Legal Studies (2024), 1–5
doi:10.1017/lst.2024.37

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The Society of Legal Scholars

CURRENT DEVELOPMENTS: BOOK REVIEW

The Collaborative Constitution

by Aileen Kavanagh. Cambridge University Press, 2024, xvi + 492pp (£120.00 hardback) ISBN: 978 1 108 49326 0

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(Received 1 July 2024; revised 2 October 2024; accepted 14 October 2024)

The question of how rights may be best protected in a democracy is not new for constitutional scholars. There is no shortage of answers, but these have tended to emphasise the importance of 'legal' or 'political' branches of government. Yet, this binary choice is flawed. What we actually see across constitutional democracies is a diverse network of state and non-state actors that cooperate to promote and protect human rights. This is not least evident from existing work on how states respond to judgments and recommendations of international human rights courts and monitoring bodies. Whilst primary responsibility for these matters typically falls to the executive, in practice implementation requires the contribution of various state (and sometimes non-state) actors.[1]

A recognition of the collective, cooperative exercise that is rights protection is long overdue. For this reason, *The Collaborative Constitution* by Aileen Kavanagh,[2] Professor of Constitutional Governance at Trinity College Dublin, is a welcome contribution. The book's central claim is that the protection of rights is, and should be, a shared responsibility of all three branches of government. To this end, *The Collaborative Constitution* takes the reader through an 'iterative engagement between abstract theory and constitutional practice',[3] drawing on a mass of scholarship, case law and documentary evidence. There are, as will be discussed, some notable omissions. But, in spite of these, *The Collaborative Constitution* is a compelling, meaningful and significant text, and Kavanagh successfully defends her central thesis.

A word should first be spared on *The Collaborative Constitution*'s pleasing prose and style. Despite the innate complexity of the issues tackled in this work, it is an immensely engaging and accessible text. Metaphor and symbolism are used creatively to illuminate discussions. For instance, the choice between legal and political constitutionalism is described as a 'Manichean narrative',[4] and the principle of legality as a 'go slow' sign for the legislature to 'drive carefully'.[5] Kavanagh frequently stops to consolidate, and guides the reader carefully through each chapter. Scholars and students of law or political science, whatever their stage, will therefore face little difficulty appreciating and engaging with *The Collaborative Constitution*.

Turning to the book's substance, it is apparent that *The Collaborative Constitution* has much to offer. Perhaps the most significant contribution of the work is the theoretical framework. Kavanagh

[1]Eg on courts see C Hillebrecht *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014) p 25, '[n]o single domestic actor, not even the strongest executive, can satisfy all of the tribunals' mandates, legally or logistically'.

[2]A Kavanagh *The Collaborative Constitution* (Cambridge: Cambridge University Press, 2024).

[3]Ibid, p 13.

[4]Ibid, p 32. Kavanagh uses Manicheanism to compare legal and political constitutionalism to the choice between 'good' and 'evil'.

[5]Ibid, p 226.

takes aim at the alternative perspectives for understanding the relationship between the branches of the state, namely political and legal constitutionalism, and dialogue theory. The debate of political versus legal constitutionalism, it is argued, is an inaccurate 'dramatisation'.[6] We should appreciate branches' flaws and strengths to devise 'more measured and realistic accounts of the institutional division of labour in a constitutional democracy'.[7] A series of common flaws in this debate are revealed including, notably, a methodological deficiency whereby scholars have tended to 'compare an idealistic picture of one institution with a dystopian picture of its perceived rival'.[8] This is a pertinent point and reminiscent of other works in recent years that have sought to emphasise the importance of making valid comparisons when debating rights.[9] Kavanagh also succeeds in her critique of 'dialogue theory,' which scholars have typically presented as a solution to the political versus legal impasse. Instead of being at odds, these theories suppose rights issues would be resolved by a joint enterprise between the legislature and judiciary. This was an inherently appealing perspective as it provided a relatively simple solution – *both* politicians and judges are important. Yet, despite its potential, Kavanagh explains it had 'facilitated a deep ambivalence about the roles and relationship between the branches of government'.[10]

As to the solution, Kavanagh presents a case for collaboration. Throughout the book, but initially in Chapter 3, Kavanagh draws together and makes sense of decades of constitutional scholarship to make a simple but critical claim: the branches of government should (and do) work together. Here, it is argued that the 'pure doctrine' of the separation of powers, typically used to illustrate the proper relationship between branches of government, does not reflect the 'interdependence and interaction' that occurs in reality.[11] We must instead conceptualise rights protection as a 'dynamic division of labour, where each branch plays a distinct but complementary institutional role'.[12] This relationship is mediated by 'comity', which requires branches to exercise 'mutual self-restraint' and 'mutual support', but also 'affirmative obligations' of *collaboration*.[13] The collaborative constitution is also understood to have various features. Foremost, all branches share a common goal – to ensure democracy, the rule of law and the protection of rights. This is an aspect of the collaborative constitution that Kavanagh returns to in subsequent chapters, showing how in practice each branch contributes to this goal in different ways. Additionally, the relationship between these branches is long-term and therefore one where any 'conflictual behaviour' can undermine the constitutional order.[14] All branches must also recognise the limits of their role and respect the contribution of one another in governing.

It is useful to reiterate here that *The Collaborative Constitution* deals with an array of doctrinal theoretical and empirical questions. This is to Kavanagh's credit, as it is done very capably. However, this does sometimes come at a cost, as in places the reader may find themselves wondering, perhaps mostly in Chapter 3, precisely what type of claim is being made. By way of example, here it is explained that a feature of collaboration is 'the *heterarchical* – rather than hierarchical – nature of the relationship between branches' where no one branch 'reigns supreme'.[15] This requires some unpicking. At a glance, this appears completely at odds with parliamentary sovereignty. But that would only be the case if this were a doctrinal assertion about the extent of Parliament's legal authority – what it *can* do. When we take this claim in context, it is apparent from the rest of the chapter that we are dealing with mostly normative and empirical claims about what constitutional actors *should* do, and what they *actually do*.

[6]Ibid, p 31.
[7]Ibid, p 32.
[8]Ibid, p 38.
[9]Notably K Sikkink *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton, NJ: Princeton University Press, 2018).
[10]Kavanagh, above n 2, p 80.
[11]Ibid, pp 87–89.
[12]Ibid, pp 91–92.
[13]Ibid, pp 98–100.
[14]Ibid, p 103.
[15]Ibid, p 102 (emphasis added).

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If that is the intention here – to claim that it is both desirable for there to be a heterarchy and that in practice this is what we see – then this is hardly controversial. Readers should therefore read *The Collaborative Constitution* carefully and consider claims in context before making any undue critiques.

Throughout the book, Kavanagh successfully demonstrates how collaboration is reflected in constitutional practice. Most notably, in Part II of the book, we see how rights permeate the political process. In Chapter 4, there is an illuminating and much-needed discussion of rights in the executive. Instead of seeing the executive as 'the constitutional villain',[16] we are provided with a more optimistic picture highlighting the important ways that the government engages with rights. Here, the work of civil servants, bill teams, parliamentary counsel, and government lawyers is brought to the forefront. This is to Kavanagh's credit, especially as these actors are so often missing in constitutional discourse, with attention being turned instead to the action or inaction of ministers or other senior figures. Similar observations can be made with respect to the discussion of Parliament in Chapter 5. It is emphasised here too that Parliament is not unitary but a multifaceted body comprising different individuals and components. Certainly, in the context of rights, some parliamentary actors have a more central role, foremost the Joint Committee on Human Rights (JCHR), so it is useful to disaggregate and conceptualise Parliament in this way. We learn here about the JCHR, described as a 'hybrid constitutional watchdog',[17] and how it brings 'law into politics and politics into law'.[18] This is an excellent explainer of how the Committee works with other actors inside and outside of Parliament to inform the legislative process. These chapters are crucial for breaking down the complex executive and legislative machinery and show us what happens beneath the surface. Kavanagh sheds light on the long-overlooked micro-processes and individuals in the political branches, further revealing rights protection as a collaborative enterprise.

There are nevertheless some notable omissions here that readers will want to be aware of. Foremost, *The Collaborative Constitution* is 'HRA-centric'. That is to say that it focuses almost wholly on the Human Rights Act 1998 (HRA 1998) without regard to the wider international human rights framework that can and does shape the work of constitutional actors. So, in Chapter 4, there is no discussion of the other factors that have driven 'rights-consciousness' in government. For instance, important networks and actors have emerged to coordinate and manage responses to the reviews of international human rights mechanisms. The Convention on the Rights of the Child and its Committee, especially, has particular salience in government.[19] In Chapter 5, the wider international dimension of the JCHR's work does not receive any attention.[20] This is not necessarily problematic; nor is it inappropriate, as the HRA 1998 is undeniably the most crucial component in the human rights system. But, given the recent research on the UK and the UN human rights mechanisms,[21] it would have been desirable for the wider rights framework to receive more attention in this work, even if only peripherally. Similarly, it is important to note that the focus here is primarily on central rather than regional institutions. This is, on one hand, a curious omission as Scotland is an exemplary case of collaboration in action. Notably, the mission to incorporate further human rights treaties into Scots law has required a collective effort of both the Scottish Government and Parliament, civil society, and (though perhaps

[16]Ibid, p 127.

[17]Also see A Kavanagh 'The Joint Committee on Human Rights: a hybrid breed of constitutional watchdog' in M Hunt et al (eds) *Parliaments and Human Rights* (Oxford: Hart Publishing, 2015).

[18]Kavanagh, above n 2, p 158.

[19]Cabinet Office 'Guide to Making Legislation' (2022), available at https://www.gov.uk/government/publications/guide-to-making-legislation, para 11.29.

[20]Albeit this is an area of the Committee's work that is seen as needing improvement: see E Hourigan et al 'Parliament and human rights' in A Horne et al (eds) *Parliament and the Law* (Oxford: Hart Publishing, 2022).

[21]Notably B Dickson *International Human Rights Monitoring Mechanisms: A Study of Their Impact in the UK* (Cheltenham: Edward Elgar, 2022); Bingham Centre for the Rule of Law *The Implementation of Human Rights Recommendations in the UK* (2023), available at https://binghamcentre.biicl.org/projects/national-implementation-of-human-rights-global-survey-of-state-implementation-systems-and-processes.

https://doi.org/10.1017/lst.2024.37 Published online by Cambridge University Press

to a lesser extent) the judiciary. Yet, this appears to be beyond the scope of the book – Kavanagh is concerned foremost with what happens *centrally*.

Kavanagh's framing of the role of the judiciary, and its relationship with the legislature, is also an important contribution of the book. It is perhaps difficult to foresee a collaborative relationship between these two branches given the formal supremacy of Parliament. Yet, readers are provided with three insights that are particularly illustrative of a partnership in action.

First, Kavanagh deals capably with the elephant in the room and explains how the legislative power of override can be reconciled with the notion of collaboration. In Chapter 11, case studies of Canada and the UK show that the political costs of overriding the judiciary are 'deliberately hardwired into the system'.[22] Additionally, the principles of comity and mutual self-restraint, developed in Chapter 3, entail that legislatures should exercise the override with caution to respect the role of authority of the judicial branch. Although a legislature can dispense with a judicial ruling, doing so routinely risks undermining institutional credibility in the collaborative scheme.

Secondly, Kavanagh defends the idea of 'calibrated constitutional review' which enables the judiciary to supervise the legislature without overstepping its institutional capacity. It is emphasised that the judiciary has an important but ultimately subsidiary role in the constitution, acting as a means of 'quality-control'.[23] As part of this role, judges not only have to assess the substantive merits of a legal claim, but they must also carry out an 'institutional evaluation about the scope and limits of the judicial role'.[24] A review of case law, in Chapter 9, clarifies the various 'calibrating factors' that courts have used to determine whether to defer (or, as Kavanagh prefers, whether to 'give weight' or 'give space') to the legislature.

Finally, in the penultimate Chapter 12, parliamentarians' responses to declarations of compatibility are analysed. The key contribution of this chapter is in Kavanagh's claim that, whilst these declarations remain non-binding, a constitutional convention that they should nevertheless be complied with is emerging. A review of Hansard finds a consistent willingness to embrace (and in some cases welcome) courts' findings, rather than to reject or deplore them. In the few cases where Parliament's response has been averse or reluctant,[25] not to mention the prisoners' voting saga, a close reading of debates nevertheless reveals that political actors feel a normative obligation to comply.

Together, these insights reveal a more nuanced, complex picture of the relationship between the legislature and judiciary. Rather than one branch unreservedly exercising its power over the other, it is clear that there exists mutual recognition and respect. Readers are thus brought full circle and see how the theory developed earlier in the book is reflected in constitutional practice. There are, however, some contentious claims that deserve to be queried. Perhaps the most controversial, in Chapter 11, is an assertion that the HRA 1998 '*gave*' Parliament the power to override judicial decisions on rights.[26] Whilst the precise origins of Parliament's sovereignty remain debatable,[27] it is at least controversial (arguably erroneous) to suggest that the legal authority to override the judiciary on matters of rights *derives* from the HRA 1998. Perhaps if we adopted a different interpretation of 'power', we might assume that Kavanagh meant the HRA 1998 gave parliament the 'authority' or 'legitimacy' to dispense with judicial decisions.[28] In any case, clarification here would have been desirable.

[22]Kavanagh, above n 2, p 360.

[23]Ibid, p 270.

[24]Ibid, p 269.

[25]Kavanagh considers these to be *R v Home Secretary, ex p Anderson* [2003] UKHL 46, *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 (the 'Belmarsh case'), *R (Thompson) v Secretary of State for the Home Department* [2010] UKSC 17, and *Smith v Scott* [2007] CSIH 9.

[26]Kavanagh, above n 2, p 361 (emphasis added).

[27]See notably J Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) chs 2–3.

[28]This might plausibly be defensible given the various provisions of the HRA 1998 that preserve parliamentary sovereignty, namely ss 3(2), 4(6) and 6(3)(b).

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Overall, *The Collaborative Constitution* is an excellent text. Kavanagh offers valuable insights into how the branches of government act collaboratively and provides a convincing case that such collaboration is a desirable means for achieving a just government. It is an exciting, refined work and will no doubt prove indispensable for scholars and students of public law. Those concerned with human rights compliance and how domestic politics facilitates the implementation of international human rights norms will equally find *The Collaborative Constitution* worth studying.

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