

Identifying the Canon from the Anticanon

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I. The (Disputable) Canon: The Legislature May Make Its Own Laws

Exceptions prove the rule, as the saying goes, and so perhaps might anticanons, once sufficiently established, often prove the existence of canons. Some constitutional provisions are so close to universal globally that they might not even, at first glance, be deemed particularly canonical. Until, that is, they are broadly violated, at which point we might well discover they were canons all along. Unless that happens, their near universality might seem more a demonstration of their self-evident, almost tautological nature rather than what we might think of as “canon”—the setting forth of a normative principle or set of principles to be broadly emulated.² The power of a judiciary to interpret laws in existing cases, for example, or the power of the executive to use the force of the state to implement law. Or, the subject of this paper, the power of the legislature to enact its own legislation.

At one level, this *is* surely tautological, definitional rather than expression of canon. A legislature without the power to make law is not a legislature. It is at best a consultative assembly, as Saudi Arabia’s *shura* council, designed “ornamentally” to resemble a legislature but in fact handpicked by the King and possessing the power only to present bills for the King’s consideration, with which the King may do what he wishes.³ The creation of a *shura* council is not global “anticanon”, reflecting a set of ethical principles generally renounced rather than emulated.⁴ Nobody renounces the principle of an executive having handpicked advisors she may ignore at her leisure—most chief executives do. It is merely the institutionalization of a different body than that which we would regard as a legislature.

Yet is it “canonical” to render a legislature, one democratically elected, capable of drafting its own legislation, rather than merely enacting legislation presented by the executive? In American terms, the question seems almost absurd, its negation something of an oxymoron that cannot be sensibly sustained. To deny the Congress the power to make law, only to reject law initiated by the President, would render it neither a legislature nor a consultative assembly, but some sort of body wielding an insurmountable veto over legislation initiated by the executive. The division of powers between the two would be almost reversed in such an instance.

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² Mark A Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. FOR. 33, 34 (2011).

³ Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT’L. L. 375,

⁴ Here I adopt Jamal Greene’s definition of anticanon. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 384 (2011).

Elsewhere, and in particular in parliamentary systems, the matter is undoubtedly less ridiculous. Parliament does select its government, and the drafting of legislation by the government for parliamentary consideration is not only unremarkable, it is decidedly routine. This is the means, after all, by which an executive in a parliamentary system sets out to implement its political agenda. Parliament is therefore less likely to draft legislation that the government finds objectionable than it is to use other powers generally available to it to control or curb government excess, among them votes of no confidence or summoning cabinet members for questioning. Indeed, even in many modern presidential systems it is not uncommon for the executive to have the power to introduce a bill in the legislature,⁵ and for such executives to use this power liberally.⁶

Still, while the executive, president or prime minister, might draft most legislation in large numbers of instances, there does appear to be broad global consensus in support of the notion that the legislature must be capable of drafting and debating its own laws as well. The principle seems to be that one of the core functions of any legislature is the making of whatever law it sees fit, not merely that presented by others. It is perhaps for this reason that modern constitutions feel the need to stipulate specifically that legislation may originate in the legislature itself rather than exclusively be the product of the executive.⁷ Rare indeed is the exception to this broad rule.⁸

Yet is this global constitutional canon, or merely near universal practice largely uncommented upon? The funny thing about principles so broadly observed is that one can internalize them without having ever publicly expressed very much commitment to them. Equality under the law without regard to race or ethnic origin may well be regarded as canon, reflected *not only* by the near ubiquity of constitutional provisions pronouncing it *but also* by the fervor with which it is expressed as a principle by leading political and legal actors even in states with severe, existing ethnic or racial division. Racial or ethnic subjugation is an accusation leveled against many, but admitted by almost none, demonstrating the extent to which provisions concerning racial or ethnic equality may be deemed canonical.

The right of a legislature to draft its own law in derogation of an executive hardly seems as staunchly defended, near universal as it is. In fact, there are limitations to it in some states that go without extensive criticism or comment. Among them is the French prohibition against the enactment of bills or amendments introduced by individual members that result in the reduction of public revenue or an increase in public expenditure.⁹ This might be deemed

⁵ South Korea Art. 52, Brazil, Egypt.

⁶ Nathan Brown, *Constitutions in a Nonconstitutional World*.

⁷ Germany Article 76(1); Italy Article 77(1); Egypt. South Korea Article 52

⁸ Jordan does provide a limited exception, as the main text shows.

⁹ France Art. 40.

offensive or unnatural within the United States (it is hard to imagine a Congress where individual members could not successfully propose tax cuts or demand earmarks), but it is not so regarded globally.¹⁰

So is the rule that the legislature may make its own law part of a global constitutional canon, or merely general global practice, limited in some places more than others, and in no event important enough to be a source of such broad emulation and admiration globally as to be deemed canonical? Is it fundamental to enable a legislature to draft its own laws, when so many national systems are so deeply reliant on the executive to draft most legislation, or merely a salutary additional power afforded them? Or, perhaps most importantly, has much thought given to the question at all, when there was no contrary practice to comment upon extensively?

II. The (Possible) Anticanon: The Legislature May Not Draft Its Own Legislation

Sometimes, the anticanon might help illuminate the canon. In Decision 43 of 2010, the Iraqi Federal Supreme Court broke from near universal practice respecting legislative power in a decision that has subjected the court to much criticism, enough that this decision could well evolve into an anticanon. That decision held that the Iraqi Council of Representatives (functioning currently as the sole house of its legislature),¹¹ did *not* have the power to make its own legislation, but only had the power to enact (or refuse to enact) laws proposed by the executive. The Council and its members could *propose* legislation to the executive, which the executive could then, if it wished, put into the form of draft law and present to the Council of Representatives for enactment. Beyond this, the Council of Representatives' legislative power did not extend, though of course it retained the powers commonly given to parliaments to question ministers and issue votes of no confidence.

There is no particular purpose in examining the reasoning of the decision in close detail. It is enough to say that in reaching the decision, the Court tracked the constitutional language closely, and that its method was at least plausible. More interesting is precisely why this Court, and this nation state, broke so dramatically from the near universal practice respecting legislative power when other plausible interpretations of the text far less radical presented themselves as well. What, in other words, might have led the Iraqi court to this unusual position?

More than anything else, I would posit, was the *failure to recognize the principle of a legislature making its own law as being part of the global constitutional canon*. The Iraqi court was

¹⁰ Tunisia, Egypt and Jordan, to name only three states, have the same limitation.

¹¹ The Iraqi legislature is supposed to be bicameral, but under Article 65, the second house is to be created by legislative enactment of the Council of Representatives. That law has yet to be passed.

particularly susceptible to breaking from a norm that was not canon for a variety of reasons. The first of these is that the court may well have been ignorant of the norm, in the manner in which it surely would not have been had it been the subject of more fervent defense, as, say racial, ethnic or religious equality is. The Court is forthright in embracing such global canons, striking down legislation it finds to violate principles of equality as to non-Muslim religious minorities in strong and unapologetic terms no matter how staunchly defended by the executive.¹² It seems in Decision 43 to be unaware of any broad global practice at all.

In this regard, it should be noted that Iraq has been dramatically isolated as a nation state over a period of decades, and this isolation has had a profound effect on its legal system generally, and its judiciary in particular. The judiciary remains professional, secular (meant not as a comment of personal piety, but as a commitment to the interpretation of state produced positive law in a manner firmly rooted in the civilian tradition) and bureaucratized.¹³ It is not, however, particularly exposed to global constitutional trends. There have been massive amounts of aid dollars that have poured into Iraq to address judicial capacity and judicial training, admittedly. Most of this has been directed to matters of direct political interest to those doing the funding (such as training to conduct trials against members of the former regime) or spent on more generalized areas that raise global interest (and dollars), mostly in the areas of human rights and criminal justice. Constitutional interpretation, at least beyond the interpretation of constitutional provisions relating to individual rights, is not a priority. It would therefore not be a surprise if the Iraqi Federal Supreme Court was unaware of precisely how unusual their determination in Decision 43/2010 was from a comparative perspective. The fact that the matter is so rarely remarked upon globally helps to reinforce this conclusion.

Yet if the Iraqi courts are isolated as a *global* matter, they do benefit from modest exposure to the workings of regional courts and constitutions in the Arab world. The legal systems are similar, the constitutions and constitutional decisions of the high courts are broadly accessible in their original Arabic, and the states in question near enough in terms of geographical proximity to render Iraqi judges generally aware of constitutional trends in the region. And those *practices*, overwhelmingly, render legislatures largely toothless in the face of assertive executive power.

As the dean of Arab constitutionalism in the American academy Nathan Brown has indicated, legislatures throughout the Arab world simply lack the capacity to compete with executive power for a variety of reasons. First of all, their technical abilities in drafting are severely compromised, with individual members lacking a personal staff to assist them in the process.

¹² Decision 6/2010, granting Sabaeans the ability to vote for special seats in the same manner that is afforded to Christians.

¹³ Haider Ala Hamoudi, *Death of Islamic Law* 38 Ga. J. Int. Comp. L. 293, 311 (2010).

Instead, whatever skills exist within the legislature are centralized in a single office, which by its nature almost certainly favors the leadership of the legislature over its individual members (regardless of what that centralized office might profess, sincerely, to the contrary).¹⁴

Legislatures rarely develop strong grass roots networks in the Arab world, meaning that their attempts to call upon popular support to advance an agenda are compromised. Finally, electoral rules often are manipulated to ensure that the legislatures remain dominated by a major party.¹⁵

Yet if the constitutional structure of Iraq's neighbors was largely characterized by dominant executives and passive legislatures, almost no constitution imposes the formal limitation of preventing the legislature from making its own law. This is easy enough to explain. If Iraq was isolated, Arab states like Kuwait, Egypt, Tunisia and Morocco decidedly were not. It is possible that those states regarded the near universal practices respecting legislative power as part of the global canon, and concluded that constitutional provisions that denied a legislature the power to draft its own law could appear to outside observers to be anticanon—espousing principles that are dramatically undemocratic, or at least broadly disruptive of a balance of power as between legislature and executive. It is notable that the only limitations generally imposed on legislative drafting by members of parliament resembled restrictions that could be found in France.

Or perhaps the Arab states did not regard universal practice as canon, but saw no need to disturb it. In most Arab states, observing the general, universal practice concerning legislative power carries few costs. The sad norm in Arab states at least until the Arab spring was of dominating executives who could not be challenged. In this milieu, a querulous legislature with individual members engaging in the familiar demagoguery of proposing laws that have no serious possibility of being enacted has its benefits. It both helps to deflect criticism of authoritarianism, and it provides a useful outlet of expressions of frustration and anger against existing policies in a carefully circumscribed fashion. Even in more authoritarian states, where no public dissent is tolerated and all elections are carefully managed to prevent any semblance of an opposition from appearing in the legislature (as in Syria, perhaps), the dangers of constitutionally permitting legislators to present draft laws is no worse than pointless. They will not do it, for fear of (surely extralegal) repercussions. Hence, whatever Bashar al-Asad's

¹⁴ Interestingly, this is just as true of Iraq's legislature operating today as it has been of other Arab legislatures.

¹⁵ Brown 122-24. Naturally, some of this is quite likely to change, at least over the short term, with the advent of the Arab spring. Indeed, the raucous opening session of Egypt's first post-Mubarak lower house of Parliament is more reminiscent of meetings of Iraq's Council of Representatives than those described by Brown's work, which precedes the Arab spring. Heba Saleh, *Raucous Start for Egypt's First Free Parliament*, FIN. TIMES 6 (Jan. 24, 2012). Nevertheless, the roots of executive dominance remain strong, and certainly were quite well known to Iraq's high court judges when they issued Decision 43 of 2010, before the advent of the Arab spring.

problems, they do not involve concern that the thoroughly coopted legislators comprising the People's Assembly will begin drafting legislation that meets with his objection.

That the Arab states may well not have seen the practice as canon, merely a generalized practice regarded as salutary, might be demonstrated by the presence of a limited Jordanian exception. Jordan, a state that could not be fairly described as seeking to challenge broad Western inspired global paradigms on any number of fronts, does limit legislative proposals issued by individual members in important ways. It indicates that any bills prepared by members must be approved by legislative committee and then submitted to the government for drafting, though the government does appear to be under obligation to prepare such a draft within one legislative session.¹⁶ Still, the fact that Jordan has managed to limit the powers of its parliamentary members to such a significant degree is notable.

Unlike the balance of the Arab states, in the absence of the recognition of canonical status, there are strong political reasons that the Iraqi executive might be inclined to limit legislative power in a more formal manner than any that appear in the executive dominated Arab world. The potential costs of permitting the legislature such power are considerably greater. Iraq's political power is more perilously divided in the post-Saddam era than such power has traditionally been in Arab states generally. No single party controls the Iraqi political landscape as the NDP controlled Egypt, as the RCD controlled Tunisia, or as the Sabah family controls Kuwait. Iraq's Prime Minister does not even hail from the largest party in the Council of Representatives.¹⁷ Instead, he was elected to his position on the basis of a very unstable coalition that has already fractured in important ways.¹⁸ The possibility of legislation being enacted in a state like Kuwait that is contrary to the interests of the ruling faction is remote, though certainly present at times.¹⁹ In any event, it can be controlled. The possibility of Iraq's Council of Representatives enacting legislation to which the Prime Minister is opposed is far more substantial, and would only involve a modest shifting of important allegiances among key factions. It is therefore not impossible to imagine Iraq's Council of Representatives unable to muster the necessary votes to issue a no confidence vote (or unwilling to bring down the

¹⁶ Jordan Const. Art. 95(i).

¹⁷ Hannah Fairfield & Archie Tse, The 2010 Iraqi Parliamentary Elections, N.Y. Times (Mar. 26, 2010), <http://www.nytimes.com/interactive/2010/03/11/world/middleeast/20100311-iraq-election.html>.

¹⁸ The Iraqiya coalition which helped to elect Maliki in exchange for Cabinet posts and power sharing promises initiated a boycott of both the Council of Representatives and the Council of Ministers when the Prime Minister declared that a warrant had been issued for Iraqiya leader and Iraqi Vice President Tariq al-Hashimi. The coalition has since returned to the legislature but the executive boycott continues. In addition, the Sadrists, part of a separate coalition, have called for new elections. Taken together, Iraqiya and the Sadrists have enough votes, approximately one third of the legislature, to at least threaten the possibility of legislation to which the Prime Minister is implacably opposed. That the Speaker of the Council of Representatives hails from Iraqiya, enabling him to place items on the agenda to his liking, only adds to the possibility. Admittedly, this would require a type of coordination of action that the various factions have yet to prove themselves capable of over any sustained period.

¹⁹ Nathan Brown cites to an excellent example with respect to the Kuwaiti Parliament in 1972.

government), but gathering enough support to disrupt the Prime Minister's agenda with significant amounts of legislation in conflict with it. That Iraq's parliamentary system does not enable the Prime Minister to call early elections by dissolving the parliament renders this danger, from the point of view of the executive, even more acute.

Added to this is the fact that while Iraq's judiciary has in important respects acted independently in a manner that seems to offer considerable promise,²⁰ it has on occasion buckled to executive pressure, particularly where core executive interests are involved.²¹ Sadly, this tendency has only increased with time, though enough independence has been demonstrated overall that some level of hope and optimism is warranted.²² The Federal Supreme Court is no exception to these broad tendencies. Considering that Iraq was firmly totalitarian for a period of decades, and that this ended less than a decade ago, it is hard not to be generally impressed by the decisions of the Court. That is not the same as to say, however, that it is willing to challenge the executive when the executive is particularly determined to see a matter through. Here, the Prime Minister does seem to have found the possibility of a legislature acting as counterweight to his own agenda to be deeply troubling. In such instances in the past, he has seemed to be able to influence the judiciary to rule in his favor. Importantly, however, none of this would have been possible had either the Prime Minister or the Court believed they were violating something regarded as part of the global constitutional canon. Neither would want to appear global pariah, renouncing principles that were held in common, or claimed to be held in common, by the global legal community.

Yet it is not only the Court that failed to recognize the canon, it is also the drafters of the constitution. The language of the Constitution is patently ambiguous on the matter, and, so far as I have been able to tell from examinations of draft text, insufficiently considered. Article 60 indicates that "bills" come from the executive branch, but "legal proposals" could come from ten members of the legislature or a legislative committee. Precisely what a "legal proposal" might be, however, is left unclear, nor was much attention given to it in drafting. The fact is that during constitutional negotiations, the overwhelming focus in the sections respecting legislative power concerned the proper exercise of central as opposed to subnational jurisdiction.²³ There was less concern about the relationship of the legislature to the executive, because the assumption was that the Shi'a would control both for demographic reasons alone.

²⁰ Charles P. Trumbull IV and Julie C. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 Vand. J. Int. L. 331 (2011).

²¹ Haider Ala Hamoudi, *The Will of the (Iraqi) People*, 2011 Utah L. Rev. 45, 55.

²² NGO decision, Hashimi warrant.

²³ Feisal Amin Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1629-30 ("In Iraq the most emotionally charged issue, bar none--as charged as was the slavery debate in the United States in the eighteenth and nineteenth centuries--was the nature of federalism and the extent of the powers of the newly-created federal government in Baghdad.")

This led the Kurds to seek protection through broad guarantees of federalism²⁴ and the Sunnis largely to despair at the constitutionalization of policies they found inimical to their core interests.²⁵

It is true that given Iraq's recent dictatorial past, a fair amount of thought was put into the means by which to control executive power, but these were focused on ensuring the existence of other types of parliamentary power. Chief among them was the power to summon ministers, including the Prime Minister, and to dismiss such Ministers through votes of no confidence.²⁶ There was also sufficient concern respecting executive overreach to lead the drafters to prevent the Prime Minister from being able to dissolve parliament and call for an early election, unusual in a parliamentary system and meeting with the objection of one of Iraq's premier legal experts, Beirut based Dr. Hasan Chalabi. Virtually no thought was given as to the legislature's power to draft its own law. Article 60 changed only slightly over weeks of drafting, and the extensive meeting minutes, policy papers, outside reports, and internal memoranda that I have reviewed reflect no mention of it at all. The matter slipped entirely under the radar of Iraqi drafters under time pressure to produce a draft²⁷ and unconcerned with the matter.

Had there been a general feeling that the power of the legislature to make its own law was part of a "canon" akin to a provision respecting equality of the law irrespective of race, gender, ethnic origin or religion, it is unimaginable that such ambiguity would not have been recognized, and corrected. A proposed provision that, analogous to Article 60, indicated something to the effect that "*equality* under the law is guaranteed to all individuals irrespective of their race or ethnic origin, and *similarity* under the law is guaranteed to all individuals irrespective of their sect, religion or gender", would never have advanced very far. Drafters do not often tolerate ambiguity as to the canon, when they see it.

And while it is easy enough to dismiss this ambiguity as the result of ill advised drafters, it might be noted that Article 60 does not seem to have engendered much opposition at the time of drafting from outside observers who were constitutional experts. Law review articles respecting the process by inside observers do not even mention it.²⁸ To the extent this is criticism of short sightedness on the part of outsiders, I deserve a fair share. In 2009, prior to the Court's ruling in Decision 43/2010, a special committee of the Council of Representatives was tasked with

²⁴ Id.

²⁵ Arato?

²⁶ These appear in Articles 61-63 in thorough detail.

²⁷ The interim constitution, the Transitional Administrative Law, required the completion of a constitution by August 15, 2005. TAL Art. 61(a). Due to delays in government formation and disputes among various factions, the drafting did not begin in earnest until late June of that same year. Ali Allawi, Occupation of Iraq ____

²⁸ Feldman and Martinez; Deeks and Burton; Istrabadi

making a series of amendments to the Constitution designed to address key areas of dispute. The committee members discussed each article of the Constitution, in some cases in some depth. The debates over Article 60 took less than ten minutes, all of it focused on who should be permitted to submit “bills” to the legislature and who should only submit “proposals.” The distinction between the two was hardly clear, and when comment was sought from the two outside experts on the committee on its final proposal, Chibli Mallat and me, we did not object to that proposal. I do not even remember paying particularly close attention.

It never occurred to us that the distinction as between “proposal” and “bill”, in the original text or the proposed amended,²⁹ was meant to deprive the legislature of its ability to draft its own law. We thought it could result in priority to the government’s bills, or a requirement that the government’s bill be introduced into the full chamber and read without amendment by committee or speaker prior to that introduction, or even that an individual member’s proposal might require committee approval before reaching the floor. In any event, the language did not so much offend us as bemuse us. Mostly, over cigars the night after the discussion at our villa, less than a mile from the Council of Representatives, we dismissed the distinction as a type of semantic digression in which the committee periodically engaged,³⁰ and decided our efforts were better directed to more important matters. And that proved dramatically short sighted, on our part and on the part of many before us.

III. Whither the Anticanon?

It is of course premature to declare Decision 43/2010 as “anticanon”. It might just be an anomaly of little lasting import. If the Court did not recognize its decision as unusual when it made it, surely it does now. It is a topic of some discussion among Iraqi parliamentarians, who use it as primary demonstration of the Court’s fealty to the Prime Minister rather than to “The Law”. Criticism has reached Arab media outlets, and most international personnel working in one way or another in Iraq have few kind things to say about it. The Court could quietly seek to reverse itself. Or the decision could fade into obscurity given that political realities in Iraq are such that no law ever seems to emerge from the Council of Representatives that is not the product of broad consensus among all significant political factions, which would necessarily

²⁹ The revised text would give the Council of Representatives the power to “consider proposals of law from ten of its members or one of its specialized committees” as well as to “consider bills” from the executive. This would have made Decision 43/2010 harder to support, but still plausible if one maintained that a “proposal” was not the type of text that could be enacted into law, only referred to the executive for drafting after legislative “consideration.”

³⁰ To take one example of a clear semantic digression, there was a bewildering dispute, complete with lengthy digressions into linguistic nuance, over whether the lower house should be called “the National Assembly”, as the transitional legislature was known, or the “Council of Representatives.” Other examples, consuming hours of committee time and worthy of note for that reason alone, included vigorous debates over whether the President of the Republic should “be in possession of” or “have obtained” a college degree, and whether a judge should be prevented from “performing other work” or “being engaged in other work”.

include the faction of the executive.³¹ By the time that changes, it is quite possible few will remember this decision, or feel the need to bring it up. This is not a nation, after all, that dwells on its judicial opinions in the fashion of the United States.

That said, one can imagine a contrary result, and if the reader might indulge me, I might offer the following hypothetical merely to illustrate. As the Arab spring begins to take root, and legislatures emerge from their previous torpor in states from Egypt and Tunisia to (we may only hope) Syria and Bahrain, executives are likely to grow increasingly concerned about their ability to restrain legislative initiatives that may be popular but that meet with executive disapproval, perhaps because they agitate a powerful military institutional interest, perhaps because they threaten an economic elite, or both. Legislatures in states that remain firmly in the grip of existing powers, such as Kuwait, with a history of some assertiveness, may grow yet more assertive in this environment. Executives may well look to means to control these legislatures by various means, and they may well look to regional example as offering possibilities to do so. Might it be possible in these emerging states to muddle the power of the legislature to draft its own law into ambiguity through references to “proposals” and “laws”? To exert pressure on a court to rule that this renders the legislature powerless to make law? That (to take one crucial step left unresolved by the Iraqi court) to amend law is to make law and that therefore the legislature may not so much as change a bill introduced by the government, only to vote on it as it stands? Might Decision 43/2010 inspire such developments, in a region accustomed to executive dominance, among a political elite desperate to retain it? I hope not, and certainly I do not expect something quite so dispiriting. But if it does arise, even in part, we may well have found our anticanon, and with it, perhaps unearthed a canon we never knew we had before.

³¹ Haider Ala Hamoudi, *Identitarian Violence and Identitarian Politics*