

Principles of Constitutional Design

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The Separation of Powers

Why the Term “Separation of Powers” Is Used

“Separation of powers” is usually associated with so-called presidential systems, but all political systems use separated powers to some extent. We later use the concept of a “pure parliamentary system” to explicate precisely the codification of an Index of Separation of Powers and demonstrate that only two or three political systems reasonably approximate a pure parliamentary system. At this point it is useful to consider how framers of parliamentary systems develop ways to limit majority rule and to indicate in preliminary fashion why such limits are best considered as manifestations of a separation of powers.

In a “pure” parliamentary system, an electoral majority is translated into a parliamentary majority, and that parliamentary majority selects a prime minister who serves as the sole executive. Also, parliament is the final court of appeal for judicial matters. As we will see, this model is almost always rejected in practice for a more complex one. For example, almost all parliamentary systems also have a separately elected or appointed executive outside of parliament, as well as a supreme or high court that serves as the final body for legal appeals. Regardless of the actual powers of these two separate entities, they articulate institutionally a reluctance to place the power for all governmental functions in the same hands. If an executive is elected separately from parliament, or has a veto power or the power to send either pending or approved

legislation to the supreme court for review, the separation of powers has been significantly strengthened.

In a pure parliamentary system, the functions of ultimately resolving judicial appeals as well as determining whether a piece of legislation is constitutional remain in parliament's hands. Giving either final judicial appeal or the function of constitutional review to a body outside of parliament strengthens the separation of powers, and invariably both are farmed out to one or more high courts in actual parliamentary systems. A number of parliamentary systems even require that all legislation be sent to the high court for a constitutionality review before the legislation can be adopted. Another common practice in parliamentary systems is to have two high courts, one to consider constitutional issues, and another to serve as the highest court of appeal for civil and criminal cases. Some systems have a high court for criminal cases and one for civil cases, which is still another way to strengthen separation of powers. Typically, members of the high court have life tenure or very long terms of office. In each instance, the separate institution serves to thwart direct majority rule.

Framers of constitutional republics have shown great ingenuity in this regard. Aside from bills of rights that prohibit majorities from reaching certain sets of policy decisions, a wide array of governmental functions is placed in extraparliamentary bodies so as to insulate them from majorities acting through parliament. Examples include the creation of electoral commissions that oversee and regulate all elections, constitutionally creating independent bureaucratic courts and commissions that oversee and regulate various aspects of the bureaucracy, placing certain categories of policy within the competence of elected or appointed bodies other than the national parliament, subjecting certain policy issues to automatic public referenda, providing for the activation of a referendum by an executive or a specified minority within parliament, establishing a constitutional amendment process that includes parliament as only one of the required actors or bypasses parliament altogether, and requiring a supermajority for certain issues or for amending the constitution. Also, some political systems create a national council with extraparliamentary competency, or subject executive vetoes to judicial review, or create ombudsmen with considerable powers. The list could go on at great length, but these examples establish the point.

In every instance, some of the power that a “pure” parliament would have for enacting majority will is separated from parliament and given to some entity that is to a greater or lesser degree separated from parliament. The net result is to produce an average separation of powers for parliamentary systems that is close to the average for “presidential” systems. For this reason, we will subsume all means of slowing down, channeling, or thwarting majority will under “separation of powers.”

Four Historical Patterns of Devolution from One-Man Rule

What we now call separation of powers rested historically on a devolution of power away from strong-man rule – whether called a king, emperor, pharaoh, or what have you. This devolution proceeded along one or more of the following paths from one political system to another.

1. Popular consent: Using cultural and/or political institutions to limit the center of power to a range acceptable to “public opinion.”
2. Separation of functions: Dividing power among multiple more or less specialized and independent entities or offices.
3. Representation: Creating an elective body to share the exercise of power with the central governing agent, who now becomes an “executive.”
4. Federalism: Moving significant power away from the center to other, more local arenas of decision making.

These four historical movements eventually developed into the two great principles of Popular Sovereignty and the Separation of Powers, which together undergird and define modern constitutionalism.

As discussed earlier, popular sovereignty rests on the dual impulse for popular control and for limiting that popular control. What was identified earlier as popular consent is the most “primitive” form of the impulse for popular control. As this impulse matures historically and is institutionally codified, it becomes popular control. When the institutions for popular control are in turn limited by other institutions, it becomes popular sovereignty. Elected bodies of representatives, separation of functions, and federalism are prominent among these limiting