

Comparative Law  
and Global English for Legal Studies  
A Law-Linguistic Journey

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*estratto*



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MICHELE DI BARI - SERGIO GEROTTO

MOOC: UNDERSTANDING THE ITALIAN LEGAL SYSTEM:  
PUBLIC LAW AND PUBLIC INSTITUTIONS

SUMMARY: 1. The reasons behind the idea of creating a new MOOC. – 2. The MOOC's contents: A brief overview. – 3. Final remarks.

1. *The reasons behind the idea of creating a new MOOC*

In the legal realm – as wisely observed by Ferrari – one of the main effects brought about by globalization is the circulation of institutional solutions among different legal orders<sup>1</sup>. In other words, the investigation concerning the constitutional architecture of different countries that belong to the same legal tradition can highlight how very similar institutional devices have been used to secure the separation of powers and the protection of fundamental freedoms and democracy. For this reason, today, it is extremely important for law scholars and law students to develop linguistic and technical skills that allow them to understand the mechanisms that characterize their own and other legal systems.

This is the motive behind Sergio Gerotto and Michele Di Bari's decision to create a massive open online course (MOOC) explaining – in English – the Italian public institutions, focusing on their main features and providing a comparative overview. Indeed, legal comparison can be useful as far as it is not just an exercise of reading different legal sources and comparing them just on their wording. On the contrary, comparative methodology is helpful in understanding how and to what extent a specific institutional/legal solution has been implemented in different legal systems and how successful that solution has been.

To do so, the course has taken a functional approach<sup>2</sup>, i.e., the ex-

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<sup>1</sup> G.F. FERRARI (ed.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Boston, Brill-Nijhoff, 2019, pp. 2 ff.

<sup>2</sup> As underlined by Husa, “functionalism normally refers to an approach. Typically functionalist approaches study parts of a social system by demonstrating how these parts have

amination of each public institution has been primarily aimed at explaining how the separation of powers is guaranteed in the Italian system<sup>3</sup>.

## 2. *The MOOC's contents: A brief overview*

The course begins by explaining why democratic states need a constitution (written or unwritten). In particular, it is underlined how democratic regimes encompass a series of different mechanisms and institutions aimed at preserving civic cohabitation. Consequently, even if interests in society compete for their establishment as social and legal norms, the democratic structure allows this competition to be conducted within a given set of rules. Liberal democracies are thus constructed following the bedrock of the separation of powers.

In the course, it is explained how the democratic process of law-making must be built according to a predefined set of rules in order to provide legitimacy to potential outcomes derived from the elaboration of individual or group interests at the institutional level<sup>4</sup>. The perception of legitimacy stems from the recognition of a “*common frame*” around which each and every social instance is formed, discussed, and eventually rejected or developed as a new legal instrument that responds to the need of a social claim. This “*common frame*” is usually referred to as a constitution.

The seven-week course allows participants to identify the specific features concerning the following: (1) the Italian parliamentary system; (2) the executive; (3) the judicial system; (4) the Head of State; (5) the distribution of power among the different levels of government (Regions); (6) the Constitutional Court.

When analyzing legislative power, the MOOC clarifies how the Italian Parliament is made of two chambers: the Senate of the Republic,

an effect on the integration or disintegration of a system, and how they influence the existence of these parts as active components of the system”. See J. HUSA, *Functional Method in Comparative Law - Much Ado About Nothing?*, in *European Property Law Journal*, vol. 2, n. 1/2013, pp. 6 ff.

<sup>3</sup> R. MICHAELS, *The Functional Method of Comparative Law*, in M. REIMANN, R. ZIMMERMANN (eds.), *Oxford Handbook of Comparative law*, 2006, pp. 364 ff.; see, also, R. MICHAELS, *Two Paradigms of Jurisdiction*, in *Michigan Journal of International Law*, vol. 27, n. 4/2006, pp. 1003-1069.

<sup>4</sup> According to Dahl, democracy (ideally) is a form of government that provides opportunities for: 1) effective participation; 2) equality in voting; 3) gaining enlightened understanding; 4) exercising final control over the agenda; 5) inclusion of adults. R. DAHL, *On Democracy*, New Haven, Yale University Press, 1998, p. 38.

where senators are elected on a regional basis, and the Chamber of Deputies composed of deputies elected on a national basis. It is explained how the two Chambers exercise the same functions to ensure that the Italian system is identified as a legislative system that functions through perfect bicameralism. In this section, the term bicameralism is explained, and by using a comparative approach, a distinction is drawn between (a) *perfect bicameralism*, that is, when the vote of both houses is necessary to enact primary legislation and new bills must be approved by the majority of representatives in both assemblies of the Parliament, and (b) *imperfect bicameralism*, in which only one of the houses gives confidence to the government, and the chamber to which the executive is responsible can – in some circumstances – overrule the other chamber. If Italy represents an example of perfect bicameralism, the cited case of the United Kingdom provides an example of imperfect bicameralism.

Other differences concerning bicameralism are discussed throughout the course. For example, it is explained how in some legal systems that have adopted perfect bicameralism, both chambers give confidence to the executive cabinet (as it is in Italy), while in other bicameralism systems, the executive is directly elected by the citizens (e.g., the United States).

The section dedicated to executive power describes how, according to the Italian Constitution, the Government is a collegial body composed of the President of the Council of Ministers and the Ministers themselves. Since citizens do not vote directly for the Prime Minister, the course highlights how the President of the Council of Ministers is appointed by the head of state, and on their proposal, all the Ministers are also nominated to form the executive cabinet. Then, the Government must present its program to both Houses of Parliament and obtain the confidence as required by the Constitution.

Then, the course explains how, in some circumstances, when it is necessary to legislate on very technical and specialized matters, it is possible for the government to resort to a *legislative decree*. To do so, the Parliament approves a *delegation law* establishing the object, the guiding principles, and the timeline within which the Government will be able to enact a new bill. If the government does not respect the contents and the limits specified in this enabling act, for example, by adopting a statute not provided for in the delegation law, the legislative decree could be declared unconstitutional by the Constitutional Court.

The course also examines *decree law*, i.e., acts that have the same force as the law and are adopted in cases of necessity and urgency by the

Government. Decree laws are analyzed for their peculiarity: if they are not converted – and thus approved – by the two Chambers with a law called a conversion law, they lapse after 60 days.

In the part concerning judicial power, the *MOOC* explains how in Italy, judges and prosecutors are autonomous in the sense that they must comply only with the law. Therefore, they cannot decide whether to prosecute a case or how to adjudicate a matter based on their beliefs, nor can they receive instructions.

It is explained how judges cannot be removed from office, nor can they be dismissed or suspended from office or assigned to other offices or functions, unless it is through a decision of the High Council of the Judiciary, i.e., the self-governing institution of the Italian judiciary that ensures its independence from the other branches of government.

As for the role of the Head of State, the *MOOC* underlines how the Head of State in Italy's republican system is the organ that guarantees the separation of powers and the proper functioning of the so-called circuit of guarantees and political decision-making. In other words, the President truly «presides over» important functions in defense of the Constitution. These functions include the following: (i) the power to dissolve the Houses of Parliament and call elections; (ii) the promulgation of laws; (iii) the formation of new governments in the alternation of parliamentary majorities; (iv) the appointment of five Judges of the Constitutional Court; (v) the power to postpone a bill passed by the Parliament if the President is persuaded that there are traces of unconstitutionality; (vi) and presiding over the High Council of the Judiciary.

The *MOOC* then describes the distribution of powers, detailing how legislative powers are vested in both the State and the Regions as follows. First, an initial list of subject matters falls under the central jurisdiction of the State (e.g., foreign policy; defense and armed forces; currency; national security, customs). Then, a second list of subject matters defines the areas of concurrent competence where Regions can set up the details with deference to the fundamental principles laid down in State legislation (e.g., education; professions; health protection; sports, disaster relief, etc.). Finally, with respect to all other matters not covered explicitly in these two lists, Regions retain exclusive and residual legislative powers.

Nevertheless, the *MOOC* clarifies how despite this allocation of legislative powers between national and regional governments, one could not affirm that Italy is a federal State. In fact, Italian Regions still lack the main features of federated States, such as, to list only a few, representa-



tion in a second chamber of the national parliament, involvement in the process of amending the Constitution, law enforcement, judicial powers, and almost limitless legislative powers. Moreover, these entities are not financially independent and, in some peculiar circumstances, their elected officials – the President of the Region included – can be removed from office by decree of the Ministry of the Interior.

In its final part, the *MOOC* analyzes the Italian Constitutional Court's functions, emphasizing, in particular, how, in constitutional democracies, supreme courts play a fundamental role in shaping the legal realm by striking down existing law (declaration of unconstitutionality) and how constitutional Judges are necessary to solve institutional conflicts. The course underlines how *judicial review* could be seen as interfering with the principle of the separation of powers, as it undermines the prerogatives of the legislature (i.e., elected representatives). Nevertheless, it is explained that the Constitutional Court's judicial review is necessary, and sometimes even desirable, since it is essential for preventing fundamental rights violations. In the context of conflicts among the different branches of government, the *MOOC* explains how the Italian Constitutional Court is called to implement the constitutional rules governing the allocation of powers.

### 3. *Final remarks*

In conclusion, Sergio Gerotto and Michele Di Bari have the ambition of answering – through the contents of their *MOOC* – the following questions: (a) Why is the Italian legal system so complicated when viewed from the outside? (b) How does it work? (c) Why is the Italian legal system not so different from other systems in the world? (d) How is the Italian legal system compared to other legal systems? According to the authors, the course can help participants familiarize themselves with the Italian institutional organization and, given the constant reference to comparative public law, to distinguish the peculiarities of Italian constitutional architecture. This work represents the first step toward the development of a more comprehensive *MOOC* on comparative public law.