

Date Printed: 06/16/2009

JTS Box Number: IFES_78
Tab Number: 114
Document Title: Models of Democratic Government
Document Date: 1989
Document Country: United States -- General
Document Language: English
IFES ID: CE02856



* 0 1 D B A C 3 E - 8 C D D - 4 4 F C - B F 5 4 - 6 8 3 1 9 1 1 F 0 2 2 2 *

MODELS OF DEMOCRATIC GOVERNMENT

Paper Prepared For:

Education for Democracy/International

**A Project of the
American Federation of Teachers**

By:

**JOHN P. FRANK
October, 1989**

Mr. Frank, who practices law with Lewis and Roca, Phoenix, Arizona, is the author of ten books, principally on constitutional law and history, has taught those subjects at Indiana, Yale, and both Arizona universities, and has lectured widely on those matters.

TABLE OF CONTENTS

I.	THE LEGISLATIVE BRANCH.....	1
	A. Composition.....	1
	B. Powers of the Legislature.....	4
	C. Limits on the Legislative Power.....	7
II.	THE EXECUTIVE DEPARTMENT.....	9
	A. Nature of the Executive.....	9
	B. Selection of the Executive.....	10
	C. Powers of the Executive.....	11
	D. Limitations on the Powers of the Chief Executive.....	13
III.	THE JUDICIAL POWER.....	13
	A. Introduction.....	13
	B. Jurisdiction.....	15
	C. Special Considerations Applicable to Courts.....	16
IV.	AMENDMENTS.....	19
V.	LIMITS ON THE POWERS OF GOVERNMENT.....	21
	A. Freedom of Speech, Press, and Religion.....	21
	B. The Just Administration of the Criminal Law.....	25
VI.	THE FUNDAMENTAL RIGHT OF EQUALITY.....	29
VII.	SUMMARY.....	30

This description, based largely on the American system, assumes a three-part government with a legislative, an executive, and a judicial department. All branches of the government of a democratic society must have abundant powers. At the same time, all must be limited. The notes following are organized in terms of powers and limitations with final division on the limitation on all branches of the government.

I. THE LEGISLATIVE BRANCH

A. Composition.

1. The legislative branch should be chosen by election from districts.
2. The districts should be substantially equal in number of voters. If one district has twice as many voters as another district, then the vote of the citizen in the larger district counts only half as much as the vote of a citizen in a smaller district. To avoid this inequality, districts should be of as nearly even in population as possible.
3. The voters should include all adults as measured by age. It is not very important what the minimal age is except that it should be fairly close to what the

particular culture regards as adulthood. In America, it was for many years 21 years of age; more recently it has been reduced to 18. All voters should be citizens of the country. The voters should include men and women, and there should be no exclusions based on race, color or religion or ownership of property.

4. The term for which the elected legislators serve can be whatever appeals to the traditions of the particular country. In America, the term for the larger branch of the national legislature is two years. There is nothing magic about this; it could be some other figure if people desired.

5. What has just been said assumes that the legislators are elected, as in the American system, for a fixed term. If the country chooses to use the English system in which the leadership of the executive department is drawn from the legislature, with a prime minister instead of a president as the chief executive officer, then the legislature may have a term based on alternative systems. The term may run for a period of years, as in England five; but there

can be a new election at any time the prime minister cannot get a majority vote for some important matter of his policy.

Either of these systems is "constitutional" and democratic; in either of them, the voice of the people at an election is the final authority.

6. The legislature will need some employees of its own who are not in either of the other departments. The legislative bodies will need secretaries. Committees of the legislature may need staffs. The prime minister may need some personal assistants in order to handle his work. This system usually starts small. In the American system at the present time, the number of legislative staff employees has become quite large. This is neither a good nor a bad thing; it is simply a question of needs of the particular government. However a new government almost certainly will not have many legislative department employees.

B. Powers of the Legislature.

The powers of a legislature will depend in part upon its traditions and the needs of the country; yet three powers are essential and without them the legislature is not really a legislature at all. These are:

1. The power to lay and collect taxes. The government must have revenue.
2. The power to spend money, which may be obtained either by borrowing or by taxes. The legislature does not make the actual expenditure or the actual loan, but it authorizes the executive department to do so. It is a good limitation to provide that taxes must be equal throughout the country in the sense that whatever is taxed in one part of the country shall be subject to the same tax in all other parts of the country.
3. To declare war and to provide for the common defense of the country.

4. Other important powers of the legislature will depend on whether in a particular country there is one central government which makes all the important laws or whether the lawmaking power is divided between the central government and regions of the country. For example, in the United States, there is a federal government in Washington which exercises federal powers and there are 50 states which exercise state powers and there must be a system for telling these powers apart. In a country which does not have this sort of division, as in England, all powers are in the parliament. There is no need to allow for state powers but there remain some powers for the counties and the cities. The extent to which power is centralized is probably to be determined in accordance with the tradition of the country. However, somewhere, either in a central government or in some subdivision of the country, there must be the following powers:
 - a. Selection of the executive crimes, which means the power to determine what conduct the state will not tolerate and will punish.
 - b. The power to establish a postal system and to authorize the building of whatever roads are

necessary either for the postal system or for general transportation.

- c. In connection with the war power, there needs to be a power to establish armies but it may be desirable to provide that no appropriation for the army shall be for longer than a certain period of time, as for example, two years, so that the army never becomes independent of the legislature. This is to prevent it from becoming a force of its own in the government.

- d. There will be other powers which arise from the traditions of the country and its felt needs. However, a particularly useful catch-all provision, so that the legislature will not in the future be caught up in arguments of detail over its powers, is to provide that the legislature may make all laws which shall be "necessary and proper" to effectuate the other specific powers which it has been given. This helps to avoid making the constitution too bulky. For example, a clause authorizing the raising of armies does not necessarily authorize the purchase of uniforms or guns for the army. The "necessary

and proper" clause will take care of those incidental needs.

C. Limits on the Legislative Power.

The most important limits on the legislative power will be taken up in part IV of this discussion because they apply to all branches of government. Here we note some specialized limitations on the legislature.

1. In the English and American system, the most basic limitation on the tyrannical power of government is that no one should be subject to being arrested and put in prison except in accordance with law and there are limitations on what those laws may be, taken up later. If a government sought to put someone in prison simply on the government's own say so, as Louis XIV did in France in the 17th Century or as Stalin and Hitler did in Russia and Germany in the 20th Century the remedy in the English-speaking countries is to appeal to a court for a writ of habeas corpus. This is an application to a court for an order to the government to produce the arrested person and justify holding him. That particular writ is peculiarly English and American, but is the most sacred single right of an Englishman or an American.

Other countries in the European tradition may have some similar devices for appealing to the courts in such circumstances, but if they do not, they should invent some such procedure. In any case, the American Constitution expressly provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require it." This limitation is very narrowly construed and the right of the citizen to the writ is virtually never denied. Any free government needs some system similar to this.

2. No government should be allowed to make any conduct an offense after the event. That is to say, if what a citizen has done was legal when he did it, the legislature should never be allowed to make it a crime later. Every citizen is entitled to know when he does an act whether it is legal or illegal. The English or American system of limiting the power of the legislature for this purpose is to provide that "no bill of attainder or ex post facto law shall be passed." European countries will have other concepts and labels to get at this protection, but whatever their method is, the legislative body should be limited in this regard.

3. The legislative body should never permit the drawing of money from the public treasury except by laws as passed by it. Any system under which a prime minister or a general or anyone else can take whatever he needs from the treasury as he sees fit should be prohibited; only the legislature can authorize the expenditure of money.

4. If a country has subdivisions, such as states, provinces, or cities, none of them should ever be allowed to raise armies or make war, or coin money, or make agreements with foreign countries without the consent of the national legislature.

II. THE EXECUTIVE DEPARTMENT

A. Nature of the Executive.

Under the American system, the divisions of government are divided into three, a legislative, an executive, and a judicial. Under the English system, the system of government is fundamental divided into two, with the prime minister being both a part of the legislature and the head of

the executive department. In many European countries, this system is compromised so that there is a president with limited executive powers and a prime minister with the bulk of the executive responsibility, to be exercised through departments. The English and the American systems are by far the oldest constitutional governments in the world, the American system dating from 1789 and the English system dating perhaps from 1689, perhaps from some earlier date depending on how one wishes to resolve certain historical questions of impractical importance here. The point is that no one can say with certainty that one system is "better" than the other. However, whatever the executive system, it should have its powers and its limitations and the most important of these are listed in the paragraphs following.

B. Selection of the Executive.

This will depend on which of the forms is to be used. The effective chief executive can be chosen either by the people themselves by election or by the legislative body as is done in the parliamentary system. At the basic stage, the decision must be made which form is desired, and the mechanics of choice will then flow from that decision.

C. Powers of the Executive.

The four most important powers of the executive, no matter how chosen are:

1. The executive shall be the head of the military forces of the country and shall have the final responsibility for defending the country and for conducting war. The executive will necessarily delegate much of this power in two related directions, first to departments operating under his direction responsible, in whatever fashion suits the tradition of the country, for the actual formation and operation of the army, the navy, and the air force, as well as all the defense of the country. Second, he may make delegations either through those departments or directly to military officers of responsibilities for carrying out decisions concerning the defense of the country. What is vital is that the final authority over all military matters, in a democratic society, must rest in the chief executive.

2. The executive shall appoint the major heads of the executive departments. There may or may not be a system of requiring confirmation of those appointments by the legislative body; this may well depend on the traditions of the country. Subject to the laws passed by the legislative branch, those heads of executive departments shall have authority to make further subsidiary appointments and to carry out the policies of their respective department in accordance with the laws as passed by the legislature.

3. The chief executive should have power to make treaties with foreign countries, but those treaties should not become effective until they have been approved in some fashion by the legislative department.

4. It is the ultimate responsibility of the executive to ensure that the laws are faithfully executed. He should have the duty of proposing to the legislature national budgets, containing plans for expenditures and taxation, which however shall not become effective until approved by the legislature, and the budgets may be altered by the legislature in the course of considering them.

The executive should appoint judges and ambassadors and, subject to the other provisions contained here, to conduct either directly as he sees fit or through a department head the foreign affairs of the country.

D. Limitations on the Powers of the Chief Executive.

1. The executive may exercise no powers not authorized as here set out, and, where authority over matters is in the legislative department, shall exercise no powers without the authority of the legislative department.
2. The chief executive, in the exercise of his powers, may not violate any of the provisions set forth in the general limitations on government contained in part V of this document.

III. THE JUDICIAL POWER

A. Introduction.

The country must have courts for two purposes:

1. To enforce the laws of the country. Courts are necessary to try and punish criminals, to collect taxes, to settle any disputes which the citizens may have with his government.

2. Additionally, courts are necessary to settle disputes between citizens or between businesses or between businesses and citizens. These may be the disputes that arise from contracts or from accidents, to take two familiar examples.

3. The country may want several court systems. It may want courts of great simplicity for small disputes. (Has the citizen paid his grocer? Were the goods he bought of acceptable quality?) It may need quite different and more elaborate courts for other purposes. A court suitable to punish traffic offenses may be quite different from a court appropriate to try a murder case or a case involving claimed insurrection against the state. As to the kinds of courts, any constitution should march in two directions. First, it should adopt for immediate use the kinds of courts which are part of the tradition of the country, what the country is used to. Second,

there should be a grant of power to the legislature to create other courts from time to time as needs may arise.

4. It is also customary to have some courts for trials and others for appeals from the trial courts. It is probably just as well in the beginning to adopt the traditional structure of court systems unless they are working very badly.
5. This leaves the matter of the choice of judges and their tenure of office. In some countries, judges are chosen by election and in others they are chosen by appointment by the chief executive of the state. In some countries terms of judges may be for life and in others they may be for as few as four years.
6. In the English and American system, it is common to have trials by jury. This is peculiar to the Anglo-American tradition, is not used on the continent, and is not recommended for European use.

B. Jurisdiction.

The law must provide which matters are to be presented to which courts. The constitution of the United States makes

careful distinctions between matters which will be in the courts of the federal system and the courts of the states. Since a European system is not likely to be a federal system, that particular kind of distinction is not needed but careful lines need to be drawn to distinguish the work of whatever courts there are.

C. Special Considerations Applicable to Courts.

However the courts are constituted, it is important that they be independent and that they be fair and this cannot be left to chance. Certain particular provisions should be included:

1. Whatever the term of the judge may be (we have noted above that this may run from a few years to life), there should be clear provision that a judge cannot be removed from office except for some well defined reason as, for example, taking bribes. A judge should not be subject to removal simply because the executive does not like his decisions. No judiciary can be independent unless it has some such protection. Moreover, there must be some formal procedure for determining whether any judge should be removed. In the American system, impeachments and actual trial

by the legislature is the formal device. This proves too clumsy to be effective and the various states have found other methods to deal with such problems. Since a country may have some tradition of how to deal with errant judges, I say no more about it here.

2. There should be a provision that a judge's compensation cannot be reduced during his term of office. If a judge is to be independent, the legislature and the executive should not be able to cut his pay if dissatisfied with his decisions.

3. A common device of tyranny is the business of charging citizens who have disagreed with their government with the crime of treason. Other countries will have other words for the description of what are charged to be rebellious acts, but they all come to the same thing. Special restrictions should be put on charges of treason:
 - a. No person should be punished for treason except by conviction in a court, and no person should be held in prison on charge of treason without

the protection of the writ of habeas corpus, or its local equivalent, also to be enforced by the courts.

b. Treason should be limited to waging war against the country. To avoid tyranny by secret police, no person should be convicted of treason unless there has been testimony of two witnesses to the same actual act of treason, or on confession in open court. Protection against forced confessions is taken up in the next section.

c. The constitution of the country must be the supreme law of the land. This includes all the laws passed by the legislature and the orders as validly given by the executive. It is to be remembered that the laws of the legislature are to be measured in terms of the broad "necessary and proper" clause discussed above.

4. There is an important difference between the English and the American constitutions which other countries must consider. Under the English system the last word on the meaning of the constitution is the

legislative body, which is to say that if a law is passed by the legislature, it is constitutionally valid. Any debate on conformity to the constitution must take place before the law is adopted. Under the American system, the final decision as to the constitutionality of a given law is the highest court of the country. Either system works fairly well and each has its flaws. A third country adopting a new system might choose either method of determining constitutionality, dependent upon the traditions of the country. In any case, it is a decision which must be made.

IV. AMENDMENTS

No constitution can anticipate all the problems of the future, and there must be some system for changing it. There are, as usual, at least two choices. One is to adopt a difficult system of amendments so that the constitution cannot be easily changed. This is the American system, and by virtue of the difficulty of amendment, this, the oldest written constitution in the world has only been amended 26 times and 10 of those amendments came, really, as a part of the creation of the original constitution itself. A much simpler method of amendment is to provide that

any amendment may be adopted by approval of the legislature and approval of the voters at the next election.

In making these choices, a country is deciding rather more than a simple mechanical question. If amendment is easy, there will be many amendments and the constitution will tend to grow until it is very little different from the general body of laws of the state. If amendment is made difficult, the constitution itself will remain a simple document which the people can have some hope of understanding. The extraordinary durability of the American Constitution is probably due to the difficulty of its amendment process.

On the other hand, the constitution must have elasticity and the capacity of growth somehow if it is intended to endure for ages to come. No constitution could have lasted from the horse and buggy and village days of 18th Century America to the crowded cities of the space age unless the system of government could grow with the needs of the people. This elasticity can be obtained by allowing the courts to interpret the constitution and thus, in effect, to amend it by broadening its construction. For this purpose, again, the "necessary and proper" clause contained among the legislative powers is the key to having a constitution which can live. There have been constitutions by the dozens even in the 20th Century which have risen and fallen quickly; no

constitution can last unless it has a growth capacity somehow, whether by amendment or by construction.

V. **LIMITS ON THE POWERS OF GOVERNMENT**

A constitutional system here outlined creates an extremely powerful government. Such a government could have great capacity to abuse its citizens. Hence, any sound plan creating the mechanics of a strong government should give adequate power to the government to function; but it also should, on the other hand, contain adequate restraints to protect the liberties of the citizen. It is for this reason that constitutions have bills of rights which must be clear, simple and enforce to the hilt if one tyranny is not to be substituted for another.

A. **Freedom of Speech, Press, and Religion.**

Some of those bill of rights provisions as suggested in the paragraphs following:

1. The people should have freedom of religion. This means two quite separate things and while both are extremely important, the first is a little more important than the second. Specifically:

- a. No person should be required to profess any religion against his desires. No person should be punished or handicapped or penalized in any way because he chooses one religion over another or, indeed, no religion at all. Each person should have the free exercise of his own religious choice.
- b. In addition to "free exercise in the American and the English worlds, there can be no "establishment" of religion. This means that no child can be compelled to go to a religious school if he does not wish to and, of fundamentally economic importance, no person can be compelled by taxation to contribute to a religion to which he does not choose to give. In other countries with established religious freedoms. That is to say, a citizen may not be required to attend religious service or to profess a particular religious faith, but he may still be required to pay taxes to support the official religion of the state.

If a country has a firm tradition of compulsory support of the state religion, the country may conclude to continue that practice. This would be unfortunate, but it would not be disastrous since the tax presumably would be a light one since it is general. Unless a country has free exercise of religion, it is not truly free at all. Taxation in support of religion is an unfortunate departure from a perfect freedom, but it is more endurable than any requirement that the citizen profess any particular religion. The latter goes to the individual's freedom of conscience and, indeed, to his soul; the support goes only to his pocketbook.

2. No person should be punished for anything which he says or publishes. If he undertakes overt acts against the state, as by joining an armed mob attacking the capitol, he is subject to punishment, for these would be illegal acts. But the right of advocacy is different. While it is not always easy to draw the line between advocacy and action, as a practical matter the distinction works out fairly well. If, as has been suggested above, the right of the citizen to the writ of habeas corpus or its local variant is the most important right of a free people,

because it protects against arbitrary imprisonment, the freedom of speech and the press are the next important rights of a free people and deserve top place in the scale of values. If any person is dissatisfied with his government, he has a right to say so, and if he wishes peaceable to enlist his neighbors in his cause, he has every right to do so.

Ancillary to his freedom of speech and of the press is the right of the people to assemble and to petition the government to correct the people's grievances. The freedom of speech would not be worth much if the people could not gather to communicate with each other. Freedom of speech would also not be worth much if the people could not tell their government of their distresses. Hence, the right of freedom of speech and of press and the right to assemble and the right to petition for the redress of grievances are usually thought of together.

These rights which have just been described are the key religious and political freedoms of the people.

B. The Just Administration of the Criminal Law.

From the most ancient times and in every society, the key tools of tyranny are in the exercise of criminal law. At its most basic, this tyranny is represented by the seizure of the individual by the state and his imprisonment, perhaps even torture or death without his ever having violated any valid laws and, indeed, often without any charges against him. No free country can tolerate these abuses. Their control requires many rules which must be rigorously enforced. The key requirements of a civilized society follow:

1. No one's home should be broken into by the public or secret police and searched without an order from a court which must be based upon a showing to the court that there is good cause for the search. Similarly, no person should be seized by the police without a similar order. This is not to say that the police may not make arrests of persons perceived to be committing crimes without such a court order; of course, the police may arrest the criminal seen to be breaking into someone's home or committing a crime upon the street. When the charge is that the crime has occurred on some previous occasion, then there must

be a showing to a court before an arrest is made. The most dreaded sound in the modern world is the knock on the door of the home in the middle of the night as the police come to seize the occupant for some political offense, real or imagined. Such power must be guarded against scrupulously and yet the state must not be paralyzed from enforcing the laws. The best system to protect against this abuse is the system of requiring a warrant from a court based on some actual proof that there is some justification for either the arrest or the search.

2. No person shall be held under arrest without a clear and written charge of violation of some valid law of the state. Every citizen charged with any crime is entitled to know the exact nature of the charge against him, and if there is no such valid charge, he should be released on habeas corpus or its equivalent.

3. One way the state can abuse its citizens is by charging them more than once with the same offense. If any person is arrested and is charged, and is tried by a court and is found not guilty, he shall never be charged again for that same offense. If the

state can charge and charge and charge, it cannot fairly break its citizens and ruin their lives.

4. No person should ever be required to be a witness against himself. All over the world today, the greatest abuses of tyrannical governments are torture of prisoners. This should be absolutely prohibited. One way to decrease the likelihood of torture is to provide that the individual need not testify against himself, because if he need not testify against himself and if his involuntary confession will not be accepted in court, there is a reduction of the incentive to torture.

5. Every person charged with an offense shall be entitled to be tried in accordance with the law of the land, which means that the procedures of the court shall be as specified in the law and whatever freedoms the defendant should have must always be allowed him. The procedures for trial may be adapted from the traditions of the country so long as they do not violate any provision of the Bill of Rights as, for example, freedom from imprisonment without charge or freedom from torture.

6. No person shall be convicted of a crime without having the opportunity to hear in court the witnesses against him and to have those witnesses examined as to the truth of their charges; and every; and every person shall be entitled to have witnesses called by the court whom he regards as necessary for his defense, and he shall be entitled to an attorney.

7. Persons charged with crime should not be held for protracted periods in prison awaiting their trials. Where there is no reason established in court that the prisoner is likely to flee, or that he is likely to commit some other crime if put at liberty pending his trial, he should be allowed to go free pending the trial upon posting of bail to ensure his appearance when needed. Fines should not be unreasonably high, being limited in accordance with the traditions of the country; and no cruel and unusual punishment should be allowed. What is "cruel and unusual" will be measured in accordance with the traditions of the country, but for examples, branding, or cutting, or whipping should not be allowed.

VI. THE FUNDAMENTAL RIGHT OF EQUALITY

The fundamental moral right of all free people is the right to be treated equally. There should not be one law for the rich and another for the poor, one law for this religion and another for that, one law for the friends of the state and another for its critics. The state cannot guarantee that in truth all persons will live equally and that is not its responsibility. Some by reason of birth or ability or chance will be more fortunate than others. The state may permit the nation to endure these inequalities, though it may attempt to alleviate them as, for example, by relief for the poor. However, under no circumstances shall the state impose additional inequalities; it should be required to deal evenly and equally with all of its people.

This was the fundamental principle of the French Constitution of 1789. It was to a degree written into the original American Constitution in the 18th Century by the provision that no citizen shall be denied the privileges and immunities of the laws, and it was formally written into the American Constitution by ratification in 1868 with the language that no government may "deny to any person within its jurisdiction the equal protection of the laws."

VII. SUMMARY

Any system of governments of a free people will have divisions of more or less importance. The most absolutely essential, without which there can be no freedom, are:

1. The government must be powerful enough to govern. Freely elected representatives must have the power to tax, to spend, and to defend the country.
2. The executive must have the power to enforce the laws.
3. The judiciary must have the power to interpret the laws and aid in their enforcement.
4. The citizens must have a free and equal right to vote for their representatives. They must have some equivalent of the Anglo-American right of habeas corpus, or freedom from arbitrary imprisonment. They must have the right of freedom of of speech and of the press and the right to assemble and petition for redress of grievances. If they are charged with crime, they must be proceeded against only in accordance with law with the right to fair trial as has

been detailed and with freedom from torture. The state must treat its citizens equally and without discrimination, for all persons are entitled to the equal protection of the laws.