

Principles of Constitutional Design

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whole. Yet, these two systems are generally categorized together as “parliamentary.”

There is a need to capture the differences among political systems in the distribution of separation of powers. An index that captures these differences would be, at the very least, a useful supplement to the general categorization schemes currently in use. It would also permit the use of statistical techniques that assume a continuous variable. Statistical analyses, however, would now read “Political systems with a higher level of separation of powers tend . . .” rather than “Presidential systems tend . . .”

A Separation of Powers Index

The Separation of Powers Index is constructed by assigning weights to the various alterations in the minimal separation-of-powers model developed earlier as the pure parliamentary model (Table 4.1). That is, the various aspects of separation of powers are defined by their contribution to a move away from the pure parliamentary model outlined earlier where all powers are concentrated in a single political entity. As with the Popular Control Index, the final score is additive of a number of institutional elements, and the score assigned each institution is an estimate of each element’s relative importance for producing separation of powers. One apparent anomaly is that under element B the apparent creation of two executives produces less separation of power than the independent election of a single executive. However, if the head of government is in parliament, this prime minister prevents the separately elected executive from devolving much power away from parliament. It should be noted that it is also possible for some institutional elements to produce more than one incremental addition to the total index. For example, if an executive veto is subject to legislative override *and* judicial review, .25 would be added twice to the total. Or, if there is a second national court, .25 would be added to whatever other score was generated by that element.

Technically, the zero point on the index is represented by a pure democracy – all citizens assembled in one place, who together have all political power through majority rule. However, to keep matters simple, the zero point on the index is defined by a system with the characteristics of a pure parliamentary model. To this most basic model,

TABLE 4.1. A Separation of Powers Index

Institutional Element	Contribution to Index Score
Bicameralism	
Strong bicameralism (separate, popular elections)	+1.50
Weak bicameralism – upper house selected by lower house	+0.25
Weak bicameralism – appointed by executive	+0.25
Independent executive	
Separately elected single executive who is both chief of state and head of government	+1.5
Separately elected chief of state, but there is also a head of government in parliament	+0.50
Outside executive is hereditary but has real power	+0.50
Executive outside of parliament elected by parliament	+0.25
Outside executive is hereditary and essentially symbolic	+0.25
Outside executive appointed by British monarch	+0.00
Dual executive (add this score to any from above)	+0.15
Executive veto power	
Executive outside legislature has absolute veto power	+0.50
Executive veto power subject to legislative override	+0.25
Executive veto subject to plebiscite	+0.25
Executive veto subject to judicial review	+0.25
Selection of cabinet or ministers	
Outside executive selects ministers without legislative approval	+0.75
Outside executive selects cabinet with legislative approval	+0.50
Prime minister selects with or without parliament's approval	+0.25
Prime minister selects through formal intermediary (e.g., governor general)	+0.25
Judicial independence	
A separate, elected judiciary	+1.00
Separate judiciary approved by more than one agent (e.g., executive, senate, judicial commission)	+0.50
A separate judiciary selected by one agent	+0.25
Any of these <i>plus</i> a second high or constitutional court	+0.25
Any of these <i>plus</i> life tenure for judges (or good behavior)	+0.25
Level of judicial review	
Supreme court can nullify legislative acts	+0.50
Supreme court precertifies constitutionality of legislation	+0.50
Supreme court has judicial review only over lower courts	+0.25
Degree of federalism	
States or provinces elect national upper house	+0.75
States or provinces elect own assemblies	+0.50
States or provinces have separate, significant competencies	+0.50

(continued)

TABLE 4.1 (continued)

Institutional Element	Contribution to Index Score
A completely federal (not merely decentralized) system	+2.00
Degree of difficulty in amending constitution	
Two legislative houses using simple majority rule	+ .25
Two legislative houses using two-thirds to three-quarters majority	+ .35
Two houses approving twice with intervening election	+ .35
Two houses plus approval by external executive	+ .50
Two houses plus referendum	+ .75
Two houses plus at least a majority of state or provincial legislatures	+ .75
One legislative house – half + 1 majority	+ .00
One legislative house – two-thirds to three-quarters majority	+ .00
One legislative house approves twice with intervening election	+ .00
One legislative house plus approval by external executive	+ .25
One legislative house plus a national referendum	+ .25
One house plus at least a majority of state or provincial legislatures	+ .25
Limits on the range or scope of legislative powers	
Legislative and executive powers limited by a bill of rights	+ .25
Significant constitutional exclusions of or limits on power	+ .50
Legislation can be initiated by referendum	+ .25
Other separation of powers provisions (exemplary, not exhaustive)	
Reasonably independent ombudsman with investigative powers	+ .15
Council of state drawn from two or more agencies to advise executive	+ .10
Multiple agents, any one of whom can force judicial review	+ .05
Most laws must also be approved in a referendum	+ .25
Elected officials can be recalled by plebiscite	+ .10
Independent election commission to oversee election process	+ .10
For every major executive official elected beyond president (e.g., attorney general)	+ .10
For every such executive official selected by two or more agents	+ .05
For every elected executive commission (e.g., mercy commission)	+ .10
For every such commission selected by two or more agents	+ .05
Some in lower house are selected by provincial governments	+ .25

we then add the score for each separation-of-powers institution used by a given country. On the index, Britain has a score of 1.0 (an elected parliament with weak bicameralism, a cabinet appointed by the prime minister, a monarch as a separate but symbolic executive external to parliament, and an amendment process that requires approval by both houses and the external executive). One might argue that a more refined index would allow us to capture the “softness” of factors contributing to the British score, and a better score might be closer to .5 or at least below 1.0. However, the purpose is not to capture some objective phenomenon in all of its nuances, but rather to give us a useful way of comparing political systems. For an initial comparison, the United States has a score of 8.00. The Separation of Powers Index developed here retains the parliamentary and “presidential” forms as virtual opposites. New Zealand’s parliamentarism comes in with a score of .50, and the scale ranges up to a probable high score of around 10.00. We can now array political systems between these two “polar” types without having to force any country into a category that destroys the possibility of taking into account degrees of difference in the separation of powers. It also allows us to identify systems that have a rough equivalence in the separation of powers, even though they use a different institutional mix.

Popular Control versus Popular Sovereignty: An Empirical Test

Over the past three chapters, the discussion has driven home the paradoxical nature of the two faces of sovereignty, and thus of popular sovereignty. Sovereignty is a theoretical concept that simultaneously requires the presence of a supreme power and of limits on that supreme power. A Popular Control Index, developed in Chapter 3, permits quantification of the relative extent to which the people have supreme power in a given political system. A Separation of Powers Index, developed in this chapter, measures the extent to which there are limits placed on popular control. These indices are essentially based on the presence of a variety of institutional provisions in national constitutions. Table 4.2 codifies the relevant data for seventy-five nations that appear to have passed the tests required to be termed constitutional republics. These data include their respective scores on the Popular Control Index and the Separation of Powers Index. Using these data