

SABINO CASSESE

A WORLD GOVERNMENT?



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INTRODUCTION

THE idea of uniting humanity, or – at least – of developing a concert of civilized nations is an old one: Dante’s one government under one ruler and a shared end; Hobbes’s league of commonwealths; Kant’s *civitas gentium* embracing all the peoples of the Earth; Einstein’s world government; Mann’s new order of the world, a society of free peoples with equal rights and duties. Are these only aspirations, or should it be recognized that there has been progress since the time of States as the only rulers, such that the division of the world into a hundred and ninety-three different and divided national governments is no longer entirely true?

There are now many features of a new world order: the circulation of concepts, techniques, rules; the development of global epistemic communities; an increasing mix of national and supranational institutions; the formation of more horizontal links among States, which do not disappear, but rather become accountable to one other; the generalization of common usages and rules. Overall, this is conventionally called globalization¹.

Globalization is the major development in the field of public law in the second half of the twentieth century. It has evolved according to an incremental pattern. First, it was applied to peace and human rights (the United Nations); then, to areas such as the sea, nuclear waste, health, labor, the environment. Subsequently, it was applied to trade, and, finally, to global terrorism and global crises. The process of globalization has been piecemeal, and globalization has developed through crises and unbalances, by accretion and accumulation.

[1] For an overview of this progress and the difficulties it has encountered, see A. Cassese (ed.), *Realizing Utopia. The Future of International Law*, Oxford, Oxford University Press, 2012.

In the global space, there is no global government, but rather several global regulatory regimes (from health to labor, to trade, to sea, to banking) without one single hierarchically superior regulatory system. The global polity is the empire of “ad-hoc-crazy:” global regulatory regimes that do not follow a common pattern. This highly a-systematic structure has been nicely encapsulated in the formulation “governance without government” (a formulation which already dates back a quarter of a century²). What unifies this mosaic of legal orders is reciprocal interest.

Vertically, there is continuity and no clear dividing line between global and national levels. “Global” does not mean that the State is excluded. National civil societies, national bureaucracies, and national executives are all important actors in the global arena, where they accept losing some of their autonomy (sovereignty) in exchange for obtaining influence in a much larger area than that of the national State. The bazaar replaces the cathedral³.

Global does not mean intergovernmental. In the global space, there are transnational networks and links among civil societies that are as important as International Governmental Organizations (IGOs). While global regulatory regimes are approximately two thousand, Non-Governmental Organizations (NGOs) number more than sixty thousand⁴.

There is no representative democracy and there are no periodic elections at the global level; but deliberative democracy can work as a surrogate, granting participation in the decision-making processes.

Global regulatory regimes impose democratic principles on national governments. In particular, some democratic principles (free elections, freedom of association, free speech) are imposed by global actors (such as the European Union and the Council of Europe) on national governments. An example is the conditionality of accession

[2] J. N. Rosenau and E. O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge, Cambridge University Press, 1992.

[3] The metaphor is taken from E. S. Raymond, *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*, Sebastopol, Calif., O’Reilly and Associates, 2001. See also M. Xifaras, *The Global Turn in Legal Theory*, in *Canadian Journal of Law and Jurisprudence*, 2016, vol. 29, February, pp. 215-243.

[4] Union of International Associations, *Yearbook of International Organizations*, München, Saur, 2005.

to the European Union (EU). Another example of this phenomenon is provided by the European Convention on Human Rights, which provides for individual complaints to be brought before the European Court of Human Rights, which in turn has compulsory jurisdiction over its Member States⁵.

Finally, the global polity is porous and open: national governments, other global regulatory regimes, and civil societies can interfere with and influence the global institutions.

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3) *Governing the World*, in S. Cassese (ed.), *Research Handbook on Global Administrative Law*, Cheltenham-Northampton, Edward Elgar, 2016, pp. 502-511

4) *Does a “Global Constitution” exist?*, keynote speech delivered at the *colloque* on “*Le constitutionnalisme globale – Peut-on penser la Constitution sans État?*”, Institut Villey, Université de Paris 1, Paris, 29-30 May 2017, to be published in the proceedings of the conference

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6) *Administrative Law without the State? The Challenge of Global Regulation*, in *New York University Journal of International Law and Politics*, 2005, vol. 37, n. 4, pp. 663-694

[5] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11, art. 34.

- 7) *Is There a Global Administrative Law?*, in *The Exercise of Public Authority by International Institutions*, Heidelberg, Springer, 2010, pp. 761-777
- 8) *Global Standards for National Administrative Procedure*, in *Law and Contemporary Problems*, 2005, vol. 68, pp. 109-126
- 9) *Ruling Indirectly: The Judicial Subsidiarity in the ECtHR*, in *Subsidiarity: a two-sided coin?*, in *Dialogue between judges 2015*, European Court of Human Rights – Council of Europe, pp. 11-18
- 10) *The Development of Global Administrative Law*, in S. Cassese (ed.), *Research Handbook on Global Administrative Law*, Cheltenham-Northampton, Edward Elgar, 2016, pp. 1-11
- 11) *Global Administrative Law: The State of the Art*, in *International Journal of Constitutional Law*, 2015, vol. 13, n. 2, pp. 465-468
- 12) *Legal Comparison by the Courts*, in *Revista Jurídica Piélagus*, 2010, n. 9, pp. 21-25
- 13) *The Constitutional Function of Supranational Courts: From Global Legal Space to Global Legal Order*, in *International Administrative Tribunals in a Changing World*, London, Esperia Publications Ltd., 2008, pp. 238-247
- 14) *The Constellation of Global and National Courts: Jurisdictional Redundancy and Interchange*, in A. Seibert-Fohr – M. Villiger (eds.), *Judgments of the European Court of Human Rights - Effects and Implementation*, Baden-Baden, Nomos, 2014, pp. 151-163
- 15) *Interactions between National and Supranational Jurisdictions: The Hedgehog Dilemma*, in *International Journal of Procedural Law*, 2015, vol. 5, n. 2, pp. 190-200

CHAPTER I

NATIONAL GOVERNMENTS
AND GLOBALIZATION

I. FROM THE NATION-STATE TO THE GLOBAL POLITY

1. THE AMBIGUITIES OF THE STATE

THIS chapter is divided into three parts: the first concerns the rise of the State, the second discusses the decline of the State and the third is on the resurgence of the State.

In 1931, an American scholar wrote that “a cursory examination of the term ‘State’ brought to light no fewer than one hundred forty-five different definitions;” and he concluded that “from now on State will need to be accompanied with subscript brackets indicating the particular definition that is being used.”¹ Therefore, it is important to handle the concept of “State” with caution.

As Max Weber first noticed, the State is but one of the many forms of polity that emerged in the sixteenth century and developed through the nineteenth century.² Later, Otto Brunner³ and Otto Hintze⁴ took up the concept of the historical nature of the State, recently developed

[1] C. H. Titus, “A Nomenclature in Political Science”, in *American Political Science Review*, 1931, vol. 25, n. 3, pp. 615 ff. See also S. Cassese, “Fortuna e decadenza della nozione di Stato”, in *Scritti in onore di Massimo Severo Giannini*, Milano, Giuffrè, 1988, vol. I, pp. 91 ff.

[2] M. Weber, *Staatssoziologie*, J. Winckelmann ed., Berlin, Duncker und Humblot, 1966.

[3] O. Brunner, *Land und Herrschaft. Grundfragen der territorialen Verfassungsgeschichte Österreichs im Mittelalter*, Baden bei Wien, 1965 (Engl. translation: *Land and Lordship. Structures of Governance in Medieval Austria*, University of Pennsylvania Press, 1995).

[4] O. Hintze, *Wesen und Wandlung des modernen Staats*, in *Sitzungsberichte der Preussischen Akademie der Wissenschaften*, 1931, Berlin, de Gruyter, p. 790; see also *The Historical Essays of Otto Hintze*, with an introduction by Felix Gilbert, New York, Oxford University Press, 1975.

by Bertrand Badie and Pierre Birnbaum. According to the latter two authors, “[o]ften seen as the unescapable result of political development, the construction of the state should by contrast be understood as an original innovation located in time and space.”⁵

As for the concept of the State, this formed slowly in the seventeenth century and was explored by a wide range of thinkers, from Hobbes to Hegel, to whom we owe the idea that “civil society” and the State are both connected and opposed at the same time. The contribution of jurists was essential to the construction of the State. The German jurist Ernst Forsthoff observed: “*Der moderne Flächenstaat ist eine Hervorbringung des Juristen. Die Juristen haben ihn im 16. Jahrhundert geschaffen, die Juristen haben ihn auf seinem Wege begleitet.*”⁶ The Austrian jurist Hans Kelsen noted that the concept of the State is essential for two different purposes: to unify diverse entities and to direct them towards a unitary objective, the general interest; and to ensure the neutrality of the officials called to work for the State, distinguishing the holder of the office from the office itself.

In other words, the conceptual construction of the State has been instrumental in uniting countries (civil societies) around their ruling class and in giving a common purpose to separate parties.⁷

2. THE FIRST CYCLE: RISE AND GROWTH

If we consider the cycle experienced by Europe’s political bodies over the last few centuries, we may see that in the fourteenth century, there were one thousand political bodies in this part of the world. In the sixteenth century, there were only five hundred; in the age of the French Revolution there were three hundred and fifty, and at the beginning of the twentieth century there were only twenty-five political bodies that could be called nation-States. As the British historian Mark Greengrass

[5] B. Badie and P. Birnbaum, *Sociologie de l’État*, Paris, Grasset, 1979, p. 243 (English translation by A. Goldhammer, *The Sociology of the State*, Chicago, Chicago University Press, 1983).

[6] F. Forsthoff, *Rechtsstaat im Wandel*, Stuttgart, Kohlhammer, 1964, p. 77.

[7] H. Kelsen, *General Theory of Law and State*, Cambridge, MA, Harvard University Press, 1949, p. 191.

writes: “[s]wallowing and being swallowed up, were fundamental features of Europe’s political past.”⁸

Notwithstanding this process of mergers, the States that resulted were not fully united. For example, even after the merger of German States (what is called the unification of Germany), there were several political bodies within the larger unit: after 1871, in the *Kaiserreich*, under Prussian rule and *Kanzler* Bismarck, there were twenty-six political bodies; some of these even had power in military affairs.

Why has there been such a thorough change since the fourteenth century? Why did nations become nation-States? What are the explanatory factors for this development? What were the catalysts of State-building?

There are three explanations.⁹ The first was developed by the American historian and political scientist, Charles Tilly, in a book entitled “Capital and Coercion”¹⁰ and can be summarized with the following sentence: “States make war, war makes States.” In other words, the military-fiscal State emerges from dynamics of conquest and domination.

The second explanation characterizes nation-building as a process of self-perpetuation and self-aggrandizement that is governed by the insiders. Those who occupied State offices were able to act with a certain degree of autonomy from the ruling classes and were able to bring about the ends they desired. The State is a development of monocratic power: central institutions were built to serve the Prince and were organized in

[8] M. Greengrass, “Introduction: Conquest and Coalescence”, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in Early Modern Europe*, London, Edwards Arnold, 1991, p. 2.

[9] For a taxonomy of the theories of State formation, see T. Ertman, “State Formation and State Building in Europe”, in T. Janoski, R. Alford, A. Hicks, M. A. Schwartz, *Handbook of Political Sociology*, Cambridge, Cambridge University Press, 2003, p. 367; H. Spruyt, “The Origins, Development, and Possible Decline of the Modern State”, in *Annual Review of Political Science*, 2002, vol. 5, pp. 127 ff.; L. Tedoldi, “Dove eravamo rimasti? Lo Stato in età moderna tra problemi storiografici e questioni aperte”, in *Le carte e la storia*, 2009, vol. 15, n. 2, pp. 19 ff.; P. Carroll, “Articulating Theories of States and State Formation”, in *Journal of Historical Sociology*, 2009, vol. 22, n. 4, p. 553; T. Vu, “Studying the State through State Formation”, in *World politics*, 2010, vol. 62, n. 1, pp. 148 ff.; and H.P. Glenn, *The Cosmopolitan State*, Oxford, Oxford University Press, 2013 (challenging the concept of the nation-State, claiming that all States are cosmopolitan).

[10] C. Tilly, *Coercion, Capital, and European States AD 990-1992*, Oxford, Blackwell, 1992.

concentric circles around the ruler,¹¹ as “*le roi a un pouvoir préexistant aux lois*” (the king’s powers preexist the legal system).¹²

The third explanation has to do with culture, identity, language, ideas, national traditions and beliefs. On 11 March 1882, a great French historian, Ernest Renan, gave a lecture in Paris on “*Qu’est-ce qu’une Nation?*”. His conclusion was that “*une nation est une âme, un principe spirituel,*” “*une grande solidarité,*” “*un héritage,*” “*l’existence d’une nation est un plébiscite de tous les jours*” (“a nation is a soul, a spiritual principle, a great solidarity, a heritage; the existence of a nation is a plebiscite held every day”)¹³

The classical German eighteenth- and nineteenth-century school of philology also established a direct link between culture and the State. For Friedrich August Wolf, school and State were one;¹⁴ for Ulrich Wilamowitz-Moellendorf, there was a direct relationship between “*Volk, Staat, Sprache:*” a people has no right to exist if it does not have a common culture and a shared language.¹⁵

In conclusion, war is not the only path to bureaucratic centralization and to State-building; there are other explanations too, which are complementary to that of war. This does not mean that war becomes less important. States continue to prepare for wars, to be able to defend their territories or their citizens even beyond their territories, or to maintain peace in other parts of the world.

What is the nation-State? What are the peculiarities of this polity compared to previous forms (city-states, confederations, federations, empires)? First, the State is a polity that develops in a nation. This does not mean that it is established as a representative body, but that the “*fab-*

[11] P. Molas Ribalta, “L’impact des institutions centrales”, in W. Reinhard (ed.), *Les élites du pouvoir et la construction de l’État en Europe*, Paris, PUF, 1996, pp. 25 ff.

[12] F.-R. Chateaubriand, *Mémoires d’outre-tombe*, Ed. Livrée par J.-Cl. Berchet, Bordas, «Classique Garnier», 1989-1998, vol. II, p. 2204.

[13] Available at <http://www.lexilogos.com/document/renan/nation.htm>. For an Italian translation, see E. Renan, *Che cos’è una nazione? E altri saggi*, Rome, Donzelli, 2004. See E.-W. Böckenförde, *La nascita dello Stato come processo di secolarizzazione*, in E.-W. Böckenförde, *Diritto e secolarizzazione. Dallo Stato moderno all’Europa unita*, Rome-Bari, Laterza, 2007, pp. 33 ff. for another explanation for the birth of the State.

[14] D. Lanza, *Interrogare il passato. Lo studio dell’antico tra Otto e Novecento*, Rome, Carocci, 2013, p. 33.

[15] U. von Wilamowitz-Moellendorf, *Volk, Staat, Sprache*, Berlin, Büxenstein, 1898; see also D. Lanza, *Interrogare il passato*, cit., p. 67.

rication collective des identités nationales”¹⁶ is largely the product of the State-building process, because the construction of the State runs parallel to a nation’s self-recognition.

Second, it has a minimum size, which must be sufficient for a certain degree of economic development in a world where trade is under State control, and for resisting pressures from other States.¹⁷ Therefore, State-building occurs against and in contrast to other entities.

Third, unlike the political bodies of the Middle Ages, that were fluid and polycentric and did not have a vocation for absolutism, the State is stable, hierarchical, unitary, and centralized.¹⁸

Fourth, within the State, a division of labor exists such that decision-making, implementation and conflict resolution are assigned to different bodies.

Finally, the State is also a culture, an important component of which is legal positivism. This was developed by lawyers, who played a significant role in the rise and development of the State.¹⁹ Positivism is an expression of faith in the State.²⁰ Thus, the State has become a quasi-divine entity, belonging to a superior, sacred world.²¹

As seen above, the cultural aspect of the State – that is, the State as an idea, not as an entity – has played an important role throughout the State’s entire history. For almost two centuries now, however, this role and its meaning has been challenged by authors as diverse as Karl Marx, Léon Duguit and Philip Abrams, to cite only a few. For Marx, the State is a “superstructure” of civil society. Duguit wrote that “in public law we no longer believe that behind those who hold office there is a collective personal and sovereign substance of which they are only the agents and

[16] A.-M. Thiesse, *La création des identités nationales. Europe XVIII – XX siècle*, Paris, Seuil, 1999, p. 13.

[17] A. Alesina and E. Spolaore, *The Size of Nations*, Cambridge, MA, MIT Press, 2005.

[18] M. Ascheri, *Istituzioni medievali. Una introduzione*, Bologna, Il Mulino, 1994; P. Grossi, *L’ordine giuridico medievale*, Rome-Bari, Laterza, 1995.

[19] R. Schnur (ed.), *Die Rolle der Juristen bei der Entstehung des modernen States*, Berlin, Duncker und Humblot, 1986.

[20] As noted by E. Forsthoff, *Lo Stato nella società industriale* (1971), Italian translation, Milan, Giuffrè, 2011, p. 12.

[21] F. Werfel, *Twilight of a Word* (1936), Italian translation *Nel crepuscolo di un mondo*, Milan, Mondadori, 1954, p. 151 (short story with the title: “Class reunion”).

organs.”²² Abrams concluded that the State “is a spurious object of sociological concern and... we should now move beyond Hegel, Marx, Stein, Gumpłowicz and Weber on from the analysis of the State to a concern with the actualities of social subordination.”²³

Once established, nation-States began to grow. There were three factors of growth. First, the suffrage: with the advent of elections, governments became more representative, becoming the “citizens’ States.”²⁴ With the extension of suffrage came a growth in popular demand for schools, healthcare, social services and public enterprises. Then there were wars: suffice it to consider the rise in public employment in England, Italy or France after World Wars I and II.

The law-and-order State became the “avuncular State”, which undertakes to protect the people from illness and accident, to provide education, to remove distinctions based on gender and ethnicity, and to ensure welfare and well-being.²⁵ As Tocqueville had foreseen, the State is now “*un pouvoir immense et tutélaire... Il est absolu, détaillé, régulier, prévoyant et doux.*”²⁶

These developments affected the State’s constitutional aspects (Parliament and Government) much less than its administrative one: as noted by Carl Schmitt, “the total State (the State that occupies every space of society...) is by nature an administrative State.”²⁷ Consequently, the State has engaged in a new endeavor: that of distributing and allocating resources among its citizens.

Throughout its history, the State has turned out to be a highly adaptive polity, capable of adjusting to various internal and external pres-

[22] L. Duguit, *Law in the Modern State*, New York, Fertig, 1970, p. 243 (English translation of *Les transformations du droit public*, Paris, Colin, 1913).

[23] P. Abrams, “Notes on the Difficulty of Studying the State” (1977), in *Journal of Historical Sociology*, vol. 1, n. 1, 1988, p. 58.

[24] O. Beaud, *La puissance de l’État*, Paris, PUF, 1994.

[25] T. Caplow, “Evaluating State performance”, paper presented at the Conference on Social Change in Western Europe, Poitiers, 8-9 October 1997. See also M. L. Dauber, *The Sympathetic State*, Chicago, University of Chicago Press, 2012.

[26] A. Tocqueville, *La démocratie en Amérique II* (1840), Paris, Laffont, 1986, p. 648.

[27] C. Schmitt, “Legalità e legittimità”, in Id., *Le categorie del “politico”*, Bologna, Il Mulino, 1972, p. 215.

tures. States have adapted to democratic and authoritarian rule; to large territories and small; to liberal and to communist policies.

In this process of adaptation, the State has developed a great ability to negotiate and mediate,²⁸ contrasting strongly with the traditional “*Hohheitlichkeit*,” following different patterns of bureaucratic rationalization.²⁹ Therefore, in many countries, the State is now no different from a modern factory and the managerial techniques applied therein.

Another indicator of the State’s adaptive nature is its ability to assimilate elements that were originally foreign to its traditional foundations. For example, the merit system was unknown in Europe until the eighteenth century, when it was imported from China and became a permanent feature of the major European States (later, China imported electoral systems from Europe, which were previously unknown to it).³⁰

In the course of this long history, beyond the apparent uniformity, there are several substantial differences and different styles of statism.³¹ One major difference is that between strong States (for example, French “*étatisme*,” the Prussian tradition and the powerful, Hegelian theory of the State) and weak States (such as in Italy, where a hundred and twenty-seven different executives were established in the one hundred and fifty years of its life).

A second difference is between European and non-European States: the first share the common tradition of the *ius publicum europaeum*, based on the German reinterpretation of Roman law.³²

[28] B. Jobert and P. Muller, *L'État en action. Politiques publiques et corporatismes*, Paris, PUF, 1987, pp. 69 ff. and 74 ff.

[29] B. S. Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, the United States and Great Britain*, Chicago, Chicago University Press, 1993.

[30] G. Bertuccioli, “Riflessioni su un anniversario”, in *Mondo cinese*, 1994, n. 87, pp. 3 ff., but especially p. 6.

[31] P. Baldwin, “Beyond Weak and Strong: Rethinking the State in Comparative Policy History”, in *Journal of Policy History*, 2005, vol. 17, n. 1, pp. 12 ff. and especially p. 18; S. Steinmo, *The Evolution of Modern States. Sweden, Japan and the United States*, Cambridge, Cambridge University Press, 2010, pp. 29 and 206.

[32] C. Schmitt, *Ex captivitate salus*, Italian translation, Milan, Adelphi, 1987, pp. 64-80. L. Garofalo, “Carl Schmitt e la “Wissenschaft des römischen Rechts”. Saggio su un cantore della scienza giuridica europea”, in *Diritto e società*, 2007, n. 2, pp. 171 ff..

The third, most important, difference is that between States with a significant martial component and States where, instead, this has become less important.³³

Recent literature prefers to abandon the strong States/weak States dichotomy in favour of the idea that it is necessary to broaden the notion of stateness,³⁴ and that there are differing degrees of stateness and statehood: “[t]he State’s importance cannot be captured on a one-dimensional strong-weak continuum or through a model that builds on a Weberian conception of coercive capacity located in centralized bureaucracies.”³⁵ This conclusion, however, prompts a question: “how does the State evolve and succeed without the traditional elements of State building, or the customary apparatus of power and authority?”³⁶

Another important point is the interaction between the process of State-building and the way in which the concept of State is approached; in other words, how the State is perceived and studied. Voltaire believed that there were two models, embodied by France and England, respectively. In France, the State was at the centre, while England was based on self-government (however, it must be noted that while we now conceive of self-government as synonymous with local government, in the nineteenth and twentieth century, scholars such as von Gneist believed that *Selbstverwaltung*, as opposed to *Staatsverwaltung*, had a much greater meaning, i.e. that society itself could run the State³⁷).

[33] T. Caplow, *Evaluating State performance*, cit.

[34] The first author to stress the importance of “different levels of stateness” is J. P. Nettl, “The State as a Conceptual Variable”, in *World Politics*, 1968, vol. 20, n. 4, 1968, pp. 559 ff. This idea was then expanded by C. Tilly, “Reflections on the History of European State-Making”, in C. Tilly (ed.), *The Formation of National States in Western Europe*, Princeton, Princeton University Press, 1975 (Italian translation: “La formazione dello Stato in Europa. Riflessioni introduttive”, in C. Tilly (a cura di), *La formazione degli Stati nazionali nell’Europa occidentale*, Bologna, Il Mulino, 1984, pp. 7 ff.). See also O. Nay, “Fragile and Failed States: Critical Perspectives on Conceptual Hybrids”, in *International Political Science Review*, 2013, vol. 34, p. 326.

[35] D. King and R. Lieberman, “Ironies of State Building: A Comparative Perspective on the American State”, in *World Politics*, 2009, vol. 61, n. 3, p. 581.

[36] D. King and R. Lieberman, *Ironies of State Building*, cit., p. 548.

[37] R. von Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, 2 vols., Berlin, Springer, 1857-1863, vol. II, p. 818 and 1863. R. von Gneist, *Geschichte und heutige Gestalt des englischen Communalverfassungs oder des Selfgovernment*, 2 vols., Berlin, Springer, 1863. On Gneist, see F. Ferraresi, “Il modello costituzionale inglese e la Germania fra Otto e Novecento”,

England is a paradox: a very powerful State, with strong military might and the centre of a colonial empire, but one without any notion of State.³⁸ In his book “Introduction to the Study of the Law and Constitution,”³⁹ the British master of nineteenth-century constitutionalism, Professor Albert Venn Dicey, ignored both the word and the notion of State, while scholars such as Georg Jellinek in Germany or Vittorio Emanuele Orlando in Italy placed the theory of the State at the very centre of their reflections. Authors such as Bertrand Badie and Pierre Birnbaum go so far as to write that in countries like the United Kingdom and the United States, the organization of society makes the construction of the State unnecessary. The centre does not erect itself into a State, nor does it delegate its agents to do so. The “self-organization of society” is sufficient.⁴⁰

The same is true for the United States, where the concept of State “slipped in importance during the ‘behavioral revolution’ of the 1950s and 1960s”⁴¹ and had a revival in the 1980s. In 1985, a book entitled “Bringing the State Back In”⁴² was published and noted “a sudden upsurge of interest in ‘the State.’” It is now clear that “the apparent ‘statelessness’ of the United States is an illusion.”⁴³

These paradoxes draw attention to a further one. There is not necessarily a convergence between States and theories of the State: strong States may have poor, or no, theories of the State at all (such as the United Kingdom), while weak States may have developed strong theories of the State (such as Italy). It has been noted – with reference to the latter case – that “in their initial self-construction as fully-inclusionary centers of

in E. Capozzi (ed.), *Le costituzioni anglosassoni e l'Europa: riflessi e dibattiti tra '800 e '900*, Soveria Mannelli, Rubbettino, 2002, pp. 79 ff. and especially pp. 83 ff.

[38] A different opinion in J. McLean, *Searching for the State in British Legal Thought. Competing Conceptions of the Public Sphere*, New York, N.Y., Cambridge University Press, 2012.

[39] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), Indianapolis, Liberty Fund, 1982.

[40] B. Badie-P. Birnbaum, *Sociologie de l'État*, cit.

[41] T. Vu, *Studying the State through State Formation*, cit., p. 148.

[42] P. Evans, D. Rueschemeyer, and T. Skocpol (eds.), *Bringing the State Back In*, Cambridge, Cambridge University Press, 1985.

[43] D. King and R. Lieberman, *Ironies of State Building*, cit., p. 547.

political power, States produced an inflated and over-centric semantic form for themselves, which they were not able to realize.”⁴⁴

Today, there are a hundred and ninety-three States that belong to the United Nations, a hundred and eighty-five States that are members of the International Labour Organization, and a hundred and fifty-six States that are part of the World Trade Organization. To become a member of one of these organizations, it is necessary to be a State. This is another paradox. Through treaties, States establish international organizations; but then international organizations induce, promote, support, and control States; they establish standards of democracy and of rule of law for States. Therefore, State-building is now both a bottom-up and a top-down process.

3. THE SECOND CYCLE: THE DECLINE OF THE STATE

The second cycle began in the early twentieth century, with the first crisis of the State. It continued into the 1970s, with the second crisis and the “retreat of the State,” and into our days with the State’s third crisis and the process of globalization.

Why did politicians and scholars begin talking of the crisis of the State in early twentieth-century Europe? This was because State authority was then challenged from within for the first time, by a variety of forces: associations, especially trade unions, which replaced the atomistic civil society, collectivism and corporatism of previous times. At that point, unable to represent these interests, political representation revealed its deficiencies. This societal “malaise” relating to the State, an indicator of the difficult relations between State authority and civil society, led many authors to write that the State was decaying, or being eclipsed.

This weakening of the State had three interpreters, one in France, just before World War I, one in Italy during World War I, and the third

[44] C. Thornhill, *The Future of the State*, in P. F. Kjaer, G. Teubner and A. Febbrajo, *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, Oxford, Hart, 2011, p. 372. On the theories of the State, see also M. Fioravanti, “Per una storia dello Stato moderno in Europa”, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2010, n. 39, p. 69 ff.

in Germany, during the Weimar Republic. The first was Léon Duguit, who declared that “*l’État est mort.*”⁴⁵ The second, Santi Romano, proposed to replace the State with the “legal order” (*ordinamento giuridico*) as the central concept of public law.⁴⁶ The third was Johannes Popitz, followed by Carl Schmitt, who introduced the concept of “policracy” as a substitute for democracy.⁴⁷

The first crisis met different reactions. One was the Italian reaction: the restoration of State authority. Mussolini and Fascism were a reaction to the first crisis of the State.

On a theoretical level, there was another reaction. Duguit wrote that “[l]’État n’est pas une personne juridique; l’État n’est pas une personne souveraine. L’État est le produit historique d’une différenciation sociale entre les forts et les faibles dans une société donnée;” “[f]aux le postulat de l’État-personne; faux celui de la puissance droit subjectif [...]” and proposed to abandon the concept of the State in favour of more realistic concepts, such as the “*service public*” and “rulers” (*gouvernants*).⁴⁸ In several countries, but especially in Italy and Germany, the authoritarian reactions to the crisis of the State produced another result: a *Staatsmüdigkeit* (State-weariness) and *Entzauberung* (deconsecration or de-mythisation) of the State.⁴⁹

The second crisis occurred in the 1970s and 1980s. At the political level, the indicators of this new crisis were the reforms introduced by Margaret Thatcher and President Reagan. At the scholarly level,

[45] L. Duguit, *Law in the Modern State*, cit., p. 243.

[46] S. Romano, *L’ordinamento giuridico (1917-18)*, Firenze, Sansoni, 1946.

[47] E. Forsthoff, *Lo Stato nella società industriale*, cit., p. 14.

[48] L. Duguit, *L’État, les gouvernants et les agents*, Paris, Fontemoing, 1903, p. 1 and p. 53. This book was a development of another book on the State, by the same author: *L’État, le droit objectif et la loi positive*, Paris, Fontemoing, 1901. The purpose of the latter text was to “montrer que l’État n’est point cette personne collective, investie d’un pouvoir souverain, imaginée par l’esprit inventif des publicistes” (p. 1) and to critique the work published by George Jellinek in 1892 and previous works of P. Laband and C. F. Gerber. See also Id., *Les transformations du droit public*, Paris, Colin, 1913, p. XIX: “Ainsi la notion de service public vient remplacer celle de souveraineté. L’État n’est plus une puissance souveraine qui commande; il est un groupe d’individus détenant une force qu’ils doivent employer à créer et à gérer les services publics. La notion de service public devient la notion fondamentale du droit public moderne. Les faits vont le démontrer”.

[49] G. Dahm, *Die Stellung des Menschen im Völkerrecht unserer Zeit*, Tübingen, J. C. B. Mohr, 1961, p. 11.

the book authored by Guy Peters and Richard Rose, “Can Government Go Bankrupt?” set the tone.⁵⁰ This crisis was due to the modern State’s failure to perform its duties, to governments’ inability to meet popular demands, to the difficulties suffered by the welfare State, to ungovernability, to the financial crisis,⁵¹ and to failures in policy implementation.⁵² Could Hegel only suppose that the State could go bankrupt?

The State responded to the internal signs of this crisis in several ways: the rollback of State regulation of the economy, liberalizations, privatizations, sale of State ownerships, cuts in public expenditure, decentralizations.

These developments have reduced not only the size of governments, but also the differences between the public sphere and the private arena.⁵³ As a consequence, new problems have arisen. These include establishing the essence of the State and of sovereign authority, the location of the “hard core” of government powers and the dividing line between public and private, how to map the State, where to establish State boundaries and how to classify State agencies.

These problems have many practical implications. For example, since the German *Grundgesetz* establishes that the exercise of sovereign authority is, as a rule, entrusted to members of the public service (Art. 33, par. 4), can forensic treatment facilities be privatized in Germany?⁵⁴ Or, since the Israeli Constitution protects human dignity and liberty, can

[50] G. Peters and R. Rose, *Can Government Go Bankrupt?*, New York, Basic Books, 1978.

[51] R. Mayntz, “Governing Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm” in J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions*, London, Sage, 1993, pp. 11 ff.

[52] J. L. Pressman and A. Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland, Or Why It’s Amazing that Federal Programs Work at All*, Berkeley, University of California Press, 3rd edition, 1984.

[53] M. P. Maduro, “The Chameleon State. EU Law and the Blurring of the Private/Public Distinction in the Market” in R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, Antwerp-Oxford-Portland, Intersentia, 2010, pp. 279 ff. See also J. C. Alexander, *The Civil Sphere*, Oxford, Oxford University Press, 2006.

[54] See *Bundesverfassungsgericht*, 2 BvR 133/10 (2012). This decision established that the law did not give rise to objections concerning insufficient protection against unjustified interference with fundamental rights.

a law authorize a private, for-profit corporation to operate a prison in Israel?⁵⁵

At a higher level, beyond the State, the blurring of the line between public and private has given rise to another problem: that of redefining an area that all members of a union can consider public. For this purpose, the European Union has identified a new institution, the “body governed by public law,” which also includes private entities that are under public control, either through participation or through financing. Thus, the State becomes an entity “à géométrie variable.”

But there are also external signs of crisis. These include transnational corporations exercising “parallel authority” alongside national governments;⁵⁶ big businesses, insurers, accountants and international bureaucrats all encroach on the sovereignty of the State. There is, therefore, a “declining authority of the States” and a growth of “authority beyond the State.”⁵⁷

The third crisis is now under way. In Europe, national governments have lost control over their currencies. In 1998, there were thirty-seven currencies in Europe; from 2014, only twenty. At the global level, the phenomenon of globalization is unfolding: there are two thousand global regulatory regimes and sixty-thousand nongovernmental organizations; there are international organizations such as the WTO, networks of national regulators such as the Basel Committee; hybrid public-private regulators such as the International Standardization Organization, and private global regulators such as ICANN, the Internet Corporation for Assigned Names and Numbers. These

[55] The answer of the Supreme Court of Israel (Case No. HJC 2605/05 of 2009) was that the constitutional provision according to which the government is the executive branch of the State (Section 1) implies that there is a “hard core” of sovereign powers that the government must exercise itself, in order to ensure personal liberty and human dignity. Similar cases have arisen in Costa Rica and India in relation to the privatization of prisons and police. See D. A. Slansky, “Private Policing and Human Rights” in *Law & Ethics of Human Rights*, 2011, vol. 5, pp. 112 ff.

[56] S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge, Cambridge University Press, 1996, especially pp. 91 ff.

[57] S. Strange, *The Retreat of the State*, cit., pp. 3 ff. and pp. 91 ff. See also S. Cassese and V. Wright, *La restructuration des États en Europe occidentale*, in V. Wright and S. Cassese (eds), *La recomposition de l'État en Europe*, Paris, Éditions de la découverte, 1996, pp. 7 ff. and D. King and P. Le Galès, “Sociologie de l'État en recomposition” in *Revue française de sociologie*, 2011, vol. 52, n. 3, pp. 453 ff.

regulators have the power to impose standards. See, for example, the *Codex Alimentarius* Commission, that establishes food standards that reach our very tables. These international organizations are not part of a unitary legal order, but rather of a fragmented legal space.⁵⁸

Globalization is, at the same time, denationalization of State institutions and a cumulative process of expansion of trade, communication, media, migration, crime, terrorism and even fashion.⁵⁹ This development has two levels: one is global or universal, the other is supranational.

The main features of the global level are the following: development through mutual connections; a fluid organization; joint decision-making techniques; absence of any separation between the global and the domestic levels; three powers, legislative, executive and dispute-settling (but more continuity between them, rather than a true separation, a legislative branch acting mainly as standard-setter, and an executive branch less developed than in domestic legal orders, as the global polity is reliant to a great degree upon national implementation through indirect rule); an administration and administrative law with weak constitutional foundations; the growth of a global rule of law (i.e. principles that are common to all regulatory regimes: the right to a hearing, participation, the right to be informed, access to a judge) and legalization of global administrative networks towards a universal rule of law; and finally, control of the State by the economy, which replaces State control over the economy (indeed, through rating agencies, it is markets that control States, rather than States that control markets).⁶⁰

As for Europeanization – which is but one example of supranationalism – we may see multiple citizenships (European, national and sub-national); multiple *demos* (akin to the *Vielvölkerstaat* of the Middle

[58] See S. Cassese (ed.), *Global Administrative Law*, Cheltenham, Elgar, 2016.

[59] See J. Habermas, *The Divided West*, Cambridge, Ciaran Cronin, 2006, p. 175; S. Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages*, Princeton, Princeton University Press, 2006, p. 1; C. Zürcher, *When Governance Meets Troubled States*, in M. Beisheim and G. F. Schuppert (eds), *Staatszerfall und Governance*, Baden-Baden, Nomos, 2007, p. 11.

[60] S. Cassese, “Administrative Law without the State? The Challenge of Global Regulation” in *Journal of International Law and Politics*, 2005, vol. 37, n. 4, pp. 663 ff. (now in this book, p. 109 ff.) and S. Cassese, *The Global Polity*, Seville, Global Law Press, 2012.

Ages)⁶¹ in which national identities become less important; several languages, as in the *Mehrsprachenstaat* of the past; a concentration of power that is replaced by networks (for example, the structure of the European Central Bank and the role of national governors); and a plurality of polities, such as the *imperium* which included several *regna*.

However, it is necessary to highlight that States are organized in “layers,” and that not all developments occur simultaneously. Therefore, the three crises mentioned above did not all occur at the same time and did not all span the same number of years, as noted by several authors.⁶²

The decline of the State poses a major problem: if the State is the place where democracy has developed, what will happen to democracy if the State disappears or becomes less important? Will it evaporate? Or will it be replaced by a cosmopolitan democracy? The democratic deficit of the global polity is compensated by many surrogates. One is legitimacy through procedure, by participation in decision-making processes (deliberative democracy), that is widespread in the global space (from the World Trade Organization – WTO – to the Internet Corporation for Assigned Names and Numbers – ICANN). Another is horizontal accountability, that is global actors, national and international governments, being accountable to each other (Hungary versus the European Union; the European Union versus the United Nations Organization). Another is judicial review acting as a “fire alarm” system (the approximately one hundred and twenty global courts and an equivalent number of quasi judicial bodies open the way to civil societies to keep under control both national and international bodies). Another is capacity-based authority, power based on reputation and expertise (as in the case of the International Electrotechnical Commission – IEC⁶³).

[61] K. F. Werner, *Naissance de la noblesse. L'essor des élites politiques en Europe*, Paris, Fayard, 1998 (Italian translation, *Nascita della nobiltà*, Turin, Einaudi, 2000, p. 58).

[62] L. Jacobs and D. King, “America’s Political Crisis: The Unsustainable State in a Time of Unraveling” in *Political Science and Politics*, 2009, April, pp. 277 ff.

[63] D. D. Avant, M. Finnemore, and S. K. Sell (eds), *Who Governs the Globe?*, New York, Cambridge University Press, 2010.

4. THE THIRD CYCLE: RESURGENCE OF THE STATE

At the end of the second cycle, one could reasonably wonder whether the State could survive so many crises without defeat. Fortunately, many of the second cycle's developments were replete with ambiguities. To implement the Big Government reforms, Margaret Thatcher required a very strong central government: to make the State smaller, one needs greater powers. A lesser State ownership went hand-in-hand with greater regulation on part of independent regulatory agencies. State activism shifted from a market-steering orientation to a market-supporting one⁶⁴. Also, greater emphasis on consumer protection implies more State regulation.

These ambiguities show that the State has not disappeared with liberalizations and globalization, but, on the contrary, is alive and is only self-restructuring, to adjust its structure and functions to the new spaces, so that it can overcome its internal weaknesses. The developments analyzed above are simply part of the dynamics of the State.

States cope with internal fragmentation (next-steps agencies, *enti pubblici, établissements publics*) by governing without State-centric government models⁶⁵; by learning the lessons of government without governance; by “societal replacement for the incapacity of government to steer and row”; by its “management of networks and [...] self-organizing systems of interaction” as an alternative to conventional governance; by a “decentralized rowing”⁶⁶; and finally, by using an instrument of the British colonial tradition – indirect rule. Indeed, it can be said that the world is rediscovering indirect rule: the European Union is ruling indirectly, and the same is true for the WTO.

As for the external pressures, States are surrendering sovereignty to regional and global institutions, but at the same time they promote

[64] J. Levy (ed.), *The State After Statism. New State Activities in the Age of Liberalization*, Cambridge, MA, Harvard University Press, 2006.

[65] J. Pierre and B. G. Peters, *Governing Complex Societies: Trajectories and Scenarios*, Basingstoke, Palgrave Macmillan, 2013.

[66] B. G. Peters, “Shouldn't Row, Can't Steer: What's A Government to Do?”, in *Public Policy and Administration*, 1997, vol. 12, n. 2, pp. 51 ff.

competition among nations⁶⁷. Thus, from being “guardians of national security”, they become “guardians against economic insecurity”⁶⁸.

Next to the thousands of international organizations, there are the regional supranational organizations like those established in Europe, Southeast Asia, North America, and South America. The most developed is the European Union, which presents many distinctive features.

First, while domestic administrations depend on a single centre of power, the European administration does not have only one centre. Unlike the situation in domestic governments, in the European Union there is no one single branch of government entrusted with the implementation of rules. Implementing power can be exercised by the Commission, by the Council, or by Member States.

Second, while domestic administrations have exclusive powers of implementation, the European administration is not the Union’s only implementing authority. In the Union, the Member States take all measures necessary for implementing legally binding Union acts, and the Commission or the Council have implementing power where uniform conditions are required. Consequently, the Union’s implementing power is residual and not monopolistic.⁶⁹

Third, while domestic administration is binomial,⁷⁰ European administration is trinomial. For example, in the area of competition

[67] V. Cable, “The Diminished Nation-State. A Study in the Loss of Economic Power”, in *Daedalus*, 1995, vol. 124, n. 2, pp. 23 ff. (issue topic: “What future for the State”).

[68] S. Strange, “The Defective State”, in *Daedalus*, 1955, vol. 124, n. 2, pp. 55 ff.

[69] Court of Justice, C-8/88 Germany v. Commission. See A. J. Gil Ibanez, *El control y la ejecución del derecho comunitario. El papel de las Administraciones nacionales y europea*, Madrid, Instituto nacional de administración pública, 1998; K.-H. Ladeur (ed.), *The Europeanisation of Administrative Law. Transforming National Decision-Making Procedures*, Dartmouth, Ashgate, 2002; J. H. Jans, R. de Lange, S. Prechal and R. J. G. M. Widdershoven, *Europeanisation of Public Law*, Groningen, Europa Law Publishing, 2007. On the relationship between European law and national administrative laws, G. Vesperini, *Il vincolo europeo sui diritti amministrativi nazionali*, Milan, Giuffrè, 2011.

[70] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1935, pp. 332-333: “*Droit administratif*”, or “administrative law”, has been defined by French authorities in general terms as “the body of rules which regulate the relations of the administration or of the administrative authority towards private citizens;” and Aucoc, in his work on *droit administratif*, describes his topic in very general language: “Administrative law determines the constitution and the relations of those organs of society which are charged with the care of those interests (*intérêts collectifs*) which are the object of public administration, by which term is meant

and State aid, the administration and the private party are not the only two players. On the contrary, there are several players: the European Commission, acting as the guardian of competition; one national government, the grantor of the aid; a private party that has benefited from the aid as grantee; other interested States; and other interested parties. This multiplicity of players generates “polycentric adjudication” processes.⁷¹

Fourth, unlike national law, the European Union features a double legality.⁷² Indeed, the European treaties state that the Union is a “community based on the rule of law” and has a “complete system of legal remedies and procedures,” in accordance with the “basic constitutional charter, the treaty.” These treaties state that there are two ways of implementing the “general measures” of the Union’s institutions: community implementation (where private parties can bring an action before the Court of Justice) and national implementation (where private parties can bring an action before national courts). These treaties state that all measures that are intended to have legal effects can be subject to judicial review.⁷³

Fifth, while national governments have a single component, the European Union government is composite. In the EU, there are indeed four essential components, of differing natures: purely European (the Commission and the Court of Justice), multinational (the Parliament), inter-governmental (the Council), and inter-bureaucratic (the Committees).

the different representatives of society among which the State is the most important, and the relation of the administrative authorities towards the citizens of the State.”

[71] L. L. Fuller, “The Forms and Limits of Adjudication”, in *Harvard Law Review*, 1978, vol. 92, pp. 394-395. Polycentric adjudication processes require inter-institutional agreements: M. Cini, “EU Decision-Making on Inter-Institutional Agreements: Defining (Common) Rules of Conduct for European Lobbyists and Public Servants”, in *West European Politics*, 2013, vol. 36, n. 6, pp. 1143 ff.

[72] On the features of the legality principle in European law, K. Lenaerts, “The Rule of Law and the Coherence of the Judicial System of the European Union”, in *Common Market Law Review*, 2007, pp. 1625 ff.; L. Azoulay, “Le principe de légalité”, in J.-B. Auby and J. Dutheil de la Rochère (eds), *Droit administratif européen*, Bruxelles, Bruylant, 2007, pp. 393 ff.; A. von Bogdandy, *Constitutional Principles*, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, Oxford, Hart, 2006, pp. 15 ff.

[73] Court of Justice C-294/1983 *Les Verts*. See also Court of Justice C-46/87 and 227/88 *Höchst* and C-103/88 *Fratelli Costanzo*.

Sixth, while national law is imposed on national societies, European law leaves space for a choice of law.

Seventh, administrative development in the national context depends on national government policies, but administrative development at the European level depends on the interaction between national and European administrations. *Wechselseitige Eigennutz* (“reciprocal expediency”) is the first and most important reason for which the State opened up and established standard-setting supranational and global bodies. One of the first to observe this was Immanuel Kant.⁷⁴

States share their sovereignty (from a traditional point of view, this is an oxymoron: true sovereignty cannot be shared – if it is shared, it is not sovereignty). They join forces with other States and accept global standard-setting bodies, but they also try to reduce the asymmetry between the globalized economy and national governments.

Each State is confined by its own borders and, therefore, has no power to fight global terrorism and global warming, or to organize Olympic Games. To engage in these endeavors, the U.N. Sanctions Committee, the Kyoto Protocol, and the International Olympic Committee respectively are necessary.

Because they must share tasks and power, States become part of global networks and replace hierarchies with horizontal links, and command and control with negotiation. Clear departmental boundaries, clear lines of authority, detailed reporting mechanisms, and formal decision-making procedures are replaced with complementarity and reciprocity, vertical and horizontal interdependence, and mutually supportive actions.⁷⁵

The result is often negative, because these confused new arrangements frequently lead to traps for joint decision-making. At this point, States have less power, because they must share decision-making with other States; but, at the same time, they are able to enter areas previously closed to them. Here is another paradox: States have less power and more power at the same time.

In conclusion, “contrary to the brave new world many expected in the wake of globalization and global economy integration [...] the State is

[74] I. Kant, *Zum ewigen Frieden*, Italian translation, *Per la pace perpetua*, Milan, Feltrinelli, 2010, p. 78 (observations on the *Handelsgeist* (the spirit of trade)).

[75] G. Thompson, J. Frances, R. Levacic, and J. Mitchell (eds), *Markets, Hierarchies and Networks: The Coordination of Social Life*, London, Sage, 1991.

doggedly present”⁷⁶ and “the notion of growing statelessness in the international system and the global economy has quickly evaporated.”⁷⁷ There is no decline, no retreat, no crisis of the State. There is only a process of reconfiguration, adaptation, and restructuring which is part of the State’s dynamics. This process may overlap with severe short-term crises and policy challenges but that is distinct from implosion of the State as the key organizing entity for political communities.

Contrary to a widespread view that opposes globalization and national governments, States are a constitutive element of globalization, as in Kant’s dove flight.⁷⁸

In the process of globalization, there are several paradoxes that strengthen the links between the State and globalization. First, globalization is a process through which States establish global regulators by agreement.⁷⁹ But the reverse is also true, as global regulators sustain, promote, and provide incentives for States and the rule of law, as is the result of the United Nations’ global efforts to promote democracy through the United Nations Democracy Fund or the European Union Democracy Initiative.

Second, global institutions promote and develop global indicators with the expectation of self-harmonization and reciprocal pressure. Examples are the “State Capacity Survey” developed by Columbia University; the “State Fragility Index” published by the Center for Systemic Peace and the Center for Global Policy at George Mason

[76] D. King and R. Lieberman, *Ironies of State Building*, cit., p. 550. Similar conclusions are drawn in G. Corso, “Persistenza dello Stato e trasformazioni del diritto”, and in L. Condorelli, “Crisi dello Stato e diritto internazionale: simul stabunt simul cadent?”, both in *Ars interpretandi*, 2011, vol. 16, special issue on *Lo Stato contemporaneo e la sua crisi*, pp. 107 ff. and 173 ff., and in P. Du Gay and A. Scott, *Transformation de l’État ou changement de régime? De quelques confusions en théorie et sociologie de l’État*, in *Revue française de sociologie*, 2011, vol. 52, n. 3, pp. 537 ff.

[77] D. King and R. Lieberman, *Ironies of State Building*, cit., p. 547. On the challenge posed by globalization to the State, see also T. J. Lowi, “La globalizzazione, la guerra e il declino dello Stato”, in *Rivista italiana di scienza politica*, 2009, vol. 39, n. 1, pp. 3 ff. and K.-H. Ladeur, *The State in International Law*, Osgoode Hall Law School Research Paper n. 27/2010.

[78] I. Kant, *Kritik der reinen Vernunft*, Riga, Hartknoch, 1781, 1787, Einleitung, III.

[79] This point has been recently stressed by R. Kwiecień, “On Some Contemporary Challenges to Statehood in the International Legal Order: International Law Between Lotus and Global Administrative Law”, in *Archiv des Völkerrechts*, 2013, vol. 51, pp. 279 ff.

University;⁸⁰ the “Sovereignty Index” elaborated by the joint venture between the Brookings Institution, the Institute for State Effectiveness, and the Australian National University;⁸¹ the “Index of State Weakness in the Developing World,” published by the Brookings Institution;⁸² the “Failed States Index” produced by the Fund for Peace and published by Foreign Policy;⁸³ and the Worldwide Governance Indicators (WGI).

5. THE STATE IN FLUX

As a result of these developments, retreats and advances, the State has become more malleable, better able to adjust, adapt, and change according to the new challenges and contexts.

These adjustments have produced several outcomes. The first is the de-differentiation of society and State. Over the past few centuries, the State established itself through a process of differentiation from the various social interests and the public interest. The separation of the political and the social led the State to become an entity separate from society. Today, the dividing line is blurring, and the State is a marketplace, or arena, of competing economic and social forces.

The second outcome is internal fragmentation. Originally, the State was more or less united around a centre which was able to keep the periphery under strict control, thereby ensuring the unity of the legal system. Today, the growth in the dimensions and powers of territorial and functional bodies has resulted in the development of multiple legal systems within the State. Therefore, the centre is obliged to replace rule with negotiation.

[80] J. A. Goldstone, R. H. Bates, D. L. Epstein, T. R. Gurr, M. B. Lustik, M. G. Marshall, J. Ufelder and M. Woodward, “A Global Model for Forecasting Political Instability”, in *American Journal of Political Science*, 2010, vol. 54, n. 1, pp. 190-208.

[81] A. Ghani, C. Lockhart, and M. Carnahan, *Closing the Sovereignty Gap*, London, Overseas Development Institute (ODI), 2005.

[82] S. E. Rice and S. Patrick, *Index of State Weakness in the Developing World*, Washington, DC, The Brookings Institution, 2008.

[83] N. Haken, J. J. Messner, K. Hendry, P. Taft, K. Lawrence, T. Anderson et al., *Failed States Index 2012*, Washington, DC, The Fund for Peace Publication, pp. 1-48.

Third, as Parliaments became more representative through universal suffrage, the power of civil society grew. As a result, the State and its body of servants have been compelled to replace command and control with leadership, hegemony and negotiation.

Fourth is joint decision-making. When both a national and a supranational, or global, administration intervene in the decision-making procedures, there are arrangements that allow for both levels of government, the national and the supranational, to make their voices heard. From the first perspective, the most interesting institutions are the European Union committees.⁸⁴ First established to keep the European Commission under the control of the Council and domestic administrations, they subsequently became a means for the Commission to broaden the scope of its jurisdiction, obtain information from domestic administrations, consult and receive support from national constituencies, and hold national administrations' actions under review. Moreover, the committees unite national bureaucracies and provide a "forum" for discussion and exchanging ideas. They are a means for the formation of a common understanding among domestic administrations. Consequently, committees play three important roles: bottom-up, to represent the views of domestic administrations in the Union; top-down, to transmit European policies to national administrations; and horizontal, to open and facilitate dialogue among national administrations. Committees, however, are not the only kind of mixed – national and European – organizations. There are many more such entities, which exist at a metaphorical halfway point between Brussels and national capital cities to ensure a balance among national and supranational governments.

The fifth outcome is interdependence of State and non-State actors. Non-governmental Organizations ("NGO") are established in order to interact with global regulatory regimes. National governments become

[84] T. Christiansen and E. Kirchner (eds), *Committee Governance in the European Union*, Manchester, Manchester University Press, 2010, M. Savino, *I comitati dell'Unione. La collegialità amministrativa negli ordinamenti compositi*, Milan, Giuffrè, 2005; F. Gencarelli, "Il Trattato di Lisbona e la nuova comitologia", in *Diritto comunitario e degli scambi internazionali*, 2012, n. 1, pp. 1 ff.; T. Christiansen and M. Dobbels, "Delegated Power and Inter-Institutional Relations in the EU after Lisbon: A Normative Assessment", in *West European Politics*, 2013, vol. 36, n. 6, pp. 1159 ff.

more transparent and must hear national, supranational and global pressure groups. The global disputes are multi-polar and involve both private parties and States.

Finally, like Ulysses, the State has committed itself through international treaties, thus renouncing full sovereignty and agreeing to share power with other States and global institutions. Globalization and the ensuing State-global space interactions produced two paradoxes.

The first paradox is clear in the role played by globalization in the constitution and development of States. The United Nations Organization supports States as members of the international community. The traditional relationship between States and the international community is reversed: previously, States created the international community. Now, the international community supports States. States establish global organizations, which, in turn, legitimizes States.

This reversal is amplified when global or supranational institutions impose on national governments, or promote among them, certain basic models of democracy, or rule of law. For example, the United Nations Democracy Fund (UNDEF) finances civil society organizations for the promotion of democracy, and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), is active in the fields, *inter alia*, of democratic development, election observation, and non-discrimination.

The second paradox is that, while global institutions are entirely new organizations, they mimic national governments. For example, they allocate rule-making, executive and dispute-settlement functions to separate bodies. This does not mean that the separation of powers principle is replicated in the global space, as the different environment leads to changes that, in turn, result in different organizational arrangements in the two areas. Here, once again, the “myth of the State” and the conceptual reduction of all public powers to the State affects the development of globalization.

6. METHODOLOGICAL IMPLICATIONS

This analysis has two methodological implications. First, one must take an evolutionary approach to social institutions.⁸⁵ Lawyers and political scientists are good at analyzing and dissecting dead bodies. But States are subject to “a continuous adaptive process,” and are “moving in different directions.”⁸⁶ One has to learn to analyze and study these living institutions and move towards understanding the rules governing their change, the way the American sculptor Alexander Calder moved from “stabiles” to “mobiles.”

Second, while seeking to ameliorate the poor state of empirical measures on the quality of States,⁸⁷ one must also try to conceptualize the complex web of integrated global and national polities. States are a constituent part of globalization. They expand in the global space and, at the same time, are limited by global institutions.

National governments split, as noticed by the French international law scholar Georges Scelle, in his theory of the “*dédoublement fonctionnel*,” they establish global institutions and become their servants or implementers. Between States and global institutions, and among States, new kinds of relations are established, which one could call of horizontal accountability;⁸⁸ national governments monitor their counterparts, since their actions are interrelated.

[85] O. Lewis and S. Steinmo, *How Institutions Evolve: Evolutionary Theory and Institutional Change*, paper presented at the APSA in Seattle, 2011.

[86] S. Steinmo, *The Evolution of Modern States*, cit., p. 210 and p. 206.

[87] F. Fukuyama, “What is Governance?”, in *Governance*, 2013, vol. 26, n. 3, pp. 347 ff. and the World Bank, *The State in a Changing World: Selected World Development Indicators*, Washington, DC, The World Bank, 1997.

[88] For this concept as applied within national governments, see G. O’Donnell, “Horizontal Accountability in New Democracies”, in A. Schedler, L. Diamond, and M. F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies*, London, Lynne Rienner, 1999, especially pp. 38 ff.