Chapter 3

THE CASE FOR COLLABORATION

1. Introduction

Underpinning all controversies surrounding the protection of rights is a deeper question about the roles and relationships between the branches of government. In this chapter, I argue that the branches of government are partners in a collaborative enterprise where they each have distinct, but complementary, roles to play, whilst working together in mutually respectful, constructive and supportive ways. Instead of squaring off against each other to get the last word on rights in fierce constitutional combat - or having a cosy constitutional conversation about rights - I argue that they must work together in a spirit of constitutional partnership. On this vision of constitutionalism, the branches of government are not enemies. But they are not friends either. Instead, they are partners in a collaborative enterprise where they are required to treat each other with comity and respect. Moving from isolation to interaction - and from conversation to collaboration - this chapter defends the idea of the collaborative constitution.

The challenge, then, is to articulate a relational, interactive and collaborative conception of the separation of powers, where each branch has a distinct role whilst working together towards the shared goal of protecting rights in a democracy. Taking up that challenge, this chapter proceeds in the following way. As with any partnership or collaborative endeavour, we must start with a division of labour. Therefore, Part 2 outlines the dynamic division of labour between the three branches of government. In Part 3, I argue that this division of labour must be supplemented by meaningful checks and balances, in order to curb potential abuse of power and counteract the risk of jurisdictional overreach. Part 4 brings the dual dimensions of division-of-labour and checks-and-balances together, arguing that they are both underpinned by the deeper constitutional values of comity and collaboration, where the branches of government must work together as part of a joint institutional effort. Part 5 takes up the important question of how the collaborative constitution accommodates conflict and friction between the branches, defending the idea of ‘conflict within constitutional constraints’. Instead of engaging in no-holds-barred

constitutional showdowns, the branches of government should mediate their institutional differences and disagreements through mechanisms of *constitutional slowdown*. Only when the branches of government treat each other with mutual respect - disciplining their interaction with an appropriate degree of self-restraint and forbearance - can they achieve successful and sustainable constitutional government over time.

2. Dividing Constitutional Labour

When we look at constitutional democracies around the world, we are immediately struck by their *institutional plurality*. Instead of unified authority under a single ruler, powers are divided and shared between distinct branches of government. The view that powers should be dispersed amongst a plurality of institutions, rather than concentrated in one single branch, is often thought to be the 'essence of constitutionalism'[1] and the core of the constitutional separation of powers.[2] The question then arises: how do we demarcate the domains of the different branches, and divide the labour between them? One classic answer is provided by the so-called 'pure doctrine'[3] of the separation of powers, namely, the claim that we should allocate to each branch a single function which gives it its name, whilst prohibiting them from encroaching upon the functions of the others.[4] In its simplest telling, the legislature legislates or makes law; the executive executes or gives effect to it; and the courts adjudicate disputes and apply the law. We can call this the '*one branch – one function'* view.[5] It posits a 'one-to-one correlation'[6] between the three branches of government and their respective functions, whilst warning each branch not to stray beyond the confines of its single function.[7]

But the claim that there is a tight one-to-one correlation between branch and function cannot be sustained in any constitutional system. It is an open secret that all three branches

[1] Barendt (1997) 137; Möllers (2019) 244-5.
[2] Albert (2010) 207; Magill (2000) 606; Gardbaum (2020b) (describing this as the 'anti-concentration principle').
[3] On the 'pure doctrine' of the separation of powers, see Vile (1998) 13-14; Carolan (2009) 18ff; Kavanagh (2016b) 224-6; Fombad (2016a) 60-64.
[4] Barendt (1995) 601.
[5] Kavanagh (2016b) 225; Merrill (1991) 231.
[6] Kyritsis (2007) 386; Merrill (1991) 231; Carolan (2009) 18.
[7] Kavanagh (2016b) 225.

perform all three functions to some extent.[8] For example, the Executive carries out a legislative function when making 'delegated legislation'. Indeed, in many countries, the Executive plays a central, if not a predominant, role in enacting primary legislation as well.[9] Executive power is strikingly multi-functional. When we turn to the legislature, a similarly multi-functional picture emerges. The legislature enacts general laws, but it also holds the Executive to account, keeps order in the legislature, administers the process for voting on bills, and resolves disputes over contempt and breach of parliamentary privilege.[10] Similarly, when we consider the courts, we see that judges apply the law and adjudicate legal disputes, but they also make, change and develop the law in myriad ways. Certainly, in common law systems, judicial law-making is widely accepted as an inevitable - and indeed legitimate - part of the judicial role.[11] The courts must also administer justice and run the court system effectively.[12]

Clearly, the strict '*one branch – one function'*[13] view cannot be sustained as a descriptive matter. With its monolithic insistence that each branch perform one single function and no other, it does not capture the complex institutional realities in any modern democracy.[14] This undercuts the explanatory power of the 'pure doctrine'.[15] But it also exposes its limits as a meaningful *ideal* to which the constitutional system should aspire. After all, we *need* the legislature to run its internal affairs and we *want* the Executive to make delegated legislation. We also need the courts to be able to develop the law even as they apply it, and sometimes to change it in significant, albeit interstitial, ways. In fact, it is hard to see how any branch could carry out its roles in any meaningful way, if it was confined to the performance of one single function to the exclusion of others.[16] Some intermixture of functions is both necessary and desirable.

The idea that the branches of government should operate in solitary confinement with 'high walls'[17] between them, fails to capture a crucial feature of the institutional practice,

[8] Nourse (1999) 754; Griffith (2001) 55; Möllers (2013) 8.
[9] Gwyn (1989) 266.
[10] Packenham (1990); Norton (2013b) 9ff; Russell & Gover (2017) 283; Sathanapally (2012) 53; Russell & Cowley (2016) 123.
[11] Lord Irvine (1999) 352; Lord Reid (1972) 22.
[12] Lord Thomas (2017a) [17].
[13] Kavanagh (2016b) 225.
[14] Heun (2011) 22; Mendes & Venzke (2018) 6.
[15] Kyritsis (2017) 38; Lawson (1994) 1231; Magill (2000) 1136-7; Kavanagh (2016b) 226.
[16] Nourse (1999) 758, 760, 782; Kavanagh (2016b) 222; Fombad (2016a) 68; Pierce (1989) 365.
[17] *Plaut v Spendthrift Farms Inc* 514 US 211 (1995) (Scalia J).

namely, the interdependence and interaction between the three branches of government when carrying out their respective roles in the constitutional scheme.[18] Consider, for example, the role of the legislature. When the legislature enacts laws using vague statutory terms, it effectively delegates some decision-making authority to other bodies to fill in the gaps in the legislative framework and specify what those terms mean in concrete cases. [19] This is an example of what Joseph Raz describes as 'directed powers'[20] i.e. where the legislature sets out the general legal framework using 'deliberately underdetermined rules',[21] thus giving other institutional actors the power and discretion to decide what the law requires in the context of individual cases, subject to the ends which must be served by the exercise of those powers. And, as Raz clarifies, the purpose of directed powers is 'to introduce and maintain a certain division of power and labour between various authorities'.[22] Nor should we assume that legislative use of vague statutory terms is a rare or exceptional occurrence. In fact, vagueness a 'pervasive legislative tool'[23] which legislatures use in order to ensure an appropriate division of labour, such that the legislature enacts the general rules whilst allowing for 'particularised equitable decision-making to determine specific cases'.[24] This highlights the fact that the legislature is dependent on courts and other bodies to implement and give effect to the legislation it enacts.

Other forms of interdependence and interaction are manifest when we look at the decisions made by the courts. In fact, from the judicial perspective, the interdependence of the branches of government is even more pronounced, since judges are constitutionally required to respect, implement and give effect to the law enacted by the legislature.[25] As the 'weakest branch of government',[26] the courts are deeply dependent on the other branches of government to respect and implement judicial decisions.[27] Otherwise, their decisions will have no effect. Thus, the idea of each branch operating in solitary confinement, oblivious to the decisions, actions and needs of the other branches, fails to capture the interdependence

[18] Kavanagh (2016b) 227; Eskridge & Frickey (1994) 28-9; Carolan (2009) 259.
[19] Endicott (1999) 194; Yap (2015) 75.
[20] Raz (1994) 242.
[21] Raz (1979) 194.
[22] Raz (1994) 243.
[23] Endicott (1999); Raz (2001) 419 (arguing that vagueness is a 'power-regulating device' between public organs of government in the collaborative law-making enterprise).
[24] Waldron (2016) 140; Burton (1994) 190.
[25] Kyritsis (2017) chapter 7.
[26] Hamilton (1788), Federalist Paper 78.
[27] Whittington (2007) 26; Hübner Mendes (2013) 206.

and constructive interaction between the branches.[28] In order to carry out their roles in the constitutional scheme, each branch must be cognisant of - and responsive to - the roles and responsibilities of the other branches of government which operate within a deeply interdependent and interactive institutional setting.[29] The purity of the 'pure doctrine' is both descriptively inaccurate and normatively implausible.

But if we reject the idea of distinguishing between the branches on the basis of mutually exclusive functions, this begs the question: how can we can account for the distinctness of the branches of government in a way which does not conflate their respective powers? After all, 'the desideratum of distinctness'[30] is a necessary component of any meaningful separation of powers. I propose that the answer lies in the idea of *institutional roles,* and the need for distinct, but inter-connected, institutional roles within a joint institutional enterprise.[31] When we reflect on the nature of governing, we can see that responsible government in any complex society requires the state to carry out a multiplicity of different tasks.[32] Yet, there is no 'one-size-fits-all' decision-making process appropriate for all the tasks the State must carry out.[33] Different tasks call for different decision-making processes. Therefore, it is important to have different institutions carrying different tasks in institutionally differentiated ways.

Typically, we need an institution with energy and efficiency to initiate and propose new policies (the Executive); a deliberative and representative body to scrutinise policy proposals and provide a means of making clear, open, prospective, stable, general rules for the community (a legislative assembly); and an independent body with legal expertise to adjudicate disputes about what the law requires in individual cases (the courts).[34] This provides an outline sketch of the constitutional division of labour between the three main

[28] Schacter (2011) 1397 (rejecting the 'separate spheres' approach to understanding the separation of powers).
[29] Eskridge & Frickey (1994) 28-9.
[30] Kyritsis (2007) 386; Kavanagh (2016b) 229, 232.
[31] Kyritsis (2007) 392; MacFarlane (2013) 8-10.
[32] Green (2007) 165.
[33] Kyritsis (2017) 50; Malleson (2010) 109.
[34] Of course, the three main organs of government will typically be joined by a wider cast of constitutional characters, which supplement and support constitutional democracy, including an independent legal profession, police force, civil service, media bodies, electoral commissions, ombudspersons, anti-corruption commissions etc, see generally Tushnet (2021); Scheppele (2009); Huq & Michaels (2016) 349; Fowkes & Fombad (2016) 1; Pal (2016); Fombad (2016b); Khaitan (2021). On the important role of 'knowledge institutions' in a constitutional democracy (i.e. Universities, schools, libraries, a free press, statistics offices etc), see Jackson (2021).

organs of government in a constitutional democracy. So how do we allocate power to these different branches? We begin by examining the various procedural features of different institutions – e.g. their composition, decision-making process, access to information and the skills and expertise of the officials who work within them. Then, we allocate tasks ‘to those state organs which by virtue of their composition and decision-making process are suited to perform them well’.[35] But we must also elicit the value these bodies instantiate given their various procedural features, because institutions only make sense in light of the purpose they are supposed to achieve and the value they are designed to instantiate.[36] By relating substantive tasks to different institutions based on their institutional characteristics, skills, competence and sources of legitimacy, we try to secure a good division of labour designed to enhance the likelihood of good decision-making overall.[37] Thus, if an institution has epistemic or legitimacy-based strengths, it should be allocated tasks which speak to those strengths. Similarly, if it has epistemic shortcomings, it should not be assigned a task that requires the corresponding epistemic virtues.[38] In short, a good separation of powers channels the multiplicity of decision-making tasks to the forum best placed to carry them out.[39]

Rather than trying to distinguish the branches of government in terms of single, mutually exclusive functions, my approach cashes out the separation of powers in terms of a dynamic division of labour, where each branch plays a distinct, but complementary, institutional role.[40] What sets the institutions apart, on this account, is *not* an injunction to exercise one single function to the exclusion of all others. Instead, it is the imperative to carry out a distinct institutional role in the constitutional scheme as part of a differentiated division of labour. The upshot is a system of ‘separated institutions sharing powers’,[41] whilst carrying out different roles in a collaborative constitutional scheme.[42]

There are three advantages of thinking in terms of institutional roles rather than mutually exclusive functions. First, institutional roles can encompass a multiplicity of functions, thereby providing a better fit with constitutional practice on the ground. For

[35] Kyritsis (2017) 39, 126; Kavanagh (2016b) 231.
[36] Kyritsis (2017) 42ff (describing this as ‘purposive interrelation’); Raz (1979) 106.
[37] Barber (2001) 65.
[38] Kyritsis (2015) 124.
[39] Kavanagh (2016b) 231.
[40] Kyritsis (2015) 107; Kavanagh (2016c).
[41] Neustadt (1964) 43.
[42] Kyritsis (2017) 34.

example, the judicial role of adjudicating and resolving individual disputes can encompass the dual functions of applying and making new law. Similarly, the constitutional role of the Executive can encompass myriad functions, including making delegated legislation, proposing primary legislation, applying or executing legislation enacted by Parliament, and most capaciously, running the country.[43] Therefore, a role-based account can capture the multi-functionality of the branches of government which the traditional 'one branch – one function' view struggles to accommodate.

Second, a role-based account highlights the normative dimension of the separation of powers. It emphasizes the 'role obligations'[44] which attach to the branches of government in the constitutional scheme. Institutional roles are much more than a laundry list of functions, or an enumeration of discrete tasks or jobs to be performed. Instead, they have an irreducibly normative character, constituted by the standards that define what the people who perform those tasks can legitimately do in their institutional or official capacity.[45] When we talk about the *role* of judges or legislators in the constitutional scheme, we are not just making factual statements about what they do. We are also making normative statements about what they *ought* to do and how they ought to behave *qua* judge or *qua* legislator.[46] In doing so, we situate the various functions and tasks of the three branches of government within a 'constitutional role morality',[47] that is, a set of norms, principles and standards which constitute the role and guide its exercise, thereby giving us normative benchmarks against which we can appraise and evaluate the institution's performance.[48]

Third, the idea of institutional roles helps focus our attention on the 'position' or 'place' of each institution within a broader constitutional scheme.[49] Given that the three branches of government must divide and share the power between them, the challenge of articulating the scope and limits of each institutional role becomes a matter of establishing their *relative position* within the constitutional scheme of government.[50] The question about

[43] Endicott (2020b).
[44] Jackson (2016) 1717.
[45] Raz (1979) 105; Weis (2020a); Kyritsis (2017) 42; Sabl (2002) 1-2.
[46] Jackson (2016) 1751; Kyritsis (2015) 9; Heclo (2006) 735-6.
[47] Siegel (2018) 115-118.
[48] Heclo (2008) 81, 134, 137-139 (where 'officium' indicates 'the performance of a task, with heavy overtones of a duty to perform them properly, in light of the duties and obligations which accompany those tasks'); Quinlan (1993) 538-10; Kyritsis (2017) 4, 42; Sabl (2002) 14, 52; Cicero (2000) 30. In this book, I treat 'role' and 'office' as interchangeable terms; cf Weis (2020a).
[49] Weis (2020a) 214; N Siegel (2018) 113.
[50] Mendes & Venzke (2018) 3; Roughan (2013) 5, 137ff; Kyritsis (2017) 4.

the allocation of power and responsibility then becomes a question of 'relative authority'[51] within a constitutional division of labour, in the context of a deeply interdependent, iterative, and interactive constitutional scheme. Instead of marking out strict functional boundaries, my account therefore foregrounds the normative constraints of different role-conceptions, where the branches of government share powers and functions, whilst remaining mindful of the legitimate role of their constitutional partners in governance.

Of course, once we admit some sharing and overlap of function between different constitutional actors, this raises the worry that we thereby undercut our ability to distinguish meaningfully between the branches.[52] For example, if both the courts and the legislature make law, how can we mark out the boundaries between them? The answer is that whilst both institutions make law, they do so in different ways, shaped by their different roles and competences within the constitutional division of labour.[53] Judicial law-making powers tend to be piecemeal and incremental, where judges develop the law gradually using existing legal resources. By contrast, legislatures have the power to make radical, broad-ranging changes in the law not based on existing legal norms.[54] Therefore, the distinction between the institutional roles of the courts and legislature does not map onto a distinction between two different functions (such as making law and applying it). Nor does it map directly onto different subject areas or types of issue (such as policies and principles, law and policy, polycentric and non-polycentric issues).[55] It cuts across those distinctions. The real difference between them resides in the *way* in which each branch of government approaches carries out their respective tasks given the various procedural features of their institutional design and the role each branch plays vis-à-vis each other.[56] As legal philosopher, John Gardner, observed:

> What is really morally important under the heading of the separation of powers is not the separation of law-making powers from law-applying powers, but rather than separation of legislative powers of law-making (ie powers to make legally

[51] Mendes & Venzke (2018) 1.
[52] Kavanagh (2016b) 232.
[53] See Kavanagh (2016b) 232; Ginsburg & Kagan (2005) 3.
[54] Raz (1979) 194; Gardner (2012) 41.
[55] Kavanagh (2016c) 124ff.
[56] Kyritsis (2007); Raz (1979) 106 ('Norm-applying institutions should … be identified by the way they fulfil their functions rather than by their functions themselves').

unprecedented laws) from judicial powers of law-making (ie powers to develop the law gradually using existing legal resources.[57]

In order to secure that meaningful separation, we do not need to erect 'high walls'[58] between the branches in a rigid, compartmentalized allocation of functions. Instead, we need each branch to respect their place within the constitutional scheme, whilst simultaneously respecting the contributions made by their partners in authority.[59] In this way, the branches of government are kept in their place largely by 'the imperatives of role',[60] not by an implausible essentialism about functions.

3. Curbing and Counteracting

Thus far, I have argued that the separation of powers requires a division of labour between the branches of government, where they each play a distinct role in the constitutional scheme. But division-of-labour considerations do not exhaust the requirements of the separation of powers. In order to curb abuse of power and correct for jurisdictional overreach, we need to supplement the division of labour with checks-and-balances. Of course, these two dimensions of the separation of powers are not unrelated. After all, one way of curbing abuse of power it to divide it amongst multiple actors so that it is no longer concentrated in few hands.[61] Nonetheless, in order to secure the division of labour whilst preventing the risk of overreach and usurpation, we need to put supplementary safeguards and monitoring mechanisms in place. In short, we need to 'combine separation with supervision'.[62]

---

[57] Gardner (2012) 41.

[58] *Plaut v Spendthrift Farms Inc* (1995) 514 US 211, 239 *per* Scalia J (arguing that the separation of powers is a 'structural safeguard' and 'prophylactic device, establishing high walls'); though note the warning of Breyer J in the same case (that 'the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens', 245); Greenhouse (1995).

[59] On the difference between legislative- and judicial- powers of law-making, see further Gardner (2012) 37-42; Raz (1979) 109-110, 194-201; Kavanagh (2004) 270-4.

[60] Quinlan (1993) 538.

[61] Claus (2005) 419; Kyritsis (2015) 107.

[62] Kavanagh (2016b) 233-234; Kyritsis (2017) 142.

In thinking about this issue, it is useful to recall James Madison's canonical account of the value of checks and balances within a system of separated powers. Whilst the first task for the separation of powers was to make some 'division of the government into distinct and separate departments'[63] where each department must have a 'will of its own',[64] Madison argued that 'the next and most difficult task is to provide some practical security for each, against the invasion of the others'.[65] Writing in the *Federalist Papers*, Madison famously contended that it was not 'sufficient to mark, with precision, the boundaries of these departments [of government], and to trust to the parchment barriers against the encroaching spirit of power'.[66] In order to avert the risk of abuse of power we must provide 'auxiliary precautions'[67] as checks and balances in order to defend the institutions from undue incursion and enable them to correct for jurisdictional overreach. As Madison put it, we need to 'contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places'.[68] In this way, checks and balances are an important way of buttressing the original division of labour, supporting it with safeguards against the usurpation of power, thus ensuring that the system as a whole will 'reliably track justice'.[69]

The need to include curbing and counteracting mechanisms within a constitutional system stems from normal precepts of institutional design. When setting up institutions, we structure them so that they can play to their institutional strengths, but we also need to mitigate their attendant risks.[70] Therefore, implementing the separation of powers is a 'two-sided exercise',[71] which involves the identification of the valuable role each institution can play, as well as an appreciation of their potential downsides and shortcomings. A good governmental structure will not only *allocate* tasks to institutions well-suited to carry them out; it will also seek to *curb* potential abuse of power. Such safeguards answer to the political

[63] Madison (1788), Federalist no. 51.
[64] Madison (1788), Federalist no. 51; Möllers (2019) 238.
[65] Madison (1788), Federalist no. 48; Allan (1993) 53.
[66] Madison (1788), Federalist no. 51.
[67] Barber (2013).
[68] Madison (1788), Federalist no. 51; Kinley (2015) 32
[69] Kyritsis (2017) 33.
[70] Kyritsis (2012) 303.
[71] Kyritsis (2012) 303.

imperative to keep power in check, whilst providing 'a voice of assurance'[72] that each branch of government will observe their limitations when carrying out their role.[73]

In the canonical texts on the separation of powers, writers such as Montesquieu and the US Founding Fathers stressed the centrality of checks and balances as a way of controlling political power and curbing its potential abuse.[74] Indeed, many contemporary theorists view these checks as the very 'essence'[75] of the separation of powers, echoing Justice Brandeis' iconic statement that the aim of the separation of powers was 'not to promote efficiency but to preclude the exercise of arbitrary government'.[76] But this is a false dichotomy.[77] We are not forced to choose between efficiency and checks-and-balances as the sole or supreme rationale of the separation of powers. Instead, we can acknowledge that the separation of powers is a multi-value ideal which promotes a plurality of normative ends, including efficiency and safeguards, autonomy and constraint, specialisation and control.[78] This more variegated, multi-faceted understanding better reflects the institutional and normative complexity of constitutional government, where a constitutional allocation of power is combined with a system of mutual checks and balances in a *system* of constitutional governance.

4. Comity and Collaboration

Thus far, we have seen that the separation of powers comprises both a division-of-labour and a checks-and-balances dimension. The task of this section is to show that these dual dimensions are both underpinned by the deeper value of inter-institutional collaboration. Of course, one way of dividing labour between different institutions would be to give each body a discrete set of tasks which they carry out in solitary confinement, without any concern for what the other bodies are doing. But such a disjointed array of isolated and insulated bodies could not function as a workable system of constitutional governance. The

[72] Strauss (1987) 513, 526; Kyritsis (2015) 109.
[73] Levinson (2011) 657, 659.
[74] Möllers (2013) 10.
[75] Barendt (1995) 599; Möllers (2019) 244-5; Malleson (2010) 102; Albert (2010) 207; Fombad (2016a) 58ff.
[76] *Myers v Unites States* (1026) 272 US 52, 293 (Brandeis J, dissenting); Fisher (1971) 114.
[77] Pozen (2014) 75; Gwyn (1965) 32-36; Fisher (1971) 114; Malleson (2010) 99ff.
[78] Huq & Michaels (2016) 342; Vile (1998) 303, 368; Möllers (2013) 10.

branches of government are not 'satellites in independent orbit'[79] or 'latifundia that have no connection between them'.[80] Instead, they are constituent parts of a constitutional system, where each depends on the others to carry out their role as part of the 'common project of governance'.[81] Though they have distinct roles, they must work together. Though they are relatively independent from each other, they are also interdependent in various, subtle ways.[82] As constituent parts of a broader collaborative enterprise, they must therefore coordinate their actions and combine their institutional effort in order to work together as part of a *system* of separated powers.[83]

This idea of separate but interconnected branches was famously expressed by the US Supreme Court when it announced that

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[84]

It is also echoed by a former Lord Chief Justice of England and Wales, Lord Thomas,[85] who observed that just because each branch of government has a distinct role in the constitutional scheme

> does not … mean that each branch stands in isolation from the other, each carrying out its functions without reference to, understanding of, or working with the others. The opposite is the case. While careful to ensure they maintain their distinct roles, and do not intrude upon the functions and responsibilities of the others, the Executive, Judiciary and Parliament cannot but work together.[86]

---

[79] Bingham (2000) 230; Roughan (2013) 7.
[80] Barak (2006) 36.
[81] Halberstam (2009) 334; Shane (2003) 506; Levi (1976) 378; Kyritsis (2007) 397; Roughan (2013) 47.
[82] Joseph (2004) 322.
[83] Kavanagh (2022); Kyritsis (2008) 154; King (2008a) 428; Zeisberg (2004) 25.
[84] *Youngstown Sheet and Tube Co v Sawyer* 1953 343 US 579, 635 (Jackson J); Levi (1976) 378; Joseph (2004) 323, 332.
[85] Thomas (2014) [7].
[86] Lord Thomas (2017b) [16]; Lord Thomas (2014) [40], [11] ('… the judiciary, the Executive and Parliament can work well together whilst still respecting their functional boundaries'); Lord Justice Gross (2016) 25; Lord Burnett of Maldon (2018) 17; Kavanagh (2016b) 235-7.

So how should the branches of government engage with other whilst working together in the collaborative constitutional scheme? The key value underpinning the interaction between the branches of government in the collaborative constitution is the duty of inter-institutional comity.[87] Comity is 'that respect which one great organ of the State owes to another'.[88] It is the 'duty of one authority to respect and to support the proper function of other authorities'.[89] Of course, the detailed requirements of comity in context will vary in accordance with the specific subject-matter, institutional relationship and configuration of powers and legal rules in any legal system. Nonetheless, there are two general features of inter-institutional comity which underpin those more detailed, context-dependent dynamics. These are the requirements of *mutual self-restraint* and *mutual support*.[90] In order to treat each other with comity and respect, the branches of government must remain vigilant to avoid interfering with the others' ability to carry out their respective roles; but they may also be required to actively support each other in various ways, in order to realise the common goal of good government under the constitution.[91]

Let us start with the norm of *mutual self-restraint*. This norm of constitutional self-restraint entails that each branch should refrain from interfering with the other branch's capacity to carry out their role, thereby ensuring that they do not undermine or usurp the authority of their counterparts in the constitutional scheme.[92] Put more positively, they must all be 'careful to respect the sphere of action of the other',[93] allowing the other branches sufficient 'leeway'[94] to do their job well. Examples of these norms of self-restraint and non-interference are commonplace in many constitutional systems. For example, the UK courts generally refrain from interfering with the privileges or internal workings of Parliament or

[87] Endicott (2015a); Endicott (2002); King (2008a) 428; Kavanagh (2009a) 169ff.
[88] *Buckley v Attorney General* [1950] Irish Reports 67 [80] (O'Byrne J); Kavanagh (2008) 187ff; Endicott (2021) xv, 17; Stephenson (2016) 139.
[89] Endicott (2021) xv, 22; Lord Thomas (2017b) [18]; *R (Jackson) v Her Majesty's Attorney General* [2005] UKHL 56, [125] ('In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality … is maintained to a large degree by the mutual respect which each institution has for the other').
[90] Kavanagh (2016b) 236.
[91] Bratman (1992); Bratman (2014).
[92] Bickel (1986) 24 (arguing that in discharging their own duties, each branch should strive not to 'lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility').
[93] *AXA General Insurance v HM Advocate* [2011] UKSC 46, [148].
[94] Kavanagh (2016b) 236.

from 'questioning proceedings in Parliament' as prohibited by Article 9 of the Bill of Rights 1689.[95] Another example of constitutional self-restraint is the *sub judice* rule which requires Members of Parliament (MPs) to refrain from discussing matters that are before the courts, in order to avoid prejudicing judicial proceedings and undermining the ability of the courts to make independent decisions.[96] This reflects 'the long-standing comity between the Parliament and the courts which means that each takes care not to intrude on the other's territory, or to undermine the other's authority'.[97]

Self-restraint is also manifest in the requirement that Ministers and parliamentarians should refrain from denigrating or criticizing the courts in an unduly personalised, intemperate or inaccurate way.[98] Although it is acceptable within the British constitutional order for Ministers or parliamentarians to criticize judicial rulings, they must do so in a measured and respectful manner which stops short of impugning the integrity of individual judges or undermining the administration of justice.[99] Politicians must walk the fine line between criticism and condemnation, disagreement and denunciation.[100] For the most part, UK Ministers manage to stay on the right side of this line. When they disagree with the courts, they generally do so without delegitimizing the important role of the courts in the constitutional scheme.[101] In exercising such constitutional self-restraint, the political actors help to sustain 'a political culture that respects the authority of judicial decisions'.[102] If they failed to do so, this would challenge 'the relationship of comity – the mutual respect and understanding for each other's respective constitutional roles – that ought to exist between Parliament and the judges'.[103]

But the duty of comity is not exhausted by the exercise of reciprocal self-restraint and non-interference. It also entails some 'affirmative obligations'[104] which require the branches

[95] Kavanagh (2014).
[96] See Jack (2011) 518; Gee at al (2015) 119-122; King (2019a) 203; Lord Woolf (2008) 84; Lord Hodge (2016) 22; HL Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament*, 6th Report of Session 2006-7, para [41]-[42]; Lord Thomas (2017b) [39]-[43] (examining 'the constitutional limits on judicial comment' on controversial topics of acute political moment).
[97] Grieve (2012a) 6.
[98] Gee et al (2015) 49; O'Brien (2017); Lord Dyson (2018) 18.
[99] Gee et al (2015) 54, 119, 120.
[100] N Siegel (2017) 15; Ruth Bader Ginsburg (1992) 1194-98 (outlining a similar distinction between robust criticism and 'intemperate denunciation' amongst judges on a collegiate court).
[101] N Siegel (2017) 15; Gavison (1999) 241; Kavanagh (2010b) 38.
[102] Gee et al (2015) 116; Shane (2003) 509.
[103] Oliver (2003) 19-20.
[104] Pozen (2014) 38; Sabl (2002) 7; MacDonnell (2013) 624, 636ff.

to positively assist and support one another in carrying out their respective roles in a scheme of constitutional governance.[105] The requirement of *mutual support* is manifest when the courts give effect to legislation enacted by Parliament, implementing it in a faithful manner, giving more determinate content to vague statutory terms, whilst ensuring that legislative enactment hews to constitutional principle. It is also manifest when the government and Parliament provide adequate funding and structural support for the courts, in order to ensure that they are properly equipped to carry out their adjudicative functions.[106] It is also legible when the political branches respect and implement court rulings in a good faith manner,[107] and when political actors or public officials defend the judiciary from illegitimate attacks or damaging critique.[108] The underlying point, here, is that judicial independence cannot be secured by judges alone.[109] It only survives in a system of constitutional governance where there is a culture of respect for the law and the legal system within politics as a whole.[110] As legal scholars on both sides of the Atlantic observe: 'a healthy politics of judicial independence has always depended on a functioning partnership between judges and politicians'.[111] Judicial independence ultimately depends on 'the commitment of the executive and legislature in collaboration with the judiciary to maintain a healthy democracy that is committed to the rule of law.'[112]

Now we can begin to put the pieces of the jigsaw together. The collaborative constitution is one where the branches of government have distinct but complementary roles, whilst respecting each other and working together as partners in a joint enterprise of governing.[113] The fact that the branches must work together in a collaborative enterprise frames and shapes the interaction between them. The collaborative constitution is marked by the following features.

[105] Kyritsis (2017) 46. The norm of mutual support is also legible in the explicit constitutional duty placed on executives and legislatures in some countries to assist so-called 'fourth branch' institutions in supporting the joint enterprise of governing as a whole, see Pal (2016) 100-102.
[106] Lord Thomas (2017b) [19].
[107] Cranston (2013) 25-6; Lord Burnett of Maldon (2018) 7.
[108] Thus, when judges were described as 'enemies of the people' in the *Daily Mail* (Slack (2016)), the then Lord Chancellor (Liz Truss MP) was roundly criticised for failing to defend the courts in a prompt and forthright fashion, see Elliott (2017); Bowcott (2017); Lord Thomas (2017c) [2]-[3]; Lord Thomas (2017b) [41]-[42].
[109] Whittington (2003) 473; Lord Thomas (2015b); Lord Justice Gross (2018) 6.
[110] Gee et al (2015) 11; Levinson (2011) 733; Oliver (2013) 322.
[111] Gee et al (2015) 61, 1, 9, 11, 14, 22, 24; Ferejohn & Kramer (2002) 1039; Katzmann (1988) 2.
[112] Lord Hodge (2015) 473; Lord Justice Gross (2018) 6-7; MacDonnell (2019) 201.
[113] Kumm (2009) 305; Kumm (2017) 56; King (2008a) 428; Joseph (2004) 334; Dyzenhaus (1998) 107; Sager (2004) 5.

First, although the branches of government play distinct roles in the constitutional scheme, they nonetheless share the *common goal* of securing just government under the constitution.[114] By 'just government', I simply mean government which acts justly and fairly on behalf of the community, informed by key constitutional principles including democracy, the rule of law, justice and the protection of rights.[115] To be sure, the common goal of the collaborative enterprise is stated at a high level of abstraction. Nonetheless, it captures the important point that whilst the three branches of government have a distinct role to play, they must show a 'constitutionally grounded concern for the common constitutional enterprise',[116] and a commitment to the '*res publica* as a whole'.[117] This commitment is legible in the constitutional requirement of many systems that all the key constitutional actors - not just judges - must swear an oath to support and uphold the constitution.[118]

Second, whilst the branches of government share a common goal, this in no way presupposes identical or equivalent institutional roles. On the contrary, it is *a common goal, differently realised*.[119] Collaboration signposts 'the coming together of distinct elements, espousing complementary goals but responding to different sets of incentives'.[120] Although the branches have joint work, they have different jobs, working together towards a common goal in role-specific ways.[121] Therefore, the collaborative constitution embraces an 'institutional and perspectival diversity'[122] which inevitably flows from having 'a plurality of governing institutions'[123] working together. Institutional heterogeneity lies at the core of the collaborative constitutional framework.

Third, the collaborative constitution highlights the heterarchical – rather than hierarchical – nature of the relationship between the branches.[124] Instead of a hierarchical

---

[114] Kyritsis (2017) 35; Endicott (2009) 1; *Huddleston* [1986] 2 AER 941, 945, per John Donaldson MR (describing the relationship between the branches as 'a partnership based on a common aim').
[115] Sager (2004) 5-6; MacDonnell (2016) 30.
[116] Jackson (2016) 1743; Halberstam (2004) 801-2; Griffith (1997) 291.
[117] Cicero (2000) 30; Sabl (2002) 1, 141.
[118] Jackson (2016) 1743; Halberstam (2004) 801-2; de Visser (2022) 220; Tushnet (1995) 254-255; Fowkes (2016b) 217.
[119] Levi (1976) 391 (describing 'a harmony of purposes differently fulfilled'); Jackson (2016) 1718; Friedman (1992) 772; Hübner Mendes (2013) 77; Carolan (2016a) 225-7; Carolan (2016b) 115.
[120] Joseph (2004) 334; Carolan (2009) 124, 139
[121] Joseph (2004) 323; Quinlan (1993) 539.
[122] Halberstam (2009); Carolan (2016b) 118, 225; Stephenson (2016) 9; Sabl (2002) 2, 15, 315-6; Shane (2003) 506-507; Hamilton, Federalist 73, at 443.
[123] Sabl (2002) 2, 15; Sadurski (2019) 23; Rosenblum 85; Carolan (2016b) 220-222.
[124] Halberstam (2009) 326-356; R Siegel (2017) 1757; Krisch (2008) 185; Krisch (2010) 111; Rodriguez (2014) 2097.

arrangement of 'command and control' where either the courts or the legislature reign supreme, collaborative constitutionalism envisages a more complex, heterarchical dynamic where the branches of government must engage with each other in a spirit of mutual accommodation rather than antagonism, compromise rather than combat.[125] Crucially, whilst heterarchy is not hierarchy, it is not equality either. Just because each branch has a valuable and legitimate role in the collaborative enterprise does not mean they play equivalent or interchangeable roles. Instead, they play different roles in the constitutional scheme, whilst working together in the spirit of partnership and mutual respect.[126]

Fourth, the relationship between the branches of government is not a one-off encounter or an isolated engagement. Instead, it is a *long-term working relationship* stretching over time.[127] In order to sustain a successful long-term relationship, the interaction between the branches of government is framed by the requirements of *reciprocity, repeat-play* and *reputation*.[128] The ongoing success of a long-term relationship between interdependent actors depends on a healthy reciprocity between the actors and a consideration for the medium or long-term impact of their actions for the relationship as a whole. Opportunistic power-play might secure short-term advantage, but can undermine a branch's reputation as a reliable and trustworthy partner in ongoing constitutional endeavour.[129] An unduly confrontational move against another branch might trigger open retaliation and a resultant break-down in reciprocal respect, thus unleashing vicious 'cycles of escalating constitutional brinkmanship'[130] which risk corroding the mutual respect and support on which successful long-term relationships rely.[131] Given that the branches of government are involved in a repeat-play – rather than one-off – dynamic, this curbs the incentives to engage in conflictual behaviour. Therefore, the fact that the branches are embedded in long-term working relationships significantly shapes and constrains the interaction between them. In order to sustain good working relations over the long-term - and accrue the mutual benefits of a stable constitutional order - the branches of government

[125] Fallon (2001) 11; Halberstam (2009).
[126] Carolan (2016a) 221; Krisch (2008) 185, 196-198.
[127] Balkin (2016) 242-3; Jackson (2016) 1759; Vermeule (2007) 245ff.
[128] Levinson (2011) 676-7, 684, 711; Pozen (2014) 70; Guzman (2008) 33; Putnam (1994) 88ff; Whittington (2002) 806-8; Elster (2010) 32; Levitsky & Ziblatt (2019) 107.
[129] Heclo (2008) 68-9; Schacter (2011) 1367; Ellickson (1991) 156.
[130] Levitsky & Ziblatt (2019) 112; Nelson (2014); Shane (2003) 543.
[131] Pozen (2014) 2; Matthews (1959) 1072.

may be required to pass up on a short-term gain, in order to garner longer-term advantages for the common good and the democratic polity as a whole.[132]

Finally, the values of comity and collaboration require the branches of government to recognize each other as partners in the joint enterprise of government.[133] In a mutual dynamic of '*role recognition*',[134] each branch must be mindful of the scope and limits of their own institutional role, whilst simultaneously respecting the valuable roles of their partners in authority. Rather than riding roughshod over the contributions made by the other branches, or treating them like pawns in a game where winner-takes-all, the branches of government must recognise the legitimacy of the others' contribution to the common endeavour, building on those contributions in a spirit of comity and collaboration.[135] Such mutual recognition does not mean that the branches of government must agree with each other.[136] Far from it. In fact, the strength of the collaborative enterprise depends on the varied contributions of diverse institutional perspectives, and the dynamic tension and robust contestation which necessarily ensue. However, the collaborative constitution nonetheless requires the branches of government to check each other in a spirit of comity and respect, ever mindful of the fact that they each make a partial contribution to a joint enterprise where they must respect the legitimate contributions made by their fellow-participants in the joint scheme.

The upshot for our understanding of the separation of powers is profound. It forces us to abandon the 'pure doctrine'[137] where the branches of government work in splendid isolation with 'high walls' between them. In place of high walls, the branches need to build bridges, forging lasting and constructive working relationships between them in a system of 'shared authority'.[138] Instead of a static vision of mutually exclusive functions, the separation of powers is thus recast as 'a dynamic process of engagement',[139] where the branches must carry out their roles in a relationship of interdependence, reciprocity and mutual respect. Moving from isolation to interaction – and 'from rivals to relationships'[140] – the collaborative

---

[132] Ellickson (1991) 52-56; Bejan (2017) 146; Nagel (1998) 8.
[133] Bratman (2014) 41.
[134] Lord Hodge (2015) 483-4; Lord Hodge (2018) [23].
[135] Sager (2004) 7; Griffith (1997) 291.
[136] Stephenson (2016) 13.
[137] Vile (1998) 13-14.
[138] Kyritsis (2015); Harlow (2016) 173-4; Cartabia (2016) (using the metaphors of 'bridges and walls' to illuminate the 'Italian style' of constitutional adjudication).
[139] Malleson (2010) 100.
[140] Kavanagh (2019); Barsotti et al. (2017) 63-7, 235-239 (describing the institutional and interpretive 'relationality' involved in the Italian constitutional system).

constitution envisages 'separate branches sharing powers',[141] working together towards the common constitutional goal of securing just government under the constitution. On the collaborative vision, the aim of the separation of powers is not to insulate the branches from each other in a rigid, compartmentalised fashion, but rather to structure their interaction and regulate their relationships as constituent parts of a workable system of constitutional governance.[142]

There is no doubt that this marks a departure from some traditional understandings of the constitutional separation of powers. A static compartmentalisation of functions is replaced with a dynamic division of labour. High walls are replaced with the hard work of building – and, crucially, *sustaining* - a constitutional partnership over time.[143] Though the sheer elegance and simplicity of the 'pure doctrine'[144] of the separation of powers is undoubtedly alluring, it posited a purity which exists nowhere in the world, whilst simultaneously exaggerating the stringency of the separation required by the doctrine, and inflating the role of conflict and sanctions within it.[145] Between the dual distorted narratives of an essentialist separation of functions on the one hand, and all-out competition and conflict on the other, we have suppressed the underlying collaborative relationships between the branches of government which make our system work.[146] Instead of emphasising mutual checking and 'sanctioning devices' as the very 'essence'[147] of the separation of powers, the collaborative vision puts those checks in collaborative context, appreciating that the branches of government 'do not merely counteract protectively; they also interact productively'.[148]

By recasting the separation of powers in relational and collaborative terms, our focus of attention shifts away from the competing claims of the courts and legislature to get the last word on rights, towards a more productive inquiry into the nature of the relationship between them. Building constructive constitutional relationships between partners needs more than a set of prohibitions and sanctioning devices to curb potential abuse of power. It also requires norms of constructive engagement and mutual respect which shape, constrain

---

[141] Neustadt (1964) 43.
[142] Kavanagh (2022); Appleby, MacDonnell & Synot (2020) 441-8.
[143] For reliance on the building metaphor in constitutional scholarship, see eg Fowkes (2016); Von Bogdandy & Paris (2020) (on the way in which the Italian and German constitutional courts 'build judicial authority').
[144] Vile (1998) 13.
[145] Kavanagh (2016b) 229; Posner & Vermeule (2010).
[146] Post & Siegel (2003b) 34; Baker (2019) 407-409.
[147] Barendt (1997) 599.
[148] Hickman (2005a) 335; de Londras (2017); Lord Irvine (2003a) 131.

and discipline the mode of interaction between them.[149] What keeps the branches apart, on this vision, is the distinct institutional roles in the constitutional division of labour. But what holds them together are the relational norms of comity and collaboration which positively frame and shape the interaction between them. These norms provide the 'connective tissue'[150] between the branches of government in a system of 'separatedness but interdependence, autonomy but reciprocity'.[151]

5. Conflict within Constraints: From Showdown to Slowdown

With all this talk of the branches of government working together in a spirit of inter-institutional comity - welcoming rather than eschewing the contributions of the other branches and supporting each other in a collaborative enterprise - the question arises whether the collaborative vision of constitutionalism can accommodate ongoing disagreement, competition and conflict between the branches. After all, when we look at the inter-institutional dynamics surrounding controversial rights issues in many countries across the world, it seems as if the branches of government are on a collision course concerning rights, rather than acting as respectful partners in a collaborative enterprise. Indeed, many scholars argue that inter-branch rivalry and conflict is the central normative rationale of the separation of powers, encapsulated so powerfully by the Madisonian mantra that the branches government should be pitted against each other so that 'ambition can be made to counteract ambition'.[152] Rather than striving to *work with* the other branches in a spirit of comity and collaboration, we may think that the branches of government should *work against* each other in a spirit of antagonism where the actions of one branch are met with a countervailing force. Is it not more accurate, then, to portray these inter-institutional dynamics in fundamentally conflictual rather than collaborative terms? Indeed, is the principle of the separation of powers not premised on the very idea that the branches of government *should* conflict rather than collaborate, compete rather than combine?

[149] For an exploration of the negative and positive dimensions of the separation of powers, see Möllers (2019) 246; Möllers (2013) 10, 37, 40-43; Malleson (2010); Hailbronner (2016) 392ff.
[150] Greene (2018) 94; MacDonnell (2019) 204; Kinley (2015) 32.
[151] *Youngstown Sheet and Tube Co v Sawyer* 1953 343 US 579, 635, Jackson J; Post & Siegel (2003a) 1946.
[152] Madison (1788), Federalist no. 51.

The short answer is 'no', but the longer response requires us to disaggregate the cluster of concerns it raises, including *contestation*, *counterbalancing*, *critique, correction*, *competition* and *conflict*. Though often conflated, these are not identical phenomena and the collaborative constitution accommodates them in different ways and to different degrees. Let me start with checks and balances. If the Madisonian mantra about 'ambition counteracting ambition' is simply a dramatic way of expressing the value of robust checks and balances in a system of separated powers, then this is clearly part and parcel of the collaborative constitution. As emphasised above, checks and balances are a constitutive part of the collaborative endeavour. They are axiomatic, not anathema to the collaborative constitutional scheme. A well-functioning collaborative constitution needs a 'healthy opposition'[153] and creative constitutional tension between the branches of government, precisely so that they can hold each other to account and contribute diverse perspectives to the collaborative effort. By curbing the abuse of power and strengthening the division of labour, checks and balances *help* the individual branches of government - and the common constitutional project as a whole - to work well.

At first blush, it may seem paradoxical to suggest that when one branch checks, corrects, or even vetoes the decision of another branch, this is a form of help. But the paradox disappears once we reflect on the fact that mutual oversight, correction and critique are not necessarily incompatible with participation in a joint activity.[154] We are all familiar with the idea of 'constructive criticism' or *criticism as help*.[155] As academics and scholars, for example, we appreciate critical feedback as a way of helping us to improve our analysis, deepen our understanding, and contribute to better scholarship overall. In fact, critical feedback is often perceived as more helpful than a purely laudatory response. This is just one example where mutual critique, contestation, and correction can be a central part of a working relationship, rather than being anathema to it.[156] Note that the emphasis here is on *constructive* criticism. There is a difference between constructive criticism intended to help, and vituperative condemnation designed to harm. Whilst the branches of government are required to check

[153] Fowkes (2016b) 216.
[154] Kyritsis (2015) 11, 118; Carolan (2009) 203.
[155] Bulman-Pozen & Gerken (2009) 1288 (using the analogous idea of the 'connected critic'); Uhr (2006) 43.
[156] For analogous reflections on the idea of *criticism as help*, see Gee et al (2015) 150 (using the example of workplace appraisal); Sunstein & Hastie (2015) 107ff (on the value of priming critical thinking within organisations to enhance the overall performance of group decision-making).

and balance each other in constitutionally prescribed ways, they must nonetheless do so within an overarching normative framework of respect for the roles and relationships which lie at the heart of the constitutional order.

Of course, for any system of separated powers to succeed, there must be a 'tension, a tautness'[157] between the branches. Too much agreement or alignment between them and the requisite distance and tension is lost. But too much acrimony and antagonism means that the norms of mutual respect, civility and constructive engagement will become frayed at the edges, thereby straining the relationship of comity and partnership between the branches. The collaborative constitution navigates a middle course between these two extremes, by accepting the value of inter-institutional contestation and critique, whilst situating that contestation within the broader collaborative dynamics which underpin a long-term, working relationship between partners. It supports a system of sceptical, rather than sanguine, cooperation where each branch is embedded in 'a relationship of mutual tension'[158] as well as mutual respect. As such, the branches must be prepared to check and counterbalance the other as part of an ongoing, collaborative process.[159]

But there is no denying that the relationship between the branches can 'sharpen into conflict'[160] at times. Elected politicians may feel deeply frustrated to be on the receiving end of an adverse judicial decision which impedes them from pursuing their preferred policy. They may respond by venting their frustration in public, decrying judicial interference with their decisions, and castigating the courts as the enemies of democracy.[161] When such conflicts flare up – as they inevitably do from time to time - what comes to the fore is a fiercely antagonistic dynamic marked by anger and frustration, rather than a collaborative relationship marked by respect and restraint. The question, then, is whether this conflictual dynamic captures the fundamental nature of the relationship between the branches?

There are a number of reasons to resist this conclusion. For one thing, we should beware of assuming that these flashpoints of friction are necessarily representative of the ordinary, everyday modes of engagement between the branches. Media coverage of current affairs tends to highlight issues of controversy and conflict, thereby giving conflictual episodes

[157] Griffith (1985) xi; Kavanagh (2019) 69.
[158] Loughlin (2013) 109-10; Post & Siegel (2003a) 1952.
[159] Carolan (2009) 186-7 (proposing an attitude of 'sceptical cooperation' between the branches).
[160] Griffith (2001) 49.
[161] Feldman (2015) 96-97.

undue salience in our reading of the political dynamics. It is one of the truisms of journalism that conflict is newsworthy.[162] It provides 'good red meat for a media that has an insatiable appetite for news'.[163] But whilst the media feasts on these flashpoints of friction – no doubt stoking the fire along the way – we should be wary of assuming that these conflictual episodes are replicated in the day-to-day dynamics of constitutional government on the ground. Viewed in diachronic perspective, the engagement between the branches may reveal pockets of conflict which punctuate a broader and longer trajectory of respectful but robust contestation within a framework of collaborative governance.[164]

In the UK, for example, empirical evidence suggests that the occasional but high-profile conflicts between politicians and judges are the exception not the rule.[165] In the mundane, day-to-day working of the British constitution, government Ministers, parliamentarians and parliamentary officials work hard – often behind the scenes – to constrain, limit, and avoid inflammatory outbursts and corrosive conflict between the key constitutional actors.[166] Similar norms of respect and restraint are legible in other established constitutional democracies.[167] Therefore, the conflictual dimension may be given undue salience in our appreciation of how the branches of government relate to each other in contemporary constitutional democracies. Whilst we are fascinated by the agonistic drama of dissensus, mesmerised by the rifts and rivalries it portends, the dull realities of constitutional government behind the scenes may nonetheless manifest an ongoing commitment – though shaky at times – to an ethic of comity and collaboration based on mutually respectful modes of engagement.[168]

But the deeper point at work here is that successful constitutional governance cannot be a matter of force meeting equal and opposite force in an unbridled battle of wills. If the branches of government were truly at war, locked in a perpetual state of inexorable aggression held only at bay by the threat of sanction from a counteracting force, the constitutional system would degenerate into chaos and lawlessness. Democracy would decay. As in all long-term relationships, it is inevitable that there will be disagreement and

[162] Simons (2015); Flinders (2012) 147.
[163] Lord Woolf (2008) 155; Lord Dyson (2018) 199; Heclo (2008) 27.
[164] Krisch, Corradini & Reimers (2020).
[165] Gee at al (2015) 27.
[166] Gee et al (2015) 24.
[167] Geyh (2006) 234; Pozen (2014) 34; Halberstam (2009) 336-7; Levinson (2011) 733
[168] Chafetz (2011); J Webber (2000) 126.

interbranch conflict at times. Indeed, it is a sign of a healthy relationship that it can tolerate a measure of conflict and friction, without this undermining the relationship completely. However, if antagonism, hostility and open confrontation become the daily *modus vivendi*, the relationship will likely fall apart. Consider the analogy with marriage. Marriages are long-term relationships marked by mutual respect and love in the service of common endeavours. But as we all know, there is no marriage without disagreement and all marriages experience conflict at some stage. Good marriages can weather a certain amount of conflict, but if antagonism becomes pervasive and entrenched, then the marriage is likely to break down. But this does not mean that the institution of marriage is accurately understood or normatively oriented towards no-holds-barred conflict across the board. In fact, the opposite is the case. The rationale of the institution of marriage – the ideal to which it is oriented - is to secure the commitment of two people to a long-term loving relationship, underpinned by the norms of mutual respect, support, trust, and self-restraint, all of which are all required to sustain a long-term relationship over time.

The same is true of the relationship between the branches of government. The existence or prevalence of sharp conflict and angry contestation between the branches does not entail that this is how the constitutional relationships *ought* to be conducted. If political actors try to eviscerate the jurisdiction of the courts, or discredit the legitimacy of the courts in a way which undermines their ability to carry out their judicial role, then those actors have violated the norms of the collaborative constitution on which a well-functioning constitutional depends. Whilst the branches of government can tolerate a degree of antagonism and confrontation at times, it cannot be conflict all the way down.[169] Nor can it be conflict all the time. For a healthy system of constitutional government to exist – and, crucially, to *per*sist over time – the interaction between the branches must be based on unwritten conventions and 'tacit understandings'[170] that the branches of government will treat each other with comity and respect. As with all long-term relationships, the relationship between the branches works best in a context of collaboration and trust. In the longer term, it cannot plausibly be based on conflict.[171] Therefore, existence of conflict does not undercut

[169] Chafetz (2011); Pozen (2014).
[170] Le Sueur (1996) 26; Huq (2018) 1530 (suggesting that a healthy constitutional democracy is better served by 'the restraining friction of formal conventions and expectations of mannered interaction', rather than 'sharp, and even angry, contestation').
[171] Le Sueur (1996) 26; Hay (2007) 161.

the ideal of the collaborative constitution. If it stays within bounds - and is episodic rather than endemic - then it will not undercut the constitutional practice either.

The key problem with the conflictual narrative is that it overlooks and underplays the constitutional norms and constraints which frame and shape the inevitable contestation between the branches.[172] It presents a distorted and exaggerated picture of inter-branch dynamics which foregrounds collision, whilst occluding the underlying collaborative dynamics at play. As a former British Prime Minister, Lord John Russell, put it: 'every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed … each must exercise a wise moderation'.[173] Whilst the Madisonian mantra inclines scholars 'to see interaction between branches as conflicts between independent strategic actors seeking to pursue well-defined policy preferences', this frequently masks 'more cooperative interaction between interdependent branches'.[174]

When we appreciate the practice of mutual respect, restraint, recognition and support between the branches of government, we can see that they are more to each other than merely sites of resistance and pushback. Instead, they are partners in a collaborative enterprise, where they need to work together constructively as part of a common constitutional project.[175] Therefore, the collaborative constitution seeks forbearance rather than ferocity in inter-institutional relations. It enjoins the branches of government to avoid aggressive tactics of 'constitutional hardball'[176] where the branches of government engage 'in a form of unrestrained institutional combat aimed at permanently defeating one's political rivals and not caring about whether the democratic game continues'.[177] It requires them to eschew 'dirty tricks or hardball tactics in the name of civility and fair play'.[178]

Instead of engaging in *constitutional showdowns*,[179] the collaborative vision articulates a preference for *constitutional slowdown* where the branches of government commit to the painstaking processes of constitutional government under the rule of law,

[172] Lovell (2003) xix; Hilbink (2009) 782-3.
[173] Letter of Lord John Russell to Poulett Thomson (October 14, 1839), cited in Shane (2003) 508; N Siegel (2018) 145; Balkin (2018) 17; Levitsky & Ziblatt (2019) 8, 106ff; Holland (2016) 232.
[174] Lovell (2003) 24.
[175] Sabl (2002) 123-4.
[176] Tushnet (2004); Balkin (2008).
[177] Sadurski (2018) 260; Levitsky & Ziblatt (2019) 109.
[178] Levitsky & Ziblatt (2019) 107; Balkin (2018) 19.
[179] Tushnet (2004); Posner & Vermeule (2010) 67ff.

channelling their disagreements through the required institutional structures, whilst accepting the manifold mechanisms of 'horizontal accountability'[180] which the constitution requires. In order to turn its policies into law, the government must go through the arduous stages of the legislative process, incurring all the 'enactment costs'[181] this entails. Similarly, the courts must resolve individual disputes by undertaking the close analysis required by the rigours of the adjudicative process in open court. Without doubt, these mechanisms slow government down.[182] But by proceeding in a way which manifests respect for the constitutional rules of the game, and the legitimate role of their coordinate branches in holding them to account, they evince a commitment to the common goal of just government under the constitution. They accept the cost of *constitutional slowdown* in order to win the greater prize of a well-functioning, institutionally pluralistic but constrained constitutional government.[183] Collaborative constitutionalism is a system where the government is allowed to push forward, but only if it accepts the constitutional imperative that the other branches are entitled to push back.[184]

The fact that the key constitutional actors must work '*through* institutions',[185] *within* the constitutional rules of the game, *as part* of an institutional role-morality, *together with* other actors in a system of 'articulated governance',[186] gives rise to relations of responsibility and constitutional obligation which game-theoretical accounts struggle to accommodate. When constitutional democracy goes well, the interaction between the branches is framed by the norms of comity and collaboration, respect and restraint.[187] But when those norms break down, the relationship can deteriorate into a cycle of mutual confrontation with casualties on all sides. *Constitutional show-down* can lead to constitutional shut-down, where the whole system of constitutional government grinds to a halt.[188] Less dramatically, but no less insidiously, ongoing confrontation between the branches can lead to a gradual erosion of the norms of comity and constructive engagement, ultimately leading to a break-down in the

[180] O'Donnell (1994) 59; Sadurski (2019) 243, 262; Ginsburg & Huq (2018) 150
[181] M Stephenson (2008) 15ff; Metzger (2009) 437.
[182] Issacharoff (2018) 449-450; Jennings (1971) 333; Möllers (2019) 253, 255; Sadurski (2018) 246; Runciman (2019) 145.
[183] Sabl (2002) 64, 85; Jennings (1959) 32, 88; Shane (2003) 508; Norton (2020) 29; Huq (2018) 1522.
[184] Levitsky & Ziblatt (2019) 133; Sabl (2002) 84; Möllers (2019) 253; Runciman (2019) 145; Crewe (2015b) 111.
[185] Heclo (2006) 740; Sabl (2002) 85.
[186] Waldron (2016) 46, 62-5.
[187] Bobbitt (1982) 182; J Webber (2000).
[188] Jackson (2016) 1775-6; K Young (2014).

mutual trust on which the health and well-being of the system depends.[189] A willingness to *slow down,* on the other hand, signals a commitment to comply with the constitutional rules of the game and accept the burdens as well as the benefits of joint institutional action.

Ultimately, the success of any system of separated and shared powers depends on a constitutional commitment by the key political actors to the principles of constitutional democracy. This is the famous Hartian insight that any legal system ultimately rests on the political actors recognising the fundamental principles of the constitutional order, and orienting their behaviour towards those principles.[190] And yet, although this recognition is in some sense voluntary, it does not rest on 'pure public-spirited political altruism'[191] alone. On the contrary, it is bolstered by the institutional architecture, the incentives and the checks and balances embedded in the constitutional scheme, as well as the dense network of civil society actors who work hard to hold political actors to account. It is also shored up by the norms, values, and 'traditions of conduct'[192] which incline the political actors towards respected and reputable constitutional behaviour in a context of *reciprocity, repeat-play,* and *reputation*.[193] Mechanisms of *constitutional slow-down* can also help. After all, slowing down can lead to cooling off.[194] By elongating the time-frame for decision-making in a system of 'articulated governance',[195] the collaborative constitution hews towards stability, comity and mutual respect.

When we look at the constitutional system as a whole, we can see that there are multiple elements of competition and contestation. Political parties fight fiercely to win elections and there is no doubt that the relationship between the Government and Opposition is an adversarial and competitive.[196] But even these overtly competitive dynamics are framed and shaped by the constitutional norms of mutual respect and restraint. Although political parties fight fiercely to win an election, it is a foundational rule of the democratic game that the losing side accepts defeat with grace, courtesy and, ultimately, support for the

[189] Oliver (2013) 321-323; Elster (2000) 100.
[190] Hart (2012); Levinson (2011); MacDonnell (2019) 199, 204; Huq (2018) 1530.
[191] Oliver (2013) 329; Chafetz (2011) 2, 5, 10.
[192] Loughlin (2013) 5, 23, 36
[193] Levinson (2011) 676-7, 684, 711; Pozen (2014) 70.
[194] Issacharoff (2018) 449.
[195] Waldron (2016), chapter 5.
[196] On the relationship between Government and Opposition, see Webber (2016); Gerken (2014); Jennings (1971) 30, 65, 86-92; Fontana (2009).

winning side.[197] Stable democracy requires the 'internalisation of politics as repeat play',[198] where the democratic losers accept the outcome of a fair fight, abiding by the norm that good players should not be sore losers.[199]

Similarly, the competitive and oppositional dynamic between Government and Opposition is framed by norms of comity and collaboration and the 'ethics of constitutional commitment'.[200] As leading political scientists have observed, the Opposition's role is 'to oppose, but not to obstruct'[201] - to scrutinise the Government and hold it firmly to account, but not to impede the Government from running the country or to undermine the constitutional system as a whole. Within the British parliamentary tradition, the Opposition is described as the '*Loyal* Opposition' – a nomenclature which highlights the fact that the Opposition is regarded as 'an essential *part* of the constitution'.[202] Even as it opposes the government of the day, the Opposition must nonetheless remain loyal to the Crown as a symbol of the constitutional system as a whole.[203] Thus, whilst the House of Commons is undoubtedly a 'site of confrontation'[204] between the Government and Opposition, a responsible Opposition eschews a strategy of inveterate and indiscriminate obstruction and relentless filibustering, whilst a responsible Government refrains from using the 'guillotine' at every point to silence the Opposition and prevent it exercising its scrutiny role.[205]

Away from the glare of publicity and the media spotlight on the gladiatorial battles on the floor of the House of Commons, both sides work together behind the scenes through what are tellingly described as 'the usual channels',[206] where the Government and Opposition jointly arrange the legislative business and timetable of the House of Commons, proceeding from the shared understanding that the government has to a right to govern, whilst the Opposition is entitled to oppose. [207] By recognising each other as legitimate adversaries in a

[197] Runciman (2019) 15.
[198] Issacharoff (2018) 448; Waldron (2016) 124.
[199] Ignatieff (2013a).
[200] Chafetz (2011).
[201] Sartori (1966) 151; Johnson (2007) 488; Webber (2016) 1, 10; Waldron (2016); Searing (1982) 242; Jennings (1971) 90 ('Even in normal times, it is not the business of an Opposition to obstruct government. Its purpose is to criticise, not to hinder … Obstruction brings parliamentary government into contempt').
[202] Jennings (1971) 87 (emphasis added).
[203] Jennings (1971) 87.
[204] Webber (2016) 10.
[205] Sartori (1966) 152 (describing political opposition as a form of collaboration); Matthews (1959); Crowe (1983) 909.
[206] Russell & Gover (2017) 87-8, 104, 156.
[207] Griffith, Ryle & Wheeler-Booth (1989) 297-8; Crick (1990) 276.

common constitutional project rather than enemies bent on mutual destruction, the Government and Opposition respect each other's valuable role in the democratic system, accepting that the common goal of achieving good government under the constitution runs deeper than 'the fault lines of partisan acrimony'.[208] The achievement of Opposition is that it brings political dissent into the frame of government, channels it, legitimises it, institutionalises it and makes it part of the constitutional system.[209] There is competition and rivalry to be sure, but it is a 'regulated rivalry'[210] constrained by the rules of the game and a mutual recognition that they both have a valuable part in the joint project of governance.[211] Conflict and contestation between Government and Opposition plays out against a backdrop of comity, collaboration and a sense of constitutional fair play.[212] In short, the oppositional dynamics take effect within a collaborative constitutional framework.[213]

In the long term, every constitutional system relies for stability on norms and practices of mutual respect between its institutions, and a commitment by the key constitutional actors to work together towards the common goal of achieving just government under the constitution.[214] This does not require the branches to agree or harmonise their positions on all matters. Nor does it preclude robust checks and balances. But it does require that they should respect each other's legitimate role in the collaborative endeavour; that they should *channel* their disagreements through the requisite institutional routes set out by the constitution; and that they should recognise each other as *part* – not the whole – of the system of constitutional governance.[215] Collaboration is the ideal which constitutional government realises when it goes well. Indeed, it is testament to this ideal that we often lament outbreaks of antagonism between the branches, and criticise them for not treating each other with comity and respect. We do so because we believe that such antagonism may flout the norms of comity and collaboration which underpin a well-functioning system oriented towards the common good.

---

[208] Ignatieff (2013b) 126; Anastaplo (2004) 1020; de Jouvenel (1966) 169.
[209] Gerken (2014); Waldron (2016) 99-102.
[210] Rosenblum (2008) 12-13, 133-5, 156-7, 363-4.
[211] Jackson (2016) 1756, 1745; Crick (1990) 276.
[212] G Webber (2014b) 107; Norton (2001) 28.
[213] G Webber (2014b) 107, 109; Kavanagh (2019) 67.
[214] Le Sueur (1996) 26; Bobbitt (1982) 182; Malleson (2010) 112.
[215] Rosenblum (2008) 12, 17.

6. Conclusion

This chapter has argued that the relationship between the branches of government is best understood as a collaborative enterprise between all three branches of government where they each have distinct, but complementary, roles to play whilst working together in a spirit of comity and collaboration. Even as the branches of government check and balance each other, they must do so with comity, respect, and a commitment to the collaborative enterprise in which they participate. Robust checks must be accompanied by 'robust civility'.[216] The collaborative understanding allows us to reconceive the constitution as a 'multi-actor network',[217] where the key constitutional actors interact and counteract as part of a broader and more collaborative vision of constitutionalism. Instead of portraying the branches of government as embroiled in a winner-takes-all adversarial struggle between rivals for supremacy, the collaborative constitution envisages constructive engagement and mutual respect as part of shared responsibility for realising rights. Instead of falsely cleaving the courts from the collaborative enterprise, or vilifying the legislature as an inveterate violator of rights, the collaborative constitution appreciates the valuable role that all three branches of government play in an intricate interaction where both rights and democracy get their due.[218]

In the chapters that follow, I illustrate the idea of constitutional constitutionalism in motion, relying on a fine-grained study of inter-institutional interaction in a constitutional democracy. Using the UK as a leading exemplar, I chronicle the complex dynamics of the collaborative constitution. In doing so, I seek to shift the constitutional analysis away from the dominant narrative about dialogue, pointing it towards a collaborative account where self-restraint and support, deference and deferral have an important role to play.[219] Constitutional outspokenness has its place, to be sure, but 'constitutional reticence'[220] also has value in a long-term relationship between partners. Whilst the dialogic account took its cues from structural mechanisms and formal powers contained in the texts of 'new

[216] Garton Ash (2016) 208-214; Sachs (2009) 148-9; Sadurski (2018) 8.
[217] Cohn (2007) 105; McLean (2018) 412; Murray (2013a) 52.
[218] Appleby, MacDonnell & Synot (2020) 442; de Londras (2017).
[219] Dixon & Issacharoff (2016); Lovell (2003); Graber (1993).
[220] J Webber (2000).

Commonwealth'[221] Bills of Rights, the collaborative constitution draws on the deeper well of unwritten constitutional norms and constitutional culture. Talk may be cheap, but collaboration is hard work – disciplined by the requirements of mutual respect, restraint, and recognition which are necessary to sustain a constitutional partnership over time.

By recasting the constitutional separation of powers in *relational* rather than purely *rivalrous* terms, we can shift our focus away from the blunt question about who gets the last word as a matter of formal finality, to look more closely at *how* the branches of government combine, interact, and engage with each other when making decisions about rights.[222] So viewed, we can appreciate a more calibrated, moderated, and mediated form of inter-institutional engagement, framed and shaped by the norms of comity, collaboration and conflict-management. Moving from 'rivals to relationships'[223] – and from conversation to collaboration – I articulate a vision of constitutionalism which sounds more in self-restraint than external policing, more give-and-take than tit-for-tat.[224] Alongside friction, we must consider function.[225] But underlying the dual dimensions of function and friction are the norms of comity, collaboration and constitutional fair play which frame, shape and discipline the interactions between the branches of government.[226] These norms go to the heart of the collaborative constitution in a system of 'separatedness but interdependence, autonomy but reciprocity'.[227] The upshot is that the onerous task of protecting rights is not realised by either the solitary crusade of a Herculean super-judge or the dignified legislature expressing the voice of the people. Instead, it is a collaborative enterprise between the three branches of government, where they each have a distinct but interconnected role to play.

---

[221] Gardbaum (2013b).
[222] Kavanagh (2016) 120; Kavanagh (2015a) 847; Hunt (2016) 2; Roach (2015) 406; Dyzenhaus (2015) 425.
[223] Kavanagh (2019).
[224] King (2008a) 428.
[225] Malleson (2010) 117; Barber (2001) 61.
[226] Pozen (2014).
[227] *Youngstown Sheet and Tube Co v Sawyer* 1953 343 US 579, 635 (Jackson J).