



International Law

Elixir Inter. Law 52 (2012) 11469-11477

Elixir
ISSN: 2229-712X

Genesis of the concept of sovereignty: A historical survey

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ARTICLE INFO

Article history:

Received: 9 September 2012;

Received in revised form:

11 November 2012;

Accepted: 15 November 2012;

Keywords

Sovereignty,

Bodin,

Westphalia.

ABSTRACT

Sovereignty is one of the four attributes of statehood. Earlier it was known as capacity of a government to enter into relations with other states. Sovereignty is at the core of international system. Therefore, in this paper the author seeks to trace the origin of the concept diving into the history. For this purpose the author takes into account the circumstances prevailing in Greek city-states, Rome city, Mourya Empire, Gupta Empire, feudal system, Holy Roman Empire, etc and the opinions of various jurists and thinkers have also been included and pondered upon so as to find out the contents of the concept. The paper reveals when the concept was recognised and who used the term 'sovereignty' for the first time and what type of power and freedom have been said to be its essential ingredients.

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Introduction

The term 'state' is a political expression which represents the wherewithal to govern a territory. States are the prime subjects of the public international law. As distinct from nation, State is a means to rule over certain territory which consists of bureaucracy, legislature and judiciary.¹ The true test of statehood has been laid down in article 1(1) of the Montevideo convention on Rights and Duties of States 1933² which provides; "The state as a person of international law should possess the following qualifications, permanent population, a defined territory, government and capacity to enter into relations with other states." The paper concentrates on the fourth attribute of statehood. A state must have competence to enter into legal relation with other states and such competence is founded on independence. It signifies that the state is subject to no other sovereignty and is unaffected either by factual dependence upon other states or by submission to the rules of international law.³ Judge Anzilotti in his separate opinion used the terms 'sovereignty' and 'independence' interchangeably when he said that "independence ... is really no more than the normal condition of states according to international law; it may also be described as sovereignty (supreme potestas⁴), or external sovereignty, by which is meant that the state has over it no other authority than of international law."⁵ 'Sovereignty in the relations between states signifies independence. Independence in

regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.'⁶ According to Lauterpacht, the first condition of statehood is that there must exist a government actually independent of that of any other state.⁷

As discussed earlier the fourth attribute of statehood is the capacity to enter into legal relationship which has also been termed as independence and sometimes as sovereignty.⁸ With the emergence of nation-state and liberation of international relations especially after the Peace of Westphalia the doctrine of sovereignty came to light. The concept signifies autonomous, absolute political and military power embodied in a ruler or governmental body unfettered by any other external authority. In other words it is the supreme authority of a state to govern its internal and external affairs to prevent other state form doing any unauthorised interference.

Sovereignty, power and authority- Power of a person (natural or juristic) implies will, command, no assent of the ruled, forceful obedience and unaccountability towards those on whom it is exercised. Therefore it is not necessary that power must be legitimate in all cases. Authority also generates power but such power being an outcome of the authority is legitimate and therefore power not necessarily includes authority. In the context of sovereignty and international relations power may flow from wealth, capacity to use force, technology etc. Authority differs from power. It is quality of getting assent from others and it generates power and loyalty. Free consent of subjects is the foundation of authority. Bertrand De Jouvenel remarks: "Authority is the faculty of inducing assent. To follow an authority is a voluntary act. Authority ends where voluntary

¹ Kailash Jeenger. The Concept of Sovereignty of States in Modern International Law and Globalization. 5NLR 76 (2010).

² It was adopted by the 7th International Conference of American States. Fifteen Latin American States and the United States are parties to it. The Convention is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law.

³ Austro-German Customs Union case, 1931 PCIJ (ser A/B) No. 41, at 41.

⁴ Patria Potestas, supreme power exercised by the head of the Roman family, the paterfamilias, over his wife, his sons (regardless of their age), and his unmarried daughters.

⁵ Supra note 3.

⁶ Per Huber, Island of Palmas Arbitration, 1928, RIAA, 2, 829, 838.

⁷ International Law: Collected Papers. Cambridge University Press; 1975, p. 487.

⁸ Supra note 6.

assent ends.”⁹ For a sovereign legitimate authority is inevitable but as maintained by Bertrand¹⁰, sometimes there can a situation where power is exercised over all by means of authority over a part and it is the mark of the authoritarian State.

“Every system of rule rests on some method of legitimating the ruler as well as some pattern of accountability that the ruler observes. It is in this observation of a pattern of accountability that legitimate rule has always been distinguished from mere political power. Historically, the concept of sovereignty has been used by those who sought to buttress older forms of legitimation and accountability as well as by those who have hoped to justify new means for converting power into authority. Whenever we encounter pre-Bodin discussions in which there is an attempt to marry supreme power with institutions and practices that limit the operation of that ultimate power we are in the presence of a discussion about sovereignty.”¹¹

Sovereignty in customary international law- “The customary international law mainly dealt with rules relating to war, diplomatic relations and treaties. They were, however not followed strictly by States. States did not accept any restrictions on their sovereignty and independence.”¹² But the obligations accepted by states were less to a great extent as compared to those accepted under modern international law. Therefore the question of establishing and maintaining the sovereignty of State or ruler was not of much importance at that time; rather it was the question of independence, in the event of war. Powerful States (or rulers) attacked small States (or territories), so there could be total loss of independence of a State but there was nothing which would occasion restrictions on the sovereignty of state. States were not under the subjection of international law and did not accept obligations under international treaties which would imply restrictions on their sovereignty.¹³

Types of State sovereignty-

1. Internal Sovereignty- It refers to supreme authority of a state over everything within its territory and the activities taking place within its territory. It refers to supremacy over subjects.¹⁴

2. External Sovereignty- It relates to the relationship between a sovereign power and other States. It implies recognition all over the world that each possesses this authority in equal measure. The essence of the external or international sovereignty is consequently independence in relation to sovereigns.¹⁵

⁹ Bertrand De Jouvenel. *Sovereignty: An Inquiry into the Political Good*. J.F. Huntington trans., The University of Chicago Press; 1956, p. 33. Hereinafter, Bertrand, *Sovereignty: An Inquiry into the Political Good*.

¹⁰ *Id.*, at 32.

¹¹ (Cited 2012 Jul 3). Available from: <http://law.jrank.org/pages/19072/Sovereignty.html>.

¹² Kailash Jeenger. *The Concept of Sovereignty of States in Modern International Law and Globalization*. 5NLR 77 (2010).

¹³ “Therefore the concept of sovereignty as in customary international law implies absolute powers of a state. It was ‘absolute sovereignty’.” *Id.*, (absolute sovereignty, as suggested by Hobbes and Austin).

¹⁴ C.E. Merriam, Jr. *History of Sovereignty since Rousseau*. Batoche Books Kitchener; 2001, p. 111. (Cited 2012 Jul 3). Available from: <http://www.socserv.mcmaster.ca/~econ/ug/cm/3ll3/merriam/sovrou.pdf>. Hereinafter Merriam, *History of Sovereignty since Rousseau*.

¹⁵ *Id.*

3. Legal Sovereignty- It means final and determining power in the context of legal order or system. According to A. V. Dicey legal sovereignty lies in parliament.

4. Political Sovereignty- It signifies that the will of the head of the State that is ‘political sovereign’ is ultimately obeyed by the citizens voluntarily. It is delegated to the government which is formed by the representatives of the people. In international relations it is the political sovereignty that comes into play. It is the political sovereignty that enters into treaties and conventions with foreign countries.

5. Suspended sovereignty- Suspension of sovereignty takes place in the event of occupation over a territory by other State. Alexandros Yannis in his article says that under modern international law, foreign invasion does not lead to extinction of State but a State under foreign cannot exercise its governmental authority.¹⁶ Other instances of this sort could be territories under mandate or trusteeship system. Judge McNair calls it ‘sovereignty is abeyance’.¹⁷

Sovereignty can further be classified as absolute, quasi or relative sovereignty which have already been discussed earlier.

Sovereignty, why necessary- A prime function of a state is to survive and for this purpose it must have some autonomy, and unbridled and independent authority to rule and exclude others from doing any unauthorized interference. Such an authority encompasses administrative, legislative and military powers. This authority, at one time, eliminates internal dissention and on the other prevents any external authority from subjugating it or subjecting it to any superfluous obligation. The absence of sovereignty can cause anarchy and frequent wars as before the Peace of Westphalia during Holy Roman Empire. Such an authority i.e. sovereignty is of several types such as political, legal, internal, external, absolute, relative, popular etc.

Origin and development of ‘sovereignty’- Before Christ, during the time of Greek city states, Rome and Mourya Empire power was supreme. Mighty kings used to conquer the less powerful. The scene continued till Holy Roman Empire. In fact the origin of the concept of sovereignty was parallel to that of nation-state. Before the Peace of Westphalia the supreme power existed in monarchs and church but perhaps it went unnoticed or it was taken for granted. At the end of middle ages, before Jean Bodin (a French thinker), the word *souverain* was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called *Cours Souveraines*. The word ‘sovereignty’ has a history¹⁸, a history of the true power that it has exercised in framing the international state system and hence the international legal system.

Jean Bodin (1530-1596) - Jean Bodin’s *Six Books of a Commonwealth* (*Six Livres de la Republique*) published in 1576 contains the first systematic analysis of sovereignty in western political thought which was intended to deal with the structure

¹⁶ Alexandros Yannis. *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*. EJIL13 1038 (2002). (Cited 2012 Jul 6). Available from: <http://ejil.oxfordjournals.org/content/13/5/1037.full.pdf>. At 1046 he maintains that it signifies an extra-ordinary delegation of sovereign rights. The incidents of Kosovo and East Timor made him pen this article.

¹⁷ *International Status of South West Africa*, 1950 ICJ Rep 150.

¹⁸ On history of sovereignty, see Merriam, *History of Sovereignty since Rousseau*, supra note 14.

of authority within the modern state. In his time France was suffering from civil war and schism, and the French monarchy was helpless. His work was influenced by these circumstances. In the beginning of his work Bodin defines sovereignty (*souverainete*, *supreme potestas*) as “The absolute and perpetual power of a commonwealth, and then in a Latin edition he says, “The supreme power over citizens and subjects, unrestrained by law.¹⁹ Sovereignty is the central fact in Bodin’s political theory on which depends the definition of citizenship, the classification of forms of state and the identity of the state which are indeed the essential and vital elements of the commonwealth.²⁰ He characterises the commonwealth as perpetual.²¹ “The essential manifestation of sovereignty, he (Bodin) thought, is the power to make the laws, and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes.”²² However there were certain limitations upon the absoluteness of sovereignty. He by no means desired that the sovereign should be freed from obligation to any law. He declares that every ruler in the world is subject to the laws of God, of nature, and of nations which no sovereign can break through.²³ Therefore

¹⁹ See Jean Bodin. *Six Books of the Commonwealth*. M.J. Tooley abr. & trans p. 24. (Cited 2012 Jul 6). Available from: http://www.arts.yorku.ca/politics/cominel/courses/3020pdf/six_books.pdf. Hereinafter Bodin, *Six Books of The Commonwealth*.

²⁰ “Bodin concluded therefore that the essence of statehood, the quality that makes an association of human beings a state, is the unity of its government; a state without a *summa potestas*, he says, would be a ship without a keel. He defined a state as ‘a multitude of families and the possessions that have in common ruled by a supreme power and by reason.’ J.L. Brierly. *The Law of Nations*. Sir Humphrey Waldock ed., OUP, Delhi; 6th edn., 1st Indian edn. 2008 p. 8. Hereinafter Brierly, *The Law of Nations*.

²¹ See supra note 40 at 25. “I have described it as perpetual because one can give absolute power to a person or group of persons for a period of time, but that time expired they become subjects once more... The true sovereign remains always seized of his power.”

²² Brierly, *The Law of Nations*, supra note 20 at 8.

²³ See *id.*, at 9: “We might suppose from this phrase that Bodin intended his sovereign to be an irresponsible supra-legal power, and some of the language in the Republic does seem to support that interpretation. But that was not his real intention. For he went on to say that the sovereign is not a *potestas legibus omnibus solute*; there are some laws that do bind him, the divine law, the law of nature or reason, the law that is common to all nations, and also certain laws which he calls the *leges imperii*, the laws of the government. These *leges imperii*, which the sovereign does not make and cannot abrogate, are the fundamental laws of the state, and in particular they include the laws which determine in whom the sovereign power itself is to be vested and the limits within which it is to be exercised; we should call them the laws of the constitution. The real meaning of Bodin’s doctrine can only be understood if we remember always that the state he is describing is one in which the government is, as he calls it, a *recta* or a *legitima gubernatio*, that is to say, one in which the highest power, however strong and unified, is still neither arbitrary nor irresponsible, but derived from, and defined by, a law which is superior to itself.” (emphasis supplied)

according to Bodin sovereign is not absolute.²⁴ All these limitations are, however, ethical rather than political in character, and could at best bind only the conscience of the ruler. The personal preferences of Bodin are strongly in favour of monarchy, but he concedes, nevertheless, that democracy or aristocracy may also enjoy the full attributes of sovereign power. The State as a whole is not regarded as the sovereign, but one element thereof is the bearer of the supreme power and the other is the object against which this power is directed.

The true attributes of sovereignty according to Bodin- Bodin opines that the attributes of sovereignty are power to make law²⁵ binding on all his subjects, to make war and peace²⁶, to institute the great officers of a state²⁷ and finally that that the prince should be the final resort of appeal from all other courts.²⁸ While

²⁴ See Bodin, *Six Books of The Commonwealth*, supra note 19 at 27: “If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princess of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations.”

²⁵ See *id.*, at 43: “But to avoid any ambiguity one must add that he does so without the consent of any superior, equal, or inferior being necessary. If the prince can only make law with the consent of a superior he is a subject; if of an equal he shares his sovereignty; if of an inferior, whether it be a council of magnates or the people, it is not he who is sovereign.” See also Quentin Skinner. *Foundations of Modern Political Thought*, Vol. 2 (1978).

²⁶ See *id.*, at 44: “This is one of the most important rights of sovereignty, since it brings in its train either the ruin or the salvation of the state. This was a right of sovereignty not only among the ancient Romans, but has always been so among all other peoples. Whatever latitude they may give to their representatives to negotiate peace or an alliance, they never grant the authority to conclude without their own express consent.”

²⁷ See *id.*, at 45: “I confine it however to high officials, for there is no commonwealth in which these officers, and many guilds and corporate bodies besides, have not some power of appointing their subordinate officials. They do this in virtue of their office, which carries with it the power to delegate.” See generally Julian Franklin. *Jean Bodin and Rise of Absolute Theory*. (1973).

²⁸ See *id.*, at 46: “Even though the prince may have published a law, as did Caligula, forbidding any appeal or petition against the sentences of his officers, nevertheless the subject cannot be deprived of the right to make an appeal, or present a petition, to the prince in person. For the prince cannot tie his own hands in this respect, nor take from his subjects the means of redress, supplication, and petition, notwithstanding the fact that all rules governing appeals and jurisdictions are matters of positive law, which we have shown does not bind the prince. This is why the Privy Council, including the Chancellor de l’Hôpital, considered the action of the commissioners deputed to hold an enquiry into the conduct of the President l’Alemant irregular and unprecedented. They had forbidden him to approach within twenty leagues of the court, with the intention of denying him any opportunity of appeal. The king himself could not deny this right to the subject, though he is free to make whatsoever reply to the appeal, favourable or unfavourable, that he pleases... With this right is coupled the right of pardoning convicted persons,

identifying these incidences of sovereignty he takes into consideration the then monarchy, dukedom, the status of kings, the feudal system, the status of lords and vassals, and the church.²⁹

Before he lays down to view the attributes of sovereignty he critically analyses the views of Aristotle, Polybius, and Dionysius Halicarnassus in this context and says that they appear to have discussed the subject so briefly that it seems that they haven't understood the principles involved, though he marks Halicarnassus at a better position.³⁰

Analysing the Bodin's doctrine of sovereignty Brierly³¹ comments that he didn't deviate from the Middle Ages in that during that period too, the concept of arbitrary legitimate power was alien to all legal thought. He further remarks that it was law that made the ruler, not, as later theories of sovereignty have taught us to believe, the will of rulers that made the law. Regarding the nature of sovereignty he says that sovereignty for Bodin was an essential principle of internal political order and as to the nature of sovereign he concludes that Bodin intended his sovereign to be a constitutional ruler subordinate to the fundamental law of the state. Thus Bodin's doctrine of sovereignty is a gigantic innovative legal leap unknown to any other thinker. His doctrine later on became an essential attribute of statehood and basis of the international relations.³²

and so of overruling the sentences of his own courts, in mitigation of the severity of the law, whether touching life, property, honour, or domicile.”

²⁹ See for detailed discussion, *id.*, 42-48.

³⁰ See for further discussion, *id.*, 41-43. At one point he clearly specifies that dukes, counts, and all those who hold of another, or are bound by his laws and subject to his commands, whether of right or by constraint, are not sovereign. The same holds good of the highest officers of state, lieutenant-generals of the king, governors, regents, dictators, whatever the extent of their powers. They are not sovereigns since they are subject to the laws and commands of another and may be appealed against. The attributes of sovereignty are therefore peculiar to the sovereign prince, for if communicable to the subject, they cannot be called attributes of sovereignty. Just as Almighty God cannot create another God equal with Himself, since He is infinite and two infinities cannot co-exist, so the sovereign prince, who is the image of God, cannot make a subject equal with himself without self-destruction. He (Bodin) affirms that none of the three functions of the state that Aristotle distinguishes are properly attributes of sovereignty.

³¹ See Brierly, *The Law of Nations*, *Supra* note 20 at 10-11.

³² See Merriam, *History of Sovereignty since Rousseau*, *supra* note 14 at 8: “Such then was the theory of Bodin. In France it became the theoretical bulwark against particularism and antinationalism; it furnished the theoretical basis for seventeenth and eighteenth century absolutism; and, in a still broader sense, became the foundation of the modern theory of sovereignty. It was the first systematic study of the essential nature of the supreme power.” See generally Stephane Beaulac, “The Social Power of Bodin's ‘Sovereignty’ And International Law”, available from: <https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/1353/1/01Beaulac.pdf> (Visited on June 29, 2011), see also Eelco Van Kleffens. *Sovereignty in International Law*. (1953), See also Julian Franklin. *Sovereignty and Mixed Constitution: Bodin and His Critics*. (1991).

It is very pertinent to mention here that what the Bodin's work was all about is the systematic discussion on the doctrine of sovereignty and not state sovereignty because the state (nation-state) had not emerged yet. The concept of nation-state culminated in the Peace of Westphalia though began to grow long back in Investiture Controversy.³³

Hugo Grotius (1583-1645) - He is well known for his elaborative work on international law known as *De Jure Belli Ac Pacis* (The Law of War and Peace). According to Grotius sovereignty implies “that power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will.” He maintains that the duration of the power does not affect its essential nature and at this point he differs from Bodin who says that the supreme power must be perpetual. He features his concept with a peculiarity namely limitable. He opines that the sovereignty is in no way absolute and it is subject to law of God,³⁴ and further it is divisible. He puts forth that it can reside in general subjects and special³⁵ though this division was objected but he replied: “For it is not in the power of man to devise any form of government free from imperfections and dangers.”³⁶ Many persons allege many inconveniences against such a two-headed sovereignty, but in political affairs nothing is quite free from inconvenience.

“The most important element in the theory of Grotius was not, however, that of the content, but that of the bearer of the sovereign power. The sovereignty, Grotius declared, may reside either in a general subject (*subjectum commune*) or in a special subject (*subjectum proprium*); as the general subject in which the sight resides is the body, the special subject, the eye. Hence, one may say either that the body sees, or that the eye sees. So the sovereignty has a general bearer, that is, the body politic, or *civitas*, and also a special bearer, namely the person or persons constituting the government. One may say, consequently, that

³³ The Investiture Controversy was the most significant conflict between secular and religious powers in medieval Europe. It began as a dispute in the 11th century between the emperor of the Holy Roman Empire and the Pope concerning who would control appointments of church officials (investiture). It would eventually lead to nearly fifty years of civil war in Germany and the disintegration of the German empire, a condition from which it would not recover until the reunification of Germany in 19th century. (Cited 2012 Jul 15). Available from: <http://www.crusadeshistory.com/Investiture-Controversy.aspx>.

³⁴ At this point he walks parallel to Jean Bodin and Johannes Althusius. See for more details Merriam, *History of Sovereignty since Rousseau*, *supra* note 14 at 8-11.

³⁵ See generally Bertrand, *Sovereignty: An Inquiry into the Political Good* 169-214, *supra* note 9. To know more about Grotius see Peter Borschberg. *Grotius, the Social Contract and Political Resistance: A Study of the Unpublished Theses LVI*. IILJ Working Paper 2006/7, (Cited 2012 Jul 18). Available from: <http://www.iilj.org/publications/documents/2006-7-HTBorschberg-web.pdf>.

³⁶ Hugo Grotius. *On the Law of War and Peace*. A.C.Campbell, A.M. trans. & abr., Batoche Books Kitchener; 2001, p. 49. (Cited 2012 Jul 18). Available from: <http://socserv.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>. “As a dramatic writer says, I you must either take these advantages with those imperfections, or resign your pretensions to both.”

the State as a whole is sovereign or that the special organ, the Government, is sovereign. Grotius here came close to the idea of State sovereignty.³⁷

Thomas Hobbes (1588-1679) - He was an Englishman and during his time England was undergoing some political hardships. He penned a famous book known as *Leviathan* in 1651. According to him during anarchy government arises by a contract whereunder each individual surrenders his rights to one person who henceforth becomes the bearer of the personality of all the contracting individuals.³⁸ The agreement reads as:

“... which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements to his judgement.”³⁹

By this agreement sovereignty and subjects are created simultaneously and such sovereignty is absolute, unified, inalienable, based upon a voluntary but irrevocable contract. People cannot delegate or alienate such sovereignty because they were not a people until the sovereignty was created. They cannot dispose it off as they never possessed the supreme power.⁴⁰ He has laid down various rights⁴¹ of a sovereign which

³⁷ Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 11.

³⁸ See Thomas Hobbes. *Leviathan*. (1651) p. 105, 106. Hereinafter *Leviathan*, (Cited 2012 Jul 24). Available from: <http://socserv.mcmaster.ca/~econ/ugcm/3ll3/hobbes/Leviathan.pdf>. “The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.”

³⁹ *Id.*, at 106.

⁴⁰ See Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 13.

⁴¹ See *Leviathan*, supra note 38 at 107-111: Hobbes lays down some incommunicable and inseparable rights of sovereign:

- Firstly, the subjects cannot lawfully make a new covenant without his permission,
- secondly, there can happen no breach of covenant on the part of the sovereign,
- thirdly he that dissented must now consent with the rest or else justly be destroyed by the rest,
- fourthly, whatsoever he doth, can be no injury to any of his subjects,
- fifthly, no man that hath sovereign power can justly be put to death, or otherwise in any manner by his subjects punished,
- sixthly, it is annexed to the sovereignty to be judge of what opinions and doctrines are averse, and what conducing to peace; and consequently, on what occasions, how far, and what men are to be trusted withal in speaking to multitudes of people; and who shall examine the doctrines of all books before they be published,
- seventhly, is annexed to the sovereignty the whole power of prescribing the rules whereby every man may know what goods he may enjoy, and what actions he may do, without being

are, of course, annexed to sovereignty and the enumeration apparently shows that his sovereign has unbridled powers who has got all the administrative, legislative and judicial powers and having once agreed to the covenant, his subjects cannot dissent to it. The sovereign was not even subject to the laws of nature and the question of *leges imperii*, the law of the government does not arise.⁴² At this juncture he differs with Bodin.⁴³ Even the church was considered as subordinate to sovereign. Hobbes justifies the absolute character of his sovereignty by saying:

“The condition of man in this life shall never be without inconveniences; but there happeneth in no Commonwealth any great inconvenience but what proceeds from the subjects’ disobedience and breach of those covenants from which the Commonwealth hath its being. And whosoever, thinking sovereign power too great, will seek to make it less, must subject himself to the power that can limit it; that is to say, to a greater.”⁴⁴

For the prosperity of a people ruled by an aristocratical or democratical assembly cometh not from aristocracy, nor from democracy, but from the obedience and concord of the subjects: nor do the people flourish in a monarchy because one man has the right to rule them, but because they obey him. Take away in any kind of state the obedience, and consequently the concord of the people, and they shall not only not flourish, but in short time be dissolved.⁴⁵

molested by any of his fellow subjects: and this is it men call propriety,

- eighthly, is annexed to the sovereignty the right of judicature; that is to say, of hearing and deciding all controversies which may arise concerning law,
- ninthly, is annexed to the sovereignty the right of making war and peace with other nations and Commonwealths,
- tenthly, is annexed to the sovereignty the choosing of all counsellors, ministers, magistrates, and officers, both in peace and war,
- eleventhly, to the sovereign is committed the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made,
- lastly, considering what values men are naturally apt to set upon themselves, what respect they look for from others, and how little they value other men; from whence continually arise amongst them, emulation, quarrels, factions, and at last war, to the destroying of one another, and diminution of their strength against a common enemy; it is necessary that there be laws of honour, and a public rate of the worth of such men as have deserved or are able to deserve well of the Commonwealth, and that there be force in the hands of some or other to put those laws in execution.

⁴² See *Leviathan*, supra note 38 at 128: “So that it appeareth plainly, to my understanding, both from reason and Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocratical Commonwealths, is as great as possibly men can be imagined to make it.” (emphasis supplied)

⁴³ See for details Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 14.

⁴⁴ See *Leviathan*, supra note 38 at 128.

⁴⁵ *Id.*, at 208.

Thus the rationale behind the absolute character of sovereignty is obedience.⁴⁶

Samuel Pufendorf (1632-1694) - He was a German thinker and his great work was *The Law of Nature and of Nations* (*De Jure Naturae Et Gentium* 1672). His doctrine which was a harmonization of both Grotius and Hobbes dominated Germany to the French Revolution. He admits the contract principle as the basis of the State, but requires two stages in the process, namely an agreement to form a civil society, the "Pactum Unionis," followed by a farther contract between the people so formed and the Government, "Pactum Subjectionis."⁴⁷ The sovereignty so created is the supreme power in the State. Sovereignty, properly understood, Pufendorf declares, signifies not absoluteness, but merely supremacy.⁴⁸

As to sovereign he says none of his acts may be rendered void by any other organ in the society; he is responsible to no other power, free from the restraint of all human law; and this power is essentially one and indivisible. In the grant of power to the ruler, definite restrictions should be placed upon him of a character calculated to restrain his tendency to usurp all authority. Like Grotius, Pufendorf maintains⁴⁹ that the sovereignty may be held either with "full right" or in a manner more or less limited, but though limited, remains nonetheless truly sovereign. The elective or limited monarch is, therefore, contra Hobbes, a genuine sovereign, and not a mere agent of the constituting power. To Pufendorf it does not seem essential that the sovereign should have all power, but it is sufficient if he have the highest power; that is to say, he must be supreme, but need not be absolute. "Yet, notwithstanding its somewhat contradictory character, or one might say even because of it, the theory of Pufendorf became widely influential. It reconciled to a certain extent the benevolent despotism of the German states with the spirit of individual liberty, by conceding supremacy to the one, but not excluding the other from a degree of control. With some modifications his doctrine was followed by the great

German expounders of political science in the eighteenth century."⁵⁰

John Locke (1632-1704) - Locke played a pivotal role in English Revolution of 1688. His theory was the accepted justification to overthrow of the Stuarts. It was resorted to in the American Revolution against England and still remains the popular theory of sovereignty in England.

Locke starts with a 'state of nature',⁵¹ contra Hobbes's a 'state of war'.⁵² At the inception there is established a civil or political society and then a government. To this end every man surrenders irrevocably to the community his natural rights in so far as is necessary for the common good — and no farther. The political society so constituted establishes by a fundamental law the legislature which is the supreme governmental power. This body is then the source of law, the representative of the will of the society. Next in order comes the legislative body, the sovereign among the governmental powers, and so far absolute, or as we might say, the governmental sovereign. The Legislature is, however, only a subordinate and fiduciary body, entrusted with certain powers. Back of the Legislature stands another body, which is ultimately the true sovereign. This is the civil or political society which has instituted the Legislature, and might be called the political sovereign. Between the government and the political society there is no common judge; in other, words, they are in a perpetual state of nature, the essential characteristic of which is this lack of a common umpire. Hence, when the people of a political society is deprived of civil rights, it has still an original natural right to resume the sovereignty temporarily placed in the hands of the Legislature. As Locke explains, "The community may be said in this respect to be always the supreme power, but not as considered under any form of government," because the power of the people remains latent until the government is dissolved. Locke's theory is, then, that the executive is while within the law, supreme; that the Legislature is the sovereign governmental organ so long as the government endures; and that the political society (or the majority thereof) is the latent, and on the dissolution of the government, becomes the active sovereign.⁵³

"As to the content of sovereignty, it is difficult to deduce anything more than the statement that it is not absolute. If the power is used for the general good it would seem to be almost without limit. Thus Locke declares that a good prince cannot have too much prerogative, "that is, power to do good," "whatsoever cannot but be acknowledged to be of advantage to

⁴⁶ See Bertrand, *Sovereignty: An Inquiry into the Political Good*, supra note 9 at 231-246 on political consequences of Hobbes. At 242 under a heading 'Necessity of political stability in the Hobbesian system' Bertrand emphatically mentions: "The public authority is, then, a formidable policeman who, whether by immediate fear or by a habitual respect with distant roots in fear, checks actions that would be harmful, but allows men to do what they please otherwise, harmful actions only expected."

⁴⁷ See for details Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 15.

⁴⁸ It will germane to distinguish between sovereign power and absolute power. Absolute power gives one complete freedom to use his rights as he will, but by a supreme power is meant only that, in the same order of beings, there is none superior.

⁴⁹ See for more details Samuel Pufendorf. *The Law of nature and of Nations* Eight Books, Book VII ch. III-IV, IX. Basil Kennet trans. (Cited 2012 Jul 24). Available from: <http://ia600409.us.archive.org/24/items/oflawofnatureat00pufe/oflawofnatureat00pufe.pdf>. For more about Pufendorf's contribution see Wulf Gaertner. *De Jure Naturae et Gentium: Samuel von Pufendorf's Contribution to Social Choice Theory and Economics*. April 2003, (Cited 2012 Aug 3). Available from: http://repositorium.uni-osnabrueck.de/bitstream/urn:nbn:de:gbv:70001001305273/1/ELibD44_pio_bei_2003_07.pdf.

⁵⁰ Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 15-16.

⁵¹ See Bertrand, *Sovereignty: An Inquiry into the Political Good*, supra note 9 at 232: "The reason for asking what is 'the state of nature' is in order to know how man behaves when he is no longer bound by any rule and his appetites are his only law. The interest of such an inquiry is not in the least antiquarian, for social man is always liable to return to behavior of this kind, the motives for which still lurk beneath his social habits."

⁵² Id. "Our interest in the state of war is not because it is a phase through which men have passed but because it is always a possibility."

⁵³ See John Locke, *Two Treatises on Government*, (Cited 2012 Aug 6). Available from: <http://www.efm.bris.ac.uk/het/locke/government.pdf>.

the society and people in general, upon just and lasting measures, will always, when done, justify itself.”⁵⁴

Jean Jacques Rousseau (1712-1778) - His theory finds expression in the French Revolution. He bases his theory on natural rights of people and develops a theory of sovereignty of people. Sovereignty arises from the voluntary agreement of independent and general wills of people. The very first peculiarity of the general will is inalienability and thereby he meant that power may be transferred but not will. As a state cannot transfer its sovereignty, in the same manner an individual cannot transfer his will. Therefore he prevents a representative form of government for the power cannot be delegated and loss of supremacy by people through voluntary act.⁵⁵

The sovereignty as conceived by Rousseau,⁵⁶ stands out as absolute, infallible, indivisible, inalienable.⁵⁷ It finds its source in an original contract and abides permanently in the political body. Rousseau, thus accomplished for the people what Hobbes had done for the ruler.⁵⁸ The English writer's (Hobbes) theory absorbed the entire personality of the State in the ruling body, the government, the bearer of the personality of all. Rousseau, by the same logic, absorbed the government in the people.

A prevailing tendency of the theory, whether monarchically or democratically designed, as the movement toward the absolutist conception of sovereignty. According to Rousseau the sovereign will of the people emerged, untrammelled by limitations, incapable of contractual restraint.⁵⁹

The contract might be one between government and people, as with many of the Monarchomachs⁶⁰; or a social contract organizing the people, followed by a further agreement between people and government, as with Pufendorf; or, again, the single contract in which the sovereign and the State are created simultaneously, as with Hobbes and Rousseau. In any event, the tendency was to rest the supreme power upon a basis of popular consent. In the later period, especially after Grotius, the State and sovereignty were construed generally from the point of view of the individual, whose natural rights were combined with those

of others to form the political right of the ruler. The first tendency was to derive the power of the sovereign from the people as a whole, the later from the units of which the people was composed. One may say, then, that a strongly characteristic feature of the development of the theory of sovereignty during this period was the individualistic-contractualistic tendency. The emphasis on the individual came from the Reformation, the form of contract from the Roman law.

The result of the individualistic development was then, the vesting of the absolute, indivisible and inalienable sovereignty in a body created by a suppositions contract and fictitiously endowed with personality.

Immanuel Kant (1724-1804) – He was a German jurist. He formally accepted the contract theory. It is said that he was revolutionary, but practically the reverse. As he advocated the formation of the State is effected through a contract in which the private wills are united under the general or public will. Kant departs from his predecessor, Rousseau, however, by expressly denying the real or historical existence of such an agreement. As a matter of theory, the contract is a necessary basis of the ideal, logically-derived state, but, as a matter of fact, empirically, it is in no wise indispensable, “is as such even impossible.” The nature of the sovereign power existing in the State is strongly suggestive of the Leviathan of Hobbes, or the “general will” of Rousseau. Kant's idea is clearly expressed: “The ruler in the State has against the subjects clear rights and no (enforceable) duties. If there were legal rights against the sovereign, reasons Kant, they must be capable of enforcement against him; but this could be accomplished only by somebody able to coerce the sovereign. Such a body would, however, be the true sovereign, or further limited by some still stronger power. The series of limitations must end at some point, and here appears the unlimited and illimitable sovereign of the State. Kant's theory of sovereignty was as absolute as that of his great predecessors, Hobbes and Rousseau. He started with the premises of the French Revolution, but ended with the conclusions of the Reaction. He began with the voluntary agreement of individuals, but in the end endorsed the Government of those who possessed the might. The general will, the creature of the contract, was lost in the will of the de facto ruler or rulers, occupying the place of authority. He distinguishes, though not always clearly, between the ideal State and sovereignty and the practical State and sovereignty.”⁶¹

Karl Ludwig von Haller (1768-1854) - He propounded the anti-revolutionary⁶² theory and repudiated the necessity of contract and envisaged force as the basis of state and sovereignty. He said that social nature of men is a fundamental fact which we need not artificially construct and from the society authority is built up in a natural way. Those who are powerless attach themselves to the powerful. The necessity of the weaker is the opportunity of the stronger.⁶³ He was of the

⁵⁴ Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 17.

⁵⁵ However Grotius and Hobbes regard it as possible.

⁵⁶ His works include *Letters Written from the Mountain*, (1764), *The Principle of Political Right*, (1762), *Discourse on the Origin and Basis of inequality among Men*, (1754).

⁵⁷ See Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 18.

⁵⁸ For further details see id., at 18-21.

⁵⁹ “Constitutional limitations, the laws of God, of nature and of nations must yield to the Leviathan, the mortal god of Hobbes, while with Rousseau the sovereign will of the people emerged, untrammelled by limitations, incapable of contractual restraint. In both theories, the individual, the unit, must surrender absolutely all, so far as the interest of the State requires, and of its needs the sovereign is the judge, from whose decision there is no appeal.” See id., at 20.

⁶⁰ “Over against the theory outlined by Bodin, and defended by his followers, stood that of the school of political writers characterized by their adversaries as the “Monarchomachs.” The historical basis of their doctrine was the religious intolerance and persecution which followed the course of the Reformation, and necessitated the development of a theory of resistance for the use of the minority party.” Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 8.

⁶¹ Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 23-27.

⁶² Theory of Rousseau is generally called as revolutionary theory wherein will of the people is supreme. But Haller vehemently denied the requirement of contract to form state. His theory is said to belong to patrimonial theory.

⁶³ “Out of these facts is deduced the law which underlies the new Restoration of Political Science, that ‘natural superiority is the basis of all authority, need is the basis of dependence or servitude; the stronger rules, must rule, and always will rule.’”

opinion⁶⁴ that equals will not obey equals; inequality shall only necessities authority.⁶⁵ He recognises two classes of state: monarchy and republic. In his views sovereignty is the result of superior force, however acquired though it is by no means absolute but restricted by mutual obligations between the members of the society, right of oppressed people and divine law.

Reason as the basis of sovereignty (Victor Cousin; 1792-1867) – In the previous discussion over sovereignty it has been witnessed that it was founded on will. The trend took a different route after the restoration of the Bourbons⁶⁶ (1814-1830) in France. By the Charter of 1814 a monarchy with a responsible ministry and a bicameral legislature i.e. a constitutional monarchy was established. It brought to light a compromising theory framed by *Doctrinaires*⁶⁷. Victor Cousin advocated the most the theory. He opined that sovereignty is the same as the absolute right and it originates from reason and that too absolute. He maintains that absolute reason only is infallible, and thus the only source of absolute right and of sovereignty. The absolute reason cannot be found on earth so there should not be any dispute as to sovereignty and therefore the French people should renounce the claim of sovereignty.⁶⁸

Sovereignty of State, an organism- The idea of State as put forward by revolutionary theorists was that it is a conscious construction of human will. As a fiction it could not become the holder of the supreme power; it must be something more real, more definite, something less dependent on the voluntary actions of the people composing it. But according to a later idea State must be a real organism and a person having a responsible ministers and an organic law; a constitution. Schelling said that State is a part of “world process” and it is result of natural construction. J. J. Wagner, on the other hand, opined that State is an organism, a living organization and that the State must also be regarded as a person. Person, as he said, is a unity of perception and will, and wherever, among a number of men, this is found, there is a personality; so the family, the community, the State. Hegel too supported the theory by saying that State is

an organism which has its basis and causes in itself and which is a subject of rights.⁶⁹

John Austin (1790-1859) – Austin, the disciple of Bentham, was advocate of positivism. He defined law as a command of sovereign. As to sovereign, he says, “If a determinate human superior not in a habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.” The striking feature of his sovereignty is definiteness and determinateness that is readily ascertainable. Habitual obedience, the custom of obeying, constitutes the fundamental and essentials basis of the political society and of supreme power. In his opinion custom does not make law but makes the law-maker. The rule of custom ends where the sovereignty begins. It was a concept of continuous, illimitable and indivisible sovereignty. The sovereign was not bound by his own laws and had no legal duties.

Some others views as to sovereignty- Besides the above-mentioned theories many other views came to light supporting or rejecting or altering the previous theories. John C. Calhoun denied the idea of contract to form a political society and maintained that government is not a matter of choice, but a necessity which cannot depend on our volition. He said that sovereignty is not the sum of executive, judicial and legislative powers but the vital principle of the state out of which all these powers arise. Reacting against Bodin, Georg Meyer advocated non-sovereign states. He said that Bodin’s idea of the State could lay no claim to universal application for all times and peoples, that it was not fitted to become the basis of political science. The view was affirmed by Laband also.

Hugo Preuss, yet another reaction against Bodin, assailed Bodin’s absolute and perpetual power of a State and maintained that it is incompatible with international law for an absolute power will not agree to be bound by agreements. Such a concept cannot prevail in modern constitutional states.⁷⁰

State sovereignty and Westphalian myth- It is generally said that the concept of sovereignty as seen today is a gift of Peace of Westphalia to the world. But historical facts have something else to prove. Westphalian sovereignty was confined to exclusive authority over everything within the borders and territorial integrity whereas on the contrary state sovereignty is an essential attribute of statehood which signifies capacity to enter into legal relationship and independence, as already discussed.⁷¹ Both the

See Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 34.

⁶⁴ See *id.*, at 33-7.

⁶⁵ At this juncture he seems to have come close to John Austin’s (1790-1859) definition of sovereign- “... who has no like superior, who is not bound to obey others ...”

⁶⁶ “The ‘Bourbon Restoration’ is the name given to the period following the successive events of the French Revolution (1789–1799), the end of the First French Republic (1792–1804), and then the forcible end of the First French Empire under Napoleon (1804-1814/1815) — when a coalition of European powers restored by arms the monarchy to the heirs of the House of Bourbon who once again became possessors of the Kingdom of France.” (Cited 2012 Aug 15). Available from: http://en.wikipedia.org/wiki/Bourbon_Restoration.

⁶⁷ “Doctrinaires’ was the name given during the Bourbon Restoration (1814-1830) to the little group of French Royalists who hoped to reconcile the Monarchy with the Revolution, and power with liberty. They favoured constitutional monarchy.” (Cited 2012 Aug 15). Available from: <http://en.wiki.pedia.org/wiki/Doctrinaires>.

⁶⁸ See also Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 39.

⁶⁹ See *id.*, at 47.

⁷⁰ Merriam, *History of Sovereignty since Rousseau*, supra note 14 at 108: “The conception of sovereignty is, moreover, hostile to any system of constitutional law, inasmuch as it excludes the reciprocal rights and duties on the part of the State, thus arraying itself against any possibility of a body of law.”

For history of sovereignty see also Jens Bartelson’s *A Genealogy of Sovereignty*, Bertrand De Jouvenel’s *Sovereignty: An Inquiry into the Political Good*, F.H. Hinsley’s *Sovereignty and John Hoffman’s Sovereignty*.

⁷¹ Straumann Benjamin. *The Peace of Westphalia as a Secular Constitution*. p. 183. (Cited 2012 Aug 18). Available from: <http://www.iilj.org/aboutus/documents/Straumann.Westphalia.pdf>. “What has been called “Westphalian” sovereignty in the narrower sense, that is to say the exclusive legal authority over territory to the exclusion of outside actors, is therefore on Grotius’ account a domestic, constitutional category. Both kinds

Treaty of Munster and the Treaty of Osnabruck, the two main treaties that comprise the Peace of Westphalia, did not mention sovereignty. Moreover treaty contained clauses that allowed Sweden and France to intervene, should the Holy Roman Empire break the Peace. This directly violates the concept of individual sovereignty, as it allows external actors to interfere with state affairs.

“While the Peace of Westphalia was not the beginning of Westphalian sovereignty, it did play the important role of applying the principles found in the earlier documents to international relations. The Concordat of London was between England and the Papacy; the Concordat of Worms was between the Holy Roman Empire and the Papacy. The Peace of Augsburg was signed by the Holy Roman Emperor and several Lutheran nobles; in other words, an internal document. By putting these principles of increased secular power into an international treaty, as the Peace of Westphalia did, the rulers were able to Westphalian sovereignty was a long process that improved with the Peace of Westphalia, but by no means did Westphalian sovereignty begin in 1648. The Peace of Westphalia was merely another step in the long process of establishing ideals of Westphalian sovereignty.”⁷²

Conclusion-

Thus the vital concept never existed and was not recognised before the Holy Roman Empire as power used to rule at that time. Sovereignty can not be dreamed of under overarching ‘power’. It won’t be erroneous to say that the concept of sovereignty and nation-state materialized on the international scene simultaneously. The concept has undergone a sea-change in the twentieth century, from absolute sovereignty to qualified sovereignty, though sovereignty is still supreme. The attributes of sovereignty in the modern international law are; exclusive territorial jurisdiction, consent based membership of international organisations as well as jurisdiction of international courts. There was no question of these attributers until sovereignty, nation state and international law came into existence.

of sovereignty cannot be said to have arisen with the Westphalian Peace treaties.” He has emphatically quoted Stephen Krasner. His major works include *Sovereignty: Organized Hypocrisy, Problematic Sovereignty and Power, the State and Sovereignty*.

⁷² Gordon Kelly. *The Origins of Westphalian Sovereignty*. 23 Senior Seminar, (HST 499W), June 6, 2008. (Cited 2012 Aug 24). Available from: <http://www.wou.edu/las/socsci/history/thesis%2008/KellyGordonWestphalianSovereignty.pdf>. In this article he has quoted Leo Gross, James A. Caporaso and Andreas Osiander.