

pondělí 10. ledna 2022

## Public law

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- **website** (najít url) - news, updates, program (calendar of the exam), asi zápisky a prezentace
- **exam - ORAL, general questions (2 - 3) a pak doplňující**

### Jak na zkoušku?

- technical language - be careful with words
- logic
- completeness
- konekce

Law = Any system of regulations (norms) to govern the conduct of the legal persons

Act = A statute enacted by the legislative branch

Right = A power or privilege held by a legal person as the result of a legal rule

Legal personhood = The attribute to be vested of rights and duties (human, being, from birth to death & public, private collective entities: juristic persons)

Legal capacity (svéprávnost) = The capacity of legally acting by exercising the rights and assuming duties ("competent" human being & collective bodies)

Legal fact: The natural events that have legal consequences

Legal act: the human behaviors (of individuals & collective bodies) that have legal consequence

Legal goods: the object of legal right or duties

## 2. The legal rule

- General = The legal rule applies to an indefinite number of subject (not every rule is for everyone, ... to students, to citizens of Milan)
- Abstract = The legal rule applies to an indefinite number of situations
- Formal = the legal rule must respect some requisites of form, “nomen iuris” and procedure of its adoption and transprence define in another rule of law of an higher value
- “Positive” = the legal rule is the expression of given “political” (“polis”) decisions taken by specific bodies or institutions, for the satisfaction of the general (“polis”) interests, in a given historical moment
- Legitimate = the legal rule is consistent with its political source of legitimation and adopted by the competent authority
- Forcible - Effective = the formal capacity of the legal rule to product its effect (and therefore to be spontaneously obeyed by the subjects) and the practical capability of the same legal rule to be legally enforced (if the subject does not spontaneously obey)
- Prescriptive = the legal rule prescribes to do or not do to an “exterior” behaviour, reconnecting consequences for failure

## 3. The Sources of law in general (I): Definition and types

- Definition = **Any act of fact that is allowed to modify the legal order, by introducing a new legal rule or by amending or repealing an existent one, accordingly to the same legal order** (the distinction between acts source of law and facts sources of law is not the same as the one between legal fact and legal act: while legal facts are natural event t’with legal consequences, facts sources of law are human behaviours spontaneously repeated over tie with the idea to follow legal obligation, i. e. A legal “rule of conduct”)
- Types pf sources of law:
  - “Acts”: Constitution, Acts, Regulations, International treaties, EU laws..
  - “Facts”: Customs, Conventions (and Precedents: only in Common Law system)
  - “On production”: Identify the competent authority, procedure, criteria and limits of legal norm
  - “Of production”: Introduce, modify or repeal legal norms

- \* Source of cognisance: provide legal official notice about the legal norms

#### **4. The sources of law in general (II): The legal interpretation**

- Nature of legal interpretation:
  - The function of discovering and expounding the intended signification (“norm”) of a legal text (“disposition”) in order to apply that meaning (“legal rule”) to set a case
- Types of interpretation:
  - Authentic
  - Clear and proper meaning
  - Logical connection
  - Systematical connection
  - Original legislative will (“intentio legislatoris”): only if it is not “anachronistic”
  - Pursuant to the Constitution
  - Pursuant to European Union Law or European Convention on Human Rights
- Interpreters:
  - The same legislative branch: only authentic (“leggi di interpretazione autentica”)
  - The Judges (“giurisprudenza”) (the orienting role played by the supreme courts: Court of Cassation)
  - The law professors (“dottrina”)
  - The public administration (“circulari”)
  - “Anyone”..

#### **5. The sources of law, in general (III): The resolution of “Lacuna” and of “antinomies”**

- Lacuna: As a consequence of a “gap” in the legal order, there is no “proper” rule to be applied to a case
  - Common Law: The judge finds the rule in the common law (new rule then becomes a precedent)
  - Civil law: The judge finds the rule in the statutory law (must find the rule in another legal text in force)

- Analogia legis: finding the rule in “similar” statutory dispositions
- Analogie iuris: finding the rule in the “general principles” established in the Constitution
- Antinomia: There is contradiction (i.e. incompatibility) of meaning between two, or more, different rules, all “potentially” applicable to a case
  - Chronological criterion (based on time -> repeal) (equal force norms)
  - Hierarchical criterion (based on the force of the source: constitutional, primary, secondary, tertiary -> annulment)
  - Criterion of Specialty (based on general/particular area of application -> co-application)
  - Criterion of Attribution (based on matter of attributed legislative power -> non-application)

#### **6. The sources of law, in general (IV): The retroactive effect of laws**

- The law has retroactive effect if it applies not only to acts/facts that will happen from the time it entered into force on, but also for the act/facts that happened prior to its entering into force (therefore if it applies to facts/acts that may be ruled by a different law in force at that time)
- The law SHOULD NOT have retroactive effects because of the values of legal stability and certainty, but this GENERAL Principe may not be codified in A Constitution: in case is not, it won't be binding for the legislative power, that - therefore - may eventually adopt a statute with retroactive effect, but only if it is necessary under a strict scrutiny
- However, under the general constitutional principle “nullum crime sine lege”: the statute, which ESTABLISHES A NEW CRIME, HAS NOT EVER RETROACTIVE EFFECTS.
- On the contrary, under common constitutional Principe “lex mitior”, the statute, which ABOLISHES AN EXISTENT CRIME, HAS RETROACTIVE EFFECTS
- If a new legal provision REPEALS and old one (“chronological criterion”), the old one will be still applied to the PREVIOUS acts/facts (i. e.: the repeal of legal disposition DOES NOT have retroactive effects)
- If a legal disposition is declared INVALID (“hierarchical criterion”), it ceases to have effects also for the past since the day it entered into force (i.e.: the annulment of a legal disposition HAS retroactive effects)

## 7. The sources of law, in general (V): The Constitution

- “Constitutional fact”: “extraordinary”/“revolutionary” historical political events that successfully overthrown the existent Constitution (“ex facto oritur ius”), opening the path for a creation of entire new Constitution (“constitutional breach”) by a next formalised constituent power
- Constitutional “act”: the Constitution (as the result of a formalised constituent power: the constituent power is the power, potentially “unlimited”, to adopt an entire new Constitution) + the constitutional amendments (as the result of a constituted power: the power of amending specific parts of an existent Constitution as foreseen, regulated and limited by the same Constitution)
- **“Codified Constitution”: the Constitution as the single, fundamental legal act-document**, adopted by a formalised constituent power (the constituent power is potentially “unlimited”), that creates ex novo a system of government and of rights + the following **constitutional amendments** (simple modification of the original constitutional text), adopted by a **constituent** power (the power of amending specific parts of an existent Constitution is foreseen, regulated and limited by the same Constitution in force) -> it is typical of modern constitutionalism after the French and American Revolution, and mostly widespread today
- **Kontrola - mobil**
- “Uncodified Constitution”: the “constitution” as the set of multiple legal rules of various nature (statutes, charters, customs, precedents), that shapes an existent system of government and of rights, not embodied in a single fundamental document (approved ex novo by a constituent power) -> it was typical of pre-modern political regimes and it is applied today in U.K, Canada, Israel, San Marino
- Rigid or Flexible Constitution: binding/not binding for legislative power -> reinforced/non reinforced amending process -> supreme/not supreme law
- Voted or Octroyée Constitution: adopted/not adopted by the people or by an elected assembly
- Long or Short Constitution: detailed/not detailed in shaping the system of government and of rights
- “Original” Constitution: the constitutional text as interpreted and applied according to the original meaning at the time of adoption
- “Material” Constitution: the constitutional text as interpreted and applied over time by the political forces
- “Living” Constitution: the constitutional text as interpreted and applied over time by the supreme/constitutional courts
- “Sham” Constitution: a constitutional text formally in force but practically non-effective or scarcely effective in shaping a political regime
- The elements of a modern-day Constitution: fundamental principles; organisation of the state's power among the different branches, and levels, of

government; general outline of the other sources of law, in particular of the statutes; charter of citizens rights

- “Descriptive” (for pre-modern constitutionalism): the “constitution” as the simple “description” of an existent system of government (it may applied to any political society thru history)
- “Prescriptive” (for modern constitutionalism): the “constitution” as the deliberate “creation” of a new system of government and of rights (it comes from the modern idea that the Constitution establishes a “new framework”)
- Political-Ideological Document (contains values) and Legal Document (contains norms)

### **8. The sources of law, in general (VI): the relationship between domestic law and international law / eu law / echr**

- International law
  - Sources of the international law: international customs (general repeated behaviours of the States in their relations, accepted as legally binding) < treaties (specific agreements concluded and ratified by the States, according to their constitutional procedures, which are legally binding) + acts if the international organisations (according to the treaties, that established the same organisations) + general legal principles recognised by civilised nations
  - Modern relationship: **International law has immediate effects** and the Constitution ,ay choose if statutory law must be consistent with International law OR if statutory law may repeal/derogate International law
  - Dualism relationship: international law must be specifically incorporated into domestic law by an act of the legislative - or sometimes executive - power: in this case the international law has same legal forces of the act of incorporation
- EU LAW
  - Sources of EU law: primary (Treaty on European Union + Treaty on the Functioning of the European Union + Charter of Fundamental Rights of European Union) + secondary (EU Regulations + EU Decisions + EU Opinions)
  - In the EU matters, the EU Law prevails over the domestic law (usually, with the exception of the fundamental constitutional principles of the Member State) , it is binding and most applied by national administrative authorities, judges, and legal subjects

- The domestic Judges, having a question about the interpretation or the validity of EU Law, in a pending case the resolution of which is necessary to its Judgment, may/must request to ECJ a "preliminary ruling"
- The ECJ has not a general, but only limited, jurisdiction on EU law: the national Judges apply EU Law
- ECHR
  - Adopted by the Council of Europe (e. European Union), with annexed Protocol, and Interpreted and supervised in its enforcement by the European Court on Human Rights (e. ECJ)
  - The ECHR is not a court of Appeal or a supreme court: the individual, believing their right have been violated by a State Part of the ECHR and who are unable to remedy their claim through their national legal system, may petition the ECHR to hear their case and the ECHR may award financial compensation and require changes in domestic law
  - In general, the ECHR and the consolidated case-law of the ECHR have the same force of the international law but, even if a State does not consider International law as superior to domestic law, the ECHR itself prescribes that the State has the duty to observe effectively the provision of the ECHR

### **9. The sources of law, in general (VII): the contemporary "Legal Systems"**

- System of "CIVIL LAW": The Judge must apply only the acts of the lawmaker (Constitution, statutes, regulations,...) therefore, judgments are only source of interpretation of the existent statutory law, but not of creation of new law, and has only a persuasive, but not binding value (they are "orienting" the interpretation of existent statutory law, and, in the EU, the judgements of the Court of Justice and the consolidated judgments of the European Court of Human Rights which are binding. The statutory law is largely codified. The legal doctrine play a pivotal role in helping the judiciary and the lawmaker, it is a model adopted in Europe, Russia, Latin America, in some Center-African states, Indochina and Japan

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- SYSTEM OF "COMMON LAW: The Judge must apply also the precedents ("common law") established by higher judges in similar cases ("stare decises) besides the act of the lawmaker (Constitution, statutory law, regulations, ...): therefore, the judgments ("case-law") have a binding value (those of the supreme courts become binding for all the other courts). The statutory law is not codified, but there are "restatements" of laws. **The legal doctrine does not play a significant helping role** for the judiciary. It is a model adopted in the U.K. (with

the exception of Scotland), Ireland, USA (with the exception of Louisiana), Canada (with the exception of Quebec), in some South-African states, Australia and New Zealand.

- SYSTEM OF "ISLAMIC LAW" The religious precepts written in the Quran and in the Sunna ("sharia"), combined with the past commentaries and responses ("fatwa") created by Islamic legal doctrine ("ulema"), **are officially considered as state sources of law**, besides the acts of the lawmaker (Constitution, statutes, regulations,...) It is different from other "religious law", such as Canon law or Jewish Law, insofar Islamic Law it is a source of state law and not only the law of the religious organisation as religious groups. It is a model adopted in some North-Africa and Middle-East states
- SYSTEM OF "CHINESE LAW": it is mostly a system of civil-law (Constitution, statutory law, regulations,... without stare decisis) but adapted according to the "**Chinese-way**" based and influenced by socialist political doctrines; some role is still played, in specific contexts, by some pieces of ancient, traditional rules ("fa/ii" ??) derived from Confucianism. It is a model adopted in China.
- SYSTEM OF "CUSTOMARY LAW": It is mostly a system of common law (Constitution, statutory law, regulations,... with stare decisis), which recognises a significant role to customary law spontaneously created by groups. It is a model adopted in India and in some Center African states.

## **10. The rights & the duties, in general**

### • RIGHTS

- Rights towards the State: **liberty** (or negative) / **political** (or participative) / **social** (or positive)
- Rights towards the private natural and juristic persons: **absolute** / **relative**
- Subject of rights: **individual** / **collective** / **communitarian**
- Content of rights: **personal** / **economic** : **in rem** or **in personam**
- Level of recognition: **human (international)** / **European** / **legislative** / **private** (contracts and torts)
- Intensity of protection: **counter-limits to constitutional amending** / **counter-limits to international law** / **statutory guarantee** / **judicial guarantee** / **protected by courts upon public prosecution** / **protected by court upon private lawsuit**

- **Rights / Legitimate interest** (in those states based on administrative law system): when the public administration exercise authoritative powers pursuing the public interest, the individual is not entitled of a right but of a qualified expectation (protected by administrative courts, which may annul the administrative act) that the administrative activity is fair impartial and lawful.

- **DUTIES**

- Duties towards the State: **solidarity / political / economic**
- Duties towards the private natural and juristic persons: **general duties / obligations**
- Subject of duties: **individuals / state / government authorities**
- Content of duties: **personal / economic + of action / of abstention**
- Level of imposition: **human (international) / constitutional / legislative / private (contracts and torts)**
- Intensity of imposition: **constitutional / legislative / contractual and tort / enforced by public administrative authorities directly**
- Responsibilities: **by virtue of law (parental) / by virtue of judicial appointment (guardianship)**

## 11. The state, in generale

- **GENERAL DEFINITION IN PUBLIC LAW:**

- **A body of people that is politically organised, occupies a clearly defined territory and it is sovereign, pursuing mutual safety and common advantages accordingly to some fundamental principles, and establishing a specific legal and institutional system**

- **TERRITORY:**

- Land (soil: dry-land, internal rivers and lakes, archipelagic water + subsoil: under-earths resources)
- Territorial Seas (12 nautical miles from coastline, with exceptions: innocent passage of vessel, and crime onboard not affecting the State)
- Contiguous Zone (24 nautical miles from the coastline but only for preventive controls or subsequent interventions in respect of the territorial seas)

- Continental Shelf (200 mil from the coastline, but only for exploitation rights)
- Airspace (atmosphere, aprox. 70 km)
- Vessel and aircrafts: onboard in international spaces, according to the flag (for warships also in national space)
- **PEOPLE** (not population, not nation) <-> citizenship (“nationality”) (stateless, prevention of and minimum set of rights)
  - Birthright
    - A. ius soli
    - B. ius sanguinis
  - Naturalisation:
    - A. ius connubli
    - B. ius culturae
    - C. permanent residency
    - D. serving in the army, special merits...
  - Loss of nationality:
    - A. serving in foreign army or in a foreign public office (after intimation), permanent residency abroad (upon request), serious crimes against the State (after the final judgment)...
- **SOVEREIGNTY:**
  - The political power to rule and govern the people on the territory:
    - A. International legal independence (“superiorem non recognoscens”)
    - B. Internal legal supremacy (“imperium”)

## **12, The forms of state (I): AUTOCRATIC**

### • **ABSOLUTISM**

- The “pessimistic” view of the “state of nature”
- The “social contract” considers all the rights of the individuals before the State: none of them are unalienable and therefore they are vested into the State, which is not bound by them

- State's sovereignty is vested in a Monarch without limitation (“principes legibus solutes est”) and with no separation of powers into different branches
- “Professional” Bureaucracy, army and Judges respondent directly to the Monarch
- Mercantilism
- The State`s (Monarch`s) authority promotes the enhancement of the State`s power
- **“ENLIGHTENED ABSOLUTISM” (“Stato di polizia” ... not “police”)**
  - The “enlightened” nature of Monarch
  - Recognition of some limited “rights” protected by the courts in respect of the state's officials
  - Mercantilism
  - Some codification of the laws in order to make the law rational and certain (for the peasants)
  - The State's (Monarch's) authority promotes the subjects` welfare according to the view of the (“paternalistic”) Monarch
- **AUTHORITARIANISM**
  - State`s sovereignty is concentrated in a Dictator (dictatorship) a in a Junta or in a Single Party (oligarchy), with no separation of powers into different branches, or with a sham limitation and sham separation
  - Bureaucracy, Military and Judges dominated or strongly influenced by the Executive
  - Significant limitations of basic individuals rights and wide interference of the State in many aspects of social and private life
  - Control if the economy (thru nationalisations or monopolies in favour of State`s enterprises)

### **13. The forms of state (II): LIBERAL-DEMOCRATIC**

- The “optics-individualistic”view of the “state of nature”
- The “social contract” does not consider all the rights of the individuals before the State: some of them are considered unalienable and therefore constitute legal limits to the State`s power

- Rule of law (“Rechtsstaat”)
  - The state’s powers are exercised within the constraints set out by the Constitution (firstly flexible, then rigid) and the law enacted following a transparent, democratic and accountable process, in accordance with the respect of fundamental rights and of legal certainty, under the control of independent and impartial Courts (then vested also of the power to struck down a statute if it is unconstitutional)
- Equality principle as “equal justice under law”
- Liberty Rights
- Political Rights (voting rights: firstly limited, then universal)
- Economic Rights as “fundamental” and “inviolable” (they constitute limits of State’s intervention)
- Representative elected bodies (at the beginning: of the Nation, after; of the people)
- Separation of powers among different branches (“check and balances”)
- Market Economy ruled (NOT governed) by the State
- The State recognises, protects and promotes the autonomy of the individual (only)

#### **14. The forms of state (III): SOCIAL-DEMOCRATIC**

- The “optimistic-communitarian” view of the “state of nature”
- The “social contract” is inspired by the State’s recognition and protection of dignity and of rights, and by the State’s commitment to the pursuit of social justice (in a veil of ignorance)
- Rule of law
  - All the powers are exercised within the constraint set out by the Constitution and the law, enacted following a transparent, open and accountable process, in accordance with the respect of human dignity and rights , and of legal certainty and under the control of independent and impartial courts, that must also struck down a struck if it is unconstitutional
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## 15. THE FORMS OF STATE (IV): THEOCRATIC | SOCIALIST

### ▪ THE CONTEMPORARY THEOCRATIC MODEL

The State recognizes the rule of law, the division of powers, the written Constitutions as supreme law of the land, the elected parliaments (and eventually Presidents), the guarantee of individual and social rights, the pluralist political parties system (in a limited way), *but the model differs from the common liberal-democratic or social-democratic form because of some "key-point" distinctions:*

- The religious dicta are considered as state's source of law and as also a sources of interpretation of the parliamentary statutes
- Only one religion is recognized as the religion of the State and has authoritative specific privileges and immunities
- Religious internal official bodies are interwoven with state official bodies and powers
- The religious political parties play a pivotal role

### ▪ THE CONTEMPORARY SOCIALIST MODEL

The State implements (or "mimics") the principle of popular sovereignty, the rule of law, some different branches of government, the written Constitutions as supreme law of the land, some form of elected popular assemblies (mainly at local level), the recognition and guarantee of some individual and social rights, some political (very limited) pluralism *but the model differs from the common liberal-democratic or social-democratic form because of some "key-point" distinctions* (it is self-represented as an "alternative" form of "popular democracy" in respect of the Western democracy):

- The Communist Party plays a pivotal (leadership/guide) role in the political system and in the governance of the state
- Communist party official bodies are interwoven with state official bodies and powers
- There is not majority/opposition political alternative: the Communist Party is the governing party and may consult the other parties (or the non affiliated persons)
- There is a form of people's democratic dictatorship
- All administrative, supervisory, judicial, organs of the state are created by the people's congresses, to which they are responsible and by which they are supervised
- Socialist (NOT "social") market economy as a "dual system" with a pivotal role of the state in the overall economic system

## 16. THE FORMS OF STATE (V): UNITARY | REGIONAL

### ▪ UNITARY

- Concentration of sovereignty and of institutional powers at the national level *only* (those powers may be exercised by *national* authorities distributed over the territory, which are acting as "*longa manus*" of the central power). Only the national level is sovereign and has statehood and a Constitution
- There may be local autonomies, but those have only administrative powers exercised by a limited apparatus

### ▪ REGIONAL

- The "sub-national bodies" (e.g., the "*Regions*") have legislative and administrative powers exercised by complete apparatuses; they are **not** directly represented in the circuit of political national decisions (i.e.: the National Parliament) and in the national constitution's amending process; they do **not** have fully autonomous power to regulate their own fundamental institutions; they have limited tax powers and financial autonomy; they are autonomous but **not** sovereign; they do **not** have statehood and they do **not** have a Constitution; they do **not** have full international agency; they cannot leave the Nation by any legal mean
- The "national body" (e.g.: the "*State*") retains typical sovereign powers (currency, diplomacy, army, external boundaries, internal commerce, private and criminal laws, taxes and expenditures, economic development and competition, foreign relations, ...); it has legislative, executive and judiciary complete apparatuses; it has full statehood and international personhood, and a Constitution; it exercises substitutive powers over the regions
- Legislative powers may be allocated – in the National Constitution – by using:
  - List of matters + "residual" clause **OR**
  - List of "separated" matters + list of "concurring" matters (in the concurring matters the powers may be shared btw. State and Regions in a *blocked way*: framework/detailed or in a *flexible way*: subsidiarity and proportionality) + "residual clause" (usually, the "residual" clause is in favor of the national level but it may also be in favor of the regional level)
- Administrative powers may be allocated – in the National Constitution – by using the principle of subsidiarity and proportionality **OR** the principle of parallelism

## FEDERAL | MULTILEVEL

## ■ FEDERAL

- The “sub-national bodies” (e.g.: the “States”) have legislative, administrative and judiciary powers exercised by complete apparatuses; they are represented in one of the Houses of a bicameral Parliament; they participate in the federal constitution’s amending process; they have autonomous power to regulate their fundamental institutions with a wide spectrum of possibilities; they have extended tax powers and financial autonomy; they have a Constitution; they do **not** have international agency and personhood; they adopt civil and criminal laws; they cannot legally leave the Federation
- The “national body” (e.g.: the “Federation”) has full statehood and international personhood, and a Constitution; it has legislative, administrative and judiciary powers exercised by complete legislative, administrative and judiciary apparatuses; it has relevant sovereign powers (currency, army, diplomacy, external boundaries and internal commerce, foreign relations)
- Legislative powers may be allocated – in the Federal Constitution – by using:
  - List of matters + “residual” clause (usually, the “residual clause” is in favor of the sub-national bodies) **OR**
  - List of “separated” matters + list of “concurring” matters (in the concurring matters the powers may be shared btw. Federation and States according to subsidiarity and proportionality) + “residual clause” (in favor of the sub-national level)
- Administrative powers may be allocated – in the Federal Constitution – by using (usually) the principle of parallelism
- Judiciary powers may be allocated – in the Federal Constitution – according to the applicable law or if the litigants are citizens of different sub-national bodies

## ■ MULTILEVEL

- The “supra-national organization” (e.g.: the EU) may have legislative, administrative and judiciary powers, but the execution and adjudication of supranational law rely *mostly* on the Member States; the Member States *do* participate to the supranational legislative process; the Member States are the “masters” of the international treaties on which the supranational organization is based and ruled; the Member States may recess from the supranational organization; the Member States have the “Kompetenz-Kompetenz”; the supranational organization has *not* statehood and *not* a Constitution, but it has some form of international agency and some relevant powers (common market, economic development, ...); the supranational law have direct effect
- The “national body” (e.g.: the EU Member State) has legislative, executive and judiciary powers exercised by complete apparatuses; it retains typical sovereign powers (currency, diplomacy, army, external boundaries, criminal and civil law, foreign relations...), it has statehood and international personhood, and a Constitution
- Legislative powers may be allocated – in the Treaties – by using: a lists of matters “separated” in favor of the supranational organization + list of “concurring” matters (*flexible*: subsidiarity and proportionality) + “generic clause” (always in favor of the Member States)

## 18. THE FORMS OF GOVERNMENT IN THE LIBERAL-DEMOCRATIC STATES (I): ELECTORAL LAWS &amp; POLITICAL SYSTEMS

## ■ THE SOURCES OF THE ELECTORAL LAW

- Constitutional elements (*usually* voting rights: active/passive, principles of voting, number of seats, constituencies’ general base, the vote as a right only – liberalism – or as a right and a duty - organicism)
- Intra-parliamentary elements (*Parliamentary Standing Orders*, *usually* rules and number of MP for the formation of parliamentary groups, rules for the validation of MP election and disqualification, ...)
- Statutory elements: the *Electoral Act* (electoral formula, voting rules, rules on the electoral campaign)

## ■ THE ELECTORAL LAWS

- Proportional systems (multiple-position constituency: list of candidates for each party): the parliamentary seats are proportional to the number of votes obtained
  - Closed (or blocked) lists: written candidates / Open list (or preferences): writing-in candidates
  - Additional seats (or majority bonus)
  - Minimum Threshold
- Majoritarian systems (single-position constituency: one candidate for each party): each parliamentary seat is assigned to the one which obtains the majority of the votes
  - One-round (*plurality*: “first-past-the post”) / Two-round (*majority*: top two candidates from the first round **OR** all the candidates from the first round who pass a threshold)
- Mixed Systems

## ■ THE POLITICAL SYSTEM

- Bipartitism: two political parties and two parliamentary groups (+ eventually minor parties/groups)
- Bipolarism: two coalitions of parties (the parties may present a unified list for the coalition, or they may present single lists with one coalition’s agreement); there may be one parliamentary group for each coalition (or not)
- Multipartitism: many political parties-lists and many parliamentary groups (one for each party-list)

## Lecture 07 (24 January 2022) - Doplnit první slide

## Lecture 08 (25 January 2022) - doplnit celé

# 25. THE FORMS OF GOVERNMENT IN THE LIBERAL-DEMOCRATIC STATES (VIII): POLITICAL-LEGISLATIVE ACTIVITY

## THE PARLIAMENT

- Unicameral | Bicameral: representative of sub-national entities (federalism) / representative of different components of society / reflection-cooling
- The role of the President: speaker
- Commissions → legislative affairs (different role played by the House)
- Committees → internal affairs | consultative affairs | inquiry affairs
- Internal Autonomy (sources of law: standing orders | budget autonomy | immunity from external police intervention)
- MP's privileges: independence ("free mandate") | immunity (from prosecution: absolute / relative: "leave") | indemnity

## THE LEGISLATIVE ACTIVITY

- The initiative: only internal | mixed: with a dominant role of the Government (or the single President of the Executive) / popular or other bodies' initiative
- Equal bicameralism / Differentiated bicameralism: joint special commissions or joint sessions or definitive approval by one of the Houses
- Voting: open/secret | Majority of the members *must be present* | Different majorities to pass: "simple" / "absolute" / "qualified"
- The power of the head of State: issuing or promulgation: mandatory | veto-power: suspensive (rebuttable with a second parliamentary vote: simple or qualified majority), silent promulgation | type of control: regularity / constitutionality (preventive control) / political-opportunity
- Statutory Limits
- Reinforced Statutes
- Parliamentary Limits
- Budget Powers | International Treaties Power | Elective Power | Powers related to the EU system (control of subsidiarity)

## THE POLITICAL ADDRESS ACTIVITY

- Agenda
- Confidence
- Control
- Address
- Hearings

## THE GOVERNMENT

- Law-making power: delegated | emergency-urgency
- Regulatory Powers
- General and Special Policies
- Appointment

# 26. THE MODELS OF ADMINISTRATIVE ACTIVITY IN THE LIBERAL-DEMOCRATIC STATES

## CLASSICAL MINISTERIAL MODEL

- Typical of the French Administrative system since the Napoleonic era (replied in the continental Europe model)
- Concentration of the administrative power in the Ministerial national bodies (organized in Departments, Divisions, Offices, with a uniform structure)
- The Ministry has its headquarters in the capital city but also peripheral offices distributed on the territories as "terminals" of the command-chains
- The internal structure of the Ministry is based upon hierarchy: the superior in office may take the file of the inferior and decide it (call-back principle)
- The sphere of political decisions is in "continuity" with the bureaucratic sphere of administration
- Civil servants selected by public concurrence, operating in a third-party position, pursuing only national public interests, and they are ruled by a special laws' sector, different from labor law and contracts, with specialized fora (administrative tribunals) for controversies (the "administrative status" of public employees)

## NEW MINISTERIAL MODEL

- Contemporary ministerial model (borrowed by the Anglo-Saxon administrative model)
- The administrative power is exercised by many multiple public administrations (national, regional, local) organized in different ways
- There are autonomous public organisms charged of specific economic or social activity, supervised by national or regional ministries, or fully-autonomous
- The Ministry has still its headquarters in the capital city but there are many more peripheral offices distributed on the territories
- The internal structure of the Ministry is based upon internal autonomy: the superior in office cannot take the file of the inferior and decide it
- The sphere of political decisions is "separated" from the bureaucratic sphere of administration: powers of address, resources' allocation and control
- Civil servants selected by public concurrence, operating in a third-party position, pursuing national public interests, but they ruled by ordinary labor law and contracts and their controversies are assessed by ordinary courts (the "common status" of public employees)

## AGENCIES' MODEL

- Performs "technical-operative" activity (once taken by the same Ministerial internal offices) in a position of autonomy, self-organization and self-management, with their own budget and legal personhood. The activity is provided for all the public administrations
- Addressed and monitored by Ministry on specific standards of activity and result

## INDEPENDENT AUTHORITIES' MODEL

- Public bodies, with a high level of technical competence, appointed neutrally
- Not dependent on a Ministry and, therefore, outside the political address and control. Fully autonomous with own budget, management and personhood
- To separate the Government (and, therefore, political address and control) of rule-making and administrative choices in economic sectors to safeguard public and private interests of constitutional nature
- To protect public interests and constitutional rights in a neutral way

## 26. THE SYSTEMS OF GUARANTEES IN THE LIBERAL-DEMOCRATIC STATES (I): JUDICIARY

- **SYSTEM:**
  - "unique judiciary" (*only one judiciary system*)
  - "multiple judiciary" (*two or more separated judiciary systems in parallel: it is NOT a distinction upon higher/lower courts*)
    - ordinary courts:
      - selected divisions (civil / criminal)
    - specialized courts:
      - differs from the ordinary courts in the selection of judges and/or in the intervention of experts in the court panels
      - hear cases on the base of: personnel (military courts) | lawsuit (courts of audits, tax courts) | public/private position of the litigants (administrative courts)
- *NO "ex post facto" court*
- **SELECTION OF JUDGES:**
  - Appointed judges (by other state's body)
  - Elected judges (by the people)
  - Selected judges (by public concourse)
- **MODELS OF CRIMINAL JUSTICE**
  - Public Prosecutors: belonging to the Judiciary branch / belonging to the Executive branch
  - Criminal Judges: sitting judge (adversarial model) / investigating judge (inquisitional model)
- **INDEPENDENCE**
  - by specific "Superior Councils" (composed by judges) and/or
  - by guarantees: irrevocability, fixed tenure and term, internal career based on professional merits and qualifications

## 27. THE SYSTEMS OF GUARANTEES IN THE LIBERAL-DEMOCRATIC STATES (II): CONSTITUTIONAL JUSTICE

- **BODY**
  - *Political:*
    - Monocratic (Head of State)
    - Collegial (internal: parliamentary commission / external: Constitutional Council)
  - *Judicial:*
    - Ordinary courts: Centralized (Supreme Court) / Decentralized (all the judges)
    - Specialized court: Constitutional Court (only centralized)
- **LODGING**
  - *Type:*
    - Petition / Question
  - *Time:*
    - Preventative ("a priori") / Repressive ("a posteriori")
  - *Access:*
    - Incidental: by all the judges or by the supreme courts only, during a pending trial
    - Direct (without any pending trial):
      - By specific constitutional bodies or specific courts (usually, the supreme ones)
      - By national government / local governments
      - By the people (recurso de amparo / verfassungsbeschwerde: usually, for protection of fundamental rights)
- **DECISIONS**
  - *Regarding the petition or question:*
    - Procedural / Acceptance / Dismissal
  - *Regarding the effects:*
    - Annulment:
      - "ex tunc" (retrospective) / "ex nunc"
      - "erga omens" (general) / "inter partes"
    - Declaratory (parliamentary privilege)

## Elections and political rights

Article 1 of the Italian Constitution:

*«Italy is a democratic Republic founded on labour.»*

*Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution»*

## Elections and political rights

*«Sovereignty belongs to the people...»*

- Sovereignty «**belongs**» to the people: at every given time (it does not «originate» from the people, or «emanate» from the people)
- **Democratic principle.** One of the founding principles of contemporary representative democracy. The people is not directly involved in the administration of the *res publica*. However, it is indirectly involved, through the selection of its representatives that sit in Parliament
- Who's the "people"?

- The people are those who hold Italian citizenship
- (May change later to minorities e. t.)

## Elections and political rights

«*Sovereignty belongs to the people...*»

- Sovereignty **legally** belongs to the people (not symbolically): actual relation between representatives (MPs) and represented (citizens)
- Representatives (MPs) must be legitimized (by the people) to create “rules”
  - Rules without legitimization: totalitarianism, authoritarianism
  - Legitimization without rules: populism, cesarism



# Elections and political rights

*«...and is exercised by the people in the forms and within the limits of the Constitution»*

The “limits” and “forms” are those typical of a representative democracy...

- **Elections** (universal suffrage)
- **Majority rule**
- **Protection of minorities** in Parliament and society: the minority must be given a fair chance to become the majority (through democratic means)



# Elections and political rights

*«...and is exercised by the people in the forms and within the limits of the Constitution»*

The “limits” and “forms” are those typical of a representative democracy...

- **Political rights.** Rights of participation (rights *within* the State)
  - Right to vote (art. 48 Cost.) - active electorate
  - Right to hold public offices (art. 51 Cost.) - passive electorate
  - Right of association in political parties (art. 49 Cost.)

# DOPLNIT

**NOW ONLY: Political, Regional, EU elections**

