Tracing the origin of Nation-state and the Westphalian Myth

Kailash Jeenger

Faculty of Law, M.I.T.S. University, Laxmangarh, Rajasthan, India.

ABSTRACT

International law is applicable on the members of international community which are states, international organisations and individuals. The term 'state' is a political expression which is a means to rule over certain territory. However the kind of state we visualize today did not exist in the ancient times. Besides, international and political thinkers call the present system of nation-states as Westphalian system. Therefore the researcher feels it worthy to make a historical research to trace the origin of nation-state being a prime subject of the international law and to highlight the myth involved. The paper begins with the Greek city-states which existed before Christ and travels through Roman kingdom, feudal system, the Holy Roman Empire and the Peace of Westphalia. The paper brings to light the Westphailian myth regarding the origin of nation-state and reveals how it originated during the Holy Roman Empire.

Introduction

Ubi societas, ibi jus (where there is a society, there is a law). For the existence of any society law is inevitable[1] and therefore international society is also governed by a law i.e. international law. Generally every law creates certain rights in favour of and imposes certain obligations upon its subjects. However unlike municipal law the subjects of public international law are States, international institutions and individuals. 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.[2] It aims at securing a system of order. These modern states are territorial which rule, control and regulate the people (not necessarily citizens), legal bodies, institutions and other things within the borders. A state is distinct from a nation which is a group of larger number of people who are together on the basis of culture, traditions, language, religion etc. Again, a state is absolutely different from other institutions like church because they are formed to achieve different objectives. "The state is commonly defined as a community which consists of a territory and a population subject to an organized political authority and such a state is characterized by sovereignty'- The Arbitration Commission of the EC Conference on Yugoslavia,[3] Opinion No. 1.[4]"

Kantarowicz is of the opinion that a state is juristic person endowed with the right to impose its will on the inhabitants of a given territory, of which right it cannot by law be deprived without its own consent.[5] There are certain attributes of statehood which a territory must possess before it can become a state and these attributes also play a vital role in granting recognition of a state to a territory. The true test of statehood has been laid down in article 1(1) of the Montevideo convention on Rights and Duties of States 1933[6] which provides:

"The state as a person of international law should possess the following qualifications:

a. a permanent population;

b. a defined territory;

c. government and

d. capacity to enter into relations with other states."

These are the four essential elements that constitute a state. If a political entity possesses these attributes of statehood then only it is recognized as a state by the world community. However the form and content of a state that are seen today, were not so at the inception of the human society. Therefore it is necessary to look into the historical background which accounted for the emergence of the nation-state.

---

1 In the absence of international law the then world suffered from, regional wars, revolutions, lack of statehood, harmony among rulers sovereignty etc. This turmoil calmed down to a great extent after the Peace of Westphalia, 1648 and nearly ended after the formation of the UNO in 1945.

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

3 The EC Peace Conference on Yugoslavia was convened following the eruption of civil war in the Socialist Federal Republic of Yugoslavia (SFRY) in 1991. The Arbitration Commission which is also known as the Badinter Commission was set up by the Conference as a body to which the relevant

authorities will submit their differences and consisted of five members.

4 The EC Arbitration Commission on Yugoslavia, Nov. 29, 1991, 92 I.L.R. 162, *in* Harris D. J. Cases and Materials on International Law. 7th ed. Sweet & Maxwell, London ;2010 at p. 113.

5 Economica, 12 (1932), *in* Paton G. W. Jurisprudence. 4th ed. Universal Law Publishing, New Delhi; 1972 at p. 348.

6 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.

Tele:
E-mail addresses: kailash333bj@yahoo.co.in

Tracing the origin of nation-state

This type of state, however, is the product of a long and chequered history; and throughout Middle Ages the growth of strong centralised governments was impeded by many obstacles, of which difficulties of communication, sparsity of population, and primitive economic conditions, are obvious illustrations. But two of these retarding influences (that of feudalism and church) deserve special notice because of the imprint which they have left even to this day on the modern state.[7]

It is a journey of city states, kingdom, feudal system, empires and nations coupled with several wars and revolutions. It is characterised by instability and power.

The Greek City States (750 BC) – After the Greek dark ages (1100- 750 BC)[8], exciting things began to happen in ancient Greece. Villages started to band together to form strong trading centres. These groups of villages that banded together were called city-states *(polis).* Soon, hundreds of city-states had formed in ancient Greece.[9] They were divided and sub-divided by hills, mountains and rivers and having aristocracy (rule by a small group of land owning elites), monarchy (rule by king or queen), tyranny (rule by one person, tyrant, who takes the power) and democracy (rule in which people can vote). After the rise of the democracy in Athens, other city-states founded democracies. Greece was not a country by then and therefore there was no central government. 'To the Greek city-states independence played the same part it has played in our own times. If they had had the word *sovereignty* they would have used it.'[10] The Delian League, based on the island of Delos, was formed to unite the Greek city-states to defend against the Persians. Athens led the league and gained more and more power over the other city states. Sparta refused to join. The other city-states became resentful of Athens' power over them. A group of city-states led by Sparta waged the Peloponnesian War against Athens for 30 years until Athens surrendered to Sparta. Later, under Spartan control, the Athenians revolted and once more set up a democracy; but they never regained the power they once had. The Greeks began to lose their sense of community and fought with one another. The ancient Greek city-states never united because the land was very mountainous and hilly making travel difficult. This is one case where geography influenced history. The city-states of ancient Greece fell to Roman conquerors in 146 BC. Greece was finally conquered by Phillip II of Macedonia (Alexander the Great's father).

Roman Kingdom and the Senate (753 BC- 509 BC) - Nearly 3,000 years ago shepherds first built huts on the hills beside the Tiber River in central Italy. These encampments

gradually grew and merged to form the city of Rome. Ancient Rome was the largest city which was ruled by king in the then known world. The history of the Roman Kingdom is not much certain as nearly no written records from that time survive, and the histories about it were written during the Roman Republic and Roman Empire. The Roman Kingdom (*Regnum Romanum*) was the monarchical government of the city of Rome and its territories. The traditional account of Roman history is that it was ruled by a succession of seven kings. Early Rome was ruled by kings who had wide military and judicial powers and represented the people to their gods.

The Roman Senate was a political institution starting in the ancient Roman Kingdom. It elected a Roman king and vested in him their sovereign power. When the king died, that sovereign power naturally reverted to the Senate. The Senate of the Roman Kingdom held three principal responsibilities: it functioned as the ultimate repository for the executive power, served as counsel to the king, and functioned as a legislative body in concert with the people of Rome.

Gradually monarchy became hereditary. The first kings were elected but during the reigns of the final three kings the monarchy became hereditary, and thus the Senate became subordinated to the king. Perhaps this violation of Senate's sovereignty led it to overthrow the last king.

The Roman Republic (509 BC- 27 BC) – The Roman aristocrats provided the leadership for the establishment of the Roman Republic, and they continued to dominate it for centuries. During the five centuries of the republic, Rome grew from a small city of 10,000 into a great cosmopolitan metropolis of 1 million whose empire of 15 million subjects encompassed the entire Mediterranean basin. Rome conquered the communities in the central mountains, the Greek cities of the south, and the Gauls of the Po River valley. Rome usually established "alliances" with foreign states and cities, but also annexed some areas as provinces when the local political organization was inadequate, as in Spain, or untrustworthy, as in Macedonia. The Roman Senate gave each conquered province an individual charter, and the Roman governor held all of the province's civil and military authority. In two centuries Rome transformed itself from a small city-state to the ruler of the Mediterranean.

The Senate and the citizen Assembly survived from the monarchy to the republic. In theory the Senate played only an advisory role, but because it contained mostly former civil officials, called magistrates, it was respected as the repository of Roman wisdom and tradition. The Senate had such great authority (*auctoritas*) that magistrates consulted it on all important issues. Citizens participated in the Assembly, which could pass laws, elect magistrates, and declare war.

Roman Empire (27 BC- AD 476/ 1453) – Roman Empire, a political system established by Rome lasted for nearly five centuries. The term Roman Empire is used to portray the Roman state before and after the time of first emperor, Augustus. At its peak the empire included lands throughout the Mediterranean world. Rome had first expanded into other parts of Italy and neighbouring territories during the Roman Republic but made wider conquests and solidified political control of these lands during the empire. Many imperial provinces were formed by Augustus but most of them were relatively recent conquests and were located at borders. The emperor had authority over Rome's civil government, including the power to preside over and to control the Senate.

---

[7] Brierly J.L. The Law of Nations. Indian ed. Sir Humphrey Waldock ed., OUP; 2008, p. 2.

[8] At the end of the Bronze Age, invaders, civil wars, or wars between kingdoms destroyed most Mycenaean centers of power, and Greece entered a period of relative impoverishment, depopulation, and cultural isolation known as the Dark Age. The art of writing was lost for most of the Dark Age, and few notable artifacts of the period remain. During this time, Greece seems to have been a land of small farming communities that had little to do with one another.

[9] (Cited   2011June   12).   Available   from: http://greece.mrdonn.org/city-states.html.

[10] Fenwick Charles W. International Law. 3rd Indian reprint. Vakils, Feffer and Simons Pvt. Ltd. Mumbai; 1971, p. 6.

As the empire developed, the emperor stood at the top of the administrative system. He served as military commander in chief, high priest, court of appeal, and source of law. All this power was intensely personal. Soldiers swore their oath to the emperor, not to a constitution or a flag. The empire lasted until Germanic invasions, economic decline, and internal unrest in the 4th and 5th centuries AD ended Rome's ability to dominate such a huge territory.

Emergence of feudal form of society-

Introduction- Unlike the contemporary forms of political system, feudalism, a contractual system of political and military relationships existed among members of the nobility in Western Europe during the High Middle Ages (lasting from about 1050 to about 1300). All nobles were ultimately vassals to the king. Feudalism was characterized by the granting of fiefs, chiefly in the form of land and labour, in return for political and military services- a contract sealed by oaths of homage and fealty. The grantor was lord of the grantee, his vassal, but both were free men and social peers. As remarked by Stubbs:

It may be described as a complete organisation of society through the medium of land tenure, in which from king to the lowest landowner all are bound together by obligation of service and obligation of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by the nature and extent of the land held by the one of the other. In those states which have reached the territorial stage of development, the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit as well as service to his lord. In states in which feudal government has reached its utmost growth, the political, financial, judicial, every branch of public administration is regulated by the same conditions. The central authority is a mere shadow of a name.[11]

Reasons for the Feudal Pattern- In the feudal period warfare was rampant but feudalism did not cause warfare; rather warfare caused feudalism. The kings were unable to defend their lands and land of their nobles and therefore nobles had to find some way to defend their lands. During that period the Carolingian Empire collapsed because it was based on the rule of one man, who did not have institutions sufficiently well developed to give effect to his will. Consequently the empire's disappearance threatened Europe with anarchy: thousands of individual seigneurs ruling their people entirely independent of any suzerain authority. The bonds of feudalism reunite the local seigneuries loosely, under which the seigneurs compromised with their freedom for effective cooperation. Under the leadership of their feudal lords, the united vassals fended off invaders and created feudal organisation of society. When feudalism proved its worth on a local basis, kings and emperors adopted it to strengthen their monarchies.

'Feudal states': a misnomer- Firstly there really was no "feudal system" if that implies a neat hierarchy of lords and vassals who collectively took charge of political and military affairs. Because the feudal hierarchy arose as a makeshift for defense against invaders, it always had a provisional, *ad hoc*, and flexible character. There was no "system". In theory the king was the chief feudal lord, but in reality the individual lords were supreme in their own territory. But this feudal form of society

cannot be called as feudal state. In fact it will be incorrect to call even the absolute feudal form of society a 'state'. As put in by Brierly:

"Thus to speak of a feudal 'state' is almost a misuse of terms; in a sense the feudal organization of society was a substitute for its organization in a 'state', and a perfectly feudal condition of society would be not merely a weak state, but a negation of the state altogether."[12]

According to Charles W. Fenwick- "… The state thus ceased to be based upon a community of interest between citizens and became a successive series of personal relations to the feudal lord. Territorial sovereignty accompanied the feudal tie. The result was that the centralization of the authority of the empire in the hands of the emperor amounted to no more than an acknowledgment of personal homage."[13]

The Holy Roman Empire (962- 1806) - The Holy Roman Empire was more of a religious nation than the Roman Empire. "... Thus was formed the Holy Roman Empire, within which peace through law was to be maintained by the cooperation of the temporal and spiritual authorities."[14] The Holy Roman Empire was created after the split of the Roman Empire because of the fall of the Roman capital - Rome. Constantinople was the new capital for the Eastern Roman Empire, or the Holy Roman Empire. Basically, Holy Roman Empire had armies to fight for God, rather than the nation. It was not a highly centralized state like most countries today. Instead, it was divided into hundreds of individual entities governed by kings, dukes, counts, bishops or other rulers who were collectively known as princes. The Holy Roman Empire was revival of the Western Roman Empire, whose legal and political structure had enfeebled during the 5th and 6th centuries and had been replaced by independent kingdoms ruled by Germanic nobles. There were also some areas ruled directly by the Emperor. At no time the Emperor could simply issue decrees and govern autonomously over the Empire. His power was severely restricted by the various local leaders.

During the Holy Roman Empire, from 11th century, the princes of the local territories struggled to get power. They were not at all surviving in harmony. The Emperors could not gain much control over the lands which were in their formal possession to a greater extent. Instead, to secure their own position from the threat of being ousted, Emperors were forced to grant more and more autonomy to local rulers, both nobles and bishops. In the 11th century this process began with the Investiture Controversy[15] and was more or less concluded

---

11　　　　Bishop Stubbs. Constitutional History of Englan*., Vol. i, 274, *in supra* note 7, at 2.

12　　　　*Supra* note 7, at 3.
13　　　　*Supra* note 10, at 11.
14　　　　Bryce's The Holy Roman Empire is still the standard work. *See id*. at 11.
15 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 2011 June 15). Available from: http://www.crusades-history.com/Investiture-Controversy.aspx.

with the Peace of Westphalia in 1648.[16] Several Emperors attempted to reverse this steady dissemination of their authority, but were thwarted both by the papacy and by the princes of the Empire. During that period the concept of "property" began to replace more ancient forms of jurisdiction, although they were still very much tied together. In the territories (not at the level of the Empire), power became increasingly bundled: whoever owned the land had jurisdiction, from which other powers derived. It is important to note, however, that jurisdiction at this time did not include legislation, which virtually did not exist until well into the 15th century. It is during this time that the territories began to transform themselves into predecessors of modern states.

Medieval concept of 'World-State'- World State is a concept of a centralized global political organization and a common rule of law that would create international order and promote peace. Ideas about world government were described by the Italian writer Dante Alighieri in his 14th-century treatise on monarchy. He advocated the concept because of continuous unrest between the pope and emperor. The princes of small territories were also craving to assert their independence of control. Like the Averroistic reasoning of his earlier claim that only under a world empire can humanity realize its intellectual destiny, this crowning claim shows Dante appropriating Aristotle to the service of a unique and almost desperate vision of empire as a redemptive force.[17] But Dante's plea of world-state went unnoticed.[18]

Reformation (15th century) - From the Revival of the Holy Roman Empire by Otto I in 962, popes and emperors had been engaged in a continuous contest for supremacy. This conflict had generally resulted in victory for the papal side, but created bitter antagonism between Rome and the German Empire which was augmented in the 14th and 15th centuries in various parts of

Europe by the further development of German nationalist sentiment. The incidental effect thereof was a fillip to the growth of national states by the breaking up of the Christendom. The decline of centralized imperial authority in Western European society was related to the emergence of new nation-states, which asserted political independence within, and finally from, the Holy Roman Empire.[19]

The Peace of Westphalia (1648) and the Westphalian myth- Thirty Years' War, a series of European conflicts lasting from 1618 to 1648, involving most of the countries of Western Europe, was fought mainly in Germany. The war was put to an end by the Peace of Westphalia, treaty, signed on October 24, 1648 and it readjusted the religious and political affairs of Europe too. It is so called because the negotiations, which began in 1644, took place in the German cities of Munster and Osnabruck, in Westphalia. The main participants were France and Sweden and their opponents Spain and the Holy Roman Empire. By the terms of the treaty, the sovereignty and independence of each state of the Holy Roman Empire was fully recognized, making the Holy Roman emperor virtually powerless. The Treaty fundamentally influenced the subsequent history of Europe. In addition to establishing Switzerland and the Dutch Republic (the Netherlands) as independent states, the treaty gravely weakened the Holy Roman Empire and the Habsburgs[20], ensured the emergence of France as the chief power on the Continent, and disastrously retarded the political unification of Germany.

It is but natural that the international society owes a debt to the Peace of Westphalia for the advent of nation-state model because it is so interlinked with the model and that is why it is popularly known as Westphalian-system. But the history shows an adverse view and advocates that the treaty was merely a part of it, rather it aimed at putting an end to the Thirty Years' War only and the process of emergence of nation-state had begun long back since Investiture controversy[21]. Leo gross, James A. Caporaso and Stephen Crasner hold the same view.[22]

Gordon Kelly[23] quotes Leo Gross and Caporaso as follows respectively: "Indeed, the Peace of Westphalia is so strongly associated with this model of the nation-state that today's international relations scholars refer to the current model of nations as Westphalian sovereignty and describe modern society as living under the Westphalian system."

"A Westphalian nation-state has two main characteristics: a specific area of land which is considered part of the nation, called territoriality, and a ruling structure that has the ultimate power to rule over the nation without yielding to any external

---

[16] Kelly Gordon. The Origins of Westphalian Sovereignty", 24 Senior Seminar. (HST 499W), June 6, 2008: "By analyzing the origins of Westphalian Sovereignty, it becomes increasingly apparent that the Peace of Westphalia was not the sole origin of Westphalian nation-states. The interactions between secular rulers and religious leaders demonstrate a slow movement towards Westphalian sovereignty, borne by a desire of secular rulers to remove the influence of the Pope from their lands. The Papacy's loss of control over the secular rulers, particularly the Protestants, resulted in the bolstering of all secular rulers. This, in turn, allowed the rulers of Europe to focus on relations between each other while utilizing the same ideals that had been encouraged by the religious conflicts. Without the Investiture Controversy or the Peace of Augsburg, the Peace of Westphalia would have only been remembered for ending the war." (Cited 2011 June 21): available from: http://www.wou.edu /las/socsci /history/thesis%2008/KellyGordon WestphalianSovereignty.Pdf.
[17] (Cited on June 27, 2011). Available from: http://plato.stanford.edu/entries/dante/.
[18] It is worthy to quote Brierly here- "... The rise of international law was the recognition of this truth (that states cannot remain absolutely separate and irresponsible). It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a number of states, secular, national, and territorial; but it denied their absolute separateness and irresponsibility, and proclaimed that they were bound to one another by the supremacy of law." *Supra* note 7, at 7. (emphasis supplied).

[19] Brierly- "But just as the state was consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was a rebellion of the states against the Church. It declared the determination of civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state." *Id.* at 5.
[20] Habsburg was a royal family of Europe, one of the oldest and most prominent dynasties from the 15th to the 20th century.
[21] *See supra* note 15.
[22] *See also supra* note 16.
[23] *Supra* note 16.

6143

Kailash Jeenger/ Elixir Inter. Law 42 (2012) 6139-6143

agency.' Caporaso finds that the traditional definition of a Westphalian nation- exclusive sovereignty over everything within the borders, legal equality with other states, and territorial integrity- already existed to some degree prior to the Peace of Westphalia. He challenges the ideal of a Westphalian nation. He notes that out of the four necessary attributes that make up sovereignty for the quintessential Westphalian state- territory, recognition, autonomy, and control- very few nation-states have possessed all four. He looks at the Peace of Westphalia as one of many steps that led to the so-called Westphalian system. He argues that the seeds had been planted before the Thirty Years' War, and they did not fully bloom until well after the war was over. By analyzing documents that appear to have elements of Westphalian sovereignty that predate the Thirty Years. War, he presents Westphalian sovereignty as a process."

According to Stephen Krasner[24] this model had virtually nothing to do with the Peace of Westphalia. He defines "Westphalian" as an "institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures." Westphalian sovereignty is violated when external actors

---

[24] *In* Straumann Benjamin, "The Peace of Westphalia as a Secular Constitution", 173, (cited 2011 July 3). Available from: http://www.iilj.org/aboutus/documents/Straumann.Westphalia.pdf.

influence or determine domestic authority structures." Krasner explains that he chooses to use this terminology because the "Westphalian model has so much entered into common usage, even if it is historically inaccurate."

Conclusion

States are one of the subjects of international law. It is applicable on the community of states and earlier, when this community came into existence Roman and Greek countries were part of it but at present all states are members of the international community. However it took centuries to the nation-states to appear on the international scenario and to become subject to a law. It is generally regarded as Westphalian system but it is not so. It was merely an occasion when nation-state came to light. The Peace Treaty merely recognised inviolability of territory and non-intervention in the affairs of states. The controversy between secular rulers and religious leaders had given rise to nation-state and sovereignty also. In fact the emergence of nation-state, state sovereignty, international community and international law was simultaneous because before their origin the city states or countries were absolutely independent, they were not subject to any law and the concepts of interdependence and shared responsibility could not be even dreamed of. Might was right and they were ambitious enough to annex a weaker state by using force. But with the origin of nation-state and international community the international scenario changed.