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## Introduction

### The Call for Collaboration

#### 1 Collaboration Calling

Which branch of government should we trust to protect rights in a democracy? Some take a court-centric approach to this question, arguing that the courts provide a ‘forum of principle’<sup>1</sup> which makes judges uniquely situated to protect rights against the feared and fabled ‘tyranny of the majority’. Others urge us to put our faith in the democratic legislature as a supremely dignified, diverse, and deliberative forum which can protect our rights against the oligarchic offensive of an ermined elite.<sup>2</sup> Rejecting the binary options of either the courts or the legislature, this book argues that protecting rights is a collaborative enterprise between all three branches of government, where each branch has a distinct but complementary role to play whilst working together with the other branches in constitutional partnership. Instead of advocating the hegemony and supremacy of one branch over another, this book articulates a collaborative vision of constitutionalism where the protection of rights is a shared responsibility between all three branches. On this vision, protecting rights is neither the solitary domain of a Herculean super-judge nor the dignified pronouncements of an enlightened legislature. Instead, it is a complex, dynamic, and collaborative enterprise, where each branch of government plays a valuable role whilst treating the other branches with comity and respect.

In making the case for the collaborative constitution, this book inscribes itself into a longer trajectory of scholarly attempts to work out which branch should protect rights in a democracy. In Chapter 1, I begin by exploring the Manichean narrative of ‘courts versus legislature’ and

<sup>1</sup> Dworkin (1985).

<sup>2</sup> Waldron (1993b); Webber et al. (2018).

‘political versus legal constitutionalism’<sup>3</sup> which dominated the scholarly discourse on protecting rights in the late twentieth century. Rejecting these alternatives as false dichotomies between polarised extremes, I argue that we need to move ‘beyond Manicheanism’.<sup>4</sup> Beyond the binaries of ‘heroes versus villains’ and ‘good versus evil’, this book offers a less dramatic but more realistic account of institutional roles, where all three branches of government are presented as ‘imperfect alternatives’,<sup>5</sup> each with its fair share of pros and cons. Whatever virtues the branches of government possess, I argue that they are necessarily ‘partial virtues which must be integrated into an institutionally diverse constitutional order’.<sup>6</sup>

Instead of embracing ‘nirvana solutions’<sup>7</sup> where paragons of principle are pitted against oligarchic ogres, what is urgently needed to advance this debate is a more grounded and granular institutional account which acknowledges the valuable, but necessarily imperfect, contributions of all three branches of government in a differentiated division of labour. The aim of this book is to provide that account. Once we accept that the protection of rights needs both legislation and adjudication – both elected politicians and independent judges – the key task, then, is to work out how these institutions act, interact and counteract in a complex, collaborative scheme. Abandoning the Manichean battlefield where democracy is presented as ‘constitutionalism’s nemesis’<sup>8</sup> and constitutionalism is portrayed as ‘the constant object of a democrat’s fear and suspicion’,<sup>9</sup> this book recasts the debate in collaborative rather than purely conflictual terms. Between the dramatic forces of light and darkness, this book explores the many shades of grey.

In the twenty-first century, scholars began to explore ways of transcending the binary framing of this debate and the antagonistic picture on which it rests. Inspired by innovations in constitutional design in the UK and Commonwealth countries, scholars argued that we should view the relationship between the branches of government as a dialogue.<sup>10</sup> Instead of positing the hegemony of one branch over the other, the courts

<sup>3</sup> Kavanagh (2019).

<sup>4</sup> Hilbink (2006).

<sup>5</sup> Komesar (1994).

<sup>6</sup> Whittington (2000) 693.

<sup>7</sup> Komesar (1994) ix.

<sup>8</sup> Waldron (2016) 38.

<sup>9</sup> *Ibid.* 38.

<sup>10</sup> Hogg & Bushell (1997); Sigalet, Webber & Dixon (2019a).

and the legislature could each have a say, albeit with the fall-back of legislative finality in circumstances of disagreement. Yet, whilst the metaphor of dialogue usefully highlighted the interaction between the branches, Chapter 2 argues that it lacked the analytical resources to capture the complexity of the constitutional relationships between the branches of government.<sup>11</sup> The malleability of the metaphor meant that it could be applied to any form of inter-institutional interaction, ranging from polite conversations between friends to no-holds-barred shouting matches between enemies locked in combat. For that reason, the idea of dialogue failed to take us beyond the Manichean narrative of ‘courts versus legislature’ and ‘rights versus democracy’. In fact, it resurrected the antagonistic narrative, shifting the debate to which branch should get ‘the last word’<sup>12</sup> in the dialogue: the legislature, as ‘political constitutionalists’ preferred, or the courts, as ‘legal constitutionalists’ claimed.<sup>13</sup> With its fixation on legislative finality and override of courts, the Manichean narrative reappeared in dialogic clothing.

In order to make sense of the subtleties of the relationships between the branches, this book argues that we need to dig deeper into the foundations of constitutional democracy, anchoring our analysis in a plausible and attractive account of the roles and relationships between the branches of government. In short, we need to ground our analysis in a conception of the constitutional separation of powers. This book makes the case for collaboration as the guiding value of such an account. Instead of squaring off against each other to get the last word on rights in fierce constitutional combat, or having a cosy constitutional conversation on the meaning of rights, the central chapter of this book – Chapter 3 – argues that they must work together in constitutional partnership marked by the values of comity, collaboration, and conflict management. On this vision of constitutionalism, the branches of government are not enemies at war. But they are not friends either. Instead, they are partners in a collaborative enterprise, where they are required to treat each other with constitutional comity and respect.

At the heart of this book lies a relational and collaborative conception of the separation of powers, where distinct branches of government perform different institutional roles whilst working together in a collaborative

<sup>11</sup> Kavanagh (2016a).

<sup>12</sup> For ‘a hard look at the last word’ in constitutional discourse, see Kavanagh (2015a).

<sup>13</sup> Bellamy (2011) 91–2; Kavanagh (2019) 56.

constitutional scheme.<sup>14</sup> When we look at how the branches of government carry out their distinctive roles, it is clear that they are not ‘satellites in independent orbit’.<sup>15</sup> Instead, they are interdependent and interrelated actors who must work together in a system of ‘separateness but interdependence, autonomy but reciprocity’.<sup>16</sup> Rather than viewing the separation of powers as a prescription for solitary confinement with ‘high walls’<sup>17</sup> between the branches, this book explores the constitutional norms of respect and restraint, fortitude and forbearance, which frame and shape the interactive engagement between them. Beyond ‘high walls’, this book builds bridges. Delving deep into the interactive dynamics between the branches, it explores the myriad modes of constructive engagement which form ‘the connective tissue’<sup>18</sup> between the different arms of government in a healthy body politic.

The collaborative constitution does not overlook the critical role of robust checks and balances between the branches. On the contrary, such checks and balances are partly constitutive of the collaborative enterprise. Comity and contestation are not mutually exclusive activities. However, alongside contestation, critique and mutual oversight, this book also discerns the inter-institutional dynamics of mutual respect and mutual support as the branches carry out their distinct but interconnected tasks. Situating checks and balances within a broader collaborative endeavour, my account emphasises that the branches of government ‘do not merely counteract protectively; they also interact productively’.<sup>19</sup> In place of a static vision of separated functions and isolated authorities, the separation of powers is thus recast in relational terms as a dynamic process of interaction and engagement, framed and shaped by the norms of mutual respect, restraint and ‘role recognition’<sup>20</sup> in a collaborative constitutional scheme.

So what is collaboration? Collaboration is the act of working together with others. As its etymology reveals, the ideas of combined labour and joint effort lie at its core.<sup>21</sup> In the constitutional context, collaboration

<sup>14</sup> Kavanagh (2022); Kyritsis (2017); Cartabia (2020).

<sup>15</sup> Bingham (2000) 230.

<sup>16</sup> *Youngstown Sheet and Tube Co v Sawyer* 1953 343 US 579, 635 (Jackson J); Kavanagh (2016b) 235ff.

<sup>17</sup> *Plaut v Spendthrift Farms Inc* 514 US 211 (1995) (Scalia J).

<sup>18</sup> Greene (2018) 94, 103; MacDonnell (2019) 204; McLean (2018) 412–13.

<sup>19</sup> Hickman (2005a) 335.

<sup>20</sup> Hodge (2015) 474; Kavanagh (2022) 539–41

<sup>21</sup> ‘Collaboration’ comes from the Latin *collaboratus* meaning ‘to labour together’ – *com* (with) and *laborare* (to labour or work).

refers to a shared commitment by diverse actors to carry out their responsibilities in mutually responsive and respectful ways as part of a joint endeavour oriented towards a common goal.<sup>22</sup> Collaboration is a complex kind of ‘acting together’<sup>23</sup> marked by three features: (1) mutual responsiveness; (2) mutual respect and support; and (3) a commitment to the joint enterprise as a ‘shared cooperative activity’.<sup>24</sup> To be clear, collaboration does not require consensus or conformity. Nor does it require identity or even equality between the parties in the collaborative effort. On the contrary, collaboration ‘signposts the coming together of distinct elements, espousing complementary goals but responding to a different set of incentives’.<sup>25</sup> Indeed, the value and point of many collaborative endeavours is precisely the desire to reap the collaborative advantage of combining a diverse range of abilities, aptitudes, skills, and perspectives in the joint resolution of a complex problem. Therefore, the collaborative constitution has institutional heterogeneity at its core. Embracing a ‘principled plurality of governing institutions’,<sup>26</sup> the collaborative constitution envisages a joint enterprise where each branch makes a distinct but complementary contribution to the joint constitutional effort. Achieving just government under the constitution is a ‘common goal, differently realised’.<sup>27</sup>

Throughout this book, I use the term ‘constitutional constitutionalism’ in order to capture the dynamic and diachronic dimension of constitutional government as a ‘going concern’<sup>28</sup> and a ‘work in progress’.<sup>29</sup> Recalling the metaphor of constitutionalism as ‘rebuilding the ship at sea’,<sup>30</sup> I emphasise that this constitutional ‘building’ and ‘rebuilding’ is an ongoing, collaborative effort which requires all hands on deck in order to keep the ship afloat and maintain it on an even keel.<sup>31</sup> Instead of framing the separation of powers solely as a set of sanctions for constitutional malfeasance, or as a negative admonition to ‘mind the

<sup>22</sup> Bratman (2014); Dyzenhaus (2006) 4–5.

<sup>23</sup> Gardner (2002) 495; Kutz (2000).

<sup>24</sup> Bratman (1992); Bratman (2014) (providing a philosophical analysis of the nature of ‘shared cooperative activity’).

<sup>25</sup> Joseph (2004) 334; Carolan (2016a) 221–5.

<sup>26</sup> Sabl (2002) 15.

<sup>27</sup> Levi (1976) 391; Jackson (2016) 1718; Bateup (2006) 1169

<sup>28</sup> Balkin (2016) 242–3; Vermeule (2007) 245ff.

<sup>29</sup> Paris (2016) 26; Bell (2016) 421ff; Balkin (2016) 241; Leckey (2015) 19; Dyzenhaus (2012) 257.

<sup>30</sup> Elster, Offer & Preuss (1998); Vermeule (2007) 245.

<sup>31</sup> Craiutu (2017) 20, 159; Daly (2017) 280ff.

institutional gaps', the collaborative constitution also embraces a form of positive constitutionalism which calls on the branches to care for the connections between them.<sup>32</sup>

Once we adopt a 'wide-scope vision of the constitutional order'<sup>33</sup> which encompasses multiple institutions, this raises the question of how we can bring diverse institutional perspectives together, combining them in a workable *system* of constitutional government or a 'constitutional *order*' as it is sometimes called.<sup>34</sup> After all, if there is a 'polyphony'<sup>35</sup> of constitutional voices, each singing to a different tune, this runs the risk of having either a variety of competing virtuoso performances or a constitutional cacophony with no coordination between them. The answer offered in this book is that constitutional government is an ensemble piece not a virtuoso performance, where each branch plays a different role as part of a broader collaborative enterprise whilst remaining responsive to – and respectful of – the distinct contributions made by their fellow participants in the constitutional scheme. This does not require each contributor to the collaborative process to play the same tune on the same instrument at exactly the same tempo. Nor does it require them to achieve perfect constitutional harmony. On the contrary, the aim of the collaborative constitution is to combine the different tones, timbre and tempo of many voices, where each participant acknowledges their distinctive role *as part* of a broader collaborative effort whilst respecting and supporting the valuable contribution of their fellow participants. Sometimes in harmony, sometimes in counterpoint – and sometimes with syncopated rhythms, discordant contributions, and a few wrong notes along the way – the constitutional actors must recognise their own voice – and those of their fellow contributors – as one amongst many.<sup>36</sup> What combines them together in a shared collaborative activity is their mutual responsiveness, recognition and commitment to each other, and to the larger ensemble piece.

Working together with others in a constructive, long-term partnership over time is hard work. Not only does it require each of the partners to

<sup>32</sup> Kavanagh (2019); Appleby, MacDonnell & Synot (2020) 447; Dyzenhaus (2006) 5.

<sup>33</sup> Kyritsis (2017) 6; also see Kavanagh (2019) 63.

<sup>34</sup> Möllers (2013) 44.

<sup>35</sup> Kyritsis (2017) chapter 2 (providing 'a moral map of constitutional polyphony'); Craiutu (2017) 23–4, 49 (describing constitutional governance as a 'complex polyphony'); Waldron (1999a) chapter 3 (applying the metaphor of 'many voices' to the legislature); Schapiro (2009) (on 'polyphonic federalism'); Bratman (1992) 327ff.

<sup>36</sup> Rosenblum (2008) 7, 12.

carry out their respective roles with integrity, commitment, and professionalism, it also requires them to exercise some *self-discipline*, which manifests in norms of mutual respect, self-restraint, and self-control. This self-control is necessary in order to keep the partnership going over the long haul. Accepting the complexity of comity and counterbalancing, contestation and collaboration, tension and tolerance in the collaborative constitutional order, I characterise the relationship between the branches of government as a difficult but dynamic *constitutional partnership in progress*.

Three leitmotifs are woven into the tapestry of the book, and bear emphasis at the outset. These are: *constitutional relationships*, *unwritten constitutional norms*, and *constitutional restraint*. Let us start with the idea of *constitutional relationships*. In many ways, this is a book about relationships. Resting on the insight that ‘constitutions are shaped by the working relationships between their principal institutions’,<sup>37</sup> this book presents constitutional government as a relational phenomenon, forged in a complex web of ongoing relationships between a multiplicity of constitutional actors.<sup>38</sup> Once we appreciate constitutional government *as relational*, new and exciting lines of constitutional inquiry come into view. Instead of asking ‘who is the ultimate arbiter of rights: the courts or the legislature?’, we can reject the false dichotomy presupposed by the question and acknowledge that all three branches of government have a shared responsibility for upholding rights. Shifting our focus ‘from rivals to relationships’,<sup>39</sup> we can begin to examine the health of those relationships, uncovering the norms of respect, restraint, and reciprocity which frame and shape the relational dynamics in a healthy body politic.<sup>40</sup>

The focus on relationships has other analytical payoffs. For one thing, it ‘renders visible a number of constitutional actors and dynamics that are often invisible on traditional accounts’.<sup>41</sup> Widening the cast of key constitutional actors ‘beyond the usual constitutional coterie’,<sup>42</sup> this book appreciates civil servants, legal advisers, parliamentary drafters, the Loyal Opposition, the Upper Chamber of a bicameral legislature, the Attorney General and many more as key constitutional actors, each embedded in a

<sup>37</sup> Griffith (2001) 49; Kavanagh (2019) 50.

<sup>38</sup> On the relational nature of constitutionalism, see Cartabia (2020); Kavanagh (2019); Kavanagh (2022); Appleby, MacDonnell & Synot (2020); Weis (2020b) 625.

<sup>39</sup> Kavanagh (2019).

<sup>40</sup> Appleby, MacDonnell & Synot (2020) 448; Cartabia (2020) 3ff.

<sup>41</sup> Appleby, MacDonnell & Synot (2020) 439.

<sup>42</sup> *Ibid* 449.

‘dense collaborative network’<sup>43</sup> within, between and beyond the branches of government. Recasting the separation of powers in relational terms, we can shift the focus away from the febrile adversarialism of the Manichean narrative towards a more productive inquiry into the interactive dynamics and collaborative interplay between the key constitutional actors. Putting constitutional relationships at the heart of our constitutional understanding, this book takes up the challenge of analysing the relational interplay between a multiplicity of actors, whilst articulating the normative values, constitutional virtues, and practical institutional skills required to make constitutional relationships work.

The second, and related, theme concerns the fundamental role of *unwritten constitutional norms* which lie at the foundation of the collaborative constitution. By ‘unwritten constitutional norms’,<sup>44</sup> I mean the rules, norms, and practices of constitutional government ‘accepted as obligatory by those concerned in the working of the constitution’.<sup>45</sup> Though neither required nor enforced by law, these non-legal rules nonetheless provide the ‘basic ground rules of constitutional practice’<sup>46</sup> – the constitutional rules of the game which are binding as a matter of ‘constitutional morality’.<sup>47</sup> Whilst the written constitutional rules may specify the *powers* of the branches of government, it is the unwritten constitutional norms which articulate the constitutional *responsibilities* which attach to those powers.<sup>48</sup> These norms regulate the roles and relationships between the branches of government.<sup>49</sup> They put flesh on the bones of the body politic.

In the UK and Commonwealth constitutional orders, these unwritten constitutional norms have a particular salience. Known as ‘constitutional conventions’,<sup>50</sup> they distribute responsibilities and facilitate collaboration between ‘the major organs and officers of government’.<sup>51</sup> They are ‘the hidden wiring’<sup>52</sup> on which the constitutional system depends. Yet, whilst these norms are often associated with the Anglo-Commonwealth

<sup>43</sup> Krisch (2010) 228; Cohn (2013) (on ‘network governance’).

<sup>44</sup> Elster (2010).

<sup>45</sup> Marshall (1984) 7.

<sup>46</sup> Wilson (2004) 420

<sup>47</sup> Dicey (1964) 24.

<sup>48</sup> Jennings (1959) 81–2; Halberstam (2004) 734.

<sup>49</sup> Elster (2010) 21; Pozen (2014) 30.

<sup>50</sup> Marshall (1984).

<sup>51</sup> *Ibid* 1; Pozen (2014) 30.

<sup>52</sup> Hennessy (1995).



constitutional tradition, they are no mere peculiarity of the uncodified constitution. In fact, *all* constitutions rely to a significant extent on unwritten norms of constitutional behaviour, which frame and shape the roles and relationships between the branches of government.<sup>53</sup> Indeed, all constitutions ultimately rest on the most fundamental norm of all, namely, that the key branches of government must recognise and accept the constitution as an authoritative framework for their behaviour and for the polity as a whole.<sup>54</sup> Thus, even the most comprehensively crafted ‘written constitution’ ultimately rests on political will and constitutional commitment by the key political actors to abide by the constitutional rules of the game.<sup>55</sup> Absent that fundamental commitment, the constitution becomes a hollow hope, a parchment barrier devoid of authority because the key constitutional actors do not recognise it as binding on their behaviour.

The salience and significance of these norms for any well-functioning constitutional system is put into stark relief in contemporary times. In the vast literature on constitutional corrosion and democracy decay across the world, the deepest lament amongst constitutional lawyers is that powerful political figures are violating the ‘unwritten democratic norms’<sup>56</sup> of mutual toleration, respect, and forbearance on which a well-functioning constitutional democracy depends. Leading American scholars observe that much of Donald Trump’s ‘most vexing political behaviour challenge[d] not the interpreted Constitution, but the unwritten norms that facilitate comity and cooperation in governance’.<sup>57</sup> In an insightful analysis, political scientists Steven Levitsky and Daniel Ziblatt emphasise the pivotal importance of norms of respect for the constitutional rules of the game and the ‘shared codes of conduct’<sup>58</sup> about how political actors are expected to behave. Without such foundational rules, constitutional practice descends into chaos and corrosive conflict.<sup>59</sup>

<sup>53</sup> Griffith (2001) 43; Gardner (2012) 89; Fallon (2001) 8; Levinson (2011) 697ff; N Siegel (2017); Pozen (2014) 30ff (on the role of ‘unwritten constitutional norms’ in the US system); Dixon & Stone (2018) (on ‘the invisible constitution in comparative perspective’); MacDonnell (2019); Endicott (2021) 14–15; Taylor (2014) (on conventions in German constitutionalism).

<sup>54</sup> Hart (2012) chapters 5 & 6 (famously describing this as the ‘rule of recognition’).

<sup>55</sup> Levinson (2011); Chafetz (2011).

<sup>56</sup> Levitsky & Ziblatt (2019) 8, 100ff.

<sup>57</sup> Pozen (2014) 9; Greene (2018); Balkin (2018) 24–8.

<sup>58</sup> Levitsky & Ziblatt (2019) 101.

<sup>59</sup> Pozen (2014) 9.

Indeed, if the key political actors stop observing those norms, then the constitutional checks and balances we rely on for security against constitutional abuse ‘cannot serve as the bulwarks of democracy we imagine them to be’.<sup>60</sup>

This underscores the foundational Hartian point that all legal systems ultimately rely on a commitment of the key constitutional actors to abide by the rules of the constitutional game and treat them ‘as normative’.<sup>61</sup> Beneath the constitutional architecture of legal rules lies constitutional attitudes as political norms. As Mattias Kumm observed, ‘at the heart of constitutionalism is not a constitutional text but a constitutional cognitive frame’.<sup>62</sup> Instead of embracing the idea of ‘constitution as architecture’,<sup>63</sup> therefore, this book foregrounds the idea of ‘constitutionalism as mindset’,<sup>64</sup> grounded in the norms and beliefs, the attitudes and actions, the dispositions and commitments of the constitutional actors to make the system work. When Donald Trump became President of the United States, his ‘norm-breaking’ behaviour highlighted the fundamentality and fragility of these ‘unwritten rules’<sup>65</sup> to a well-functioning constitutional order – norms which had been largely invisible to American constitutional scholars in previous generations because they had been taken for granted in a relatively well-functioning system. One of the aims of *The Collaborative Constitution* is to bring to these ‘unwritten’ norms to the surface of constitutional analysis, rendering them visible for all to see.

The third leitmotiv which echoes across this book is the theme of *constitutional restraint*. In all long-term working relationships, discord and disagreement, arguments and acrimony will inevitably arise at times. A healthy long-term relationship built on the firm foundations of mutual commitment, respect, and restraint can weather these storms, enabling the partners – and the partnership as a whole – to move forward in a constructive and collaborative fashion. However, if these flashpoints of friction become the pervasive, persistent and endemic mode of inter-institutional interaction, then this will undermine the fundamental norms of respect, trust and mutual recognition on which the working constitution depends.

<sup>60</sup> Levitsky & Ziblatt (2019) 7.

<sup>61</sup> Green (2012) xxi.

<sup>62</sup> Kumm (2009) 321.

<sup>63</sup> Bator (1990).

<sup>64</sup> Koskenniemi (2006).

<sup>65</sup> Levitsky & Ziblatt (2019) chapter 6 (on ‘The Unwritten Rules of American Politics’).