**Chapter 1.**

**Forms of State. forms of government**

The main features of State

The essential features of the State are as follows:

1. originality (that is, independency) of its legitimacy/source of power;
2. territoriality: the laws and regulations issued by the State apply (and relate) to the interests of the community established within the boundaries of the territory of the State;
3. preeminence : the State must be supported by an apparatus enabling to enforce laws and regulations and to make them applicable irrespective of the citizens’ will;
4. general aims pursued by the State.

THE FORMS OF STATE

As mentioned, the State has general features (see above). However, it may have different forms or shapes depending on the historical context. In particular, depending on the form of State which is considered, the forms of participation by citizen in public administration may be different. Below are summarized some of the main forms of State which have appeared during the historical evolution of State.

* Feudal state -> there is no clear distinction between public and private law (which arestill unknown figures, in their technical meaning); the territory is “owned” by the sovereign (and the various feudal entities). This authority holding the sovereign power does not consider public interest as the base for its own legitimacy and does not feel as required to take care of the interests of the community. The political power is scattered and fragmented among various local “authorities”, which do not necessarily have a connection with one another.
* Absolutism -> the [monarch](http://en.wikipedia.org/wiki/Monarch) has absolute power over people and territory, and has monopole over sovereignty. This form of State arose in order to “react” to the fragmentation of powers which took place during feudalism.
* Police state -> the State exercise repressive control of political, economic and social life, usually by an arbitrary exercise of power by means of the police, rather than by the regular operation of administrative and judicial procedures. On the other hand, the State holds a “paternalistic” behavior and assumes to be under the duty to take care of citizens’ individual wealth and welfare.
* Modern state -> at the end of the 18th century, the middle class rises to power. The modern state ia based on formal equality and the duty to protect fundamental rights and freedoms. The authority is based on the consent of citizens and said principles are set out in written constitutions or charters.
* Socialist state -> developed after the world war I, this form of State is based on the Marxist-Leninist doctrine and is based on the State ownership of the means of production. This ends up with a significant limitation of individual ownership rights (and, more generally, of the freedom of trade). Historical examples of such form of State are the People’s Republic of China, the Soviet Union and North Korea.
* Authoritarian State -> this form of State enhances, on the one hand, the national community and, on the other hand, it considers the community as politically unable to rule itself: charismatic leaders are then deemed as necessary to represent and guide the political community.
* Welfare state -> world war II marks the transition from the modern State to the welfare State. The latter is based on the importance attached to the action of public authorities, promoting the citizens’ well-being through a widespread participation to economic and social activities and in the field of social protection. Unlike the police State, the welfare State tends to solicit the participation and consent by the members of the community. Its primary purpose is to ensure a more equitable distribution of income.

CENTRALISED AND DECENTRALISED FORM OF STATE

Although there is no “golden rule”, since it depends on historical and political factors, centralised States (*i.e*., a typical form of State during the nineteenth century and the first decades of the twentieth century), in which the fundamental powers are exercised by organs of the State (as opposed to peripheral entities), may tend to evolve into decentralized States, in which pre-existing local authorities are guaranteed and recognized, and, furthermore, a more intense form of decentralisation is implemented, by granting legislative and administrative powers to local or territorial entities in certain fields (on the other hand, the dispute-settlement function still tends to be included within the exclusive competence of the central State). Decentralisation can have several degrees of intensity, from a maximum (federal States) to a minimum (States granting restricted fields of autonomy to local authorities).

It is also important to highlight the following definitions:

* institutional decentralisation: administrative functions are distributed among central and peripheral authorities (*i.e*., from a public entity to another). Local or territorial entities are only granted with administrative functions as well as with decision-making power on policy areas impacting on the local communities;
* bureaucratic decentralisation: part of the sovereign functions and the related decision-making powers are transferred within the scope of one single entity (*e.g*. from a branch to another branch of the same entity);
* self-government: as far as bureaucratic decentralisation is concerned, peripheral authorities are comprised of representatives elected by members of the local populations.

DECENTRALISATION IN THE ITALIAN CONSTITUTION

One the one hand, the Italian Constitution declares and confirms the unity of State (see Article 5), while, on the other, it requires the legislator (*i.e*., the ensemble of entities and bodies entitled to exercise the legislative power, namely the Parliament, the Government and, to a certain extent, the Regions) not only to recognize and promote local autonomies (*i.e*. institutional decentralisation), but also to implement, in the context of the public-interest services, an administrative decentralisation (*i.e.*, bureaucratic decentralization). Significant obstacles have been raised to the implementation of this provision. Only recently, a new legal system has been created to recognize and govern the powers granted to territorial entities (in particular, Regions).

THE UNIONS OF STATES AND CONFEDERATIONS

A plurality of States may create a Union, by giving rise to structures and bodies entitled to exercise functions and powers vis-à-vis the members. In such case States may want to retain part of their sovereign powers, but significant powers may be also afforded to the bodies representing the Union. Such powers may be specifically held as legally binding on member States (in other words, the legal order of each member should not allow for any misalignment or conflict with decisions made at the Union-level).

Typical examples of unions of States are, amongst others, the UNO and the Council of Europe. These are supranational organizations, contemplating a partial limitation of sovereignty of the member States. Such limitations may also entail the direct effect of certain acts issued by the bodies representing the organizations within the domestic legal systems (without the need, for member States, to implement the decisions issued by the supranational bodies). In particular, it is worth mentioning, by way of example, the following provisions of the UNO Charter:

* Art. 41 - *The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*
* Art. 42 - *Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations*

As far as the European Union is concerned, please note the following. **An**international organization**is commonly defined as “*a body that promotes voluntary cooperation and coordination between or among its members*”.** There are many types of international organizations, but one way of categorizing them is to distinguish between intergovernmental organizations and supranational organizations. The European Union is partly an **intergovernmental** organization and partly a **supranational** organization. With respect to supranational elements, many aspects of the EU policy involve economic and political integration policy (but also social policy, immigration policy and education): as far as these aspects are concerned, the policies adopted by each member State automatically conforms to the principles enacted at the EU level. On the other hand, with respect to the **intergovernmental** elements of the EU, all Member States typically co-operate to formulate common foreign policy and security policy: in these areas, Members States retain their authority and autonomy and, dissenting States may choose to pursue its own policy (even in conflict with the line adopted by the majority).

Confederation of States are a particular kind of Union, created by virtue of an international treaty. Most frequently, neighbouring States which retain their sovereignty. The phenomenon giving rise to a confederation may be either “*upstream*” or “*downstream*”, depending on the initiative to create the Confederation being taken by the States (getting together and creating the supranational structure) or by the central State (allowing for an increasing decentralization, leading to the creation of independent member States, although belonging to the Confederation: in such case, a unitary State evolves into a Confederation). Typically, States take part in a Confederation in order to better ensure the means for their own military defence and to ensure an appropriate degree of freedom of trade. Confederations usually contemplate common institutions and bodies, the most important of which is the Federal Assembly (comprised of representatives of the various member States) exercising legislative powers within the limits and under the conditions set forth by the treaty.

The constitutional elements of States

States (in order to be recognized as such) must meet three fundamental conditions. They must have the following main elements:

1. Territory -> this is generally held as a piece of land which is recognized as belonging to a community or people, in particular. Territory is a particular type of land that is fixed, plotted, mapped and organized in a particular way by the government, so that sovereignty can be exercised over it. Territory is particularly important to establish the application scope of laws and regulations enacted by the State.
2. People -> this relates to the (legal) relationship between the State and the citizens resident or domiciled on the territory. The State is fundamentally comprised of a permanent population over which it exercises its unlimited authority. The nature of the State depends upon the quality and quantity of its population.
3. Sovereignty -> it implies that the State is independent from external interference, as well as can maintain integrity within itself.
4. Territory

The first essential element of States is a fixed territory or a land upon which the State exercises its authority. The territory of a State includes the surface of the land, the soil beneath the surface, lakes and rivers lying within the State borders, waters connected to boundary rivers, air space falling within the surface of the State and the maritime area of the territorial sea. State boundaries can be both natural and artificial, depending on the availability of any natural elements aiding to identify the territorial borders. Borders, however, are mostly connected to historical factors.

The Italian Criminal Code and international law confirm the essentiality of the territory as element of the State. In particular, Article 241 of the Italian Criminal Code includes, among the crimes against the State, the “*use of force against its territorial integrity*”. In addition, a principle of the international law states that, in case of total or partial military occupation of territory by the enemy, the State still continues to exist (as a legal entity) as long as the war carries on. Such principles further confirm that territory is generally held as a fundamental element of States.

Two “figures” are closely linked to the territory: extraterritoriality and immunity.

* Extraterritoriality. On certain conditions, the law of a State may be enforced and applied to acts put in place outside the State territory. Such situations are usually connected, for example, to facts occurring on board of vessels or airplanes (irrespective of the place where they are at the time when the act is done). According to article 4, paragraph 2 of the Italian criminal law, Italian vessels, ships and airplanes are always subject to Italian law, irrespective of the place where they are localized, unless they are subject to another jurisdiction, in the light of a particular norm of international law.
* Territorial immunity. On certain conditions, acts put in place on the State territory are exempt from local laws/jurisdiction. Territorial immunity is a general exemption from the local [jurisdiction](http://en.wikipedia.org/wiki/Jurisdiction) (including the application of criminal law), as usually granted to diplomatic missions. Territorial immunities may be applied to actions or behaviors put in place in specific areas, such as [embassies](http://en.wikipedia.org/wiki/Embassies), [military bases](http://en.wikipedia.org/wiki/Military_base) of foreign countries, or to specific individuals (*e.g*., offices of the [United Nations](http://en.wikipedia.org/wiki/United_Nations)).

“Colonies” are generally not part of the State territory. Due to historical reasons, in case that the “motherland” loses control (and “sovereign” powers) over colonies, this does not affect the “motherland” territory.

The State’s rights over its territory does not fall under the category “*ad rem*” rights (such as ownership rights, as regulated by the Civil Code). *Ad rem* rights assume that the object of the right is something legally separate from the holder. As far as the State territory is concerned, the territory is one of the fundamental elements of State, therefore no distinction may be drawn between the “holder” of the right and its “object”.

The territory may also be an essential element for entities other than the (central) State. According to Article 114 of the Italian Constitution, "*the Republic is comprised of Municipalities, Provinces, Metropolitan Cities, Regions […]*". These are also commonly defined as “*territorial entities*”: unlike non-territorial entities (such as Chambers of Commerce, government-owned companies, etc.), territory is a fundamental element of such entities, since their functions and authorities may be only exercised within the limits of the relevant territory.

The State may own assets (e.g., pieces of land, immovable assets, real estate units, buildings incorporated to the land, etc.). The Italian Civil Code provides that beaches, bays, rivers, lakes and other public waters must belong to the State and are subject to a special legal regime. The State, in particular, is not entitled to dispose of those assets (by either selling those to private individuals, or creating rights over them).

1. People

The people is identified as the community of all those to whom the legal state assigns the status of citizen. From this status derive several legal implications. Generally speaking, certain material and cultural values and interests lie behind the idea of citizenship. A “people” is held as existing as long as the citizens share “*idem sentire de re pubblica*”, that is associative ties remain and the citizens feel as being part of the community, which is based on common principles, rules and interests. Under Italian law, Article 1 of Law 91/1992 provides that citizenship can be automatically acquired:

1. by birth to an Italian parent, in line with the principle of *jus sanguinis*;
2. by birth in Italy to [stateless](http://en.wikipedia.org/wiki/Statelessness) parents, to unknown parents, or to parents who cannot transmit their [nationality](http://en.wikipedia.org/wiki/Nationality) to their children; this is partially consistent with the principle of [*jus soli*](http://en.wikipedia.org/wiki/Jus_soli).

The legislation on citizenship also regulates the status of foreigners (*i.e*., citizens of another State) and stateless persons Stateless persons are those who do not have the citizenship of any State (*e.g*., the foreign child adopted by an Italian citizen, the foreign or stateless spouse of an Italian citizen); these are subject to the laws of the State where they are based, in particular as regards the exercise of civil rights.

The law in question also contemplates situations in which citizenship may be denied, lost or waived. As a general rule, pursuant to article 22 of the Italian Constitution, no one may be deprived, for political reasons, of his/her capacity to be subject to rights and obligations, as well as of his/her name and citizenship. On the other hand, any citizen may voluntarily waive his/her citizenship, if the relevant place of residence is fixed abroad. In addition, citizenship may be lost in case that public office is taken in a foreign country (or in an international organization to which Italy does not adhere): in case that the Italian government formally requests the citizen in question to interrupt his/her office and the latter refuses to give his/her consent, citizenship may be lost.

Conversely, under certain conditions, the President of the Republic may grant the Italian citizenship to foreigners or stateless persons. Persons so acquiring the status of citizens are subject to the laws of the State (in particular, with regard to the right of entry and stay).

The idea of “people” is not necessarily a synonym of “nation”. The idea of "nation" is related to the existence of an "ethnic community", identified by common language, culture, habits, traditions and interests. “Nation” is, therefore, a cultural (rather than legal or Constitution) concept, pre-existing the birth of the State, and representing a sociological base promoting the creation of the State. A “multinational State” is a [sovereign State](http://en.wikipedia.org/wiki/Sovereign_state) which is viewed as comprising two or more [nations](http://en.wikipedia.org/wiki/Nation) (*e.g*., the former [USSR](http://en.wikipedia.org/wiki/USSR) is an example of historical multinational states, given that it used to encompass a large group of local communities, which could each identified as a “nation”, due to its specific territorial, social and cultural features).

1. Sovereignty

This idea of sovereignty may be interpreted in the light of two different meanings. In a first meaning, sovereignty is the element allowing a State to be regarded as original and independent. On the other hand, sovereignty may be also identified as the supremacy of the State legal system over all other “authorities”.

Sovereignty materializes into a series of acts adopted by the State bodies, exercising administrative, legislative and dispute-settlement powers. There is a number of theories about sovereignty, aimed to identify which subject is actually entitled to exercise and “hold” sovereign powers and to determine its source of legitimacy. Article 1 of the Italian Constitution states that "*sovereignty belongs to the people and is exercised in the manner and within the limits set out in the Constitution*".

The State may also agree to limitations of its sovereign powers as a result of its participation to international organizations (*e.g*., the EU or UNO). Such limitations, however, must be agreed on a reciprocity basis and provided that said organizations are aimed at “*ensuring peace and justice among Nations*”. As mentioned, organizations may be granted with powers and functions interfering with the State domestic powers (see art. 11 of the Italian Constitution).

FORMS OF GOVERNMENT

The functions of the State may be organized and distributed, among the various constitutional bodies, according to different schemes.

* **Parliamentary form of government** -> system of democratic governance of a State, originally conceived in England in the XVIII century, in which the [body](http://en.wikipedia.org/wiki/Executive_(government)) entitled to exercise administrative functions (*i.e.*, in essence, the Government) is formally separated from the [Parliament](http://en.wikipedia.org/wiki/Parliament) (entitled to the legislative power), in accordance with the principle of segregation of powers. The Government, however, derives its legitimacy from its relationship of trust with the [Parliament](http://en.wikipedia.org/wiki/Legislature) (the administrative and powers are, thus, interconnected with each other).

The [Chief of State](http://en.wikipedia.org/wiki/Head_of_state) is normally separate from the Prime Minister. States which are based on a parliamentary system may be either [constitutional monarchies](http://en.wikipedia.org/wiki/Constitutional_monarchy) (where a [monarch](http://en.wikipedia.org/wiki/Monarch) formally holds the charge as the Chief of State, while the head of Government is often also a member of the Parliament: see, for instance, [Sweden](http://en.wikipedia.org/wiki/Sweden) and [Japan](http://en.wikipedia.org/wiki/Japan)), or [parliament-based republics](http://en.wikipedia.org/wiki/Parliamentary_republic), where the President is also appointed as the Chief of State, while the head of the Government (although appointed by the President of the Republic) is de facto endorsed by the Parliament ([Ireland](http://en.wikipedia.org/wiki/Republic_of_Ireland), [Germany](http://en.wikipedia.org/wiki/Germany) and [Italy](http://en.wikipedia.org/wiki/Italy)).

* **Presidential form of government** -> [republican](http://en.wikipedia.org/wiki/Republicanism) [system of government](http://en.wikipedia.org/wiki/System_of_government) where the [head of Government](http://en.wikipedia.org/wiki/Head_of_government)  also acts as the [Chief of State](http://en.wikipedia.org/wiki/Head_of_state). Here again, the administrative power is separate from the body entitled to legislative power (see, for instance, the USA). The head of the administration (i.e., the President) is formally not [responsible](http://en.wikipedia.org/wiki/Responsible_government) to the Parliament, which is not entitled to force the latter to resign (however, in limited and serious circumstances, the Constitution may allow the Parliament to force the President resignation).
* **Directorial form of government** -> the State is ruled by an administrative body elected by the parliamentary assembly. One of the few countries resorting to such kind of form of government is [Switzerland](http://en.wikipedia.org/wiki/Switzerland), where directories rule at all levels of administration, federal, cantonal and municipal. The [Swiss Federal Council](http://en.wikipedia.org/wiki/Swiss_Federal_Council) is elected by the Federal Assembly for 4 years (usually the members of the Federal Council cannot be forced by the Federal Assembly to resign) and is comprised of seven members. There is no relationship of trust between the Federal Assembly and the Federal Council: so, even in case that the political approach changes over time (*e.g.*, due to a political majority being overturned), the Federal Council remains in charge for the full period (*i.e*., 4 years). The Chief of State is appointed among the members of the Federal Council.