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INTRODUCTION TO THE LEGAL SYSTEM MODULE 2

2° BIEM/BIEF

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LESSON 1 - CHARACTERISTIC OF THE STATE

Legal System

- *Ubi Societas, Ibi Ius:*
  - Legal systems are the systems of rules emerging every time humans enter forms of cohabitation or coexistence

- Whenever single individuals create a social group, then a set of rules governing the life of this group will emerge
  - Therefore, we can say that legal systems are a social phenomenon that emerges when people decide to group together to pursue certain aims.
  - However, rules in a social group must be enforced: therefore, an authority within the group will have the power to create legal norms and to enforce them, in order to sanction illicit behavior. Thus, a "center of authority" is selected

- Constitutive elements of a legal system:
  - A plurality of individuals coexisting
  - Shared criteria to evaluate behavior
  - Rules making some behaviors illicit and rewarding others
  - An authority within the group with some form of law- making power and the power to enforce rules

- We have two Different Theories behind the State:

1. ***Normativist:***
   - emphasizing the formal and State element (Hans Kelsen)
   - all legal systems have their distinctive norms, which all comply with the "basic norm", the norm from which all the other norms derive and comply with
   - An example of basic norm is the Constitution

2. ***Insititutionalist:***
   - emphasizing the sociological element behind the creation of legal systems (Plurality of Legal Systems by Santi Romano)

Classification of legal systems

► Legal systems are different and many and can be identified by some criteria.

1. ***Fluid VS Concentrated:***
   - depends on whether there is a strong central authority
   - *Fluid Legal System*➔ non-central authority (International Law)
   - *Concentrated Legal System*➔ strong central authority (the State)

2. ***Voluntary VS Necessary*:**

   - depends on the connection that individuals have with respect of a certain legal system
   - *Voluntary*➔ people come together out of common will, interest, need, or belief (mostly non-territorial: associations, parties, clubs. The rules are enforceable only to the individuals that belong to the legal system)
   - *Necessary*➔ people cannot opt out of the system (mostly territorial: residents in a Town, citizens in a nation.)

3. ***Specialist VS General*:**
   - depends on the goals of a legal system
   - *Specialist*
     ➔ the legal system pursues specific goals (e.g.: "Association for the protection of the environment", WTO, The Church)
   - *General*
     ➔ the legal systems have very broad and general goals, which are difficult to synthetize without making them too specific (e.g.: The State)

NB: The EU legal system may be intended as a general legal system, however it was born as a specific legal system because it was an Economic Alliance at the beginning and we may see that nowadays it has broadened its scope.

4. ***Non-Sovereign VS Sovereign:***
   - *Non-Sovereign*
     ➔ requires authorization and legitimation by a sovereign legal system in order to exercise power (eg: Regions, local councils, government agencies, EU)
   - *Sovereign*
     ➔ sovereign power is self-sufficient, and it does not need external legitimation (eg: The State)

The State

- It is a legal system because it pursues a general goal
  Concentrated and Necessary
  ➔ there is a strong central authority and citizens cannot opt out

- *External Sovereignty*
  ➔ the State is independent from other existing legal systems and, therefore, it is an original (non-derived) entity

- Each State has its own territorial area of jurisdiction

- *Internal Sovereignty*

➔ every person in the territorial area of jurisdiction is subject to the single political power that governs the State

Montevideo Convention

- *Article 1*
  - ➔ The state as a person of international law should possess the following qualifications:
    - Permanent Population
    - Defined Territory
    - Government
    - Capacity to enter relationships with the other states

- *Article 2*
  - ➔ The federal state constitutes a sole person in eyes of international law

- *Article 4*
  - ➔ States are juridically equal, enjoy the same rights, and have an equal capacity in their exercise
  - ➔ The rights of each State do not depend on the power it possesses, but on the simple fact of its existence as a person under international law

Characterizing elements of the State

- We may identify 3 characterizing elements of the State legal system:
  - ***Territory***
  - ***Sovereignty***
  - ***People***

1. Territory

- The authority of the State is exercised over geographically defined state borders:
  - We have a difference with Medieval organization, in which borders were fuzzy and frequently changing, thus resulting in overlapping authorities over a piece of land
  - Enclaves are territories surrounded by another single country (e.g., Vatican City)

- International Law and Conventions have a role in determining the State borders

- The elements that constitute the territory itself are:
  - Dry land
  - Continental shelf outside of territorial seas to a depth of 200m (Geneva Convention, 1958)
  - Territorial seas 12 miles beyond open sea (Montego Bay Convention, 1982)
  - Aerial space
  - Subsoil

2. Sovereignty

- It is the ultimate form of political authority:

➔ ***External Dimension***

- each sovereign state has equal rights and recognizes no superior authority (Westphalian System)
- as of today, external sovereignty has been limited in order to let states become part of international organizations

➔ ***Internal Dimension***

- the State has supreme authority over any entity or legal system that may claim authority within it. This sovereign power is chiefly exercised through Law (law-making power)

- The concept of sovereignty profoundly changes with Constitutionalism – with the ideas of Rule of Law, Human Rights – and with International Law.

► The legitimization of sovereign power according to philosophers and scholars is based on:

- theocratic theories
  ➔divine nature of authority where religious law is imposed

- legitimization theories
  ➔historical roots of royal institutions (power is passed over generations)

- contractualist theories
  ➔ a social contract is at the basis of State authority, thus consent of the governed
  ➔Hobbes, individuals enter a contract with the State, relinquishing part of their freedom, to get out from the State of Nature

- theories basing sovereignty upon the idea of the Nation
  ➔ Nationalism – coincidence of ethnically or culturally defined nations with the State

- theories that attribute sovereignty to the public legal personage of the State:
  ➔ aim to create a strong state, without interference
  ➔ theory developed during the second half of the 19th century

- democratic constitutionalist theories
  ➔ it is the will of the people that grants power to the State

3. People

► The doctrinal debate has led to the formulation of 4 different theories regarding nature and content of the concept of people:

- People as the *constitutive element* of the State
- People as the *object* of State sovereignty
- People as *subject of rights* toward the State
- People as *creator of the State's will*

► Contemporary Constitutions conceive the people as the *holders of sovereignty*, who exercise it through the institutions of representatives and direct democracy

► *Citizenship* is a concept identifying the condition of being bound to a given State, from which the individual:
- Receives certain rights
- Is forced to respect certain duties and obligations
- Nowadays, the distinction between citizens and aliens is getting blurred, therefore leaving to citizens mainly political rights

- Citizens are differentiated from aliens based on 2 criteria:
  - *Ius sanguinis* (Asia, Africa, Europe)
  - *Ius soli* (North America, Latin America), American countries favor the *ius soli* because it was a land of immigration

- Citizenship can be:
  - Acquired by birth
  - Acquired later in life:
    - *Ius Connubii*
    - Obtained by law
    - Naturalization by the President of the Republic

  - Revoked (e.g.: Shamina Begum case, UK)

The State historical evolution

- The Greek *Polis*, Roman *Civitas* and Medieval Kingdom are all forerunners of the State, however the State as we know it today only affirms itself with the end of the Middle Ages

- ***Peace of Westphalia***
  ➔ conventional date of birth of the modern State, setting the end of religious wars and solidifying dynastic States across Europe, which became *sovereign* in the modern sense.

- ***Medieval Europe***
  - Complex and overlapping jurisdictions of towns, lords, kings, emperors, popes and bishops, professional organization
  - Lack of any clear hierarchy, of an ultimate political authority and of a unitary system of law

- ***Modern State System***
  - Continuity in time and space
    ➔ State survives changes in leadership and lasts over time

  - Power is centralized and administered through different institutions

  - Sovereignty
    ➔State has the ultimate authority

- The **Westphalian Model** of the sovereign state is being put into question by globalization:
  - New phenomenon that creates a world marketplace where goods, workers and capital move freely across borders
  - Due to interconnectedness, more and more activities are regulated at the supranational level (EU, IMF, WTO, NATO, UN)

- *Multi-level governance:*
  - Supranational organizations are involved in the exercise of public power and the production of norms ate the supranational level
  - norms made at supranational level apply to individuals as much as States and they coexist and interact with national law

- *Multi-level constitutionalism:*
  - Supranational organizations are subject to checks and balances as much as the State and must respect human rights
  - Supranational diffusion of juridical review and international court

- Recently, we are seeing a backlash against globalization:
  - Economic nationalism and protectionism (Trump VS China)
  - Brexit, and the withdrawal from international organizations
  - Globalization Paradox (Dani Rodrick):

    ➔ "We cannot pursue democracy, national determination, and economic globalization"

LESSON 2 – FORMS OF STATE

► We need to make a distinction between forms of state and forms of government:
- Form of State defines the relationship between the State and the citizens
- Form of Governments refers to the relationship between the constitutional bodies of a State

► Forms of State can be classified according to 2 principles:
- *Diachronic method*
  ➔ Historical evolution

- *Synchronic method*
  ➔ relationship between central governments and sub-national entities

Diachronic Method

1. *Feudal System*
2. *Absolute State*
3. *Liberal State*
4. *Democratic Pluralistic State and Welfare State*
5. *Totalitarian and Authoritarian State*
6. *Socialist State*
7. *Waves of democratization*

1. ***Feudal System***

► It is not a form of state *strictu sensu* for these reasons:
- Lacks a single center of political power, indeed we have a plurality of centers of power which could not be controlled by the king (juridical, economic, military powers)
- Total identification of the feudal lord (or the King) with the property of the land
- Organized on the basis of private agreements, contracts between individuals

► King awards the land and in turn the feudal lord promises to protect the King in case of war
- Sole aim was the protection of the land and its related possessions, including the peasants, from external attacks ➔ ***lacks generality***

► Also defined as patrimonial system because the aim is not fulfilling the general interest of the people but simply those of the lord and his manor.

2. *Absolute State*

► 2 power shifts play a key role in the move from feudalism to an absolute State (Peace of Westphalia, 1648):

1. The shift of power from the feudal lords to the King and, thus, the stabilization of the monarchical authority
   - centralization of power in the hands of the king
   - king has the "monopoly of violence" ➔ army responds only to him
   - mint of coin, justice and political power are centralized

2. The shift of power from land to money
   - The typical absolute State is Louis XIV's France ➔ *L'État, c'est moi!*

➔ ***Enlightened Absolutism:***

- Monarch were positively influenced by the principles of Enlightenment
- *Tout puor le people, rien par le people*
- Recognition of certain individual rights, such as freedom of speech, right to property and religious tolerance
- Aims at improving the lives of its subjects, who however still are not entitled to have political power (paternalistic approach of the king over citizens)
- Some examples are Frederick II of Prussia, Maria Theresa, Joseph II of Austria, Leopold II Grand Duke of Tuscany

3. *Liberal State*

► Financial, Socio-Economic and Political issues caused the crisis of the Absolute State:

- Financial problems caused by the ever-growing bureaucratic and military machine
- Socio-economic problems caused by changes brought by the industrial revolution and the increasing importance of the middle class

► Characterized by:

- Single-class state built by the bourgeoisie in order to pursue its own interest
- Strong separation between State and society
  ➔ The State shall not interfere with the economic and intimate sphere of citizens, to avoid detriment of society
  ➔ Principle of *Minimum State*, which means it has a well-defined and limited number of functions

- Rule of law
  ➔ government authority can only be legitimately exercised in accordance with laws that were adopted through an established procedure

- Principle of separation of powers (Montesquieu, L'Esprit de Lois):
  ➔ Power should be divided but there must be a system of "Checks and Balances" in order to avoid abuses of power

- Protection of rights and freedoms, including negative freedoms, which are freedoms that only stand without the State Intervention
- Representative government, characterized by a mono-class society because suffrage was determined by census or wealth (Italy case)
- Popular or national sovereignty

► ***England***

- Passage to the Liberal State was gradual and without great political and social traumas
- England never went through a period of Absolutism because the power of the king had been reduced already starting from 1215 by the *Magna Charta* (uncodified Constitution)
  ➔ The *Magna Charta* qualified itself as the fundamental law of the land, to which also the king had to attain

- Liberal state developed quite early on following the two victories that the Parliament obtained against the Stuarts in the XVIII century:
  - English Civil War
  - Glorious Revolution

➔ With the creation of the Bill of Rights (1689), the Crown bound itself to respect the prerogatives of the Parliament, thus creating a liberal state

► ***France***

- Passage to the liberal state was traumatic and violent, because the Bourgeoisie had to fight against the privileges of the nobility and the clergy and against the despotic rule of the *Ancien Règime*

- Enlightened philosophers started to want a monarchy on the model of England, where the king shares the power with an elected Parliament

- The Revolution was triggered by the Third State, which was the class paying the larger amount of taxes and lacking any political representation

- After the Napoleonic Wars, the Restoration took place in order to restore the order previous to the French Revolution

➔ The Restoration caused many protests that forced Monarchs to grant Constitutions in order to avoid revolutions like the French one (Top-Down Revolution)

- ***Italy and Germany***
  - The countries were characterized by a Weak Bourgeoisie and by Strong Aristocratic Landowners, and for these reasons the birth of the Liberal State was the result of a compromise and a "top-down" revolution, guided by the monarch himself
  - The liberal states in Italy and Germany were more centralized than elsewhere

- From the crisis of the Liberal State, caused by the mono-class society, emerged:
  - Democratic Pluralistic State
  - Totalitarian and Authoritarian State
  - Socialist State

  ➔ Liberal State collapses because it is a mono-class state: therefore, with the enlargement of universal suffrage and the birth of mass parties in Parliament, political power could not anymore do the interests of bourgeoisie only, but should also consider the lower classes

Universal Suffrage in Italy

- In 1860, a new electoral law which expanded the electoral base was adopted by the King of Sardinia and then extended to the whole kingdom of Italy:
  - Eligible voters had to be male older than 25
  - They were required to have reading and writing skills
  - They needed to pay a tax bill of at least 40 liras per year

- In 1882, a new electoral law enlarges the electoral base:
  - Voters were required to be male older than 21
  - They were required to have writing and reading skills
  - They needed to pay a tax bill of at least 19.80 liras per year

  ➔ From the 2,2%, the electoral base became the 6,9% of the population

- The 1912 electoral law creates a *quasi-universal* suffrage, with less restrictive requirements:
  - Eligible voters needed to be male older than 30
  - Being male over than 21 and having a tax bill of 19.80 liras per year, or having obtained an elementary school diploma, or having served in the military, granted the right to vote

  ➔ The electoral base passed from 6.9% to 23.2%

- From 1918, being male over 21 or having served in the military granted the right to vote
- In 1945, the right to vote was extended to women

Democratic Pluralistic State

- It is the result of the slow transformation of the liberal state from a mono to multi- class society
- Voting rights are extended with the introduction of universal suffrage

- 3 main features:
  - Passage to a multi-class society
  - Creation of mass parties
  - Recognition not only of liberal first-generation rights, but also second generation social and economic rights (positive rights)

- *Positive rights*
  - Rights which are guaranteed through an active participation of the State
  - We don't talk anymore about "minimal state" and separation between State and Society
  - They are mainly social and economic rights granted to lower classes; indeed it is a duty of the State to remove every obstacle to the equality among the people

- May be intended as a continuation of the liberal state

Welfare State

- After WW2, some countries adopted a particular type of democratic pluralistic State known as the Welfare State**,** which is characterized by a very strong commitment to the protection of Social and Economic rights

- ***Weimer Constitution (1919***):
  - First constitution committed to Social and Economic rights
  - Art 119: maternity protected by the State
  - Art 121: equal opportunities for illegitimate children
  - Art 165: cooperation between employees and employers

- After WW2, the model was the UK system, founded in the Beveridge Report:
  - Policies of social security must be achieved by cooperation between the State and the individual, with the state securing the service and citizens their contributions
  - Institution of the National Health Service (NHS)

Totalitarian and Authoritarian States

- ***Totalitarian State:***
  - It is a strong, one-party system based on an official ideology
  - A Charismatic Leader is usually the person who has theorized the ideology and has created the unique mass party
  - Nazi Germany or Fascist Italy are some examples, even though the latter is not fully totalitarian because of the diarchy at the top of the State

- ***Authoritarian State:***
  - Contrary to the Totalitarian State, the Party System is extremely weak
  - It is driven by the lust for power of the individual leader, who however often has to share power with other military leaders that organized the coup
  - There is no strong ideology and well-structured like in the Totalitarian State***,*** and consequently It is less supported by the people
  - Some instances are Franco in Spain and Salazar in Portugal

- In Europe, Totalitarian and Authoritarian States were a reaction towards the crisis of the liberal state and an attempt to solve the social conflict caused by the struggle between the bourgeoisie and the working class:
  - The solution was to suffocate political pluralism and concentrate power in the hands of specific institutions
  - Political and civil rights are suppressed but socio-economic rights are protected in order to obtain social consent, but also to control every aspect of citizens' life.

Socialist State

- It was firstly established in Russia and the Soviet Union after the October Revolution (1917), and showed a peculiar Constitutional Model:
  - Abolition of private property
  - Monopoly of the state regarding the means of production
  - Proletarian dictatorship, transitory phase until the final abolition of the State and a society without social classes (prominence of the working class)
  - Democratic centralism, defined by Lenin as the "freedom of discussion, but unity of action"
  - Strong central government
  - Economic planning (5-years planning)
  - Collectivist economy
  - Strong ideology

- Overall, there is a very close resemblance with totalitarian States because of the external threat of the “bourgeoisie states”
    - Just like Authoritarian and Totalitarian State, it is a reaction to the Liberal State, especially to the economic regime of the latter

- After the Soviet experience, the Socialist model has expanded and has been adapted to each country
    - For instance, the Chinese Socialist State protects private property and has a well-integrated class of entrepreneurs
    - China is at the primary stage of socialism from a long period, and has no intention to abolish the State and cancel every social class soon
    - Chinese people will continue to develop a socialist market economy, thus combining the ideas of socialist (planned) economy and market economy

Waves of Democratization

- During the 20th century, States that opted for Totalitarian, Authoritarian, or Socialist forms of State started to adopt the Democratic Pluralistic Form

- 1st wave
    - Characterizes Italy, Germany and Japan after the defeat of WW2
    - All the countries adopted a democratic constitution

- 2nd wave
    - India at the end of 1940s
- 3rd wave
    - Greece, Portugal, and Spain after the fall of the authoritarian states
- 4th wave
    - Argentina and Chile are liberated by authoritarian states
- 5th wave
    - Eastern Europe countries that were created after the fall of the USSR, but some of them are considered illiberal democracies (Poland and Hungary)
- 6th wave
    - Arab Spring
- 7th wave
    - Asia (Myanmar)

Synchronic Method

- The distinction is based on territorial organization
- We distinguish between:
  - Unitary States
  - Decentralized States, such as Federal or Regional States

- In Unitary States, the legislative power is exercised by the central government and there are no sub-state bodies that can legislate

- In Decentralized States, the legislative power is exercised both by the central government and the sub-state entities
  ➔ The power is vertically separated between State and territorial bodies

- We can distinguish between federal and regional states on the basis of 4 elements:
  - Extent of the legislative power exercised by the sub-state entities
  - Existence of a separate branch of the judiciary at sub-state level
  - Presence of a second Chamber of the Parliament that represents the sub-state entities
  - Involvement of the sub-state entities in constitutional amendments

LESSON 3 - FEDERALISM AND REGIONALISM

Unitary and Decentralized Systems

- Using the synchronic method, we may distinguish between:
  - Unitary Systems, where only the central government has legislative power
  - Decentralized Systems, where sub-national entities also have legislative power

- Decentralized systems may be distinguished in:
  - Federalism
  - Regionalism
  - Devolution, which characterizes mainly the UK

    ➔ All of them are forms of territorial organization characterized by a **vertical separation of power** between central governments and sub-national entities

Federal and Regional Systems

- Federal and Regional systems can be distinguished based on 4-elements:
  - Extent of the legislative power exercised by the sub-state entities
  - Existence of a separate branch of the judiciary at sub-state level
  - Present of a second chamber of parliament that represents the sub-state entities
  - Involvement of sub-state entities in constitutional amendment

- We may recognize mainly 2 federalizing processes:
  - In the **Bottom Up process** the federal state is created by a series of independent sovereign states which group together and decide to create a new federal entity. This is the most conventional process, which also took place in the **USA**

  - In the **Top-Down process,** the federal state is created through the disaggregation of a unitary region in different federal states. This is a recent process that occurred in Belgium.

- Problem of fiscal autonomy:
  - Financial arrangements that exist between Central Governments and sub-state entities is an important element for both federal and regional states
  - If sub-state entities are deprived from financial resources, then they are prevented from exercising their powers
  - Even in federal systems, federal states do not enjoy a high fiscal autonomy and have to devolve funds to the central government

Federal State

- Constitution contains a list of subject matters which are of exclusive competence of the central government, thus leaving the "residual" subject-matters to the sub-state entities
- The member States have their own judiciary system, which can be distinguished in:
    - Integrated model (Canada)
    - Separated model (USA)

- The Second Chamber of Parliament represents the sub-national entities in different ways:
    - **Equal Representation** requires that all the states have identical representation, regardless of their size and population (USA)
    - **Weighted Representation** requires that states are represented according to their size and population (Germany)

- Member States take part in the constitutional amendment procedure
    - In fact, independent states that gather into a federation want to have their voice in constitutional amendments

- Usually, Member States have their own constitution, even though this may be due to the federalizing process:
    - ➔ Indeed, Countries whose federalizing process is a bottom-up process (like the USA) have their own constitution

Regional State

- Constitution contains a list of subject matters over which the regions can exercise legislative power, thus giving all the residual subject matters to the government (which has greater power)
- Regions do not have their own judiciary system
- The second chamber of Parliament does not represent sub-national entities
- Regions do not take part in the constitutional amendment process
- Regions do not have a constitution but may have Statutes, which are quasi-constitutional documents, however hierarchically inferior to the national constitution

NB
For both Federal and Regional States, the entity which has residual legislative power has the broader set of powers

USA

- In the USA, the Second Chamber of Parliament represents each sub-national entity equally:
  - ➔ The Constitution states that the Senate should be composed of 2 Senators from each State

- The Constitution lists the subject matters of the central government, leaving the residual subject-matters to the sub-state entities

- Member States have constituent power and take part in amending the Constitution, indeed every constitutional amendment has to be ratified by at least two-thirds of the member states

Italy

- "The Senate of the Republic is elected on a regional base" but "each member of Parliament represents the Nation"
  - ➔ The Senate does not represent the Regions

- Constitution lists all the subject matters on which the State has exclusive legislative power and gives the residual legislative power to regions:
  - Despite this exception, Italy still has a regional system
  - Before the reform of Title V of 2001, the regions had exclusive power and the State had the residual power
  - Concurring legislation

- First Instance Administrative Courts (TAR) shall be established in each Region:
  - This does not mean that Italy has a regional administrative judiciary system, because administrative procedural law is the same throughout Italy
  - The jurisdiction of the tribunals corresponds to the regional territory

- Constitutional amendments can be called by one-fifth of the members of a House, or by 500,000 voters of five Regional Councils:
  - If a bill is passed by a qualified majority (2/3 of Parliament), then the constitutional amendment is enforced
  - If a bill is passed by an absolute majority (51% of Parliament), then it can go to a popular referendum

    - ➔ Regions can ask for a Referendum to be held to decide whether to amend the Constitution

Italian Regions

- Art 5 of the constitution states that the Republic is one and indivisible
- Italy has a complex 5-levels system of autonomous territorial areas:
  - Municipalities
  - Provinces, even though there have been several attempts to abolish them
  - Metropolitan Cities
  - Regions
  - The State

- Due to historical reasons, not all regions are equal, in fact they are divided in:
  - Ordinary Regions (15)
  - Special Regions (5), whose statutes are considered to be a source of law on the same hierarchical position as the Constitution because are passed by the National Parliament

- The classification depends on the adoption procedures used for the individual regional Statutes, and therefore of their hierarchical position as a source of law
  - Regions do not have a Constitutional autonomy, nonetheless special statutes are at constitutional level
  - Statutes of ordinary regions are at a higher level than Primary Sources of law (regional legislations), but are also hierarchically lower than the Constitution

- Title V of the Constitution has been reformed twice:
  - Both reforms aimed at decentralizing ordinary regions, thus giving them more power
  - For this reason, we can say that Italy is a Regional System with some feature of a Federal System

1. 1999 Reform

- The reform encompassed the Regional Form of Government and the Statutory Power held by the Ordinal Regions

- Before 1999, the adoption procedure of ordinary statutes was composed of 2 steps, the approvement at a regional level and then the approvement in the national Parliament
  - ➔ Regional autonomy was significantly compressed

- The Reform of 1999 abolished the control of the National Parliament, thus leaving the approval of statutes exclusively to the regions

2. 2001 Reform

➔ The reform dealt with the allocation of legislative powers between State and Regions

LESSON 4 – FORMS OF GOVERNMENT

- A form of government looks at how the power is horizontally distributed between the 3 Constitutional Bodies: Head of State, Head of Government and Parliament

- *Robert Elgie* states that it is better to classify forms of governments based on dispositional properties, which are mainly 3:
    - Whether there is both a Head of State and a Head of Government or whether just one institution is to be found
    - Whether or not the incumbents of these institutions are popularly elected
    - Whether or not the incumbents serve for a fixed term

- We can talk about Forms of Government only if a separation of powers actually exists, therefore, historically speaking, only after the creation of the liberal state

    - The differences between Political and Electoral systems highly influence the form of government
    - The absolute monarchy is the form of government of the absolute state, but since the absolute government lacks separation of powers, it does not make sense to talk about a form of government

Parliamentary Executive

1. ***First dispositional property***
   ➔ There is both a Head of State and a Head of Government

2. ***Second dispositional property***
   ➔ electors vote the members of the Parliament, who then elect the Head of State that appoints the government. The government must obtain the confidence of the Parliament, and it has the power of dissolution over the Parliament if there is no majority

3. ***Third dispositional property***
   ➔ Head of State serves for a fixed term. The Head of Government, however, does not serve for a fixed term because of the relation of confidence between Parliament and Government. Indeed, confidence can be both renewed or withdrawn. In monarchies, the term of the Head of State (the monarch) does not exist

Historical Evolution

- Origins of the Parliamentary form are to be found in Great Britain, although the office of the Prime Minister and the Cabinet has evolved as a matter of political expediency and constitutional practice rather than by law, given that the country does not have a codified constitution
  - The parliamentary executive was born as a matter of political contingencies
  - Since there is no written constitution, all the political practices are conventions (e.g., The leader of the majority party has to be the Head of Government)

- In 1715, King George I, coming from a German family, became king of England but did not speak English.
  - The establishment of the office of the Prime Minister was a matter of political expediency, because George was German and could not speak English

- The year 1782 represents an important moment in the evolution from constitutional to parliamentary monarchy in the UK
  - Up until that moment, the King had the power to appoint and dismiss the Prime Minister and the rest of the Cabinet
  - However, in 1782 Lord North was the first Prime Minister to resign after losing a vote of confidence

  ➔ King George III had no choice but to appoint the leader of the Whigs, Charles Watson-Wentworth, who was a Prime Minister with majority in Parliament

- In 1832, after the approval of the Reform Act, which enlarged the suffrage, struggle between the Parliament and the Monarch came ahead

- In 1834, King William IV decided to dismiss the Prime Minister Lord Melbourne and replace him buy the Tory Robert Peel
- Peel was unable to obtain majority in Parliament, thus the king was forced to reappoint Lord Melbourne

➔ This was the last time a Monarch would dismiss a Prime Minister of his own accord. Indeed, from this time onwards, the king will always elect the leader of the parliamentary majority, thus increasingly become a neutral power.

► Even though the Head of State appoints the Head of Government, he does not have discretionary power because he must appoint someone who has a corresponding majority in Parliament

- The Parliamentary Majority of the Head of Government is fundamental because he needs the confidence of the Parliament
- If the Government does not have the confidence of the Parliament, it falls, and a new Government must be created
- If no leader with a majority in Parliament is found, the Parliament is dissolved, and new elections are called
- Formally is always the Head of State that dissolves the Parliament, but is the Head of Government who has substantial power by asking the dissolution to the Head of State

► After 1945, many states understood that the relationship of power was causing the risk of having instable governments:
- A government is considered instable if Governments are formed frequently, or if the Parliament is dissolved many times and new elections are called
- States, therefore, started to rationalize the relation of power in order to foster government stability

The UK

► *Fixed-term Parliament Act 2011*

- Introduced fixed-term elections to the Westminster Parliament every 5 year
- Before the Act, Parliament could be dissolved by royal proclamation by virtue of the royal prerogative. Over time, the monarch increasingly acted only on the advice of the Prime Minister

► According to the ***Fixed-term Parliament Act***, elections can be triggered before the end of the five-year term in 2 ways:
- A motion of no-confidence is passed, and no alternative government is found within 14 days
- A motion for an early general election is agreed by at least two-thirds of the House

- In October 2019, the Prime Minister failed to secure an election by a two-thirds majority
    - Therefore, he introduced the Early Parliamentary General Election Act, which is a circumvention of the FTPA, as it has not been amended
    - The Queen's Speech announced the government intention to repeal the FTPA because it introduced too much constraint in the dissolution of Parliament

- ***The royal prerogative*** is a body of customary authority, privilege, and immunity, recognized as the sole prerogative of the Sovereign and the source of many of the executive powers of the British Government
    - Prerogative powers were formerly exercised by the monarch, acting on his/her own initiative

- Starting from the 19th century, by convention, the Prime Minister or the Cabinet has been required for the prerogative to be exercised
    - Monarch remains constitutionally empowered to exercise the prerogative against the advice of PM or cabinet
    - In practice, he would only do so in emergencies or where existing precedent does not adequately apply to the circumstances in question

- Today, the prerogative is available in the conduct of the government of the UK, including foreign affairs, defense, and national security
    - Exercise of the prerogative in the hands of the Prime Minister, other ministers, or government officials

➔ Formally, the government still acts according to the prerogative
➔ Practically, the government is enabled to act according to the royal prerogative

Italian Head of State

- Due to the vagueness in the Constitution's text, the President of the Republic's position as developed throughout the history of the Republic, has been heavily influenced by the interpretation given to the role by the President of the Republic

- Constitutional provisions about the Head of State are vague in order to allow for more flexibility, so that the figure of the President can evolve according to the evolution of the form of government

- The requirements of the President of the Republic are:
    - Being at least 50 years old
    - Enjoying full political and civil rights
    - Having Italian citizenship

► The President is elected with a secret vote by the Parliament in a joint session, together with 3 delegates from each region
    - If, after 3 ballots, there is not a 2/3 majority, the absolute majority will be sufficient (51%)

► The term of office is of 7 years, even though there is the possibility of being re-elected (only case is G. Napolitano)

► The tripartition of presidential acts is only a matter of interpretation and is not formally explicit in the Constitution:

➔ All the acts have the form of a decree of the President of the Republic

1. ***Formally presidential acts which are substantially governmental***
    - Presidential decree deriving from a decision of the government
    - The Head of State has to authorize the Government, who enjoys legislative initiative, to submit a new bill to Parliament
    - The Election Day is proclaimed by the President, but the date is set by the Government

2. ***Formally presidential acts which are substantially presidential***
    - Presidential decree decided exclusively by the Head of State
    - Power to grant pardon, which according to the Constitutional Court belongs to the President of the Republic and not to the Ministry of Justice
    - Appointment of life-senators
    - Appointment of 5 Constitutional Judges
    - Head of State can send back to Parliament a piece of legislation which has constitutional criticalities, but this is not a veto power

3. ***Formally presidential acts which are substantially complex***
    - Both the Head of State and the Head of Government take part in the decision (e.g., Dissolution of the House)

➔ Until 1960s, the power of dissolution of Parliament was both a formally and substantially presidential act. After the balance of power changed in favor of the government, the Power of Dissolution was interpreted as a formally complex act. However, the interpretation of the Constitution may change in the future.

➔ The Head of State, unlike in the UK, has broader power in the choice of the Head of Government, especially in situation of political uncertainty. However, when elections show clear results, the Head of State will appoint the leader of the winning Party.

➔ The ministers are appointed by the Head of State by suggestion of the Head of Government. The President of the Republic may refuse an appointment, but it is a matter of interpretation of the Constitution.

- *Irresponsibility of the presidential function*
    - Since the President of the Republic does not have any of the fundamental powers of the State, but is the guarantor of the Constitution, its legislative acts require the Ministerial Countersignature, through which the ministers that proposed the act assume the responsibility

- The only 2 *presidential offences* of which the Head of State may be held responsible are ***High Treason*** and ***Attempt to Overthrow the Constitution***
    - The President is put on trial **during** his office for these offences

Constructive Vote of No Confidence

- The *Constructive Vote of No confidence* allows to change the Head of Government without provoking the dissolution of Parliament
    - It is necessary if the Government does not have a strong majority in Parliament and is not likely to cover his position for the whole legislature

German Case

- In Germany, the relation of confidence is between the Chancellor and the Lower House, the Upper House is not involved because it is not elected but selected by the Governments of the Member States

    - The Head of State will elect as Chancellor the candidate elected by the Lower House (usually the leader of the majority party)

    - If the majority of members of the Lower House have no confidence in the Chancellor in office, they must be capable of electing a successor within 48-hours, in order to replace the Chancellor in office (Art. 67)

    - If a motion of the Chancellor for a vote of confidence is not supported by the majority of the Lower House, the President, upon proposal of the Chancellor, may dissolve the Lower House within 21-days. The right of dissolution elapses as soon as the Lower House elects a new Chancellor (Art. 68)

    - The Constructive vote of No Confidence was used only twice

    ➔ The very limited resort to the constructive vote of no confidence in both Germany and Spain should not lead to think that it is of limited importance, because it works as a strong deterrent

Presidential Executive

- Elgie's dispositional properties:
    1. ***First Dispositional Property***
       ➔ Head of State and Head of Government coincide

    2. ***Second Dispositional Property***
       ➔ President is directly elected (not in the US)

    3. ***Third Dispositional Property***
       ➔ The President serves for a fixed term

US

- Head of State and Head of Government are combined in one entity, the President, who is completely separated from the Congress (House of Representatives and Senate)
    - President has the power to veto legislation enacted by Congress

- Congress has the power to impeach the President:
    - The grounds are treason, bribery and other high crimes and misdemeanors
    - The House of Representatives impeaches the President by approving articles of impeachment through a simple majority vote
    - The impeachment trial takes place in the Senate, where conviction on any of the articles requires a 2/3 majority vote and results in the removal from office

- Congress can only impeach the president, but it cannot vote a motion of no confidence
    - President cannot dissolve the Congress

  ➔ There is a strong system of check and balances in order to control the President and avoid a totalitarian deviation

- The President is *popularly elected* and *not directly elected:*
    - US citizens vote every 4-years for the electors of the President who then meet to elect the President
    - If no presidential candidate has the absolute majority, the House of Representatives will elect the President

- Checks and balances are implemented for each branch: Executive, Legislative and Judicial. Each branch has the power to control the other two

Executive Branch **(President carries out laws)** 	**Checks on the Legislative Branch** Can propose laws Can veto laws Can call special sessions of Congress Makes appointments Negotiates foreign treaties	**Checks on the Judicial Branch** Appoints federal judges Can grant pardons to federal offenders
Legislative Branch **(Congress makes laws)** 	**Checks on the Executive Branch** Can override President's veto Confirms executive appointments Ratifies treaties Can declare war Appropriates money Can impeach and remove President	**Checks on the Judicial Branch** Creates lower federal courts Can impeach and remove judges Can propose amendments to overrule judicial decisions Approves appointments of federal judges
Judicial Branch **(Supreme Court interprets laws)** 	**Check on the Executive Branch** Can declare executive actions unconstitutional	**Check on the Legislative Branch** Can declare acts of Congress unconstitutional

- ***Caucuses and Primaries:***
  - Presidential candidates must be at least 35, naturally born US citizens and resident in the US for at least the last 14 years
  - Presidential candidates are selected through **Primaries**, run by the state governments, and **Caucuses**, run by the political parties (used in 11 states)

- Primaries can be:
  - *Closed*, only party members can vote
  - *Semi-closed*, requires that voters become party members by the date of the vote
  - *Open*, everyone can vote, regardless of the membership to the party

- Electoral college is the system through which the President is elected
  - 270 out of 538 **Great Electors** are needed, otherwise takes place the so-called ***1824 scenario***, in which the Congress elects the Parliament

- Great Electors are chosen by popular vote on a state-by-state basis and are elected on a "winner-take-all" basis:
  - The number of Great Electors for each state depends on the number of Representatives and Senators in the Congress
  - The main issue is faithless electors, which however is quite unlikely: it is a matter regulated at a State level and some State charge unfaithful electors with criminal charges
  - The ***wrong election*** phenomenon occurs when one candidate has the majority of Electoral Votes, while the other the majority of Absolute Votes, and it is due to the *winner-take it all system* (e.g., Trump VS Clinton)

- *Swing States* are States whose vote is uncertain: therefore these are the States where the electoral campaign will concentrate (e.g.: Ohio)

Semi-presidential Executives

- Elgie's dispositional properties:
    1. ***First Dispositional Property***
       ➔ There are BOTH Head of State and Head of Government, like in the Parliamentary executive. However, both Head of State and Head of Government have executive power

    2. ***Second Dispositional Property***
       ➔ Direct Election of the Head of State, who appoints the Head of Government, who however must have a Parliamentary majority. The Head of State has formal and substantial power of dissolution over the Parliament. There is a relation of confidence between Parliament and Government

    3. ***Third Dispositional Property***
       ➔ The Head of State serves for a fixed term, while the Head of Government does not have a fixed term of office

France

- The term semi-presidential was introduced in France in 1959 in order to describe the Executive that was introduced in France in 1958
    - However, it was adopted for the first time in the Weimar Constitution of 1919
    - The present Constitution was enacted in 1958, because of weak and unstable Governments and the War in Algeria

- De Gaulle founded the Fifth Republic with a strong presidency and was elected in the role of President of the Republic:
    - In 1962, with a presidential referendum, he introduced the direct election of the President of the Republic
    - The referendum was considered a breach of 1958 Constitution, because the President called a referendum for a constitutional amendment without going through the Parliament
    - However, the *Conseil Constitutionnel* ruled that since a referendum expressed the will of the sovereign people, there was no breach of the Constitution

- *Bicephalous system*:
    - There is both a Head of State and a Head of Government, and the French Constitution states that the Head of State shall preside over the Council of Ministers, thus giving him also Executive Powers

► *Cohabitation:*

- Occurs when the President is from a different political party than the majority of the members of Parliament
- Occurs because of the duality of the executive, and in this case the system will work more like a Parliamentary rather than a Presidential system, given that the President will be forced to appoint a Prime Minister supported by the majority of the Parliament
- Cohabitation significantly reduces the powers of the Head of State, because it forces him to compromise with the Head of Government

➔ To minimize the risk of cohabitation, in 2000 a Constitutional reform was introduced to reduce the presidential term from 7 to 5 years and to change the election calendar

- By voting the Head of State and Head of Government almost contemporarily, the risk of cohabitation is drastically reduced
- A new reform in 2002 changed the voting calendar in order to vote first for the President, and after one month for the House:
- The rationale of the new reform is that voters will probably vote for a house that would give to the President parliamentary majority

► *Sub-classification of semi-presidential systems:*

- Systems where the Prime Minister prevails (Austria, Ireland), which are very similar to Parliamentary Executives
- Semi-presidential systems based on a diarchy or clear separation of competences between the Prime Minister and his government on one hand, and the President of the Republic, on the other (Finland, Portugal)
- Semi-presidential systems where the president plays a central role (France)

Directorial Executive

- It is a both contemporary and historical form of government
    - The only country that adopts this form of government is Switzerland
    - Historically, it was the form of government introduced between the French Revolution and the Napoleonic Empire

- Elgie's dispositional properties:
    - ***First Dispositional Property***
      ➔ Head of state coincides with the Head of Government. However, the Head of State is not a monocratic body, but a Collegial Body formed of people who all enjoy the same power

    - ***Second Dispositional Property***
      ➔ The incumbents are elected by the Parliament. Even though the election is a motion of confidence to the council, the confidence cannot be withdrawn by the Parliament. Therefore, we do not have neither the relation of confidence, nor the power of dissolution

    - ***Third Dispositional Property***
      ➔ The Head of State serves for a fixed term

Switzerland

- Is the only country that adopts the Directorial Executive because it is a country with many different ethnicities and languages

- A convention establishes how seats are distributed between the different political parties
    - The convention may be modified after a significant political change in the Parliament

- The fixed term of the directorial executive is 5 years

Neo-Parliamentary or Prime ministerial Executive

- It is a form of government designed by scholars in order to try to stabilize the Parliamentary Executive
    - The reasons of the fragility of Parliamentary Executives are the relationship of confidence and the power of dissolution

- This form of government is not adopted by any state
    - Israel tried to adopt this form of government, but it was a failure
    - It is however the form of government of the Italian regions

- Elgie's dispositional properties:
    - ***First Dispositional Property***
      ➔ There are both a Head of State and a Head of Government, just like Parliamentary Executives

    - ***Second Dispositional Property***
      ➔ The Head of State, like in the Parliamentary Executives, is elected by the Parliament. However, in Neo Parliamentary Executives, the Head of Government is elected directly by voters

    - ***Third Dispositional Property***
      ➔ The Head of State serves for a fixed term. The Head of Government does NOT serve for a fixed term because of the relationship of confidence between Parliament and Prime Minister

- The relationship of confidence and power of dissolution is regulated in a peculiar manner:
    - "We stand together, we fall together" principle
    - The two bodies must be elected at the same moment and remain in office for the same period of time
    - Therefore, if the Parliament withdraws the confidence, the Prime Minister is dismissed and the Parliament is dissolved, because Prime Minister and Parliament must be elected at the same time.

- *We stand together, we fall together* principle works as a deterrent for both Head of Government and Parliament to cause political crises

Israel

► Israel decided to adopt this form of government because it had a high instability and many parties with opposite political ideologies
    - It has a proportional electoral system, which reflects the fragmentation of the political system in the Parliament

► The experiment lasted for only 9 years, and it was not successful because Israel introduced some changes in the model:
    - Introduction of Special Election, which are exclusively for the Prime Minister
    - Introduction of the "split-vote", so that voters may vote for a political party in the Parliament and a different party for the Prime Minister

➔ The two changes prevented the proper functioning of the Neo-Parliamentary model, because they undermined the "Stand together, fall together" principle and allowed to have a prime minister without parliamentary majority

Italian Regions

► Until 1999, the form of government of Italian Regions was a Parliamentary Executive, formed by a Regional Council, a President of the Region and the Regional Board
    - There was a strong predominance of the Regional Council (legislative body), over the Regional Board (executive body)

► In 1999, after the reform of regional statutes, the Neo-Presidential form of government was temporarily adopted by the regions until new Statutes were written

► The Constitution regulated some constraints about the regional statutes:
    - Either direct election or indirect election:

    ➔ If the statute provides for direct elections of the Regional Council and the President of the Region, the *stand together, fall together* principle must apply

    ➔ If the statute provides for the indirect election of the President of the Region, voters choose the regional council which then elects the President of the Region. However, the *stand together, fall together principle* does not apply

► The Statute of the region Calabria was deemed unconstitutional by the Constitutional Court, which stacked down the Constitutional Provision and forced Calabria to rewrite the unconstitutional provisions:

    - The Statute provided for the direct election of the president of the region, therefore the relationship of confidence should have been regulated by the *stand together, fall together*
    - However, the statute said that if the president resigned, it was to be replaced by the vice-president, thus compromising the *Stand together, Fall together principle*

LESSON 5 – ELECTORAL SYSTEM

Electoral Systems

- *Electoral Systems* are all the formalities through which Members of Parliament are elected
- *Electoral Laws* include all the legislations concerning elections
- *Electoral Formula* is the formula used to convert votes into seats in Parliament

- Electoral laws deal with:
  - *Active Suffrage or Political Franchise*
    ➔Determining who can vote and setting limitations based on capacity, age, citizenship…

  - *Passive Suffrage*
    ➔ Determining who can be elected, indeed the Constitution sets different age requirements for Members of Senate and Members of Parliament

  - *Regulations of other aspects of elections*
    ➔ For instance, electoral laws regulate electoral campaigns, campaign financing, media coverage, voter registration, voting methods…

- Political rights are
  - Right to vote
  - Right to stand for office
  - Freedom of expression
  - Freedom of association
  - Freedom of peaceful assembly

  ➔ Election is a prerequisite to democracy, however in the absence of these rights elections do not serve a purpose of real democracy

  ➔ Illiberal democracies, like Hungary, have still in place democratic procedures, but since rights and freedom are limited, democracy is just a formality and is not real

- Electoral integrity
  - “Good” elections are elections that meet international electoral standards
  - The notion of electoral integrity covers all stages of the electoral process, such as registration of candidates and voters, campaign, voting and counting

- Electoral malpractices, such as the violations of electoral integrity, are:
  - Ballot box manipulation
  - Vote-buying
  - Voter intimidation and pressure
  - Misuse of public resources➔ strictly connected to unfair campaign
  - Media Bias ➔ media that are not impartial
  - Restrictive ballot access
  - Unfair campaign and finance rules (candidates that do not disclose financial information or spend more than the allowed expenses)

- The main factors affecting the choice of electoral system are:
  - Encouraging political parties
    ➔candidate-centered electoral systems VS party-centered electoral systems

  - Level of education
    ➔ Level of difficulty in understanding how the electoral system works
    ➔ majority systems are much easier to understand than proportional systems

  - Making stable government

  - Interests of political parties
    ➔ Political parties will try to choose an electoral system that favors them

  - External Pressures
    ➔systems imposed by groups responsible for post-conflict reconstruction

  - Historical Reasons
    ➔ Systems inherited from colonial administration

  - Minorities accommodations
    ➔ If the countries present wide diversity, a proportional electoral system may be chosen

- Electoral systems are selected through legislation and not by the Constitution, because this makes it easier to amend electoral laws

- On the basis of the ***electoral formula***, we can distinguish between:
  1. ***Majority Systems***
     - Plurality
     - Absolute Majority

  2. ***Proportional Representation***
     - List Proportional Representation
       - Methods based on dividers
       - Methods based on quota
     - Single transferable vote

  3. ***Mixed Systems***
     - Independent
     - Dependent

1. Majority Systems

- The candidate who gets the majority of votes wins
- Majority systems are usually connected to uninominal systems
  - Numerous candidates are running for a single seat
  - The candidate winning the majority of votes wins the seat

- Majority systems have a selective effect on the political system
  - Several candidates compete for a single seat
  - Selective effect means that only the most voted party in a specific electoral district will enter the Parliament

- We can distinguish 2 main majority systems:
  a. ***Plurality***
     - First-Past-the-Post (FPTP) / Single-member district plurality (SMDP)
     - Single Non-Transferable Vote (SNTV)

  b. ***Absolute Majority***
     - Two round runoff
     - Instant Runoff, Alternative Vote, Preferential Voting
     - Supplementary voting system

  ➔ The difference refers to which majority wins the election

a. Plurality

- In a *plurality system*, it is sufficient to get the relative majority of votes to win the seat, thus no specific threshold must be reached
- Single Member Constituencies means that each constituency elects only one Member of Parliament (with exception of Single-Non-Transferrable-Vote)
    - Therefore, each party presents only one candidate for each constituency, especially when the system is uninominal

First-Past-The-Post/Single-Member-District-Plurality

- It is the system adopted in the UK and the US, where candidates are elected with just a relative majority

- Specifics:
    - Creates an incentive to vote strategically rather than sincerely
    - Potential for disproportionate translation of votes into seats ("wrong winner" case, like Trump VS Clinton in 2016)
    - Encourages a Two-Party-System rather than a multi-Party system, thus granting stability because there is no need for coalitions
    - Disadvantages minority parties whose support is spread around the country rather than concentrated in certain areas, and for this reason the system may not be very representative

- The system is very resistant to extreme parties, because Extremist Parties with widespread support may receive much less representation than parties supported in concentrated districts

Single Non-Transferable Vote

- Similar to *First-Past-The-Post System*, with the exception that it works in *multimember* districts
    - Multimember districts mean that more than one mandate is to be distributed in the district
    - Therefore, the party nominates a list of candidates for one district to obtain all the seats available
- Specifics:
    - Produces more proportionate effect than *First-Past-The-Post System* because candidates can be elected even if they don't get most votes in the district since more seats are distributed
    - Weakens political parties, because candidates are competing not only against candidates from other parties, but also against their own parties
    - Risks of clientelism and development of patronage, because candidates can develop their own net of support and tend to be always the same
    - Tendency to fewer incumbents and well-established political parties because the system has a more proportional effect on representation

b. Absolute Majority

- Candidates need an absolute majority of the votes to be elected (>51%)
- If no candidate obtains the absolute majority of votes, there are 3 possible options:
    - Two Round Runoff (e.g., France)
    - Instant Runoff / Alternative Vote / Preferential Vote (e.g., Australia)
    - Supplementary Vote System (e.g., Sri Lanka)

Two Round Runoff

- Takes place if nobody receives the absolute majority of votes in the first round

- The candidates allowed to go to a runoff election are:
    - All candidates who obtain a percentage of votes over the threshold will go to a runoff election
    - The two most voted candidates may go to a runoff election
- The candidate who wins the second ballot with either an absolute or a relative majority wins the seat in Parliament

- <u>Specifics</u>:
    - Second chance to cast a vote for those voters whose candidates lost elections in the first round
    - There may be less incentives for strategic voting, because of the possibility to cast a second vote
    - Winning candidates can claim to have won the support of the majority of voters
    - Costs of elections on the administration are doubled

Alternative Vote

- Electors must express preferences for all the candidates, ranking them according to the preferences of the voter
    - A candidate wins the seat if he obtains an absolute majority after the first preferences of all candidates have been counted for the first time
    - It is a ONE round system

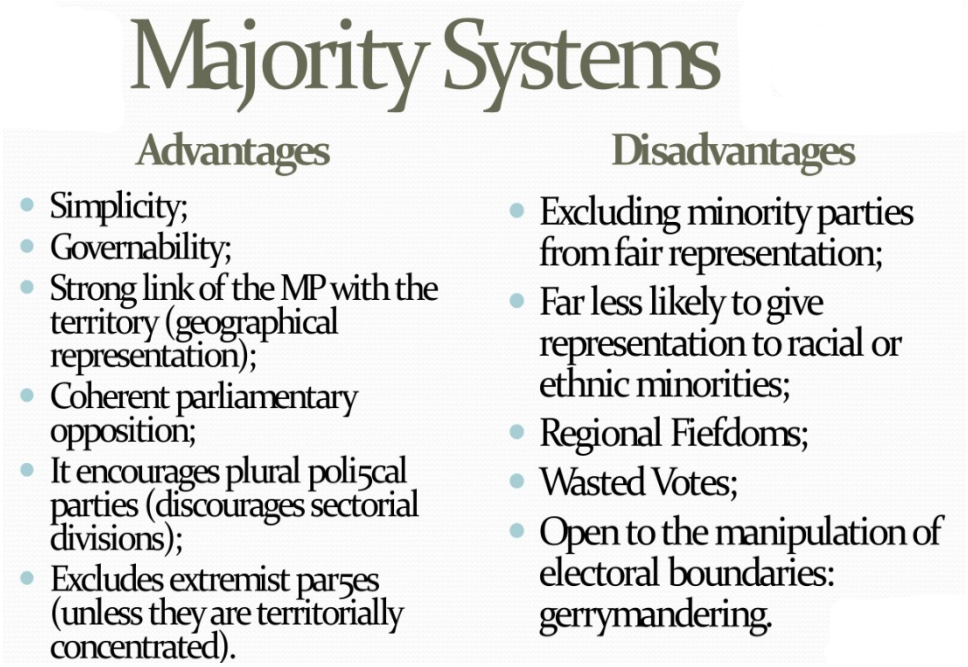
- If nobody obtains the absolute majority of votes in the first round, then the candidate with the fewest votes is eliminated
    - Ballots assigned to the eliminated candidate are recounted and assigned to those of the remaining candidates who rank next in order of preference on each ballot
    - The process continues until one candidate wins by obtaining more than half of the votes

- Specifics:
  - Proximity between voters and their representatives (common advantage of majoritarian systems)
  - Greater opportunity to convey information about voters' preferences
  - Votes are not wasted, because they are transferred to the next preferable candidate
  - Strategic voting is still possible
  - Australia is the most relevant country that has adopted Alternative Vote

Supplementary Vote System

- It is a candidate-centered system used in single-member districts
  - Voters rank at most 2 candidates
  - If no candidate wins an absolute majority, all but the two leading candidates are eliminated

Sum-up



➔ In order to favor stability and governability, majority systems tradeoff a fair translation of parliamentary scores, excluding minorities and smaller parties, and waste a lot of votes

➔ Thus, this will lead to plural political parties, where minorities converge to have parliamentary representation

2. Proportional Representation

► The number of seats assigned to each list is proportional to the votes obtained
- Usually, these systems are connected to multi-seat constituencies

► The main features of proportional systems that influence the allocation of seats are:

1. District Magnitude
- A fixed number of seats is distributed in one district
- Therefore, the smaller the magnitude of the district, the less proportional the results will be, because smaller districts usually favor larger parties
- In order to make a system more selective, legislators can both play with the design of the electoral districts and the methods (dividers and quotas)

2. Electoral threshold
- The electoral threshold can be either *natural* or *formal*

  ➔ The Natural Threshold always exist as a product of any proportional electoral system

  ➔ The Formal threshold is written into electoral laws

- The two methods are:

  a. List Proportional Representation
  - Methods based on dividers
  - Methods based on quota

  b. Single Transferable Vote

a. List Proportional Representation

► Each party nominates a list of candidates:
- *Closed Party Lists*, in which the order of candidates elected is determined by parties
- *Open Party Lists*, in which voters, along with the preferred party, may also indicate their favorite candidate within the party
- *Free Party Lists*, in which voters have multiple votes that they can allocate either within one party list or across different party lists

Methods based on dividers

- The total number of votes is divided by a series of dividers:

1. ***D'Hondt***
   - Typically helps larger parties because it has a lower divisor and therefore it is more selective
   - Number of votes of each party are divided by divisors up to the number of seats to be assigned

2. ***Sainte-Lague***
   - Typically helps smaller parties, so it is more representative
   - Dividers are all odd and the distance between dividers may vary
   - It includes a minimum threshold, only parties with more than 5% votes get seats

- Systems, however, are rarely purely proportional:
  - In fact, growingly common are majoritarian correctives such as majority bonuses
  - Since proportional systems favor coalition governments and create instability, Parliaments choose a Proportional System but introduced mechanisms that transform the proportional system into a more majoritarian system (Majoritarian Correctives)

  ➔ Thus, a more representative system with greater stability is established

  - ***Majority Bonuses***, which give the winning party more seats than the actual number it would have won following a purely proportional system

  - ***Majoritarian Threshold***, which states that only the parties that get a number of votes above a certain threshold will enter the Parliament. The threshold may be set by the Electoral System or may be implicit in the system.

- The choice between D'Hondt and Saint-Lague depends on whether legislators prefer a more *representative* (**Saint-Lague**) or *selective* method (**D'Hondt**)

Methods based on quota

- Requires the number of votes for each party to be divided by a ***quota*** representing the number of votes required for a seat
  - The result for each party will usually consist of an integer part plus a fraction remainder
  - Each party is first allocated a number of seats equal to the integer number
  - Then, parties are ranked on the basis of the fractional remainders, and those with the largest remainders are each allocated one additional seat until all the seats have been allocated (***largest remainder methods***)

1. $\boldsymbol{Hare\ Quota} = \dfrac{\boldsymbol{total\ votes}}{\boldsymbol{total\ seats}}$
   - The main issue is that most of seats are unallocated and causes a waste of votes because it generates too high reminders
2. $\boldsymbol{Dropp\ Quota} = 1 + \dfrac{\boldsymbol{total}}{1^{*}\boldsymbol{total\ seats}}$
3. $\boldsymbol{Hagenbach-Bischoff\ Quota} = \dfrac{\boldsymbol{total\ votes}}{1^{*}\boldsymbol{total\ seats}}$
4. $\boldsymbol{Imperiali\ Quota} = \dfrac{\boldsymbol{total\ votes}}{2^{*}\boldsymbol{total\ seats}}$

- All the quotas, besides the Hare Quota, are supposed to reduce the votes waste by reducing the remainders, and thus assigning less seats using the largest remainder methods
  - ➔ The smaller the remainders using a quota, the more selective a system is

b. Single Transferable Vote

- Similar system to the alternative vote BUT it is applied in multimember districts

- ***Candidate-centered system*** where voters rank candidates, also from different parties
  - This feature is named *Preferential Voting*, and allows to minimize wasting of votes
  - Voters convey a lot of information through their ballots

- Candidates depend on transfer of votes, which is an incentive for campaigning on broad platforms:
  - The system leads to a proportional outcome, but still presents strong links between candidates and constituencies

- The effect of system depends on district magnitudes
  - Seats are assigned by means of quotas, usually the Dropp Quota
  - Once a quota is calculated, we need to see whether the candidates meet the quota
  - The votes of the eliminated candidates, and the votes in excess of the winning candidate, are both redistributed to the second preferences
  - All the second preferences of votes for the winning candidate are considered, and the votes in excess are redistributed proportionally to the second preferences

***Advantages of Proportional representation*:**

- Almost faithful translation of votes into seats
- Minority parties are adequately represented by more diverse lists of candidates
- No regional fiefdoms

***Disadvantages of Proportional representation*:**

- Inefficient coalition governments which cause instability and fragmentation
- Less intuitive than majority systems
- Blackmailing power of small parties
- Allow extremist party to enter Parliament
- Lack of link between candidate and territory
- Give too much power to party leadership

3. Mixed Systems

► These systems are attempts to combine positive attributes of proportional and majoritarian systems

► Voters elect their representatives through two different systems, one Proportional and the other Majoritarian

- Votes are translated into seats at different levels (electoral tiers): District level, regional level, national level

- Majoritarian system is usually used at the lower tier (regional level) while proportional system at the higher tier (national level)

Independent Mixed Systems

➔ Majoritarian and proportional components are implemented independently

► ***Ukraine***

- Half of Members of Parliament are elected on the basis of a proportional system with closed party lists in one single nationwide constituency
- Political parties must receive at least 5% of all votes cast in order to participate in the distribution of mandates of the proportional component
- The other half of Members of Parliament are elected Single Member Districts under a plurality system in a single round (First-Past-the-Post)

Dependent Mixed Systems

➔ The proportional component is used to compensate for disproportionalities produced by majoritarian formula

- This system is also known as *Mixed Member Proportional System*

► The application of proportional formula depends on the distribution of seats through the majoritarian formula

LESSON 6 - INTRODUCTION TO EU LAW AND INSTITUTIONS

Defining the EU

- The EU is a product of an international agreement among states, but it is a very *Avant-garde* international organization, providing a new model for transnational relations:
  - Its institutions are more powerful than those of conventional international organizations
  - Its law has direct effects on individuals, while international law obligations are typically directed to states only (Weiler**)**
  - States give up part of their sovereignty in order to join the European Union, which has decision power over certain subject matters

- The EU is not sovereign like a State, but it has acquired some fundamental federal qualities:
  - The enforcement of its law is unique among international organizations and more similar to that of a Federal State

    ➔ The Court of Justice of the EU established the principles of
    - ***Supremacy***➔ EU Law hierarchically superior to National Law
    - ***Direct Effect***➔ Citizens can rely on EU Law directly before a national judge without need of implementation

  - It has exclusive jurisdiction on monetary policy in the Eurozone and has powers in areas of traditional state responsibility (Home Affairs, Foreign Policy)

- The EU does NOT technically have a Constitution:
  - In **2004**, an attempt at providing the EU with a Constitution failed
  - **Treaties**, however, have a **Constitutional Character**:
    ➔ CJEU in ***Les Verts VS EU Parliament*** (1986) defines the Treaty as “The basic Constitutional Character of the EU”

- Since the **Treaty of Nice** (2001), the EU also has a Bill of Rights, which is the **European Charter of Fundamental Rights**

- The EU Constitution failed because Dutch and French Referenda rejected it, but the **Lisbon Treaty** (2009) replicates nearly 90% of the failed Constitutional Treaty

Year	Treaty
1952	**European Coal and Steel Community (ECSC)**
1958	**Rome Treaties**: • The **European Economic Community (EEC)** • The European Atomic Energy Community (EURATOM)
1987	**Single European Act**
1993	**Treaty of Maastricht** • The European Economic Community (EEC) becomes European Community (**EC**)
1999	**Treaty of Amsterdam**
2003	**Treaty of Nice**
2009	**Treaty of Lisbon** • Treaty on the European Union (TEU) • Treaty on the Functioning of the EU (TFEU)

► The Maastricht Treaty introduced the 3 pillars that the European Union would have covered at different levels of involvement of members states:
- Economic community, which is more supranatural and refers to market integration and the development of the internal market. It has major involvement of the European institutions
- Common foreign and security policies, which is related to traditional national competences that national states would not have easily given up
- Justice and common affairs, which refers to competences such as immigration and police, which as well members state would not have left to the European Union

➔ The pillar structure is not present anymore, but some elements still exist. This structure was replaced in 2009 when the Lisbon Treaty repealed the Maastricht Treaty

► The European Union is currently based on **2 treaties**:

1. ***Treaty of the European Union*** (**TEU**)
   - Contains general principles defining the EU (values and objectives)

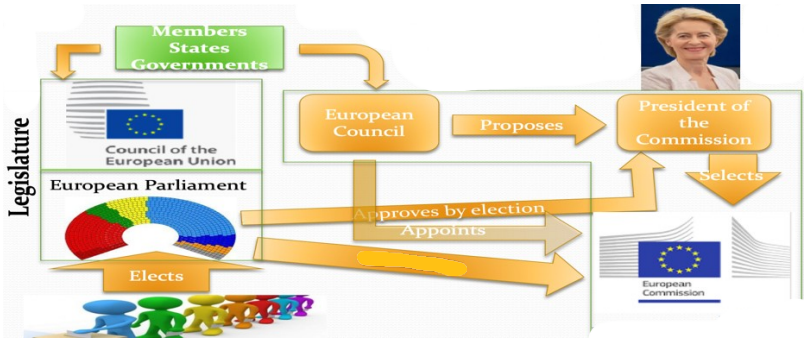
2. ***Treaty on the Functioning of the European Union*** (**TFEU**)
   - Contains specific rules on the functioning of EU institutions and policies
   - Contains the Charter of Fundamental Rights of the EU
     ➔ The Charter is external to the treaties, but has the same legal value

Key Historical Traits

► The EU grew from 6 to 28 members (27 after BREXIT)

The EU Form of Government

- ► Voters elect the European Parliament
- ► Member States select the Council of the European Union and the European Council
- ► The European Council Proposes the President of the Commission, who is approved by election by the European Parliament
- ► The President of the Commission selects the European Commission and the European Council appoints the members of the European Commission
- ► The European Parliament must give confidence to the European Commission



- ► Council of the European Union and European Parliament have legislative power
- ► The European Commission has Executive Power
- ► There is no proper relationship of confidence, but the European Parliament has supervisory power over the European Commission

<u>Takeaways</u>

- We have both a Head of State and a Head of Government, which are two full-time separate roles since the Lisbon Treaty
- Neither the Head of State nor the Head of Government are popularly elected
- The President of the European Council serves for a fixed term
- The President of the Commission does NOT serve for a fixed term because of the relationship of confidence with the Parliament

➔ These features make the EU similar to a Parliamentary Executive with special features derived by its own confederal nature

a. Council of the European Union

► The Council shall consist of one representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote
  - The members are politicians (NOT civil servants), and typically national ministers
  - Presidency rotates annually
  - The composition may vary according to the kind of issue discussed
    ➔ when dealing with economic issues, the Council will be formed by Ministers of Finance

► The Council is assisted by a committee of permanent representatives of the member states (COREPER)

► *Functions*:
  - ***Legislative powers***
    ➔ The Council is, together with the Parliament, one of the legislative bodies of the EU as it votes for legislation proposed by the Commission
    ➔ Voting inside the Council shifted from Unanimity to *Qualified Majority Voting* (QMV)

  - ***Policy-making powers***
    ➔ Setting the political direction of the Union
    ➔ The function was largely taken on by the Council

► Decision-making in the Council is one of the more debated issues in EU scholarship, and it can happen either by:
  - **Unanimity:** in less and less policy areas, only in subject matters where member states are deemed more important and do not want to give up their power
  - **Simple majority:** in exceptional circumstances
  - **Qualified Majority:** today in the majority of policy areas

► The **Treaty of Lisbon** defined Majority as:
  - At least 55% of the Members in the Council
  - Representing Member States comprising at least 65% of the population of the Union
  - Any blocking minority should include at least 4 Member States, otherwise the 3 most populous member states could alone block the proposal

► Seeing the EU as a *Proto Federal State*, the Council can be seen as a Federal Senate where State Interests are represented, BUT:
➔ The double requirements of qualified majority detract from its federal nature

► Seeing the EU as an *International Organization*, the Council can be seen as the plenary where all states are represented
➔ The Council is the quintessential intergovernmental body

b. European Parliament

► History:
- Initially, it was composed of representatives from national parliaments
- Since 1979, it is directly elected every 5 years by EU citizens
- Treaties clarify that is composed of "representatives of the Union's citizens"
- Initially its powers were minimal, but now they have expanded and are comparable to those of a national Parliament

► Composition:
- Each Member State elects a number of European Members of Parliament **degressively proportional** to their national population:
  ➔ It is an attempt to balance the democratic principle of "one person-one vote" with the federal principle "one state-one vote"
- Election of European Members of Parliament is organized at the national level through different electoral systems
- Parliament has a maximum size of 751 members

► Functions:

1. ***Legislative Powers***

- The Parliament shares law-making power with the Council of Ministers, which previously was only consulted. Today **co-decision** is the standard procedure
- The Parliament can informally propose legislation by requesting the Commission to introduce law, but does NOT have a formal power of legislative initiative

2. ***Elective Powers***

- The Parliament votes confident to the European Commission:
  - It elects the President of the Commission
  - It confirms the Commission as a whole
- The Parliament can vote a **motion of censure** and force the removal of the Commission

3. ***Supervisory Powers***

- The Parliament questions and investigates the Commission

► Types of Legislative Acts:

1. ***Regulations***
   - Equivalent to a law at a national level
   - Generally applicable over all Members of the Union

2. ***Directives***
   - Type of legislative act which is special to the Union's confederal setting
   - They lay down the term and the end-results to be achieved in every member state, but leave it up to national governments to decide how to achieve these goals

3. ***Decisions***
   - Sometimes they have more addressees➔ One or more member states/companies
   - Other times they are generally applicable and used to complement directives and regulations

► The scope of the EU competences:

- The 3 general principles that govern the Union legislative competence are:

1. ***Conferral***
   ➔ The Union does not legislate in all subject matters, but only in those subject matters that the member states, through the treaties, have delegated to it

2. ***Subsidiarity***

3. ***Proportionality***

➔ Each legislative act is adopted based on a specific legal basis, which determines the type of competence (shared or exclusive) and the type of legislative procedure

c. European Commission

► Made of 27 members➔ One per Member State

- Members of the Commission do NOT represent the Member States
- Each Commissioner is assigned a Ministerial Portfolio (Agriculture, Competition…)
- Members should be independent from governments
- Members are chosen on the ground of their general competence and European Commitment from persons whose independence is beyond doubt
- 2 of the Members are the **President of the Commission** and the **High Representative for Foreign Affairs and Security Policy**

► Functions:

- The Commission shall promote the general interest of the Union and take appropriate initiatives to that end
- The Commission is the successor of the High Authority of the Schuman declaration
  ➔ It pursues the interest of the EU as a whole and can be seen as a motor of European Integration

► Legislative Powers:

- Commission has monopoly of the power of legislative initiative
  ➔ It proposes legislation to Parliament and Council which can modify, approve, reject legislation, but CANNOT propose it themselves

► Powers of Oversight:

The Commission ensures the respect of the Treaties:

- By the Member States through infringement procedures:
  ➔ The commission investigates and prosecutes infringements of EU law by the Member States and can take one Member to Court
- By Firms through Competition Law:
  ➔ The commission investigates and prosecutes firms engaging in behavior that violates the EUY rules on competition (cartels, abuses of dominance)

d. European Council

- The European Council is a **separate institution** from the Council of Ministers
- It developed informally outside of the Treaties and was then formalized by the Lisbon Treaty (2007)

- Composition:
  - 27 Heads of State or Government of the Member States
  - President of the Commission
  - President of the European Council (without voting right)

- Since the Lisbon Treaty, the President of the European Council is a full-time role serving for 2-and-a-half-year term:
  ➔ it is elected by a qualified majority by the European Council and cannot be one of the Heads of State or Heads of Government

- Decisions are taken by consensus and there is no voting right in the European Council, however the Council does NOT have any legislative responsibility

- The European Council is charged with the definition of the EU's general direction and priorities, in cooperation with the commission:
  - It decides the questions of highest political salience that are difficult to decide within the Council of Europe
  - It can be seen as part of the Executive of the EU, together with the Commission

- The President of the Council is seen as the principal representative of the EU on the World Stage

- In the appointment of the Commission:
  - The European Council proposes a potential President for the Commission, taking into account the elections to the European Parliament
  - Parliament elects by majority the President of the Commission under proposal by the European Council
  - The President of the Commission forms the list of Commissioners, in consultation with the Member States➔ The list is then adopted by the Council
  - The proposed Commission is subject to a Vote of Consent by the EU Parliament (this is equivalent to confidence)
  - The European Council appoints the Commission, acting by a qualified majority

e. European Court of Justice

- Judicial Branch of the European Union, which has a "quasi-constitutional" role:
  1. Court of Justice of the European Union
     - 28 Judges and 11 Advocate Generals with a 6-years mandate
  2. General Court
     - 47 judges, reduced from 56 ion 2019
     - Annulment from individuals and undertakings
  3. Full Court/ Grand Chamber (13) / Chambers
     - Case deemed to be exceptional
- There are language arrangements, and the official language is French

Case Studies

1. *Costa vs Enel (ECJ)*

- According to the EU Court of Justice, on the subject matters that are competence of the EU, a Member State cannot Unilaterally Derogate from Community Acts

2. *ICIC case (ICC)*

- According to the Italian Constitutional Court, regulations are in higher position with respect to Domestic Statute Law

➔ However, in the case of contrast between the 2:

- The National Judge (*judge a quo)* must appeal to the Constitutional Court
- The National Judge cannot repeal domestic law

3. *Simmenthal Case (ECJ)*

- Simmenthal S.p.a. is sued by the Italian Financial Office for having applied a public health fee on beef exported from Frances to Italy

➔ On the basis of the ICIC case, the Italian judge should have appealed to the Constitutional Court, BUT he asked for a preliminary ruling from the ECJ

- According to the ECJ:
  1. Community Acts are directly binding for:
     - State
     - Citizens
     - Judges
  2. Community Acts not only have the power to render ineffective domestic law, but can also prevent any contrasting law from being approved
  3. National Judges must directly apply community acts in question

4. Granital Case (ICC)

► The Italian Constitutional Court accepts the supremacy clause established by the Simmenthal case

➔ However, the Italian State did not transfer its sovereignty with respect to:

- Fundamental principles
- Inalienable Human Rights

LESSONS 7/8 - SYSTEM OF LEGAL SOURCES

Sources of Law

► *Sources of law* are constituted of regulations:
- On the *production* of law, which tell us:
  ➔ which are the sources producing law
  ➔ who is the competent body enabled to produce these sources
  ➔ what is the procedure through which these sources are produced

- *Producing Law*

► *Sources of Cognizance*
- Sources that give notice about the sources producing law
- E.g., Official Gazette, Reginal Gazette, Official Gazette of the EU (all official)

➔ A source of production is any **fact** or **act** capable of changing the legal system, which means producing new legal rules
- A source of production is therefore any **act** or **fact** entitled by the legal system to produce new legal norms
  ➔ ***Acts*** are written sources of law
  ➔ ***Facts*** are unwritten sources of law

► ***Acts*** are voluntarily adopted laws that produce a juridical effect because they satisfy 3 conditions:
- ***Existence,*** if it is adopted during the exercise of power conferred to a competent body by law
  ➔ A competent body is entrusted by law with the adoption of that legal act
  ➔ For instance, the Parliament has to pass statutory legislation because it is the competent body entrusted by the Constitution

- ***Validity,*** if the body competent to adopt it followed the rules on procedure and substance, established by law for the correct exercise of legislative power

- ***Efficacy,*** if it has the requirements to produce its own effects

► ***Facts*** are not produced by the will of a specific body or subject but nevertheless produce legal effects because the law recognizes that they have the ability to do so.

➔ *Custom* is the most common legal fact, which is deemed to be at the bottom of the hierarchy of legal sources. It is not produced by the will of a specific body, nonetheless it is able to produce legal effects

➔ ***Facts*** must combine 2 elements:

- ***Objective,*** behavior that has remained unchanged over the passage of time
- ***Subjective,*** certain social behavior which is perceived obligatory and considered to be legally binding

➔ *Custom is a behavior that is constantly repeated over time and is considered to be obligatory and legally binding*

- Before the birth of international law, customs regulated international relationships between countries
- For instance, a custom governing international law is that "international agreements must be respected

► Another major distinction is between:

- ***Judicial Precedent (Common Law)***
  Decision already rendered in a case analogous to the case to be decided that is considered a binding precedent ("Case Law").
  Therefore, in Common Law there is a continuity in the decision of courts, which have to follow the judicial precedent; nonetheless, judges are able to overrule the precedent if there have been major social changes that do not allow them to abide by the precedent.

- ***Legislative Act (Civil Law)***
  Proceeding that may vary in complexity by which a legislative body draws up a text containing rules

► In the Western World there are 2 main legal traditions:

- ***Civil Law***
- ***Common Law***

➔ Belonging to the same legal tradition means sharing the same legal concepts and institutions

➔ Outside the Western World, Civil and Common Laws often co-exist with other legal traditions due to the phenomenon of colonialization

► ***Common Law***

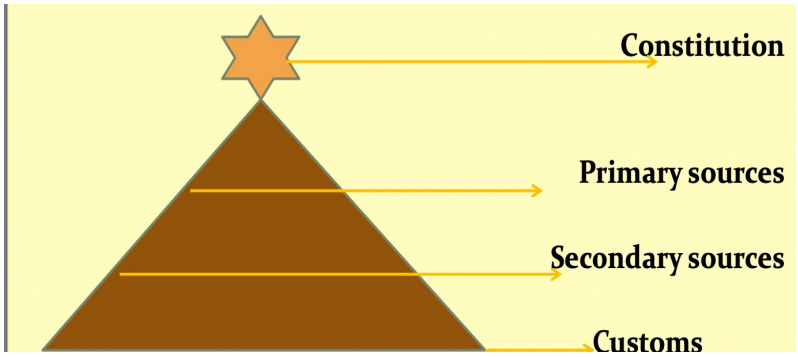
- Court judgements are considered the main legal source
- Judges are often appointed by the executive branch or by election

► ***Civil Law***

- The Courts are considered the "*bouche de la loi",* because judges only need to apply law as it is, without making or discussing it
- Judges are selected through a public examination system

➔ The difference in the selection procedure of judges between Civil Law and Common Law derives from the fact that judges are perceived differently by the 2 legal systems:
- In Common Law, people participate in the selection procedure because judges play a significant role in the creation of legal sources
- In Civil Law, judges have to interpret and apply the law, without making it

► ***Hierarchy of legal sources***



► The origins of Civil Law go back to the *Corpus Iuris Civilis*

➔ Napoleon issued the Code Civil, which contained all the legal norms regulating the relationship between private individuals

► Codification Era (19th century)
- Codification means creating a document containing all the legal norms on a particular subject matter
- Code as an "all-encompassing document"
- Expansive and purposive interpretative canons

The Constitution

► Top legal source, known as the law of laws

► It usually provides for:

1. *Frame of Government* (Form of State + Form of Government)
   - Relation among the institutional bodies
   - Relationship between institutional bodies and citizens

2. *Bill of Rights*
   - Fundamental rights of citizens
   - Art. 16 of the French Declaration of the Rights of Man and Citizen (1789) states that any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution

Codified One single document	**Uncodified**	**Codified** Every state in the world except →	**Uncodified** UK; New Zealand; Israel; Saudi Arabia
Long containing the frame of government and the bill of rights	**Short** containing only the frame of government	**Long** Latin-America (es. Bolivia)	**Short** U.S. (but Bill of Rights of 1791)
Flexible formally equal to ordinary laws (the Constitution may be modified by ordinary law)	**Rigid** Formal & Substantive limitations	**Flexible** Albertine Statute of 1848; UK	**Rigid** Various degrees: 1. U.S. (prop. by 2/3 both houses + rat. 3/4 states) 2. Spain for basic feature of the state and fund. Rights: pass 2/3 + call election + pass 2/3 + referendum 3. Perpetuity clauses
Voted drafted and voted by a constituent assembly/people	**Octroyée** granted by a monarch	**Voted** France; intermediate case: South Africa	**Octroyée** Albertine Statute of 1848
Effective Actually bind the political system	**Ineffective/Symbolic** Do not describe nor bind the functioning of the political system	**Normative** Canada, Europe, etc.	**Nominal/Sham** China; Armenia

- ***Rigidity*** implies that there is a specific procedure to amend the constitution, which is longer and more complex than the usual legislative procedure. The length and complexity of the amendment process depends on the different constitutions, for this reason we have various degrees of rigidity
    - Rigidity implies that there must be a *body* **(Supreme Court** or **Constitutional Court**) which is entrusted with the power of protecting the Constitution
    - It also implies that not every part of the Constitution can be amended (**perpetuity clause**)

- ***Flexibility*** implies that the Constitution is not different from any other ordinary law and, therefore, no body entrusted with its protection is needed.
    - The amendment procedure is the same of that used for ordinary law
    - In Liberal States, constitutions tend to be flexible and granted

- ***Effective*** means that it is actually implemented, and it is binding for the legal system:
    - Typical of the Democratic-Pluralistic State

- ***Ineffective***, on the contrary, means that the Constitution is not actually implemented, so it neither binds nor provides binding regulations to the functioning of political institutional systems

Constitution as the expression of political ideas

1. ***Liberal Democratic Constitution***

► *Liberal:*
- Natural rights became legal limitations on the government
- Protection of property and contract
- Rule of Law

► *Democratic:*
- Democracy as the legitimation principle of the state
- Implies popular election through universal suffrage, and political accountability, which means that MPs are accountable directly to their voters

► The Liberal Democratic Constitution is connected with the Democratic Pluralistic State

► US Constitution and Bill of Rights:
- *Declaration of Independence (1776)*
  ➔ Life, Liberty and the pursuit of Happiness
- *US Constitution (1787)*
- *Bill of Rights (1791)*
  Freedom of religion, press, speech, and assembly
  Freedom from excessive fines and forfeitures and from double jeopardy, as well as the right to bear arms, and to due process

2. ***Liberal Non-Democratic Constitution***
- Non-Democratic in the sense of Octroyè, that is granted by the monarch, who self-limits his power (**Top-down Constitution**)
  ➔ It is connected with the **Liberal State**

- It is still a liberal constitution, however rights are no longer natural human rights but citizens' rights

  ➔ Natural rights are inherent to the people, and the State recognizes and protects them
  ➔ ***Liberal Non-Democratic Constitutions*** do not acknowledge natural rights, but is the State that creates and confers rights and freedoms to its citizens, thus acknowledging these rights as inherent to individuals

- Examples are the Napoleonic Constitutions and the Statuto Albertino (1848)

3. ***Non-Liberal Democratic Constitution***
   - *Radical Democracy*, in which only the majority principle counts
     ➔ Majoritarian absolutism and potential for self-destruction, which means that there is no concern for the protection of political minorities, who are completely disregarded from the legislative procedure

   - Democracies with a strong tendency towards moral perfectionism and political elitism
     ➔ No respect for the interests of the population
     ➔ close connection with Majoritarian Absolutism

   - Many examples in Latin America

4. ***Social Constitution***
   - It is connected with the Welfare State, as it Problems of redistribution of wealth and opportunities
   - It aims at correcting the deficits of liberalism through:
     a. Protection of **positive rights,** which are actively granted through an intervention of the State

     b. Programmatic nature of these rights that need concretization before being enforced

   - Some examples are the Weimar Constitution (1919), the French Constitution (1848) and Post WWII Constitutions

5. ***Socialist Constitution***
   - Democratic Centralism, summarized in the quote *Freedom of Discussion, but Unit of Action* by Lenin
     ➔ The power is strongly centralized in the hand of the party elites

   - Legitimization by an “absolute truth”, which is the official ideology
   - Abolition of Capitalism and economic planning
   - An example is the People’s Republic of China

Constitutional Amendment

► Constitutions need to be amended over time for different reasons:
  - Adjust the Constitution to the environment within which the political system operates➔ Need of **updating** the Constitution
  - Correct the provisions that have proved inadequate over time
  - Further improve constitutional rights or to strengthen democratic institutions

► However, constitutions need to be protected from short-sighted or partisan amendments➔ This is the purpose of ***rigidity***

➔ The challenge is to design an amendment process that allows a Constitution to be changed for the public good, when necessary, when supported by a sufficient consensus and after careful deliberation, but that prevents it from being charged for self-interested, partisan, destructive or short-term motives

► ***Several amendment procedures do exist:***

1. Legislative supermajority
   - If the Parliament wants to amend the Constitution, a higher majority than the simple one is required

2. Direct Democracy or Referendum

   ➔ Include a variety of option that entail the involvement of people in the Constitutional Process:

   - Referendum for all constitutional amendments
   - Referendum is required only if the most fundamental provisions are amended or if the amendment entails a total revision
   - Unless the bill is passed by a sufficiently high supermajority in the legislature
   - Minority of the member of the legislature can ask for a referendum
   - Discretion in deciding whether an amendment should be subject to a referendum
   - Presidents may have a discretionary authority to refer amendments to the people

3. Double-Decision Rule
   - Time delays, because the amendment bill may have to be voted more than once, with a certain time lapse between the votes
   - Between the votes for an amendment bill, general elections must intervene, so that the amendment bill is voted by two different Parliaments
   - Double-decision rules coupled with supermajorities

4. Reference to States, Provinces, or Regions through state or provincial legislatures or referendum ➔ This is more frequent for Federal States

► ***Main design considerations to be made:***

- Amendment VS Total Revision
- Power to initiate an amendment
- Alternative routes to an amendment:

  ➔ It is possible to provide for different procedures wrt the provisions to be amended, depending on which provision are to be modified

  ➔ Sliding scale of amendments, since different amendment procedures may be connected to the typology of provision, thus making more difficult the amendment process

- Unamendability (perpetuity clause)
- Time restrictions

  ➔ Parliament may be deferred from amending the Constitution ina specific moment

► The ***Italian Constitution*** is:

- Codified
- Long
- Voted
- Rigid

➔ *Rigid* means that there is a special amendment procedure:

- It requires a double vote of each Chamber of Parliament
- The first round of voting only requires the simple majority of both Chambers
- There must be an interval of at least 3-months between the votes
- It has to be approved by a qualified majority of the members of each Chamber in the second voting, which is greater than the majority of the government
- When approved by an absolute majority, there is the possibility of recourse to the people through a popular referendum:

  ➔ When the Bill is passed by a Qualified Majority (at least 2/3 of Parliament), there is no possibility to ask for a Referendum

  ➔ From the moment the Bill is passed, there is a 3-months' time to request the referendum, if no one requires it the Bill is passed

  ➔ The Referendum can be requested by a Parliamentary minority:
  - One fifth of the Members of one House
  - 500 000 voters
  - 5 regional councils

Covid-19 and sources of law

- The adoption of the state of emergency by the states:
  - May be provided by the constitutions themselves
    ➔ In this case, the constitution states how a situation is to be considered an emergency, and how the government and the Parliament should operate
  - When not available, states rely on legislation or decrees
    e.g. Italy resorted to law decrees because the Constitution does not have a section dealing with situations of emergency. However, it provides the government with the possibility to issue law decrees in situations of emergency

- Law Decrees are acts having the force of law:
  - Horizontal exception to the principle of separation of powers with regard to law making
  - Parliament temporary delegates legislative power to the government, however this does not mean that Parliament entirely loses control

- When adopted, Law Decrees become a primary source of legislation, comparable to ordinary legislation:
  - Are adopted in a situation of necessity and urgency
    ➔ the Constitution does not define *necessity and urgency*, thus leaving it to the discretion of the government
    ➔ Sometimes, this vagueness has caused abuses of the government, which issued law decrees without a real situation of necessity or urgency
  - Are adopted and implemented by the Government
  - Are adopted in 2 phases:
    1. Government issues the law decree
    2. Parliament converts the law decree into a normal statute law within 60 days

➔ However, if the law decree is not converted by Parliament, it loses all efficacy *ex tunc,* which means that it is as if the decree was never issued
➔ In this sense, the law decree is a temporary delegation of legislative power
➔ If the Parliament converts the law decree, the law decree becomes an ordinary legislation

- If the law decree is not converted, any legal relationship that was created becomes null, however:
  - Individuals can sue the government
  - Parliament can discretionarily issue legislation that replicates the legal effects of the law decree that has not been converted

- According to judgement 360/1996 of the Constitutional Court, law decrees that have not been converted into law cannot be re-issued, unless there is a new situation of necessity or urgency

- The emergency situation entailed a compression of fundamental rights and freedoms:
    - Freedom of movement
    - Freedom of assembly
    - Freedom of expression, media freedom, freedom of information
    - Privacy and data protection
    - Asylum
    - Prisons
    - Discrimination

LESSON 9 - CONSTITUTIONAL JUSTICE

- Distinction between Supreme Court and Constitutional Court:
  - *Constitutional Court* characterizes Civil Law countries, which is a body established outside the Judiciary System with the purpose of safeguarding the supremacy of the Constitution

  - *Supreme Court* characterizes Common Law countries and is a body established within the Judiciary System. It is the "Court of last resort", which is also entrusted with functions related to the protection of the supremacy of the Constitution.

- There are 3 main reasons why a legal system needs a Supreme/Constitutional Court:
  - Ensure certainty and equality, which means making sure that the law is applied uniformly
  - Ensure the Rule of Law, which mean making sure that Constitutional bodies exercise only those powers assigned to them by the Constitution
  - Resolve conflicts between central and decentralized government
    ➔ Federal State VS Member States
    ➔ Central Government VS Regional Governments

- Constitutional Justice is everything related to the supremacy of the Constitution
- Constitutional Review occurs when a jurisdictional body compares the rigid and codified Constitution (**parameter of review**) with subordinate legal sources to the Constitution (**object of review**), and declares them unconstitutional in case of contrast

- There are 4 main systems to select Constitutional Judges:
  - Appointment based system
  - Election based system
  - Mixed system
  - Predetermined system

Appointment Based System

- Judges are nominated without any intervention of the legislative body (Parliament)

  - In the US, the President nominates Judges of the Supreme Court, however with the Advice and Consent of the Senate, due to the system of checks and balances

  - In the US, the President must follow certain criteria to avoid discrimination, such as geographical origin, gender, and religion. However, political orientation is not taken into consideration.

Election Based System

► Parliaments exert greater influence upon the election of constitutional judges in comparison with the election of judges in regular Courts
    - In Germany the Federal Constitutional Court is elected by Bundestag and Bundesrat in equal proportions (50%-50%)

Mixed System

► Some of the judges are elected by the legislative body, while others are appointed by non-legislative bodies (Austria, Italy, Spain)
    - In Italy, 5 members elected by the President of the Republic, 5 by the Parliament in joint session, and 5 by the government

Predetermined System

► Neither Parliament nor the Government are directly involved in the appointment of constitutional judges
    - In Greece the Court is composed by members of judiciary offices

Historical Perspective

Dr. Bonham's Case – 1610

► Great Britain does not have a Rigid Codified Constitution, so Constitutional Review should not be possible, however it is replaced by Common Law

► Dr. Bonham exercised the medical profession without the necessary license
    - *College of Physicians Act 1553* gave the College of Physicians a right to fine or imprison those being judged for practicing without a license
    - After being fined and imprisoned, Bonham appealed to the Court of Common Please

➔ Lord Coke stated that the College of Physicians not only was judge, but also party to the case, thus it was not an impartial judge

► In his judgement, Lord Coke stated that "Common Law will control Acts of Parliament, and sometimes adjudge them to be utterly void", thus introducing 2 main concepts:
    I) The supremacy of the Common Law in England wrt Acts of Parliament
    II) The prerogatives of Parliament were *derived from* and *circumscribed by precedent*

► Following the Civil War and the Supremacy of Parliament, the Supreme Court could not revise anymore acts of Parliament. The Supreme Court, therefore, does not perform Constitutional Review, but only Judicial Review on secondary legislation.

Marbury VS Madison – 1803

► President Adams appointed a series of Judges just 2 days before his term ended (midnight judges), one of them was Marbury
  - They were approved by the Senate and signed by the President, but they did not receive the Commissions
  - However, the new President, Thomas Jefferson, did not want the two judges to take office and asked his Secretary of State Madison not to send the Commissions, which are formal acts through which a judge could start exercising his mandate
  - Marbury brought a claim to the Supreme Court asking a Court Order (*Writ of Mandamus*) requiring Madison to issue the Commissions

➔ The *Judiciary Act 1789* in fact gave the Supreme Court original jurisdiction over *Writs of Mandamus*

► The Supreme Court, headed by Chief Justice Marshall, said:
  - Marbury has the right to get the job
  - He is entitled to a remedy
  - However, the Supreme Court does not have power to force Madison to hand over the Commission

➔ In fact, the Judiciary Act of 1789 gives the Supreme Court the power to issue Court Orders to people holding office under the authority of the United States.

► However, the Supreme Court said that the act was unconstitutional because it gave the Supreme Court a power it should not have had according to Art. 3 of the Constitution

➔ In fact, the Judiciary Act (1789) expanded the powers of the Supreme Court with respect to what stated in the Constitution

► Justice Marshall stated in his judgement:
  - The Constitution is the Supreme Law of the land
  - Only the laws in pursuance of the Constitutions shall be considered the law of the land
  - Any law repugnant to the constitution is to be considered void

► The case brought 3 main innovations:
  1. ***Judicial Review***, even though the idea of a judicial review of legislation was already part of the 13 colonies' juridical culture
  2. The Review of legislation is not only competence of the Supreme Court, which is the Court of last Resource, but it is competence of all Courts to verify if a law is in pursuance of the Constitution
  3. The Judge must eliminate unconstitutional laws from the Constitution (**Decentralization of the Review**)

The French Deviation

- Rousseau stated that the Constitution must safeguard the doctrine of separation of powers

- Montesquieu stated that the Judge is the *bouche de loi*, therefore it would be unconceivable to give judges the power to strike down legislation

- Art. 16 of the French Declaration of the Rights of Mand and Citizen (1789) stated that "any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution"

- Since Unconstitutional laws may exist and judges cannot strike down laws that they deem against the Constitution, the power of review the legislation is given to a political body, the Senate, which can review legislation before it is passed

  ➔ Indeed, today the Senate is known as the "*Constitutional Council*" in France, and not Constitutional Court

Hans Kelsen

- The Constitution is the law of the laws in a legal system conceived as a *Stufenbau*
  - This was an innovation wrt the past, when Constitutions were flexible and on the same level of other national laws

- Guardian of the Constitution should be a "Court-like" body, the Constitutional Court

  ➔ The Constitutional Court is a Court-like body, established outside the judiciary, with the specific function of protecting the supremacy of the Constitution
  - Review should not be *a priori* (preventative) but *a posteriori* (repressive)
  - If a law is in contrast with the Constitution, the Court should strike it down
  - Complaints should only be lodged by constitutional bodies:
    ➔ The Constitutional Court cannot act on its own and
    ➔ According to Kelsen, citizens should NOT be allowed to lodge Constitutional Complaints

Essential Components of Constitutional Review

Who carries out Judicial Review:

- *Centralized Review*
  - Judicial review is carried out exclusively by an ad hoc Court-like body (Constitutional Court)
  - Derives from Kelsen

- *Decentralized Review*
  - Judicial review is carried out by any judge during regular court proceedings
  - Also known as Diffused Model
  - Derives from “Marbury VS Madison”

When Judicial Review is carried out

- *Preventative review (a priori)*
  - Judicial review is carried out before the law has come into effect
  - France with reference to statute laws
  - Italy with reference to regional law, before 2001 amendment

- *Repressive review (a posteriori)*
  - Judicial review is carried out after the law has come into effect
  - Usually, review is Repressive and only rarely Preventive

Lodging a Constitutional Claim

- *Principaliter (Abstract) Proceedings*
  - Complaint is lodged independently of the proceedings in a specific case
  - The complaint can be lodged by Institutions, Associations, and Individuals

- *Incidenter (Specific) Proceedings*
  - Judicial review is carried out during a regular proceeding before a regular Court
  - If the system is *decentralized*, the Judge can review the unconstitutional law himself
  - If the system is *centralized*, the judge must appeal to the Constitutional Court

Types of Decisions
We can distinguish between 4 main types of decisions:

1. ***Cassation Decision***

- Happens when the Cassation Court determines that a law is unconstitutional after scrutinizing it, and it leads to:

   a. *Annulment (ab initio)*➔ law erased from the legal system *ex tunc*

   b. *Abrogation (prospectively)*➔ Law continues to apply in cases that are currently been decided, but it will not be applied anymore in the future

- Annulment decisions are more frequent than Abrogation decisions, because unconstitutionality is taken seriously into account

2. ***Declaratory Decision***

- It may be of a preventative character, and it is typical of legal systems extremely respectful of the strict division of powers
    - The Constitutional Court declares a law unconstitutional, but in some legal systems it waits for the Parliament to confirm the decision of the Court

3. ***Appellate Decision***

- The Constitutional Court appeals to the Legislature (explicitly or implicitly, with or without time limit) to make changes to legislation it deems to be in violation of the Constitution
  ➔ If the Parliament does not act, the Court will do so

4. ***Interpretative Decision***

- The Constitutional Court secures with its own interpretation that in the future the implementation of the statute complies with the Constitution
    - Even though the precedent is not binding in civil law countries, the Constitutional Court hopes that judges will give the right interpretation of the court

Effects of Constitutional Decisions

► Constitutional decisions lead to 2 types of effects:
  - *Subjective effects*
  - *Temporal effects*

➔ Note that effects may change depending on whether the law is declared unconstitutional or not

► **Subjective** effects may be:
  - *Erga omnes*, which means that the decision is generally binding
  - *Inter partes,* which means that the decision binds only the parties of the controversy

► **Temporal** effects may be:
  - *Ex tunc*, from the moment a disputed provision took effect
  - *Ex nunc*, from the moment the decision on unconstitutionality was taken

Models of Constitutional review

► We can distinguish 4 different models of Constitutional review:

American Model

► Judicial review is carried out:
  - By all regular Courts (***decentralized review***)
  - Under the regular Court proceedings (***incidenter***)
  - After the law has come into effect (***a posteriori***)

Austrian Model

► Judicial review is carried out:
  - By the specialized *ad hoc* Constitutional Court (***centralized view***)
  - Under specialized proceedings (***principaliter, abstract***)
  - After the law has come into effect (***a posteriori***)

Hybrid Model* (*different types of hybridization)

► Judicial review is carried out:
  - By the specialized ad hoc Constitutional Court (***centralized view***)
  - By special proceedings or under regular Court proceedings (***incidenter or principaliter***)
  - After the law has come into effect (***a posteriori***)

► The judge who has a doubt on the constitutionality of a proceeding has to stop the trial and ask the Constitutional Court to examine the constitutionality of a provision
  - Then, the judge will carry out the process according to the decision of the Constitutional Court

French Model

- The model starts from the assumption that judges are the "mouth of the laws", who cannot carry out constitutional review
- The Constitutions of 1799 and 1852 gave the Senate the power to carry out *preventative* constitutional review (***political review***)

  ➔ The proceeding can be only **principality** and not incidenter, because the law has not entered into effect

- It was only with the Constitution of the Fourth Republic (1946) that France finally set up an ad hoc body, the *Comitè Constitutionnel* for constitutional review
  - However, its jurisdiction was limited and carried out preventative review

- Under the Constitution of the Fifth Republic, France has a ***Conseil Constitutionnel***

  - Until the reform of 2008, it only carries out preventative review

  - However, it uses the Preamble of the 1946 Constitution as a parameter (*bloc de constitutionnalitè*) for constitutional review, following a judgement of 1971

  - Furthermore, in 1974 the *saisine parlementaire* is introduced, which is a constitutional petition that can be lodged by a parliamentary minority

- The 2008 reform has introduced the so-called *Question Prioritaire de Constitutionnalitè* (QPC)
  - It has introduced the Repressive Review and the Incidenter Procedure
  - QPC can only be raised when the parties fear that the legal provision applicable to the case at hand may violate the fundamental rights and liberties guarded by the Constitution
  - Moreover, the constitutional claim can be raised by a Supreme Judge only (*Conseil d'Etat* or the *Cour de Cassation*)

    ➔ This means that QPC can be raised only during the Third Instance Judgement

- QPC is to be considered relevant for the *Conseil* if:
  - It is concretely applicable to the dispute ➔ There must be an obligatory connection between the provision and the case
  - The *Conseil Constitutionnel* has not already decided on its compatibility with the Constitution
  - It is a pledge characterized by an innovative and serious nature

- ➔ QPC reduces the burden of work to Constitutional Council, because they will take judgement provided that the provision meets the 3 aforementioned criteria

- ➔ Since 2008, France is more in line with other Hybrid Models, even though the Incidenter procedure is very careful

Other functions of Supreme and Constitutional Courts

- ***Resolving Jurisdictional disputes between:***
  - Top government bodies
  - State and regional or local entities
  - Local or regional entities
  - Courts and other government bodies

➔ For instance, an example of conflict is the Power to Grant Pardon in Italy, which was unclear if it was a *formally presidential-substantially governmental act* or a *formally and substantially presidential act* because of a problem of interpretation, and the Constitutional Court gave the right interpretation of the Constitution

- ***Political Parties (Militant Democracy)***
  - Decision-making related to matters of unconstitutional acts and activities
  - Militant Democracies affirm a strong commitment towards the Protection of the Constitutional legal order

➔ For instance, the German Federal Constitutional Tribunal can declare a specific party to be unconstitutional because it threats seriously the constitutional legal order ➔ Power exercised very careful because it binds the freedom of expression

- ***Referendum:***
  - Decision-making regarding its conformity to the Constitution
  - The Italian Court can rule on the admissibility of an abrogative referendum

- ***Elections:***
  - Decision-making regarding the conformity of proceedings with the Constitution and Statute Law
  - Constitutional Courts verify if MPs can be elected, or can verify the funding of a campaign

- ***Confirmation of elected members***
  - Court affirms if people elected fulfill the requirements for being elected

- ***Capacity for office:***
  - Court states if a state official is still fit to be in office or if he should be removed (President of the Republic, or Other State Representatives)

- ***Impeachment***:
  - Impeachment of the President of the State
  - Impeachment of other State Representatives

Italian Constitutional Court

Sources

► The Italian Constitutional Court is regulated by:
- Articles of the 1948 Constitution (Art. 134-137)
- Constitutional Laws (1/1948, 1/1953, 1/1967)
- Statute law (87/1953)

Model of Constitutional Review

► It has a *hybrid* model of constitutional review:
- Centralized, because the review is carried out by a Constitutional Court
- *A posteriori*, because preventative review takes place only for the Statute of Regions
- both *principaliter* and *incidenter*

Functions

► The Italian Constitutional Court is an *ad hoc* body with 5 functions:
- Constitutional review of laws and acts having the force of law (Primary Legislation only, regulations are out of the scope)
- Jurisdictional disputes between branches of government within the State
- Jurisdictional disputes over the allocation of powers between State and Regions
- Judgements concerning accusations against the President of the Republic
- Decides on the admissibility of abrogative referendum, according to Art. 75 of the Constitution (function added with a constitutional law)

Composition

► The court is composed by 15 judges:
- 5 appointed by the President of the Republic (*Formally and Substantially Presidential Act*)
- 5 appointed by the Parliament in joint session
- 5 appointed by the Supreme Courts (Court of Cassation, Council of State, Court of Counts)

➔ This is why Italy is a mixed system in the selection of the members of the Court

► The judges:
- Remain on the court for 9 years
- Cannot be re-elected
- Are chosen among lawyers, full professors and judges

➔ Long-term office and impossibility to be re-elected favor the independence of the Court

Proceedings

► There are 3 types of proceedings:

- ***Incidenter procedure***

- ***Principaliter procedure***
  (State and Regions only, private citizens cannot start this proceeding**)**

- ***Review of Statutes of the Ordinary Regions***

The *incidenter procedure* ➔ Concrete Court case

► 2 requirements must be satisfied:

- ***Subjective requirement*➔** one has to be in the presence of a judge that is part of the ordinary or administrative judiciary system
- There has to be a pending court case during the course of which judicial power is exercised
- This procedure cannot happen if there is not any case going on

► The question may be raised by one of the two parties, including the public prosecutor, or *ex officio* by the *judge a quo*

► When doing this, the parties or the *judge a quo* must clearly indicate:

- *thema decidendum* (*object of review*)
  ➔ provision of the law or the act having force of law that are considered to be unconstitutional

- *parameter of review*
  ➔ The provisions of the Constitution or other constitutional laws that are presumed to have been violated

► Furthermore, the *judge a quo* has to verify that two conditions are met before suspending the case and referring the issue to the Constitutional Court:

- The question of unconstitutionality is **relevant** to the case

- The question of unconstitutionality is **not clearly unfounded**
  ➔ The judge must prove to the Constitutional Court that there is a minimum legal foundation to his doubt. The Constitutional Court will then judge if the doubt is founded or not.

Types of decisions

► The types of decisions of the Italian Constitutional Court are:

1. *Inadmissibility*
   - The question of constitutionality is considered *inadmissible* if any of the basic requirements are lacking

2. *Acceptance*
   - The Constitutional Court accepts the doubts of the judge, so the Constitutionality Question is considered to be **founded** and the provision is declared unconstitutional
   - Acceptance leads to *annulment* of the unconstitutional provision

3. *Dismissal*
   - The Constitutional Court is dismissing the doubts of the judge, however the decision does not mean that the provision is declared constitutional
   - The Court states that the provision is NOT unconstitutional, which means that the provision is not unconstitutional based on the doubt of the judge
   - This leaves the door open to future challenges on the same provision, which may be argued differently

4. *Interpretative (both of acceptance or dismissal)*
   - The *interpretative acceptance* declares unconstitutional a specific interpretation of the provision, and not the whole provision, which can be interpreted differently
   - The *interpretative dismissal* is the right interpretation of a provision that the Constitutional Court gives to the judge, who was interpreting the decision wrongly
   - Generally, if a judge derives two possible interpositions of a provision, one compliant with the constitution and the other not, he has to automatically opt for the interpretation compliant with the Constitution

5. *Manipulative*
   - They are always acceptance decisions whose main objective is to avoid legislative voids and to try to save parts of a certain provision
   - 3 types of manipulative decisions:

   a) *Judgements of partial acceptance*, which strikes down only the part of a provision considered unconstitutional
   b) *Substitutive judgements*, in which the court replaces the unconstitutional wrong part with the correct part
   c) Additive judgements, in which the court states what is the missing content of a provision and adds it. These judgements are critical wrt the separation of powers, because the Court adds pieces of law

6. *Exhortative* (*appellate decision*)
    - Decisions aimed at addressing the legislator, asking to take all the necessary steps to resolve the issue within a given timeframe
    - If the Parliament does not act, the Court will deliver its unconstitutionality decision

Other functions of the Italian Constitutional Court

1. Resolution of jurisdictional disputes between branches of government

- The object of the dispute may be an administrative, a judicial and, in exceptional cases, a legislative act
- The dispute may arise either:
    - Because one branch of government is exercising a power that belongs to another branch of government, for instance if a party claims the power exercised by another (*vindicatio potestatis*)
    - One branch of government challenges the way that another branch of government has exercised its power because it has adversely affected the claimant in some way
- The resolution of disputes between branches of government happens in 2 phases:

1. The ICC has to decide whether the claim that has been lodged is admissible:
    - Whether the dispute has a constitutional tone
    - Identification of the parties to the dispute (they can actually be identified as branches of government)
2. The ICC will then enter into the merits of the case and resolve the dispute:
    - The Court will declare who should exercise a certain function
    - Since the dispute is between parties, the judgement only has *inter partes* effects

2. Resolution of juridical disputes between the State and the Regions

- With the exception of statute laws, all acts of the State or the Regions may be the cause of a dispute
    ➔ *Statue Law* is an exception because if there was a clash, it would fall within the function of Constitutional Review and NOT of jurisdictional dispute
- The object of the dispute is NEVER a legislative act
- The dispute begins when the claim is lodged by the State or by the Region, within 60 days from the publication (or notification) of the act that caused the dispute
    - The ICC will resolve the dispute by declaring who the competence belongs to (State or Regions) with consequential annulment of the disputed act

➔ Due to the fact that the case is between two parties, the judgement will only have *inter partes* effects

3. *Impeachment of the President of the Republic*

- Recall the principle of irresponsibility of the President of the Republic:
  - Necessity of ministerial countersignature on the acts emitted by the President

- The only 2 presidential crimes are *high treason* and *attempt to overthrow the Constitution*
- The impeachment procedure is divided into 2 phases:

1. Parliament in joint session investigates and:
   - ***decrees dismissal*** → Negative vote of the Parliament on the impeachment
   - ***proposes impeachment*** → Positive vote of the Parliament on the impeachment
   - ***declares its competence*** → Not enough relevant evidence to start the impeachment

2. Before the Constitutional Court, that sits in an *integrated composition* of 31 members
   - The court is integrated by 16 popular judges, who are ordinary citizens who fulfill the requirements to be elected senators

4. Admissibility of abrogative referendum

- *Referendum* is an instrument of direct democracy in contrast to representative democracy:
  - Switzerland is a country that frequently resorts to *Referenda*

- An *abrogative referendum* aims at repealing a legislative provision, and for this reason it is a Primary Source of law
  - It may be requested by either 500,000 voters or 5 Regional Councils

- Specific Controls are implemented on the Abrogative Referendum:
  - Central Office at the **Court of Cassation** verifies procedural regularity
  - Constitutional Court verifies the referendum's admissibility, which means that the referendum request does not violate one of the limits of admissibility contained in Art. 75

- According to Art. 75 of the Constitution, the referendum cannot be called on certain subject matters:
  - Tax or budget laws
  - Amnesties or pardons
  - Laws authorizing the ratification of international treaties

I

- In Medieval times and during the Absolute State period, social classes and groups rather than individuals were entitled with privileges ➔ *Legal Particularism*
    - Individual were not equal and were given a *social status* according to the social class they belonged to

- The most significant product of those times was the *Magna Charta* (1215), the first attempt to protect the writ of *habeas corpus* and freedom of movement and to circumscribe the power of the Crown
    - These rights were extended to all individuals

- The liberal concept of rights began with the English Bill of Right in 1689
    - With it, the idea that the protection of individual rights is an eminent and non-renounceable function of State organization began to impose itself

- In particular in 1791, just a few years after the approval of the US Constitution (1787), the first ten amendments (the American Bill of Rights) entered into effect to protect:
    - Freedom of religion, press, speech, assembly
    - Freedom from excessive fines and forfeiture and from double jeopardy, as well as the right to bear arms, to be secure and to due process

➔ The main idea of the liberal state is that the individual shall be protected from the State, and this approach survives today in the US

➔ **(NB)** The US Constitution is considered to be a short-constitution because the Bill of Rights is contained in the first ten amendments

- These freedoms were considered pre-existing conditions rather than rights sanctioned by the Bill of Rights (John Locke)
  ➔ The State only recognizes an already existing situation

- In 1789 the *Declaration of the Right of Man and the Citizen* was approved in France
    - It was the first document in Europe enshrining rights and freedoms
    - It is significantly different from the Bill of Right of the US, because it is a more programmatic document rather than pragmatic as the US Bill of Rights
    - The Declaration introduces concepts that must be implemented by national legislation

- In the years following 1789 the French Declaration was replaced by a series of subsequent Constitutions
    - The French model rapidly circulated throughout Europe thanks to Napoleon

► After 1848 other constitutions were approved in various countries in Europe and in all of them the protection of basic rights was paramount
    - A good example is the French Constitution of 1848

► The beginning of the 1900s and the post WWI period opened with a radically different international political alignment that called for new solutions in formulating right:
    - The most notable example is the Weimar Constitution of 1919

► After WWII a new phase of constitutionalism began where unalienable rights formed the principal nucleus of constitutions, emphasizing those ethical and social values on which society is built

➔ The aim of any Constitution (written or unwritten) is to strike a balance between an individual's freedom to do whatever he wants, and the legal restrictions imposed upon that freedom for the protection of society as a whole
    - The freedom of individuals has to be protected, but it is the job of the constitution to put in place legal restrictions to those freedoms to protect society as a whole

Generation of Rights

► Rights can be classified according to the generation they belong:
    - *First Generation*
    - *Second Generation*
    - *Third Generation*
    - *Fourth Generation*

► The term *Generation* conveys the idea of Diachronically protection of these rights:
    - It tells us about the moment in which these rights have started to be protected

1. *First Generation*

- First Generation rights are also called *negative freedoms* or *civil and political rights*

- It is the first set of rights protected by the *liberal state*:
  - They are called negative rights because they are protected by an **inaction** of the State

- They are enshrined in the *Flexible Liberal State Constitutions*:
  - Statuto Albertino of the Kingdom of Sardinia and then of Italy (1848)
  - Constitution of Prussia (1850)
  - Meiji Constitution of Japan (1889)

- The Prussian Constitution of 1850:
  - All personal freedoms are guaranteed
  - All homes are unassailable, and property is sacred
  - The freedom of religious believes is guaranteed
  - Science and its instruction are free
  - Freedom of speech
  - Right to vote

2. *Second Generation*

- Second Generation rights are also called *positive freedoms* or *social and economic rights*

- They are called *positive freedoms* because they are based upon an active intervention of the State:
  - If the State does not intervene, these rights are not enforced

- They are enshrined in the Rigid Democratic State Constitutions:
  - Weimar Constitution (1919)
  - Constitution of the French Fourth Republic (1946)
  - Italian Constitution (1948)
  - Basic Law of Germany (1949)

- Art 38 of the Italian Constitution discusses welfare:
  - Citizens unable to work and lacking the resources necessary for their existence shall be entitled to private and social assistance
  - Workers shall be entitled to adequate insurance for their needs in case of accident, illness, disability, old age, and involuntary unemployment
  - Disabled and handicapped persons shall be entitled to education and vocational training

3. *Third Generation*

- Third Generation right developed during the 70s constitutionalism, and they are also known as *new rights*

- These rights started to be enshrined after the *Third Wave of Democratization* (1970s) that characterized the Mediterranean Europe area, but expanded not only in Mediterranean Europe

- They represent a broad spectrum of situations and include individual rights of a private nature (right to image, honor, identity) as well as the collective or rights of people (e.g. right to a clean environment or to peace)

- Portuguese Constitution (1976) on the Use of Data Processing
    - Citizens have the right to access to data contained in data records and files concerning them, as well as the right to be informed of the use for which they are intended
    - Access to personal data recordings or files are forbidden for purposes of getting information relating to third parties as for the interconnection of these files, save in exceptional cases
    - Data processing cannot be used in regard to information concerning a person's philosophical and political convictions, party or trade union affiliations, religious beliefs, or private life, except in the case of non-identifiable data for statistical purposes

4. *Fourth Generation*

- In recent years, many authors have identified a fourth generation of rights
- These are distinguished from *Third Generation Rights* not only because they have just recently been given the status of rights, but also because their **protection is intergenerational**
    - Rights to sustainable development
    - Rights connected ton new applications of research in biotechnology

- These rights do not exhaust themselves in the space of one generation, but on the contrary are aimed at promoting responsibility and solidarity in the utilization of resources and patrimony of mankind capable of protecting the needs of generations to come

- Constitution of Argentina (1998)
    - All individuals are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations
    - Environmental damage shall bring about the obligation to repair according to law

- Authorities shall provide for the protection of this right, the rational use of resources, the preservation of the natural and cultural heritage and of biological diversity, and shall also provide for environmental information and education

Basic Rights

► Basic rights can be classified in:
- *Individual Rights*➔ Articles that protect the freedom of the single individual
- *Rights of the Public Sphere*
- *Social Rights*
- *Economic Rights*
- *Political Rights*➔ Right to vote and to run for office

► We want to understand how constitutions balance between conflicting values:

➔ The job of the Constitutions is to introduce lawful limits to the enjoyment of rights and freedoms

1. *Individual Rights*

► Following the Italian Bill of Rights, these rights can be classified in:

a. *Personal Freedom*
- The Italian Constitution states that personal freedom is inviolable, and no one may be detained, inspected, or searched, nor be subjected to any restriction of personal liberty except by order of a Judiciary stating a reason.
- However, in exceptional circumstances the police may take provisional measures that shall be rereferred withing 48 hours to the Judiciary validation. In default of such validation in the following 48 hours, the arrest is annulled *ex tunc.*
- This is strictly linked to the Magna Charta and reflects what came before the Constitution, which is Totalitarism

b. *Personal Domicile*
- The Italian Constitution states that the domicile is inviolable, and it cannot be inspected or searched, except by order of a Judiciary stating the reason.

c. *Freedom of Correspondence and Information*
- The Italian Constitution states that freedom and confidentiality of correspondence and of every other form of communication is inviolable. Limitations may only be imposed by a judicial decision stating the reasons and in accordance with the guarantees provided by the law.

d. Freedom of Movement, Residence, and Expatriation

- The Italian Constitution states that individuals are free to move within the territory. The provision is not limited to citizen, but also to aliens. Individuals are also free to leave the country. The State can only impose limits on movement in case of public health and security.

2. Rights of the Public Sphere

► These rights entail a relationship between the individual and the society:

- They never entail a duty, but only a freedom
- An individual is free to join an association, assembly…, but is not forced to
- However, this principle may have some exceptions, for instance Medical Bar, Accounting Associations… to practice a job
  ➔ This is because the freedom to join an association needs to be balanced with the benefit to society

► These rights can be classified in:

a. Freedom of Assembly

- Assemblies are momentary gatherings of people in specific time and space
- Since they are momentary, the Constitution assigns less stringent limits to what it applies to association
- Assemblies can take place at any time and everywhere, with some limitations depending on whether the assembly takes place in a private or public space
- To hold an assembly in a public space, a 3-days' notice is required for administrative reasons, but this is NOT an authorization
- The only limitations are that assemblies shall be **peaceful and unarmed**, however the authorities may break the assembly in case of public order issues

b. Freedom of Association

- Association may have membership and structure, so they are more complex in nature than assemblies are
- Citizens have the right to form associations freely and without authorization, however the limits with respect to assemblies are stronger because they are longer-term in nature
- Secret associations and associations that pursue political aims by means of organizations having military character shall be forbidden
- It shall always be forbidden to reorganize, under any form whatsoever, the dissolved Fascist party

c. Freedom of Religion and Creed

d. ***Freedom of Expression***

- It is a right related to the public sphere because we are referring to a right that deals with the relationship between the individual and the society as a whole
- Art.21 of the Italian Constitution gives a broad notion of freedom of speech that relates to the need to express one thought in any form of communication.
- The article provides *ex post* provisions to track a balance between public morality and freedom of expression
- The Public Authority can seize the press only prior authorization of the Judiciary, stating the reasons for the seizure, and only for offenses expressly determined by the law on the press

➔ The Constitution aims at safeguarding both the rights of those expressing their opinions and the rights of those receiving an opinion, and gives one the right to express, or not to express himself

3. ***Social Rights***

► These are second generation positive rights

► These rights can be classified in:

- Education
- Healthcare
- Welfare
- Housing

➔ If we look at the Italian Constitution, some of these rights are not explicitly mentioned by the Constitution, however they can be inferred by the general constitutional structure

4. ***Economic and Political Rights***

► Economic rights are:

- Right to Property
- Freedom of Enterprise
- Market and Competition
- Trade Union Rights

► Right to Property and freedom of Enterprise are classic economic rights that are rooted in the liberal state and have their main roots in First Generation Rights

- However, they have a clear grounding in Second Generation Rights
- For this reason, we can say that they are borderline between First and Second Generation Rights

- The Italian Constitution does not have provisions regarding Markets and Competition, but the relevance of this principle can be inferred form a wide set of provisions
    - The have become much more relevant with the advent of European Law

- Trade Union Rights are conceived as collective rights which are closely related to the right to work
    - They can be perceived as rights that have both a positive and negative side
    - They can also be perceived as rights that pertain both to the single individual and the collective entity as a whole

Economic and Social Rights and Freedoms

► As Roosevelt said, individual freedoms cannot exist without economic security and independence
  - Socio-Economic Rights are fundamental for the full enjoyment of other rights

► Economic right can be looked at both from a Positive and Negative perspective
  - They can therefore be understood as economic freedoms (negative aspect) ort economic rights (positive aspect)

► When we look at **Economic Freedoms**, the **negative side** shall prevail:
  - The freedom to engage in economic activities, or private property, are considered first generation rights

➔ In the European Union, Economic Freedoms have gained more and more relevance, especially when we look at the 4 main economic freedoms:
  - Competition was necessary to create an integrated market, but it could not be achieved without basic freedoms that would create an area where **Goods, Services, People and Workers, and Capital** are guaranteed
  - The negative side and the liberal state aspect are prevailing in this case

► When we look at **Socio-Economic Rights**, the **positive side** shall prevail
  - Socio-economic rights are protections for the interests of individuals in having access to certain resources
  - They give rise to **positive obligations** in circumstances in which individuals are unable to provide for their needs, for instance during a crisis
  - Newer Generation of Rights, such as Third and Fourth Generation rights, are those economic rights related to a safe and healthy environment

► We may have **twofold rights**:
  - General Second-Generation Rights, such as the Right to Work or to Health, can be looked at both from a First and Second Generation Rights perspective
  - The **Right to Work** can be intended as the duty of the state to guarantee a job to all its citizens, but also the freedom of individuals to choose their own job
  - The **Right to Health** can be intended as the duty of the State to guarantee healthcare to its citizens, but also the freedom of citizens to choose their health treatment

➔ However, in some cases the individuals' **freedom of choice** can be limited in favor of public interest (e.g., vaccines)

- ► In times of crises, States tend to cut on the more positive rights aspects because they are costlier:
    - In these contexts, the most Positive Side of Rights is triggered, and therefore States must provide, thus incurring in high costs

- ► From the treaties and Constitutional Provisions that incorporated Socio-Economic rights, we can see that there is a close link between:
    - The emergence of Socio-Economic Rights and the different waves of constitutionalization
    - The emergence of Socio-Economic Rights and the continuous development of the international context

- ► As we move from the more negative to the more positive interpretation of Socio-Economic rights, we can see that the Role of the State varies significantly:
    - Obligation to Fulfill (negative)
    - Obligation to Protect
    - Obligation to Facilitate
    - Obligation to Fulfill (positive)

- ➔ We have an increasing degree of involvement of the State

- ► It can be argued that each freedom or right places both a positive and negative burden and obligation on the state:
    - Therefore, the difference is more a matter of degree of involvement of the State than a matter of kind
- ➔ For instance, in normal times the State leaves choice to individuals to choose their health treatment, however in times of crisis (e.g., Covid) when individuals cannot provide for themselves anymore, the state has to facilitate the access to healthcare and make sure that this right is fulfilled

- ➔ Negative and positive rights therefore are not two separated worlds, but we need to look at how relevant the role of the state is in the fulfillment of specific rights

- ► There are different arguments in favor of constitutional protection of Socio-Economic Rights:
    - They protect the vital interests individuals have in autonomy and well-being
    - They are crucial for the effective enjoyment of first-generation rights
    - They provide for the necessary resources in order to exercise freedom in the civil and political sense

- ► We can have Socio-Economic rights with 3rd and 4th generation rights elements:
    - Consumer protection, Protection of the Environment, and the Right to a balanced environment are enshrined in the Constitution

- ► We have previously underlined that the 4 main economic freedoms of the European Union are the *free movement of goods, people, services, and capital*:
    - These rights are in effect individual rights, however they create the status of the EU citizen
    - Therefore, we can once again see Socio-Economic rights as the minimum core requirement of what it means to be part of a society, because they define the role of the citizen in society

NB

- ► When talking about Socio-Economic rights, we do not only consider First and Second-Generation rights, but we have also Third and Fourth Generation Socio-Economic Rights
- ► Socio-Economic rights are relevant because they define the role of individual in society
- ► They can be looked at from both a negative freedom approach and a positive right approach➔ This is not a difference in kind, but only a difference in the degree of involvement of the State
- ► The situation of crisis is linked to a greater involvement in the role of the State, let it be a Private or a Public crisis

➔ We always have to look at Constitutions as living instruments, and courts have a fundamental role to play in balancing out different aspects regarding the context

➔ It is not possible to enjoy Economic Freedoms (first generation rights) if Socio-Economic Rights and individual needs are not met

- Economic Freedoms and Socio-Economic Rights should always be seen together
- Scholars argue that, since providing for Socio-Economic rights can be costly, in times of crises those who triggered the crisis are held responsible to compensate for the limitations experienced by citizens in the enjoyment of their rights

Religious Freedom

Does a specific model of Religious Freedom exist?

► To answer this question, we need to take different levels into account:
- If we consider territorial and national states, significant differences appear
- However, if we consider the continental level, the national differences flatten out

➔ In this sense, even though differences emerge at a European level, we can see a different European model that emerges wrt other continental models:
- The historical development, but also the migration of ideas and people, have contributed to the creation of this European model

► Therefore, to answer the question we need to take into account:
- Geographical spaces
- Historical processes
- Religious traditions
- Legal and political cultures

Emergence and development of the right to freedom of religion in Europe

► In Europe, the right to freedom of religion has taken shape in 3 stages, corresponding to its three dimensions:

1. *Institutional Dimension*
   - It has roots in the Christian dualism between **God** (the religious authority), and **Caesar** (the political authority)
   - These are two competences and two jurisdictions guiding the whole humanity (*Doctrine of the 2 swords*)

2. *Individual Dimension*
   - The essence of religion is the relationship between each individual and God, without any institutional intermediation
   - Freedom of religion is an individual right protecting the conscience of each person (*Inner Church*)

3. *Freedom of religion as a human and universal right*
   - At the end of the 18th century, the American and French declaration of rights underlined that Freedom of Religion:
     - Is a right that belongs to every human being because he or she is a person
     - Must be granted to every individual, regardless of the religion
     - Is Secularized because the State protects this freedom regardless of the religion professed by the individual

- Today, these 3 dimensions play a fundamental role in defining the position assigned to religion in the public sphere:
  - *Institutional Dimension*➔ has been legally translated into the principle of separation between Church and State
  - *Individual Dimension*➔ led to the conception of freedom of religion as primarily an individual and private right
  - *Freedom of Religion as a human and universal right*➔ Grants individual the right to seek their personal truth, religious or non-religious

- These 3 dimensions constitute the European model of religious freedom, which is centered on the dissociation of religion in the definition of public space

- The result of the combination of the 3 dimensions that built up the European model of religious freedom is that specific religions or beliefs have no impact on individuals' right to religious freedom:
  - Individuals have the right to profess and practice their chosen religion or belief
  - Individuals have the right to profess their own religion without affecting their enjoyment of civil and political rights

- The secularization of the right to freedom of religion affects both positive and negative aspects of this right:
  - The positive aspect is the right to profess and practice freely the religion
  - The negative aspect is the right not to suffer from discrimination due to religious choices

European and Non-European models of freedom of religion

- The Law of the State is the best instrument to ensure religious freedom in both its positive and negative dimensions:
  - It is **uniform** in the sense that it is applied to everyone, regardless of their religious freedom
  - It is **secular** in the sense that it is the product of a political authority, and not a religious one

➔ Uniformity and Secularism define the legal status of the citizen, independently from their religious differences. Therefore, the right to religious freedom is situated within the framework of the notion of citizenship and the State should guarantee the same legal status to all citizens.

- The right not to suffer from discrimination because of one's religion is assured by providing all citizens with the same civil and political rights
  - The **principle of equality** is the best way to ensure religious freedom, and it represents a better system than the legal recognition of religion-based diversity

► In other parts of the world (Asia, Africa), the right to freedom of religion is situated within a different framework defined by **religious affiliation**
    - *Diversity* is the best way to ensure liberty and religious freedom (system of **personal law**)
    - **Legal Pluralism** is based on religious affiliation and leads to the recognition of different civil and political rights according to religion

Europe➔ *Secularism and Uniform Law*
Asia and Africa ➔ *Religion and Legal Pluralism*

► The role that a Constitution attributes to religions, through provisions regarding sources of law, in the production of State Law is an indicator of the status accorded to them:
    - In Europe, no Constitution includes religious law as a source of state law
    - 17 non-European constitutions list Sharia among the sources of state law

► In European Constitutions, the principle of State Secularism can be found in:
    - *Preambles*, which reveal ideals and values that inspire the Constitutions. In European Constitution preambles, we generally see a silent preamble wrt religious issues, even though there may be Constitutions that refer to divinity in general terms, or to a specific God or religion.
    - Provisions forbidding the recognition of a religion or a church
    - Provisions affirming the separation between states, religions, and religious communities
    - Provisions on a State or National religion or church

➔ This information show a difference between Europe and other parts of the world regarding religious freedom in its positive and negative profiles

European model of freedom of religion and belief

► In Europe, we have 3 legal models of regulation of freedom of religion at a State level:
    - The model of *laicitè* (France)
    - The majority religion model (Italy)
    - The multi-religious model (UK)

The model of laicitè

► It is a set of secular principles and values to bond all citizens to manage diversity and build a cohesive society
  - There is a sort of *civil religion* to be accepted by all, independently from religious affiliation, ethnic membership, political opinions, or cultural tradition
  - Religion is a potentially divisive factor, and for this reason the model aims at limiting it in the public space
  - Bonds between individuals professing different religions can be created only through secular provisions

➔ Based on the extent of the limitation of religion in the public sphere, it is possible to elaborate a Soft or Hard model of *laicitè*

► France has introduced a contract called *Integration Républicaine*:
  - Before entering France, each immigrant must follow a training program where *laicitè* figures among the values of the Republic, together with *liberté, égalité, and fraternité*
  - Religion is not taught in schools, and this is an exceptional case in Europe
  - There is a Governmental body to combat sects and *derives sectaires*
  - Law prohibits the wearing at school of highly visible religious symbols, and bans full-face veil in public spaces

The majority religion model

► Shows up when a religion has played an important role in the formation of a country's national identity
  - The Majority Religion has a preferential legal status
  - The model protects a central component of a nation's historical and cultural heritage
  - The privileges do not contrast with freedom of religion, because also other religions are recognized and protected by the State

► In Italy, there is an attempt to govern the country through the values of Catholicism (*civil religion*), that supplies the cultural and ethical principles on which full citizenship is base
  - Non-Catholic can fully enjoy religious freedom rights, but not religious equality rights
  - The Catholic tradition is Italy's civil religion and provides the fundamental principles and values on which social cohesion is founded

► The components of the Italian model are:
    - ***School***, in which the teaching of Catholicism is compulsory, but attendance is optional. Other religions can be taught on request of students
    - There are no specific laws on new religious movements, no official institutions that control them, but there is a difference on their legal status
    - No law prohibits the wearing at school of religious symbols

➔ Minority religions benefit from the fact that there is a Majority religion

► The integration of non-Catholic religious communities in Italian society depends on an acceptance of the dominant position of Catholicism as the country's civil religion
    - The crucifix is indeed the main defender of the headscarves of Muslim pupils, for instance, but non-Catholic religions must accept the role of the Catholic Church as the gate keeper of the Italian identity

► We can say that there is no *equal footing* between religions, because the State support is selective and privileges Catholicism
    - The negative side is that the gap between Catholicism and other religious communities shall not become too wide

Multi-Religious model

► In a Multi-cultural and multi-religious society:
    - There is a competing set of values in the framework of human rights
    - The State cannot forge the identity and limits itself
    - We have legal pluralism

► The main components of the British model are:
    - Teaching of all religions in Schools
    - New Religious movements are accepted
    - Different religious symbols can be used in the Public Space

France VS Italy

► The Italian model of the Secular State is different from the French model because it considers the historical country's religion

► The Italian legal system envisages the fact that the Catholic Church has shaped the Italian identity:
    - Contrary to France, there is no neutrality in public spaces, and non-Catholic religions benefit from this inclusive attitude

Italy VS France VS UK

- In the UK, the State is much less secular than in Italy or France because the Head of State is also the Head of Church, even though there is a well-established Church in England:
    - The Catholic tradition in Italy, however, is stronger than Anglicanism in the UK
    - France is secular through exclusion of religious symbols in the public space
    - Britain is secular through the inclusion of religious symbol in the public space
      ➔ In the UK, equal treatment of citizens is granted through the recognition of their religion

Conclusion

- Some religious practices are incompatible with Europe's Christian tradition

- 2 main dynamics:
    - The scope of freedom of religion tends to be limited by the urge to grant security (e.g., terrorism)
    - The structure of the right to freedom of religion is affected by the resurgence of nationalisms

- We can conclude that the Secular State is capable of managing the increasing religious and cultural plurality of European countries because its foundation is the equal freedom of all religions and each European country will adopt the model that respects its proper tradition