statement. In fact, there is no denying that quite a couple of reforms have been enacted over the past few years, but they have left virtually all key mechanisms of decision-making unchanged, thus preserving the authoritarian character of the regime.

Authoritarianism, thus, does not preclude incumbents from establishing institutions known from democratic practice, such as parliaments or a seemingly operational rule of law. It can be assumed, however, that in the ruling elite’s eyes these institutions do not have the same purpose as in democracies. Rather, they operate within the authoritarian framework but are supposed to not be an encumbrance to the rulers.

This notwithstanding, the current impression is that opposition groups have started a process of learning how to deal with these conditions. It is not about opposition survival; rather, the opposition tries to take advantage of the system. Playing by the rules does not necessarily mean abandoning one’s own ambitions: for instance, when the opposition chooses to run for parliament, this cannot automatically be interpreted as definite acceptance of all the rules. Rather, it might be part of a strategy.

The purpose of this paper is to look into such strategies and to identify the implications of such observation. This cannot be done without a thorough presentation of the framework; following this we will observe how the opposition has gradually come to accept some rules in order to better operate. In the second part, it will be discussed how this modifies the existing ideas about authoritarian regimes and the role of parliaments and courts in them. At last, this will bring about some observations on the interaction between government and opposition, and identify a new role for parliaments and courts in authoritarian regimes.

1. The framework

In order to study the Bahraini case, it is both necessary to take a short look at the history of political participation in Bahrain on the one hand, and the practices the incumbents have allowed and continue

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¹ This argumentation is based on Juan Linz’s definition of authoritarianism. Linz refers to authoritarian regimes as “... political systems with limited, not responsible, political pluralism, without elaborate and guiding ideology, but with distinctive mentalities, without extensive nor intensive political mobilization, except at some points in their development, and in which a leader or occasionally a small group exercises power within formally ill-defined limits but actually quite predictable ones.” (Linz 1975: 264).

² There might be two ambiguous cases, however, namely Lebanon and Palestine, but this cannot be discussed here.

to allow. Far from being a regime in which any political participation is banned and has no right to exist, Bahrain has seemingly increased the space for political participation over the past years.

1.1. Political life in Bahrain and the emergence of opposition

Shortly after its independence in 1971, Bahrain actually held elections for a constituent assembly tasked with drafting a constitution. The text, which entered into force in 1973, foresaw a monocameral parliament, the National Assembly, with roughly two-thirds of deputies being elected through general, although exclusively male vote, while the rest hailed from the government.³ This setting, modelled after the 1961 Kuwaiti constitution (Herb 2002: 46), clearly was a step forward on the path towards increased popular participation in decision-making. Although the Amir preserved a wide array of competences, he had to take into account the parliament for whatever major policy he thought to set into motion.

Elections in 1973 created an assembly split into three major blocs: the leftist, Arab nationalist ‘Popular Bloc’; the conservative, Shi‘i ‘Religious Bloc’ (whose members were backed by Bahrain’s Shi‘i clergy); and the ‘Independent Bloc.’ In a classic strategy of *divide et impera*, the Amir—and *a fortiori* the government—tried to play the different blocs against each other, which was initially successful, as the three factions actually differed over almost any issue. It came as a surprise to the incumbents when the three blocs actually started cooperating with each other, eventually refusing to endorse the Amir-proposed State Security Law (*Qanun amn al-dawla*) and lobbying to put an end to U.S. military presence in the country.⁴ In front of an increasingly self-assertive parliament, Amir ‘Isa ibn Salman Al Khalifa chose the radical solution: in August 1975, during the National Assembly’s summer recess, he ratified the State Security Law and eventually dissolved Parliament in an attempt to prevent it from revoking his legislation once it reconvened (Nakash 2006: 136). While these acts were actually constitutional, the Amir clearly overstepped his competences when he refrained from calling new elections and *de facto* adjourned the Parliament’s sessions *sine die* (Parolin 2003: 67).

From 1975 to 2002, Bahraini opposition groups unsuccessfully lobbied for reinstatement of Constitution and Parliament. In the aftermath of Kuwait’s liberation from Iraqi aggression, a ‘pro-democracy wave’ also set path to the Gulf states. To circumvent increasing popular demands, the Amir then decided to create an appointed, purely *Consultative Council* (*Majlis al-shura*) but failed to appease the opposition’s increasingly vocal calls to get back to the pre-1975 state of affairs. Both elite and popular petitions came forward; the regime’s non-response and occasionally harsh reaction (through arrests of leading opposition members) prompted a *Bahraini Intifada*, a small-scale, though heavily impressive demonstration of the opposition’s strength and popularity. After almost five years of violent struggle, and after Amir ‘Isa died in 1999, his son and successor Hamad ibn Isa Al Khalifa tried to re-establish the calm by promising a set of reforms and the reinstatement of an elected parliament. In 2001, he set out for a National Action Charter (NAC; *Mithaq al-‘amal al-watani*) drawing up Bahrain’s future system of institutions. Despite some ambiguities, the NAC was approved by 98.4 percent of Bahrainis, men and women alike, after the opposition dropped its reservations (Amir Hamad had previously reassured the opposition about the balance of powers in the new system). The implementation reserved some surprise for the opposition, however: on 14 February 2002, Hamad unilaterally promulgated a new constitution, which set up a bicameral parliament consisting of an elected chamber and a designated one, both with equal competences (Nonneman 2006: 9).

Given the *octroyée* character of the 2002 Constitution (Parolin 2006: 68) and the system it provided for, four main opposition forces decided to boycott legislative elections in October 2002, calling for a new, ‘contractual constitution’ (*dustur ‘aqdi*) before they would actually engage in parliamentary

³ A number of ministers thus acted as *ex officio* members of the National Assembly.

⁴ The U.S. naval presence in Bahrain dates back to 1949. The three blocs threatened to pass a motion against extending the lease agreement with the U.S. in 1975 (Khalaf 2000: 75).

activities. Throughout the 2002–2006 period, these forces remained outside Parliament and refused any dialogue with either chamber (Niethammer 2008: 152). Their absence in the elections allowed loyal Sunni Islamists (Salafis and Muslim Brotherhood) as well as independent, mostly loyal, candidates to swamp a majority of seats.

However, the lessons drawn from that period prompted a majority of the boycott alliance to reconsider their strategy in 2006. While some activists held that participation would add legitimacy to a purportedly illegitimate system—they eventually ended up founding a broad extraparliamentarian protest movement called *Haqq* ('Right')—the biggest opposition group, *al-Wifaq*, decided to run, their candidates and an allied independent activist eventually winning 18 out of 40 seats. The other opposition groups, however, were defeated without exception, with some blaming unfair practices on behalf of the government.⁵

To date, the main grievances of the opposition consist in the imposed character of the constitution, which was enacted without popular consent, and more concretely, the institutional setting it provides for. In the opposition's view, the bicameral system serves to protect the system against any unwanted change: even with an opposition majority in the elected chamber, the designated upper house will always block serious attempts to change undertaken by opposition groups.

1.2. Spaces and off-limits areas for parliamentary and judicial practices

Compared to the 1975–2002 period, King Hamad's reforms have undoubtedly enlarged the possibilities for the opposition to act within the system and to challenge the incumbents from within. In the absence of an elected parliament, the opposition simply had no choice but to voice its demands in a more or less illegal way. To be sure, as in any authoritarian system, there was some space for action as well; but legislative practice had been inexistent for more than 25 years after 1975. In this sense, the reestablishment of an elected chamber opened quite a few opportunities for the opposition. First, henceforth there was a real possibility to stand in elections and be represented in parliament. Second, this very presence in parliament would allow them to propose laws and try to amend existing legislation, as well as to exercise a certain degree of control of government policies. Third, parliament could be used as a pulpit not so easy to ignore. Fourth, with the special status of parliamentarians, opposition activists would benefit from some degree of immunity for their political activities.

The system's shortcomings were clear too, however: with the non-elected Consultative Council acting as a kind of safeguard at the government's disposal, and with a number of privileges left with the King and the government, the elected chamber's possibilities remained more than limited. But even more so, the simple designation of that chamber was and is quite problematic according to the opposition's allegations: a purportedly *gerrymandered* electoral districting makes it virtually impossible for the opposition to win a majority of seats (Kapiszewski 2004: 100). When the boycott was finally lifted and the major part of the former boycotters went to the polls, the opposition gained 18 out of 40 seats, but alleged that there had been irregularities that prevented it from gaining another 4 seats. Should this be true—the allegation could actually not be proven, but a couple of indications were named—then this would indeed mean that the opposition was deprived of a majority in the elected chamber.

Still, a parliamentary majority remains an instrument limited in theory and practice: leaving apart the unrealistic scenario of such a victory, the institutional outlook of the system always allows the incumbents to block unwelcome attempts to legislate (Herb 2004: 376). Not only can the Consultative

⁵ Interviews with Ibrahim Sharif, Secretary-General of the *National Democratic Action Society* (*Jam'iyyat al-'amal al-watani al-dimuqrati*, commonly known as *Wa'd*) and Munira Fakhru, a *Wa'd* candidate who was defeated in the 2006 elections, January 2008.

Council veto texts from the elected chamber, but the government has actually a couple of means of ruling by decree or rejecting amendments to proposed texts.

King Hamad and his successive governments have made wide use of their prerogatives provided for by the Constitution: during parliamentary recess, the King has the right to issue decrees, which have to be confirmed by parliament within a given period in order to remain in force. Therefore, some controversial laws that would probably have encountered no parliamentary majority were issued by decree during the summer break. As long as there is no definitive vote on the issue, the law remains active, as an observer points out (Parolin 2004: 40). Likewise, royal decrees issued before the 2002 caesura cannot be amended but can only be abolished by a majority vote of both chambers.

With these constitutional mechanisms, it becomes quite impossible for the opposition to produce any concrete results on core issues. To be sure, there is no denying that even in the years in which a majority of opposition actors deliberately kept away from parliamentary practice, the elected chamber sometimes surprisingly gave the incumbents a hard time, occasionally voting down government-proposed texts, critically questioning ministers and even forcing some to step down. But it remains clear as well that parliament's real power remains limited, both in terms of real legislative competence and with respect to the control of the executive.

Regarding the judicial system, Amir Hamad's reforms after 1999 have definitely fostered the rule of law in the country. Shortly before the NAC referendum in 2001, Hamad dropped the National Security Law, which had produced an invisible and hardly challengeable parallel legal system exclusively at the incumbents' hands in the past. Scores of people had been tried on the deliberately imprecise grounds of having jeopardized national security; hundreds had been detained without due process for years; and many had chosen exile to escape the oppressive system.

In this sense, the reforms certainly reinvigorated basic legal principles that had been ignored for decades. Moreover, with the new Constitution, a Constitutional Court (*mahkama dusturiyya*) was created for the first time in the country's history. Despite having only dealt with a limited number of cases, the Court has already ventured to issue verdicts that ran counter to the government's line—to the very surprise of many observers who had suspected it to become a simple instrument at the incumbents' discretion.⁶

For years, the legal system had been used by the ruling elite as part of a strategy aimed at combating opposition and anti-government activities. The imprecision of quite a few legal texts, but even more so the State Security Law, combined with a lack of control of the laws' applicability, allowed the authorities not only to detain activists for long periods, but to have them sentenced to long prison terms as well. As Hasan Mushayma', who was detained more than once because of his involvement with the Shi'i opposition then named *al-Mubadara* ('The Initiative'), recalls,

[after 1996] I stayed in prison for 5 or 6 years—I never saw a judge. This is even longer than the State Security Law allowed. They did not even respect their own bad law.⁷

Still, during the boycott years 2002–2006, the opposition faced a dilemma: using the legal system that was a direct product of the 'illegitimate' 2002 Constitution would put at risk the credibility of opposition demands. At the same time, even the most fervent opponents to the new Constitution and the systemic changes introduced on the same move had to face reality: regardless of their demands, they had yet to operate within the system, lest they face the perils of illegality. In this sense, the most careful approach, which was actually chosen, consisted in *de facto* accepting the basic lines of the new system while continuing to *rhetorically* rejecting it. It is therefore that the opposition's attitude indeed contained a certain degree of pragmatism. Refuting quite a number of laws considered illegitimate because they had been adopted in violation of the 1973 Constitution, they would yet respect them.

⁶ "The Constitutional court works!", 27 March 2007 (<http://mahmood.tv/2007/03/27/the-constitutional-court-works>)

⁷ Interview with Hasan Mushayma', Secretary-General of the *Haqq* Movement, February 2008

Likewise, they would not openly disregard legal texts passed under the new Constitution. For instance, the public gatherings law in its 2006 amended version would be at least partly respected: in that sense, the opposition would occasionally coordinate its demonstrations with the authorities, if only by notifying the police of times and venues of such events.

1.3. Manoeuvring between rejection and taking advantage of the system: a gradual change of perception

In May 2002, quite some time ahead of the proposed parliamentary elections, the opposition decided to run in the municipal elections. Retrospectively, some opposition activists acknowledge that this might have conferred legitimacy upon the new regime and thereby did a disservice to the opposition's cause. An argument used later to justify partaking was that municipal elections were purely 'technical,' as the municipal councils elected through this mode bore no political, but exclusively non-political, responsibilities such as infrastructure or municipal services (Parolin 2006: 81). The real reason, however, was probably that the opposition was simply overtaken by the events: the massive popular approval of the NAC in February left it with no choice but to play the game, albeit in a limited way (Parolin 2004: 35).

It was only in the aftermath of these elections that the different opposition forces managed to find a common strategy towards the new system. Of the six political associations that emerged from the opposition of the 1990s, four eventually joined forces to pressure the government for concessions. The demands voiced regarded a number of issues, first and foremost a modification of the institutional system: the aim was to deprive the unelected Consultative Council of any legislative competence. Another one consisted in reconsidering the electoral districting considered politically biased against the Shi'i majority, *a fortiori* the opposition. King Hamad, however, only gave in to one secondary demand: as a concession to the opposition, he lifted the ban on political associations to support candidates. As the global result remained unsatisfactory, the four groups—later to be known as *al-Tahaluf al-ruba'i* (the 'Alliance of the Four') carried out their threat and called for electoral boycott.

The two remaining opposition groups—the former communists organised within *al-Minbar al-dimuqrati al-taqaddumi* ('Democratic Progressive Tribune') and the Nasserist *al-Wasat al-'arabi al-islami* ('Islamic and Arab Centre')—chose a different strategy: despite their rejection of the 2002 Constitution, they decided to partake in elections. As one of their representatives recalls, "*our conviction was that we'd better use the existing tools and try to push forward* [using these tools]." At least for *al-Minbar al-dimuqrati al-taqaddumi*, this strategy partly paid off, as three of their candidates were eventually elected. In retrospective, *al-Minbar's* representatives in parliament tried hard to carry out this objective, but were chanceless in a chamber dominated by regime-loyal (mostly Sunni Islamist) forces.

In 2006 the boycott alliance's decision to take part in the elections radically changed realities on the ground. One of the reasons behind that strategic decision was, according to an *al-Wifaq* activist, that the opposition realised the boycott had not yielded any one of the results hoped for, or had even allowed the government to bring its own legal drafts through Parliament with only minimal opposition.⁸ Indeed King Hamad had not given in to any demand, probably following a tactic of waiting-out. Under these circumstances, the idea emerged that the relative benefit of sitting in parliament was not that insubstantial after all. Rather than remaining in an uncomfortable position of constant government harassment, the opposition came to the conclusion that the parliamentary experiment might actually be worth a try.

As to the judiciary part of the game, this holds true as well. Departing from its initial policy, which was relatively rejectionist, the opposition has gradually adopted a more constructive—or call it

⁸ Interview with Jasim Husayn, MP (*al-Wifaq*), January 2008

pragmatic—approach. In this sense, one can observe that it is not the legitimacy of the overall system that is challenged, but disobedience is actually limited to a few controversial laws. As an example, one might cite the gatherings law, which was respected in most of its parts, while only the critical paragraphs continued to be intentionally ignored by some opposition activists.⁹

In the same context, on some occasions the opposition actually decided to take advantage of the new system. This can be understood as part of strategy that was thought to show the regime's shortcomings and its continued authoritarian character. As King Hamad had always presented his reform process as a smooth transition toward increased popular participation and better transparency, which also touches on the rule of law in the country, it is not surprising that the opposition's strategy was to challenge these affirmations. A couple of lawyers close to the opposition or even very active in its midst published a legal expertise analysing the new Constitution's failures. For instance, they compared ambitions to reality: if Bahrain was to become a constitutional monarchy like the "*constitutional monarchies following the democratic system*" in the world (this is how the NAC preamble actually phrased it) then it should also meet the criteria used in these regimes. This, however, was far from being the case, as the text (al-Sayyid Ahmad et al. 2002) poignantly pointed out.

On another level, oppositional lawyers regularly accompanied court hearings of activists. On several occasions, they challenged the allegedly 'political' character of a trial and thereby contributed to spread the image of a judicial system systematically manipulated by the incumbents. Remarkably, government interference in legal dealings was not always directed against the opposition: there are indeed proceedings that were interrupted on the Minister of Justice's orders. For instance, under massive popular discontent—which had led to mass demonstrations—the ministry ordered the public prosecutor to drop the case against three activists in 2007.¹⁰ On another level, the King himself interferes in the judiciary by granting amnesties whenever deemed necessary and politically opportune: when the popular human rights activist 'Abd al-Hadi al-Khawaja, then president of the *Bahrain Center for Human Rights* (BCHR), had been arrested and sentenced to one year in prison for having insulted the Prime Minister—the official indictment was a little bit subtler, though—King Hamad decided to suspend the execution of the sentence and release al-Khawaja (Wright 2006: 18). This practice has become known as *makrama* ('favour') in Bahrain; it is not limited to interference in judicial affairs but also touches on government policies. An observer considers it a "*strategic instrument of rule*" (Khalaf 2004). As a matter of fact, this allows King Hamad to preserve his image as a diligent father of the nation, who does not hesitate to 'correct' his own government ministers.

At any rate, opposition strategies take account of these schemes. King Hamad's well-known ambition is, at least for well-known opposition activists, like a protection that they can use. In this sense, when taken to court, they can confront public prosecution and even the judge. In such scenarios the strategy seems less to obtain an acquittal but rather to gain publicity; solidarity demonstrations in the street and popular pressure will do the rest, with the King having the last word on all accounts.

Legislature and judiciary present a couple of possibilities and manoeuvring spaces for the opposition. Yet there is no doubt that in theory and practice, there are clear-cut limits: with the current outlook of the system, there is no perspective for the opposition to decisively shape the political direction of the country. There are at least three barriers for legislative practice: the entrance barrier, which has kept the opposition from gaining majorities in the elected chamber so far; the institutional barrier, which is the very existence of the Consultative Council, capable of blocking unwelcome legislation; and at last the fact that most decisions can still be taken by the government, with

⁹ This is the case, in particular, when it comes to seeking authorisation for rallies from the authorities: the opposition rejects outright that directive, arguing that public meetings should not be subject to prior approval from the government (Interview with 'Abd al-Latif al-Zayani, Head of Public Security, January 2008).

¹⁰ "Bahraini King orders case dropped against activists", *Gulf Daily News*, 19 May 2007

parliament's control competence being restricted to the minimum.¹¹ Likewise, there is some possibility for the opposition to use the legal system according for their purposes, and cease to be simple addressees of juridical proceedings. Rather, they might actually become actors. The disequilibrium of forces, however, remains in the incumbents' favour: when deeming it necessary, the government still has almost all means to impose its standpoint.

2. Parliaments and courtrooms—the authoritarianism paradigm in question

The precedent diagnosis conforms to the general statement about authoritarian regimes as regimes in which dissent is widely possible but has almost no chance to significantly alter rules and policies. If this is the case—and all indications seem to point hitherto—then this paper could actually be concluded with that very remark. It is advisable, however, to take a second look at the situation, for things might actually be more complicated than they seem in the first place. The argument here is that while the opposition has no real chance to impose any change through the system, it can use it for different purposes. To put it less enigmatically: both parliament and the judiciary can be instrumentalised for the sake of political communication—either in order to point to the system's shortcomings, or by using them as pulpits for political discourse.

2.1 Growing awareness of parliamentary possibilities for action

Turning to the latter point, there is no denying that however restricted parliament's competences might actually be, parliamentarians can use their status to voice demands that might be censured in other contexts. Thanks to his notoriety but also through his official immunity, an oppositional member of parliament can actually pronounce truths and claims that other opposition activists had better avoid. It is not surprising to observe that *al-Wifaq's* parliamentarians, after 2006, ventured on loud criticism of the government on numerous occasions. That criticism was usually vented in the context of questions to government ministers containing implicit attacks on the government's policies. For instance, since 2006 there have been some questions related to alleged discrimination against the Shi'a in government jobs or in the security forces.

The most mediatised event, however, was probably a scandal dubbed 'Bandargate' that came to the public's attention in late 2006. A former government advisor, Salah al-Bandar, had published a report on a pretendedly anti-Shi'i policy within the government, implying that there was a secret cell sponsoring attempts to alter the demographic ratios in Bahrain and to turn the Shi'a from majority into a minority. The Minister of Cabinet Affairs, Ahmad bin 'Atiyyatullah Al Khalifa, was accused to be the key figure behind that alleged conspiracy. Consequently, from the beginning of the 2006–2010 parliamentary term *al-Wifaq* tried to impeach him. And even though none of the allegations could ever be verified and the supposed culprit was cleared by a parliamentary committee—simply because *al-Wifaq* had no majority there—it might have been unthinkable to attack the government with impunity in another forum than parliament. As a matter of fact, *al-Wifaq* MP Jawad Fayruz got away with openly blaming Ahmad bin 'Atiyyatullah's wrongdoings; and even though the live broadcast of his speech was cut off on the national radio, he was never sanctioned in any way.¹²

There is a second purpose behind such oppositional strategies: besides using parliament as a pulpit, it is simply the most plastic example of the entire system's shortcomings. In the first place, the balance sheet of opposition activity in parliament appears more than meagre: in spite of an enormous input—

¹¹ For instance, on budgetary issues, there is a clear regression compared to the 1973 Constitution: under the 1973 system, the government had little possibilities of circumventing Parliament, whereas the 2002 provisions have restricted Parliament's budgetary control competences (Sayyid Ahmad et al. 2002).

¹² "Waqf al-bathth al-idha'i athna' munaqashat al-taqir al-muthir", *al-Wasat*, 9 January 2008; Interviews with Jawad Fayruz, MP, January/February 2008

parliamentary questions, legal drafts, etc.—output is almost nil. But even such apparent failure can be excused by pointing to the system's deficiencies; moreover it can be instrumentalised to increase the opposition's support among the people. In this scenario, *al-Wifaq's* parliamentarians act as a group that determinedly and against all odds fights for their convictions and their constituency's sake.

2.2. Learning how to instrumentalise the judiciary

Does the same rationale also apply to the judicial game as well? The answer is clearly affirmative, albeit to a different extent. Generally speaking, the opposition also uses juridical devices as part of its strategy. Courtrooms, too, can serve as pulpits for oppositional discourse, both directly and indirectly. But unlike in parliament, where the opposition has become increasingly 'proactive,' they still remain widely reactive with regard to the use of courts.

As proceedings are usually open to the public and the press, opposition activists have tried to massively invest courtrooms to show support for indicted companions in the past. On some occasions, there was a combination of in-court and outside activities meant to generate public support for activists and indignation about the government's actions. When BCHR president 'Abd al-Hadi al-Khawaja was arrested in 2004 after accusing the Prime Minister of corruption, huge crowds staged solidarity rallies outside the court building once the trial opened.¹³ Deliberate use of feigned 'popular rage' led to clashes with security forces and could be exploited as another sign of state repressiveness contrasted by the ostensibly victimised opposition. There is no doubt that this has always been part of a clear-cut strategy.

It is quite interesting to observe that such law suits against opposition activists actually benefit the opposition more than the incumbents: on many occasions, the courts pronounce harsh sentences but their execution often remains suspended on the King's behalf. In this sense, facing the court bears only minor risks for the opposition, while it definitely enhances the image of a repressive regime staging political or politicized processes. To be sure, there have been cases in the past where opposition activists remained in prison for quite some time; but such sentences almost never target opposition leaders, who—thanks to their notoriety—are less likely to be directly affronted by the authorities. Instead, it is young opposition supporters and activists who have paid the price, having been convicted on the grounds of criminal offences more than once. One of the more recent examples is the arrest of several dozens of young adults who had allegedly participated in setting ablaze a police car and stealing a gun from that car, in December 2007. The proceedings against them continued throughout the first half of 2008, and a great number of activists were actually convicted to harsh prison sentences. Such scenarios are rather exceptional, however. In general, the opposition succeeds in building up enough pressure on the government, which consequently tries to defuse the situation by giving in—not legally speaking, but *de facto*. Suspending the execution of court verdicts or even ordering public prosecution to refrain from further steps against opposition activists allows to calm down the game, while it cannot be viewed as an acknowledgement of mistake. In any case, both scenarios fulfil a certain purpose: if activists are released or prosecution is suspended, the opposition can claim this as victory; if they 'lose,' they can denounce the 'unfair,' 'undemocratic' or 'authoritarian' system. In this sense, courtrooms bear exactly the same function as parliament when it comes to their role as a pulpit, but also as symbols of system shortcomings.

To a very limited extent, the opposition also uses the judiciary in a more active way. Quite an interesting attempt in this direction was a lawsuit filed by a lawyer close to the opposition, 'Abdullah al-Shamlawi, who took to court in 2008 in order to challenge the decree on electoral districting. The matter of unequal constituencies for legislative elections had been one big issue for the opposition since 2002 (Burke 2008: 23): their allegation was—and is—that under the current configuration, some

¹³ "Tension eases over activist's arrest in Bahrain", *Gulf News*, 4 October 2004

members of parliament represent 300, while others represent up to 13,000 people.¹⁴ As the densely-populated constituencies are mostly Shi'i, there is some suspicion about gerrymandering. On behalf of a client, al-Shamlawi attacked the Directorate of Legal Affairs (*Da'irat al-shu'un al-qanuniyya*) on the grounds of unequal treatment of citizens.¹⁵ Even though the case was rejected by a court of first instance and the court of appeal,¹⁶ al-Shamlawi's attempt might translate a tendency, i. e. the opposition making increased use of the system to challenge the very bases of the authoritarian regime. Regardless of the outcome, this might be quite a promising avenue in terms of political communication.

There is one hypothesis to draw from the above observations: more than loci where 'real' decisions are taken, parliament and courtrooms are rather instrumentalised bodies of a game that takes place on another stage. At this point, it also becomes clear that what matters most in the use of parliament and courts is political communication.

3. Legislature and judiciary as venues and instruments of political bargaining

In order to explore this idea, it seems interesting as a start to adopt a different angle, namely the incumbents' one. For if the opposition makes ample use of the legislature and the judiciary, there is no doubt the government has vested interest in these institutions as well. At last, this might allow drawing some conclusions on the 'real role' of parliaments and courtrooms in authoritarian regimes.

3.1. Understanding the incumbents' strategies: regime preservation through re-legitimation

Why do authoritarians choose to establish parliaments and courts open to the public while they would certainly fare much easier without these institutions? Bahrain's case shows quite clearly that the reestablishment of an elected parliament, in 2002, has made it much more difficult for the incumbents to rule the country: their initiatives can be if not blocked, at least seriously slowed down. Likewise, as the incumbents have no absolute control of the judiciary, they face the risk of unwelcome surprises on the part of a court. What is it then that, these rather disadvantageous facts notwithstanding, prompts the ruling elite to engage in reforms which result in the creation or the strengthening of parliaments and courts?

There is of course the interpretation that King Hamad's moves are part of a genuine project for the country, aimed at the creation of a, why not Westminster-style, parliamentary democracy in the end. Yet another viewpoint is more convincing, namely reforms as part of a strategy of regime preservation. According to this consideration, the reinstatement of the elected parliament aimed first and foremost at re-legitimising a regime whose reputation had heavily suffered during the *Intifada* years. It is true that at Hamad's ascension to the throne in 1999, there was no particular enthusiasm or euphoria whatsoever (Meinel 2003: 219–220), and the ruling Al Khalifa clan's legitimacy was occasionally questioned in the open. While Hamad certainly realised that national reconciliation was paramount to prevent a new wave of violence in the future, he also saw the need to address the opposition's demands, which had partly been at the outset of the *Intifada*. Still, the way he chose was not necessarily conforming with the opposition's expectations: to be sure, the abrogation of the National Security Law certainly was; but Hamad's writing a new Constitution instead of reinvigorating the 1973 one was definitely not. With the pre-1975 system thus amended, Hamad hit two birds with one stone: first, he could present himself as a reformer keen to bring his country

¹⁴ Interview with 'Abd al-Jalil al-Sinkays, leading member of the *Haqq* Movement, May 2005

¹⁵ "Irja' al-nazar fi qadiyyat al-ta'n bil-dawa'ir al-intikhabiyya li-damm milaff al-da'wa", *al-Wasat*, 22 December 2008

¹⁶ "Al-Shamlawi: Al-ta'n fi tawzi' al-dawa'ir al-intikhabiyya ila al-Tamyiz", *al-Wasat*, 28 April 2009

forward on the path toward an electoral democracy and thus recover legitimacy for his family's claim to power; second, he was able to effectively retain most powers.

The legitimacy paradigm worked toward two different addressees: to the West with its pro-democracy agenda (Louër 2005: 769–770; to better understand this one should bear in mind the international context, with projects such as the *Greater Middle East Initiative* or the *Broader Middle East and North Africa Initiative*), Hamad became a 'democratic' ruler and reliable partner. Domestically, Hamad's flying the flag of reform and democracy weakened the opposition, some members of which were tempted to try the new system: only part of the opposition decided to boycott, while two groups opted for effective, though critical, participation.

3.2. The real stage: bargaining behind the official channels of popular participation

Those opposition activists who decided to boycott the 2002 legislative elections had probably seen through Hamad's real intentions. Still, that insight came tardily, since the future boycotters made the mistake to participate in municipal elections—which certainly damaged the credibility of their future anti-system stance (Parolin 2006: 81). However, it can be assumed that in the long run, all opposition activists—boycotters and non-boycotters alike—have come to realise or at least to sense the new system's possibilities and limits. As shown above, this has not prevented them from accepting the rules when it serves their purposes. Likewise, the incumbents have played the parliamentary and judicial games *ad libitum* for the sake of legitimation and, ultimately, regime preservation.

This actually means that each party has actually quite a different interpretation with regard to the legislature's and the judiciary's roles. However, it is in those very places that the diverging strategies meet in the open, visibly to the public. The confrontation might actually be compared to a rhetoric contest, somewhat like the mediaeval verbal sparring exercise. But can parliaments and courtrooms truly be viewed as arenas where each combat produces a winner?

There are strong indicators that parliaments and courtrooms have a more differentiated function: they are 'marketplaces' where the opposition meets the government and each party tries to make the best of their positions. This assessment could be viewed as contradicting classic theory, which stipulates that authoritarian regimes simply do not feature any kind of real exchange between government and opposition producing a political outcome, and which holds that genuine power remains with the incumbents in such regimes. Yet it can be argued that opposition is not automatically bereft of influence even in authoritarianism, although the unequal power relation clearly tips in the incumbents' favour. This suggests that there is some potential for dealings between government and opposition: the opposition *can* actually *influence* the course of things; this is where the concept of political *bargaining* enters the scene.

For there is no denying that even in authoritarian settings the opposition can occasionally achieve its goals, or at least part of them. To be sure, it is rather unusual that the opposition wins votes by a majority in parliament; instead, opposition success should be measured by looking at the final outcome, not the procedure itself. Just like in electoral democracies, where opposition motions are almost systematically rejected but then picked up and approved almost identically by the government-affiliated parties, it is far from unthinkable that the Bahraini government comes up with draft laws heavily inspired by opposition ideas; even more so, the government might take up ideas vented by the opposition but which have not materialised yet as draft laws. By way of example, even during the boycott period, Bahrain's opposition had lobbied for the creation of a dole—but before they could come up with a draft, the government passed a decree establishing an unemployment insurance scheme. When in March 2007 the decree was submitted to parliament vote in order to be confirmed or rejected, *al-Wifaq* had no choice but to approve it. Such results can rightly be viewed as opposition 'success,' as the outcome conforms to the opposition's initial demands and ideas (Kinninmont 2007), even though the process provides a different image.

If the opposition can occasionally achieve some of its goals, then there is a new role for parliaments and courtrooms: they become organs where the price of political bargaining can be raised. Rather than bargaining in parliament or court—where the roles are unequally distributed between government and opposition—the opposition can use these fora to ‘raise the price’ or increase their own negotiating power. Even though the opposition would certainly not reject success in legislative or judicial dealings, it is more important for them to achieve them at all, no matter how they are actually achieved.

The real bargaining takes place behind the stage, in much less formal settings. Either voicing demands through or putting pressure on the government through parliament or a court is sufficient to prompt the incumbents to move; or the opposition uses legislature and the judiciary to stress their own argumentation when they are engaged in dialogue with the government. There is no doubt that this kind of informal dialogue exists; on some issues it has come to public attention, mostly when deemed opportune by one of the negotiating parties involved. For instance, *al-Wifaq*’s representatives regularly meet with government officials; when information on such appointments leaks out, this could actually be deliberate. Yet this is probably just the tip of the iceberg; there is little doubt that there are quite some dealings as well which are perfectly ignored by the public.

Conclusion

Parliaments and courts are far from being totally ineffective even in authoritarian regimes. However, their function differs in more than one aspect; rather than institutions where the rules are made (parliament) or their execution controlled (courts), they are places of bargaining between the government and the opposition, or even theatres deemed to accompany privy dealings.

The lesson to be drawn from this is that it would be totally false to view parliaments and courts in authoritarian settings as useless. To be sure, most of the power remains with the incumbents; yet at least in authoritarian regimes which cannot completely ignore domestic and international public opinion such as Bahrain, the opposition can take advantage of them. The incumbents, of course, will try to do exactly the same for their purposes. Bahrain’s example shows quite well how two competing poles try to instrumentalise the legislature and the judiciary.

There is no need, however, to denigrate the benefits of parliaments and courtrooms for political life even under these circumstances. Comparing the situations prior and after 2002, the introduction of parliamentary life and the relative strengthening of the rule of law has enhanced pluralism in the country. Still, this should not lead to the premature conclusion that Bahrain is en route to democracy.

References

- al-Sayyid Ahmad, Jalila et al. (2002), *Legal Opinion Concerning the Constitutional Matter of the Kingdom of Bahrain* [online], available at <http://mahmood.tv/bahrain-politics-2/bahrain-constitution/legal-opinion> [accessed 2008-02-29].
- Burke, Edward (2008), "Bahrain: Reaching a Threshold," *Working Paper (Fundación para las relaciones internacionales y el diálogo exterior)*, n° 61.
- Herb, Michael (2004), "Princes and Parliaments in the Arab World," in: *Middle East Journal*, vol. 58, n° 3, pp. 367–384.
- Herb, Michael (2002), "Emirs and parliaments in the Gulf," in: *Journal of Democracy*, vol. 13, n° 4, pp. 41–47.
- Kapiszewski, Andrzej (2004), "Democratizing the Arab States: The Case of Monarchies of the Gulf, 1991–2004," in: *Krakowskie Studia Międzynarodowe*, n° 3, pp. 69–129.
- Khalaf, Abdulhadi (2004), "Political reform in Bahrain: end of road?," in: *Middle East International*, n° 719.
- Khalaf, Abdulhadi (2000), "Unfinished Business: Contentious Politics and State-Building in Bahrain," *Research Reports in Sociology (Lunds Universitet)*, n° 1.
- Kinninmont, Jane (2007), "Bahrain: Assessing al-Wefaq's Parliamentary Experiment," in: *Arab Reform Bulletin (Carnegie Endowment for International Peace)*, vol. 5, n° 10.
- Linz, Juan (1975), "Totalitarian and Authoritarian Regimes," in: Fred Greenstein and Nelson Polsby (eds.), *Handbook of Political Science*, Vol. III, (Reading: Addison Wesley), pp. 174–411.
- Louër, Laurence (2005), "'Changez ou vous serez changés': Démocratisation et consolidation de l'autoritarisme dans le Golfe," in: *Politique étrangère*, vol. 70, n° 4, pp. 769–780.
- Meinel, Ute Devika (2002), *Die Intifada im Ölscheichtum Bahrain: Hintergründe des Aufbegehrens von 1994–98*, (Münster: Lit).
- Nakash, Yitzhak (2006), *Reaching for Power: The Shi'a in the Modern Arab World*, (Princeton: Princeton University Press).
- Niethammer, Katja (2008), "Opposition Groups in Bahrain," in: Ellen Lust-Okar and Saloua Zerhouni (eds.): *Political Participation in the Middle East*, (Boulder: L. Rienner), pp. 143–170.
- Nonneman, Gerd (2006), "Political Reform in the Gulf Monarchies: From Liberalisation to Democratisation? A Comparative Perspective," *Sir William Luce Fellowship Paper (University of Durham)*, n° 6.
- Parolin, Gianluca Paolo (2006), "Rules of Succession and Political Participation in the GCC States," in: Abdulhadi Khalaf and Giacomo Luciani (eds.), *Constitutional Reform and Political Participation in the Gulf*, (Dubai: Gulf Research Center), pp. 51–87.
- Parolin, Gianluca Paolo (2004), "The Role of the National Assembly in Bahrain's Constitutional Experiments," in: *Diritto pubblico comparato ed europeo*, n° 1, pp. 34–44.
- Parolin, Gianluca Paolo (2003); "L'evoluzione istituzionale delle monarchie del Golfo tra modernità e tradizione: Il caso del Bahrein," in: *Diritto pubblico comparato ed europeo*, n° 1, pp. 59–80.
- Wright, Steven (2006), "Generational change and elite-driven reforms in the Kingdom of Bahrain," *Sir William Luce Fellowship Paper (University of Durham)*, n° 7.

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