

WESTPHALIA: A PARADIGM? A DIALOG BETWEEN LAW, ART AND PHILOSOPHY OF SCIENCE

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ABSTRACT: It's in the Westphalia Peace Treaties which resides the “birth certificate” of the modern, national and sovereign State, base of the present democratic State and the founding moment of the contemporary international political system. The importance of those treaties is so clarifying to the understanding of the present models of State and Law that they form a real paradigm, the so-called “Westphalian Paradigm”, outlined by many writers in the fields of Law, Political Sciences and International Relations. In spite of being crucial, the “Westphalian Paradigm” has been very little studied and researched in the very Law field. The origins, implications and characteristics of the State model which is formed after the Thirty Years’ War constitute, always from the Jurisprudence point of view, the core of this paper. The article is concluded with a note about the contemporaneity of that State model referred by the Westphalia Paradigm, under the lights of KUHN’S concept of paradigm.

KEY WORDS: Modern State, Thirty Years’ War, Peace of Westphalia, Concept of Paradigm, Sovereignty

To the memory of Professor Guido Soares.

1. INTRODUCTION

The study of paradigms is what basically prepares the student for membership of the scientific community in which he/she will work later – this is what

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the philosopher Thomas Kuhn teaches in the beginning of his classical study about the thinking and scientific revolutions¹.

All the “vision of the world” (*Weltanschauung*) structuring of the modern and contemporary modes of understanding/applying Law is based on the tripod Stateness-rationality-oneness, according to which Law identifies with the rule imposed solely by the State, the only one valid, in use and effective in its territory and conceived according to principles of coherence, systematization, harmony and logic. The political-juridical category “State” is the base to the study and understanding of this model of Law that has been formed since the disintegration of the feudal world. State and Law maintain between each other a relationship of mutual interference so that Law (starting from the constitutional one) is meant to give a form, constitute or conform a given scheme of political organization of which main characteristic is the monopoly of the political-juridical power over a determined community gathered in a territory². In the chart of relationships between State and Law, to understand one is finally understand the other and this fact gives legitimacy to the enquiry about the Westphalian juridical paradigm which is to be developed here.

A brief historical outline reveals that the notion of State which is taken today as self-evident (the constitutional and democratic State) has its remote origins in the disruption of the feudal world as from the fifteenth century. During all the Middle Ages, owing to the deep territorial fragmentation and the rural transformation experimented by feuds in Europe, (separated microcosms, agricultural, self-sufficient and autonomous), there was a weakening in the power of the kingdoms emerged from the decadence of the Western Roman Empire. Kings inherited just a formal authority of rights, while the real authority was concentrated on the hands of feudal lords, which produced a multinuclear and atomized political universe. The feudal organization consisted of a hierarchy of privileges with numerous stages: kings were only given the power over vassals and other subordinates through the feudal lord who was immediately inferior, and whose loyalty in relation to monarchs was broken with some frequency³. In this sense,

¹ THOMAS KUHN, A ESTRUTURA DAS REVOLUÇÕES CIENTÍFICAS [*The Structure of Scientific Revolutions*] 30 (Perspectiva 1997).

² J. J. GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO [*Constitutional Law and Constitution's Theory*] 87-90 (Almedina 2002).

³ HERMANN HELLER, TEORIA DO ESTADO [*State Theory*] 163 (Mestre Jou 1968).

the effective tools of administration and authority lay in the monarch's hands just marginally; in large part, these means were private property of a feudal lord. Regarding this opposition between monarchical power and local power, Georg Jellinek called it "atomization of public power"⁴, an almost anarchical political phenomenon which made it unique in the Middle Ages. Likewise, Buzan and Little characterized the Middle Ages as "a patchwork of overlapping and sometimes competing authorities"⁵.

With the increase of commercial flow in Western Europe, the development of monetary economy and credit payments, the rebirth of cities (boroughs) and the consequent development of the bourgeoisie, started the inverse process of weakening of feuds and the strengthening of feudal monarchies – a phenomenon known as "recentralization of the power". It is to be noted that the enlargement of royal domains was followed by the astonishing development of Public Administration and Finances (as in the end the permanent concentration and safety of power depended, to a great extent, on well-paid and loyal civil servants and soldiers) and by the stimulation of a growing national sentiment, a psychological sympathy found in the identification of men from the kingdom by the similarity of idiom, habits, traditions and a common historical past (in terms of fights against feudal lords).

The bourgeoisie had an outstanding role in the construction of this nation-state. It was driven mainly to commercial activity, to which the feudal world's decentralization (made true by the variety of currencies, taxes, rules for tributes, tolls, measuring systems, customs rules etc.) was of no interest. To expand its mercantile activities the bourgeoisie needed a unified market with minor transaction costs and this would only be possible under the strong and centralized authority of a king. It was due to the alliance with the newly-born bourgeoisie, who lent their money and human resources (to form armies and then bureaucracy) and good ideas (Humanism, Renaissance and Protestant Reformation), that the royalty managed to re-conquer territories and concentrate political power. Since then, in the best syntheses of Buzan & Little, there came to exist significant symbiosis in which "holders of capital provide financial resources for the state, while the holders of coercion allow capital a significant role in government"⁶. The idea

⁴ GEORG JELLINEK, *TEORÍA GENERAL DEL ESTADO [General State Theory]* 315 (Comares, 2000).

⁵ BARRY BUZAN & RICHARD LITTLE, *INTERNATIONAL SYSTEMS IN WORLD HISTORY: REMAKING THE STUDY OF INTERNATIONAL RELATIONS* 244 (Oxford University Press 2000).

⁶ BARRY BUZAN & RICHARD LITTLE, *INTERNATIONAL SYSTEMS IN WORLD HISTORY: REMAKING THE STUDY OF INTERNATIONAL RELATIONS* 246 (Oxford University Press 2000).

of sovereignty appeared quite simultaneously to the strengthening of this nation-state through the fight of monarchy to impose their authority onto feudal lords (internal sovereignty) and emancipate themselves from the authority of the Pope as well as the Emperor of the Holy Roman Empire (external sovereignty). As a consequence, the interstate borders – marking geographical limits of political power – became securely guarded.

To many authors, the first time that juridical equality between states was solemnly stated was in the aftermath of the Thirty Years' War (1618-1648), in the Westphalia Peace Treaties, that represented at the same time the beginning of modern international society established in a system of states and “the plain affirmation of the statement of absolute independence of the different state orders”⁷. In fact, under a Eurocentric conception of history of political ideas (which envisages England as an isolated island and Iberia as Maghreb, north of Africa), the modern state appears with the Westphalia Peace Treaties. However, in another conception, a broader one, the modern nation-state (under the form of absolute monarchy) emerged long before, exactly in Iberia and England⁸. In fact, the nation-state appears long before the Westphalia Peace Treaties. Nevertheless, it is in these documents which lies the “birth certificate” of the modern sovereignty nation-state – base of the present democratic state and “founding moment” of the international political system. Far beyond this merely formal aspect, the importance of the Westphalia Peace Treaties is so great to the understanding of the notion of state that Professor Roland Mousnier, describing the 16th and 17th centuries in the *General History of the Civilizations* organized by Maurice Crouzet, asserts that those treaties symbolized a real “constitution of the new Europe”⁹, a multifarious Europe, plural and very distant from the religious unit of Christianity, from the political unit of the Holy Roman Empire and from the economical unit of the feud.

Before the Thirty-Years' War the European political order was the amalgam of the traditions of the Roman Empire and the Catholic Church. The world was heaven's mirror. One only God reigned in heaven, and so just one Emperor

⁷ PAOLO BISCARETTI DI RUFFIA, DERECHO CONSTITUCIONAL [*Constitutional Law*] 121-122 (Tecnos 1965).

⁸ José Roberto Franco da Fonseca, *Geopolítica e Direito Internacional* [*Geopolitics and International Law*], 91 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 315, 316 (1996).

⁹ Roland Mousnier, Os Séculos XVI e XVII [*Centuries XVI and XVII*], in HISTÓRIA GERAL DAS CIVILIZAÇÕES [*General History Of The Civilizations*] IV/1 302 (Maurice Crouzet, ed., 1973).

should be the lord in the secular world and just one Pope should rule the universal church¹⁰. In this same line of a monolithic religious and political thinking both Truyol y Serra¹¹ and Machado¹² speak of a “Res Publica Christiana”, Augustinian-based and valid in the whole Europe.

The symbolic character of the Westphalia Peace Treaties is undeniable and can be estimated by innumerable and multidisciplinary references to a “westphalian” or “post-westphalian” model of State or of international relations. The political, juridical, geographical, religious, and philosophical outcomes of the Westphalia Peace Treaties induced many State and Law scholars to speak of a “Westphalian paradigm” to designate a standard, a parameter or a model of State which became an absolute reference as from the 17th century. A paradigm is, according to Fourez¹³, a mental structure, conscious or not, that is useful to classify the world and approach it. In other words, paradigms are the key theories, instruments, values and metaphysical assumptions that comprise a disciplinary matrix. The concept of state that emerges from the Westphalia Peace Treaties reaches this status of fundamentality and reference to the understanding of the world which occurs after it, and taking it as a paradigm would be no great orthodoxy¹⁴. References to the centrality of the Westphalian profile of State date back at least to the middle 19th century in important authors of International Law, as Beaulac¹⁵ asserts. With undoubted legitimacy, Professor Leo Gross, in a referential text which marks the three-hundredth anniversary of those peace treaties, emphasises that “the Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old to the new world”¹⁶. In the same direction, Harding &

¹⁰ HENRY KISSINGER, *DIPLOMACIA [Diplomacy]* 57 (Francisco Alves 1999).

¹¹ ANTONIO TRUYOL Y SERRA, *LA SOCIEDAD INTERNACIONAL [The International Society]* 57 (Alianza 1974).

¹² JÓNATAS MACHADO, *DIREITO INTERNACIONAL: DO PARADIGMA CLÁSSICO AO PÓS-11 DE SETEMBRO [International Law: from the Classic Paradigm to the Post-September 11th]* 46-50 (Coimbra Editora 2003).

¹³ GÉRARD FOUREZ, *A CONSTRUÇÃO DAS CIÊNCIAS [The Construction of Sciences]* 103 (Editora UNESP 1995).

¹⁴ Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 148 (2000).

¹⁵ Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 148 (2000).

¹⁶ Leo Gross, *The Peace of Westphalia, 1648-1948*. 42 *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* 20, 28 (1942).

Lim points out that “undoubtedly, there was a pre-Westphalian system (see e.g. Nussbaum, Verdross, Ago) (...) which somehow was supplanted”¹⁷.

Despite being central to the understanding of modern and contemporary sceneries, the Westphalian paradigm has occupied very few times the core of papers in the world of legal writings – especially in Latin America. Related reports are found in sciences akin to Law and almost always, as support for other historical studies. The origins, the implications and characteristics, and present content of the Westphalian paradigm, from the Law point of view, are the core of the work here presented. It is important to retain that the deep implications of the Westphalia Peace Treaties, established three hundred and fifty years ago transcend the legal world to reach to the rim of international relations, sociology, economy, philosophy etc. The investigation which follows is circumscribed to the objects of law dogmatic, in general, and the constitutional dogmatic, in particular.

2. HISTORICAL ENVIRONMENT: FROM THE THIRTY YEARS’ WAR TO THE PEACE OF WESTPHALIA

The Thirty Years’ War represented a titanic conflict between the rival dynasties of Bourbon (from France) and Hapsburg (lords of Spain and of the Holy Roman Empire, with territories in Austria, Bohemia, the Netherlands, Bavaria, Flanders, north of Italy, Belgium and Hungary) for the domain of continental Europe. Few military conflicts, from the beginning of History, will have somehow caused such disgrace to the civilian population. It is estimated that at least half of the German and Bohemian people lost their lives due to starvation, diseases and brutal attacks from soldiers bent on pillage. The armies from both sides looted, tortured, killed and set fire to everything transforming entire regions in great deserts¹⁸. The violence of the Thirty Years’ War was particularly intense in the German territories where pain molded all the German baroque literature in the seventeenth century. Never was any country submitted to such a cruel and systematic devastation, having its population, in certain regions, reduced to the tenth part and all their moral and material values destroyed. It was the greatest catastrophe of the German people: the country came out of it extremely pauper, un-

¹⁷ CHRISTOPHER HARDING & C. L. LIM (eds.), *RENEGOTIATING WESTPHALIA: ESSAYS AND COMMENTARY ON THE EUROPEAN AND CONCEPTUAL FOUNDATIONS OF MODERN INTERNATIONAL LAW* 6 (Martinus Nijhoff 1999).

¹⁸ EDWARD MCNALL BURNS, *HISTÓRIA DA CIVILIZAÇÃO OCIDENTAL [History of the Western Civilization]* I, 538 (Globo 1981).

developed and politically divided into small princedoms, ruled in the north by mean Lutheran rulers and in the south by neglectful Catholic prelates, while in the few larger States absolutism was established in the French way¹⁹. Andreas Gryphius, the greatest name in German baroque poetry, portrayed with unique crudity the long pain of war in the sonnet “*Thränen des Vatterlandes*” (“*Homeland Tears*”), of 1636.

In the roots of war there is a religious conflict derived from the intolerance between Catholics and Protestants. In fact, the religious coexistence of Catholics and Protestants was a problem within the States as well as among them²⁰, even though nationalism, still being elaborated in the 17th century, would play a much less relevant role than the one in the wars of nineteenth and twentieth century²¹. The Protestant Reform, breaking the Catholic religious unit in Medieval Europe, provided the base from where later flourished the Thirty Years’ War and the Peace of Westphalia. Schiller, the great poet who, along with Goethe, gives prestige to German romanticism, starts his unsurpassable “*Histoire de la Guerre de Trente Ans*” mentioning that “*depuis l’époque où la guerre de religion commença en Allemagne, jusqu’à la paix de Münster, on ne voit presque rien de grand et de remarquable arriver dans le monde politique de l’Europe, sans que la Réforme y ait contribué de la manière la plus importante*”²².

It is necessary to bear in mind that once extinct the Carolingian dynasty, around 911 AD, the dukes of Franconia, Saxony, Swabia, and Bavaria founded the German kingdom, a monarchy in which the king was one of the dukes and elected by the others – therefore, an elective monarchy. In the year 936 AD the reign of Otto I starts. His victory over the Hungarians in 955 AD brought him enormous prestige and the Pope John XII, whom the German monarch protected, pronounced him Holy Emperor in 962 AD, with the title of *Imperator Romanorum* (“Emperor of the Romans”). And so was founded the Holy Roman

¹⁹ OTTO MARIA CARPEAUX, A LITERATURA ALEMÃ [*The German Literature*] 29 (Cultrix 1964).

²⁰ G. Östreich, *Problemas Estruturais do Absolutismo Europeu* [*Structural Problems of the European Absolutism*] in PODER E INSTITUIÇÕES NA EUROPA DO ANTIGO REGIME [*Power and Institutions in the Europe of the Old Regimen*] 192 (António Manuel Hespanha ed., Fundação Calouste Gulbenkian 1984).

²¹ EDWARD MCNALL BURNS, HISTÓRIA DA CIVILIZAÇÃO OCIDENTAL [*History of the Western Civilization*] I, 537 (Globo 1981).

²² SCHILLER, HISTOIRE DE LA GUERRE DE TRENTE ANS [*History of the Thirty Years’ War*] I, 1 (Lenormant 1803).

Empire²³, a fusion between the German monarchy with what was spared of the Roman Empire. Its main characteristic was the fact that once anointed Holy Emperor by the Pope in Rome, the German elected monarch became the temporal chief of the Christendom, being respected and obeyed as such by all the other noblemen of the continent – a clear prototypical manifestation of the European “supranationality” of the second half of the twentieth century.

In thesis, the temporal power of the Holy Empire was universal, while, parallel to it, the spiritual power of the Pope remained unique, unquestioned and also universal. As H. Kissinger puts it, differently from a Pharaoh or a Caesar, the Holy Roman Emperor didn't appear to have any divine attributes, escaping from him the powers to interfere with ecclesiastical nominations, for instance²⁴. However, not even the relations between these two great European authorities (the spiritual and the mundane) were peaceful²⁵.

In the beginning, the subjection of noblemen to the Emperor of the Holy Empire was just nominal (formal) and princes did what they judged legal, free from Imperial interference. From the 15th century on, however, the political ability and the warlike force of the Hapsburgs, permanently aspiring to the Imperial Catholic crown, empowered the Holy Emperor with respectability and authority and made him be feared. In this way, as from 1438, the Imperial crown became hereditary among the Hapsburgs, though formally it still remained elective. They feared it could be taken by others²⁶. Since the formation of the Holy Empire, the “electoral college” for the choice of the Emperor varied according to circumstantial alliances, battles and quarrels, though from 1356 on, with the edition of the so-called “Golden Bull” (*Bulla Aurea*), by the Emperor Charles IV, the choice of the Emperor of the Holy Roman Empire went to the hands of seven permanent electors: the Archbishops of Colony, Mainz and Trier, the King of Bohemia, the Count Palatine of the Rhine, the Duke of Saxony and the Margrave of Branden-

²³ Also called *Sacred Roman Empire of the German Nation*, *Sacrum Romanum Imperium*, *Heiliges Romisches Reich Deutscher Nation*, or still *I Reich*.

²⁴ HENRY KISSINGER, *DIPLOMACIA* [*Diplomacy*] 58 (Francisco Alves 1999).

²⁵ Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 153-160 (2000).

²⁶ ARNO KAPPLER, *TATSACHEN ÜBER DEUTSCHLAND* [*Facts on Germany*] 13 (Societäts-Verlag 1996).

burg²⁷. With the Lutheran Reform, the confrontation among the Catholic electors and noblemen against the Protestant electors and noblemen became inevitable, all of them aspiring to the imperial crown – whose functions included the defence of Catholicism and the Pope. All these vectors of holy and profane powers transformed the Holy Roman Empire into a scenery of internal and external rivalry. As Voltaire once said, the Holy Empire was never holy, not even Roman and never a truly Empire²⁸.

The first battles related to the Thirty Years' War started in 1618, when the Hapsburgs from Austria – “natural” protectors of Christendom - fought against the infidels or heretics, encouraged by the victories of the Catholic Counter Reform – the Hapsburgs, in an attempt to enlarge their domains in Central Europe and limit freedom of religion of Protestants. Such behavior disgusted many Protestant noblemen from the area of today's Germany and started an insurrection in Bohemia (the Czech Republic today) where there were mass conversions into Calvinist Protestantism after the Protestant Reformation took place along the previous century. Local noblemen, revolted with the attitude of the Catholic Emperors from Vienna against the Protestants of the region, had organized themselves in 1608 around the Protestant Union (an armed alliance to defend the Princes and Protestant cities, led by the Palatinate elector) in opposition to the Catholic League, headed by Duke Maximilian I, the Duke of Bavaria, formed shortly afterwards (1609)²⁹. The common perception among German Protestants was that the Emperor of the Holy Empire was no more than a tyrant from Vienna associated to the decadent papacy³⁰.

The lack of satisfaction in Bohemia came to its climax when, in the morning of May 23rd, 1618, a group of protestant noblemen invaded the *Hradschin* Castle, where the representatives of the Austrian Catholic government in Prague were, and made two of them jump off windows as an answer to the destruction

²⁷ The Duke of Saxony and the Marquise of Brandenburg became usually known later as the “Prince Elector of Saxony” and the “Prince Elector of Brandenburg”, respectively. The Count Palatine of the Rhine was called the “Palatine Elector”. Given to his ordering character and fundamental imperial politics, the *Bulla Aurea* is seen as a true constitutional norm of the Holy Roman Empire.

²⁸ *Apud* Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148, 169 (2000).

²⁹ Andréas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*. 2 INTERNATIONAL ORGANISATION. 251, 253 (2001).

³⁰ HENRY KISSINGER, *DIPLOMACIA [Diplomacy]* 59 (Francisco Alves 1999).

of the Lutheran churches under the orders of Vienna³¹. Though the rebels had intended to kill their victims (the Catholic noblemen William Slawata and Jaroslav Martinitz), both of them escaped miraculously to inform, personally, the Courts in Vienna what had happened³². This episode – which was registered in History as the “defenestration of Prague” – led to the refusal of the Evangelical league to accept the election of the radical Catholic Prince, Ferdinand II, Archduke of Austria (a Hapsburg) and a pupil of the Jesuits, as Emperor of the Holy Roman Empire. The religious fanaticism of Ferdinand II, for whom the state existed only to serve religion, could be measured by the words of his confident counsellor Gaspar Scioppius: “*unfortunate is the king who ignores the voice of God begging him to kill the heretics. You should not make war for yourselves but for God (Bellum non tuum, sed Dei esse statuas)*”³³. By this time, the Protestant Union had made the new king of Bohemia, Frederic V, the calvinist Prince elector from the prosperous Palatinate region³⁴, simultaneously proclaimed independent of the Austrian domain. With the overtaking of the crown of Bohemia – whose king was one of the seven electors of the Sacred Emperor, according to the *Bulla Aurea* – the protestants managed to get an eventual majority of votes sufficient to elect for the first time a non-catholic Holy Emperor.

From that incident, apparently local and restricted to Bohemia, with the “defenestration of Prague”, the conflict spread to all of Europe, transforming it into the first war of really European proportions in history. The success of the Austrian Hapsburgs and Ferdinand II in regaining the domain of Bohemia, and suffocating the revolution, eliminating the religious freedom and punishing Ferdinand V – the taking of all his territories in the Rhine Valley and transferring his right as Prince Elector to the Duke of Bavaria – depended to a large extent on the help they had requested from Spain (also ruled by the House of Hapsburg), from Poland and from several German catholic noblemen (specially the Duke Maximilliam from Bavaria) to defeat the rebellious protestants. By November 1620 Ferdinand II had already re-conquered the capital of Bohemia and expelled Ferdinand V, nicknamed “king for a winter”. Such facts – besides the ruin

³¹ ROBERT BIRELEY, *THE JESUITS AND THE THIRTY YEARS WAR I* (Cambridge University Press 2003).

³² J. P. COOPER (ed.), *THE NEW CAMBRIDGE MODERN HISTORY: THE DECLINE OF SPAIN AND THE THIRTY YEARS WAR, IV*, 308 (Cambridge University Press 1970).

³³ *Apud* HENRY KISSINGER, *DIPLOMACIA [Diplomacy]* 62 (Francisco Alves 1999).

³⁴ The Palatinate was a German region around the university city of Heidelberg, its capital.

and poverty left in Bohemia and in the Palatinate region by the troops loyal to the Holy catholic Emperor³⁵ – brought to fight other European protestant governments such as other German Princes, the king Christian IV from Denmark and king Gustaf Adolf from Sweden, all of them expansionist, non-catholic and anti-Imperialist. These two last had the hope to reunite territories north of continental Europe and wished to balance the power of religious base, so they fought violent wars, without success, with the troops of the Catholic League in the fields on the German side of the Baltic Sea.

In 1629, to aggravate the political crisis, the Holy Emperor Ferdinand II imposed upon the Germans the “Edit of Restitution”, an imperial act that annulled all protestant titles over catholic properties effective from 1555 and put the expropriate lands at the Emperor’s and his allies’ will. By doing so, Ferdinand II intended to pay part of his moral and financial debt to the catholic noblemen who had helped him to regain Bohemia and keep the Danish and Swedish temporarily apart. For the first time an Imperial act had force of law, directly enforced in the territories of the Princes, backed by the Emperor’s private army led by the competent condottiere Wallenstein³⁶. Within this scenery of continuous strengthening, the Imperial power became a monarchic power and the Emperor for Europe, a great danger³⁷.

This danger wouldn’t be neglected to the west of the river Rhine, in a way that, in 1630, the Teutonic protestants gain an enormous and continuous financial support from the French (catholic) in the fights against the neighbors Hapsburgs (also catholic), starting a new phase of the conflict. On this occasion starts the multi-centurial French battle for the fragmentation and dispersion of the German

³⁵ The humiliation imposed to the Palatinate region had its climax when the Catholic king Maximilliam of Bavaria sent part of the library of the University of Heidelberg to the Vatican, where it still is according to J. P. COOPER (ed.), *THE NEW CAMBRIDGE MODERN HISTORY: THE DECLINE OF SPAIN AND THE THIRTY YEARS WAR*, IV, 317 (Cambridge University Press 1970).

³⁶ Roland Mousnier, *Os Séculos XVI e XVII [Centuries XVI and XVII]*, in *HISTÓRIA GERAL DAS CIVILIZAÇÕES [General History Of The Civilizations]* IV/1 199 (Maurice Crouzet, ed., 1973). The condottieri were mercenaries that recruited, commanded, supplied and paid the private armed forces and whose appearing happens in the Italian peninsula in the fourteenth century – PHILIP BOBBITT, *A GUERRA E A PAZ NA HISTÓRIA MODERNA [The Shield of Achilles: War, Peace and the Course of History]* 75 (Campus 2003). The troops commanded by the *nouveau riche* Albrecht von Wallenstein gave the Emperor Frederic II a greater freedom in relation to the Duke Maximilliam of Bavaria of whom depended militarily in a higher degree - Andréas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*. 2 INTERNATIONAL ORGANISATION. 251, 256 (2001).

³⁷ Roland Mousnier, *Os Séculos XVI e XVII [Centuries XVI and XVII]*, in *HISTÓRIA GERAL DAS CIVILIZAÇÕES [General History Of The Civilizations]* IV/1 200 (Maurice Crouzet, ed., 1973).

people and the war loses its religious character (catholics *versus* protestants) to become a geopolitical conflict between the rival houses of Bourbons and Hapsburg for the domain of the European Continent. Under an ideological perspective, it's possible to identify now a sharp confrontation between two antagonistic visions of the world: (1st) a turn into the past, incarnated in the Holy Roman Empire, representative of the catholic medieval universalism and of the preeminence of the Holy Emperor and another (2nd) towards the future, the French one, with a radical argument of freedom, equality and fraternity among all the States.

A geopolitical reading of the Thirty Years' War points to a direction which to France – a Bourbon “island” surrounded by Hapsburgs' territories in Iberia and in the long corridor between the north of Italy and the Netherlands – a victory of Vienna would certainly mean being relegated to a peripheral position in European politics.

Still in this same perspective, France becomes radical in its position and, in spite of being catholic, intervenes directly in the conflict as from 1634 on behalf of Protestants. Thus, France leaves aside the secret financial support to enter in an open war against the Holy Empire. It is sufficient for the Spanish crown, the Madrid branch of the Hapsburgs, respond to the war declaration from the French. It must be mentioned that an unrest of religious and nationalist nature was in course by this time in the Spanish provinces situated in the Netherlands against the Hapsburgs of Madrid – the United Provinces of Holland constituted a Spanish possession. Spain then, viewed France as a natural ally of the revolted Netherlanders, Protestants, and an enemy of the Hapsburgs in Europe³⁸.

In the course of this conflict, the Swedish led by King Gustaf Adolf won several battles against the troops of Ferdinand II in numerous parts of the Holy Empire and managed to round the Austrian Prague. After innumerable victories in German territory, the French army came to siege Vienna. Rebellions in Portugal, Catalonia and in Naples weakened the Spanish power, whose fleet was heavily attacked by the Dutch in British waters. It was up to Cardinal Richelieu, the powerful prime minister of Louis XIII, and to Cardinal Mazarino (after Richelieu's death in 1643) to conduct France and its allies to great victories until Austria asked for a truce. By that time, Richelieu's pragmatism was so great that the Cardinal had made an alliance with the “infidel” Turkish Ottomans so that they could check out the borders to the east of Austria and then deflect the Austrian

³⁸ PHILIP BOBBITT, A GUERRA E A PAZ NA HISTÓRIA MODERNA [*The Shield of Achilles: War, Peace and the Course of History*] 101-102 (Campus 2003).

attention and the resources from Vienna from the west battle front³⁹. Richelieu's justification was very objective: "a king who sacrificed his state to his faith was exposing himself to losing both"⁴⁰.

The peace conferences which resulted in the Westphalia Treaties started in fact on December 4th, 1644 as a truly European congress – though informal negotiations already existed since 1641 in Hamburg⁴¹. Complex negotiations (starting by protocol questions) extended for about four long years. It would be the first time in which the treaties would put an end to wars in Europe.

Through the Westphalia Treaties – precisely the *Instrumentum Pacis Monasteriense* and the *Instrumentum Pacis Osnabrugense*, both concluded in Latin on October 24th, 1648 in the cities of Münster, catholic, and Osnabrück, Lutheran – considerable territorial conquests were guaranteed to the French (incorporation of the Alsatia and of the Bishoprics of Metz, Toul and Verdun) and German territories were conceded to Sweden. The independence of Switzerland and Holland⁴² from the Holy Empire was recognized and Catholicism and Protestantism (Lutherans and Calvinists) were declared confessions with identical rights. Through the Westphalia Treaties, the Holy Roman Empire was reduced to a mere fiction as each German Prince elector was given the very same rights of Sovereignty. Barriers to commerce were abolished and a long period of relative balance of power in Europe started. It is said "relative" because there was undeniable French prominence in the European policy of the XVII century⁴³. However, this Gallic prestige was far from having the same force of the "Iberic era" that took over international politics long before the discovery of America.

With the celebration of the Peace of Westphalia each Prince elector started to have the power to declare war, to sign peace treaties, establish alliances

³⁹ PHILIP BOBBITT, A GUERRA E A PAZ NA HISTÓRIA MODERNA [*The Shield of Achilles: War, Peace and the Course of History*] 103 (Campus 2003).

⁴⁰ Paul Sonnino, From *D'Avaux to Dévot: Politics and Religion in the Thirty Years War*. 286 HISTORY 192, 194 (2002).

⁴¹ Alfred-Maurice de Zayas, Peace of Westphalia (1648), in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 537 (Rudolf Bernhardt, ed., 1984).

⁴² A little before, on May 15th, 1648 also in the city of Münster, a specific treaty between Spain and the Netherlands put an end to eighty years of conflict for the independence of these last ones to Madrid.

⁴³ JACQUES DROZ, HISTOIRE DIPLOMATIQUE – DE 1648 À 1919 [*Diplomatic History – from 1648 to 1919*] 19 (Daloz 1972).

with other potencies and govern their respective States as they fancied. Such facilities resumed the *jus foederationis*⁴⁴, of capital importance to the contemporary constitutional engineering. Though still existent, the Holy Empire turned basically into a deliberative stage⁴⁵. Once reached the autonomy of the Princes in relation to the Emperor, the fragmentation of the Holy Roman Empire was inevitable, as it was constituted by an amalgam of more than three hundred sovereign territories with no national sentiment (counties, landgraviates, margraviates, duchy archbishoprics, bishoprics, abbeys, free cities and minor domains of knights of the Empire⁴⁶). So, the Holy Roman Empire maintained just a façade of unity until being definitely dissolved by Napoleon Bonaparte in 1806, when Emperor Francis II renounced the imperial crown. The German fragmentation pulverized the power of the Hapsburg from Vienna and made possible for the dynasty of the Hohenzollern, based in Prussia and in Brandenburg, to receive the territories to the north of the Holy Empire and begin its policy of great rivalry with “the Austrias”⁴⁷. This Hohenzollern’s strategy would be most significant when the constitution of the German Customs Union (*Zollverein*) was elaborated by the initiative of the Prussians in the 19th century.

Both the cities of Münster and Osnabrück, 50 kilometers away, are situated in the Westphalia (an area located northwest of present Germany). That is why this region’s name was given to those famous treaties. In catholic Münster, the representative of the Holy Empire negotiated with France and its Catholic allies, while in protestant Osnabrück, the Ambassadors from the Holy Empire met Sweden, the German Princes and their Protestant allies⁴⁸. The presence of the German Princes at the signature of the treaty, by the way, was part of the French-Swedish strategy to weaken the position of the Holy Emperor.

Each of the two treaties took the form of a bilateral agreement as the multilateral treaties practice was not conceived yet. It is estimated that around

⁴⁴ ANTONIO CASSESE, *INTERNATIONAL LAW* 21 (Oxford University Press 2001).

⁴⁵ Daniel Philpott, Westphalia, Authority and International Society. 47 *POLITICAL STUDIES*. 566, 581 (1999).

⁴⁶ Roland Mousnier, Os Séculos XVI e XVII [*Centuries XVI and XVII*], in *HISTÓRIA GERAL DAS CIVILIZAÇÕES [General History Of The Civilizations]* IV/1 199 (Maurice Crouzet, ed., 1973).

⁴⁷ DEMÉTRIO MAGNOLI, *RELAÇÕES INTERNACIONAIS: TEORIA E HISTÓRIA [International Relations: Theory and History]* 36 (Saraiva 2004).

⁴⁸ Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 163 (2000).

three hundred representatives signed the two treaties. Members of all political forces in Europe were present, with the exception of Russia, England, Turkey and the Pope, whose Catholicism was weakened and defeated. The Catholic Church acted as mediator and just in Münster⁴⁹. The powerful Pope Innocence X⁵⁰ protested firmly against the treaties, stating, in his *Bulla Zelo Domus Dei*, of November 26th, 1648, that the Peace of Westphalia was null, invalid, injurious, condemnable, inane and destitute of any significance and effect for ever more⁵¹. In spite of this personal reading from Pope Innocence X about the little worthiness of the Westphalia Peace treaties, his representative, who followed very closely all the Conference of Peace, Monsignor Fabio Chigi, would later become Pope Alexander VII, certainly for getting to know the new reality of the continental politics outlined in Westphalia as few would.

The quantity of intervening actors, the complexity of the interests involved in the negotiations of peace and the logistics difficulties intrinsic to the multiplicity of idioms plus the distance between the two cities resulted in a much more sophisticated and exhausting treaty from the perspective of the bilateral acts commonly put into effect until then⁵².

3. JURIDICAL CONSEQUENCES OF PEACE: THE CORE OF THE WESTPHALIAN PARADIGM

From the point of view of Law there were two great legacies from the Peace of Westphalia: the consolidation of religious freedom (associated with the secularization of the State) and the formal affirmation of State sovereignty (associated to the “reason of State”)⁵³. In other words, secularization, centralization

⁴⁹ J. P. COOPER (ed.), *THE NEW CAMBRIDGE MODERN HISTORY: THE DECLINE OF SPAIN AND THE THIRTY YEARS WAR*, IV, 352 (Cambridge University Press 1970).

⁵⁰ Former owner of the *Pallazo Doria Pamphilj*, where the Embassy of Brazil is today in Rome.

⁵¹ PHILIP BOBBITT, *A GUERRA E A PAZ NA HISTÓRIA MODERNA [The Shield of Achilles: War, Peace and the Course of History]* 108 (Campus 2003).

⁵² David Parrott, *The Peace of Westphalia*. 8 *JOURNAL OF EARLY MODERN HISTORY* 153, 153 (2004).

⁵³ The religious dimension of Westphalia though went past unnoticed in the analysis made by Richard Falk for whom the Westphalian model is only the “*state centric, sovereignty-oriented, territorially bounded global order*” - Richard Falk, *Revisiting Westphalia, Discovering Post-westphalia*. 4 *THE JOURNAL OF ETHICS* 311, 312 (2002). On the other side, that religious aspect is affirmed by MEINHARD SCHRÖDER (ed.), *350 JAHRE WESTFÄLISCHER FRIEDE [350 years of Peace of Westphalia]* (Duncker & Humblot 1999).

and nationalization occupied a privileged place in the description of the new Westphalian world that has been built from then. If, on one hand, it is true that such conquests derived from a long strive of European kings and noblemen dating back to the period prior to the Protestant Reformation, it is also true that it was the Westphalia Peace Treaties which formally consolidated such conquests for the first time with a truly European Constitution – the *constitutio Westphalica*⁵⁴. This new constitution made up a set of norms, mutually established, which sought to define who would be the holders of authority in the European International scenery and which rules were necessary to become one of these actors and which were the prerogatives⁵⁵ – a whole new world order, though.

The trinity of dimensions of modern state (secularization, centralization and nationalization) is also a unity-trinity because it is ultimately the sovereign, strong and centralized Nation-State the greatest creditor of the inter-confessional peace and religious freedom. “*Der staat war Freiheitsgarant und Friedensstifter*”, sentenced Gehard Robbers⁵⁶.

As to the religious aspect it is easy to verify that until then the population had to follow compulsorily the belief of their Prince⁵⁷. Nevertheless, the peace treaties from 1648 abolished this in a way that the reasons of politics did not identify any more with religious reasons. In fact, Article IV, # 19 of the *Instrumentum Pacis Osnabrugensis* and Paragraph 27 of the *Instrumentum Pacis Monasteriensis* use the same words to affirm the principle of religious tolerance: “[...] and that it shall be allowable for others who are willing to embrace the Exercise of the Augsburg Confession, to practise it, as well publickly in the Churches at set Hours, as in private in their own Houses, or other Pla-

⁵⁴ JACQUES DROZ, HISTOIRE DIPLOMATIQUE – DE 1648 À 1919 [*Diplomatic History – from 1648 to 1919*] 9 (Daloz 1972); Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148, 162 (2000).

⁵⁵ Daniel Philpott, Westphalia, Authority and International Society. 47 POLITICAL STUDIES. 566, 567 (1999).

⁵⁶ “*The State was guarantor of the liberty and founder of the peace*” – Gehard Robbers, *Religionrechtliche Gehalte des Westfälischen Friedens – Wurzeln und Wirkungen* [*Religion-legal Contents of the Westphalian Peace - Roots and Effects*] in 350 JAHRE WESTFÄLISCHER FRIEDE [350 years of Peace of Westphalia] 73 (Meinhard Schröder ed., Duncker & Humblot 1999).

⁵⁷ “*Cuius regio eius religio*” is a phrase in Latin that means “*whose the region is, his religion*”. It was with the “Augsburg peace” (1555) in the sequence of the protestant reform, that the territorial princes of Germany got the right to determine the official religion of their subjects - Leo Gross, *The Peace of Westphalia, 1648-1948*. 42 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 20, 22 (1942). By this time 4/5 of the German population was protestant.)

ces appointed for that end by their Ministers of the Divine Word, or by those of their Neighbours”⁵⁸. The preservation of this religious freedom is a mark in the beginning of a long way towards the protection of fundamental rights. On the other hand, once finished the religious and political universality of the Middle Ages, the Empire and the Papacy could not intervene in the internal matters of kingdoms and princedoms any more. As to the more mundane aspect of this question, §65 of the *Instrumentum Pacis Monasteriensis* and article VIII, # 4 of the *Instrumentum Pacis Osnabrugensis* affirm: “*That as well at general as particular Diets, the free Towns, and other States of the Empire, shall have decisive Votes; they shall, without molestation, keep their Regales, Customs, annual Revenues, Libertys, Privileges to confiscate, to raise Taxes, and other Rights, lawfully obtain’d from the Emperor and Empire, or enjoy’d long before these Commotions, with a full Jurisdiction within the inclosure of their Walls, and their Territorys: making void at the same time, annulling and for the future prohibiting all Things, which by Reprisals, Arrests, stopping of Passages, and other prejudicial Acts, either during the War, under what pretext soever they have been done and attempted hitherto by private Authority, or may hereafter without any preceding formality of Right be enterpris’d. As for the rest, all laudable Customs of the sacred Roman Empire, the fundamental Constitutions and Laws, shall for the future be strictly observ’d; all the Confusions which time War have, or could introduce, being remov’d and laid aside*”.⁵⁹

After Westphalia the Holy Roman Empire’s ability to enforce its ecclesiastical and political hegemony was virtually destroyed. With the collapse of the universal unit of the Holy Roman Empire and the Catholic Church, each state could promote its own interests. To complete this idea, the State welfare, a *raison d’État*, gave legitimacy to the means to reach it. A concept of sovereignty that frees the king or prince, simultaneously, of superior political domains (the Papacy and the Empire), equal ones (other royalties) and inferiors ones (feudal barons) starts then, what precisely had characterized all national and internatio-

⁵⁸ From the available English version in www.pax-westphalica.de, official site of the project *Acta Pacis Westphalicae* which congregates part of the research work directed by Professor Dr. Konrad Repgen. That extensive research led by Professor Repgen represent, in the words of David Parrot, “surely one of the most impressive historical projects of the last two centuries” - David Parrott, *The Peace of Westphalia*. 8 JOURNAL OF EARLY MODERN HISTORY 153, 154 (2004).

⁵⁹ From the available English version in www.pax-westphalica.de.

nal political order of before.⁶⁰ These rupture marks definitely the core of a new political thought held by centralizing governments, stern borders, exclusive internal sovereignty and formal interstate diplomacy. It is then with the Westphalia Peace treaties that the clearest point in the historical transition of the international scenery to the normative territorial sovereignty and the prevalence of laicism as fundamental to a truly multi-polar system of states interested in temporal issues can be found. The use of the term “system” shows the idea of apparent unit of many individualized diversities.⁶¹

Moral or religious considerations leave the State towards the outskirts of governmental worries in a clear separation between heresy and sovereignty, a phenomenon which was known as the “*de-theologization of the politics*”.⁶² It was Armand Jean du Plessis, *a.k.a.* Cardinal Richelieu, who conceived the pragmatic concept of *raison d'État*⁶³, showing that, for instance, when he put French interests above his origin, faith and catholic hierarchy and became an ally of the protestant Princes of a German central Europe against the House of Austria or when he recognized the Protestants freedom to preach in catholic France, and also when he edited the “Amnesty of Alais”, in 1629, the same year in which Emperor Ferdinand II imposed the “Edit of Restitution”. The *raison d'État* opposed the universal medieval moral law and indicated the independence and the supremacy of the State's interests to face religious questions. Before, politics

⁶⁰ ANTENOR PEREIRA MADRUGA FILHO, A RENÚNCIA À IMUNIDADE DE JURISDIÇÃO PELO ESTADO BRASILEIRO E O NOVO DIREITO DA IMUNIDADE DE JURISDIÇÃO [*The Brazilian State's Resignation to the Jurisdiction Immunity and the New Right to the Jurisdiction Immunity*] 24 (Renovar 2003).

⁶¹ ANTONIO TRUYOL Y SERRA, LA SOCIEDAD INTERNACIONAL [*The International Society*] 32 (Alianza 1974). Effectively a system is a theoretical tool of great utility for the analysis of reality and in general could be defined as a set of elements related, working together in a way that each element is the function of another element, not a single element working alone. While epistemological unit, all system constitutes then a collective of elements which maintains some kind of specific order, organization or structure linked to each other, what confers it some unit, yet, still apparently. If a system is a group of units which relate each other, we easily conclude that three ideas are inherent to a conception from any system: collectivity (the whole), unit (the part) and interdependency (the structure that unites the parts for composing the whole). From then the three are also base components for the constitution of any system: 1) the repertoire of its elements (distinct between themselves and the system itself); 2) the relation between these elements or its organization and structure; and 3) the organic unit that keeps the elements together for its relations.

⁶² Östreich, *Problemas Estruturais do Absolutismo Europeu* [*Structural Problems of the European Absolutism*] in PODER E INSTITUIÇÕES NA EUROPA DO ANTIGO REGIME [*Power and Institutions in the Europe of the Old Regimen*] 192 (António Manuel Hespanha ed., Fundação Calouste Gulbenkian 1984).

⁶³ HENRY KISSINGER, *DIPLOMACIA* [*Diplomacy*] 59 (Francisco Alves 1999).

and religion maintained an indissoluble union – mere questions of political opportunity are taken as options of confessional nature. As from Richelieu, however, the situation suffers a radical alteration: “*the interests of a state and the interests of religion are two entirely different things*”, the Cardinal would have said in 1616, when he was still the Bishop of Luçon⁶⁴. There is a certain irony in the fact that a catholic Cardinal, the Huguenots’ scourge in his French homeland, was the greatest responsible for expelling religious questions from European chancelleries in the brink of the Modernity.

Definitely, the verticality of the political-religious relations of the Middle Ages gives place, in the international scenery, to the formal horizontality of the links between the States but with intense individual character. This priority of interests of each monarchy in particular illustrates a more sociable feature than a communitarian one of the European system of States of the seventeenth century.⁶⁵ In the internal environment, in parallel, the absolute power of monarchies is more and more unquestionable and for this the divine legitimacy of kings plays a fundamental role.

It is fair to recognize then, that a certain notion of “*reason of State*” wasn’t unknown so far though it had a more selfish meaning and just internal – differently from the one developed by Richelieu. In the Middle Ages the “*jus eminens*” consisted of the supreme power of the prince in disposing of the belongings of his subjects or better, in the power to intervene in a supreme way in the rights of people. As referred in Rogério Soares⁶⁶, the “*jus eminens*” incarnated the “*reason of State where all privileges were dissolved*” or a way to break any positive legal rights at stages or privileged instances⁶⁷. This idea of

⁶⁴ Paul Sonnino, From *D’Avaux to Dévot: Politics and Religion in the Thirty Years War*. 286 HISTORY 192, 192 (2002).

⁶⁵ ANTONIO TRUYOL Y SERRA, LA SOCIEDAD INTERNACIONAL [*The International Society*] 35 (Alianza 1974). The dichotomy between “community” and “society” was analyzed, among others by Celso Mello, for whom “*the community would represent the following characteristics: natural formation, organic will (the energy from the organism, which is shown in the pleasure, habits and memory), and the individuals who would take part in a deeper way in the ordinary life (...). The society already had different features: volunteer formation, reflected will (it would be a product of thinking, dominated by the idea of conclusion and having as a supreme end, the happiness); and the individuals who would take part in a less deep way of ordinary life*” – CELSO D. DE ALBUQUERQUE MELLO, DIREITO INTERNACIONAL PÚBLICO [*Public International Law*] I, 45 (Renovar 1997).

⁶⁶ ROGÉRIO GUILHERME EHRHARDT SOARES, INTERESSE PÚBLICO, LEGALIDADE E MÉRITO [*Public Interest, Legality and Merit*] 55 (Atlântida 1955).

⁶⁷ EDUARDO GARCÍA DE ENTERRÍA, LA LENGUA DE LOS DERECHOS: LA FORMACIÓN DEL DERECHO PÚBLICO EUROPEO TRAS LA REVOLUCIÓN FRANCESA [*The Language of Rights: The Development of European Public Law after the French Revolution*] 98 (Alianza 1994).

superiority of the prince's power in the internal plan though it referred originally to the beginning of the Middle Ages was received and improved by the scholars of the monarchic absolutism and became an indispensable tool to a baroque exercise of power – marked by exaggeration, excess, hyperbole, extravagance and attachment to form, besides the constant conflict between the holy and the profane.

The conflicts of confessional origin of the seventeenth century, by weakening the power of the Catholic Church strengthened – simultaneously – the temporal power of the kings in a way that, in the external environment, monarchs were equals, and in the internal environment, they had no one equal in power. The religious chaos then gave place to a secular political order that in the following 140 years, until 1789, was marked by absolutism, by bureaucratization and by militarism. Let us add to that the fact that the “de-theologicalization” (lack of theology) of politics contributed decisively to the secularization of the spirit, what made the absolutism the cradle of the illuminist philosophy⁶⁸. This marks, doubtlessly, the most solid basis of European Public Laws⁶⁹, from where comes the legitimacy of the true paradigmatic character of the Westphalia Peace Treaties.

4. THE CONCLUSION: AUF WIEDERSEHEN, WESTPHALIA?

The Westphalia Peace Treaties did not constitute an obvious, radical or instant revolution in the juridical-political model of State such as the great modern political revolutions. It wasn't a “political big bang”. Far from this, according to Kuhn History suggests that the road to stable agreement in the scientific research is extraordinarily hard⁷⁰. In fact, those pacts of 1648 dramatically changed the ways of seeing and understanding the State, allowing other state actors to come into the modified continental political performance, despite not having disintegrated the Holy Roman Empire or the Papacy. The main jus-political cate-

⁶⁸ Gehard Robbers, *Religionrechtliche Gehalte des Westfälischen Friedens – Wurzeln und Wirkungen* [*Religion-legal Contents of the Westphalian Peace - Roots and Effects*] in 350 JAHRE WESTFÄLISCHER FRIEDE [350 years of Peace of Westphalia] 73 (Meinhard Schröder ed., Duncker & Humblot 1999). It is fair to recognize, however, that this “de-theologicalization” (lack of theology) is just relative, made true much more into external politics than in the internal one, once the divine attributes of the king are more and more recalled and reinforced.

⁶⁹ JEAN-JAQUES ROCHE, RELATIONS INTERNATIONALES [*International Relations*] 94 (L.G.D.J. 2001).

⁷⁰ THOMAS KUHN, A ESTRUTURA DAS REVOLUÇÕES CIENTÍFICAS [*The Structure of Scientific Revolutions*] 35 (Perspectiva 1997).

gories of this re-designed world started a progressively larger consensus after 1648.

Opposed to traditional political conceptions of revolution as rupture and eradication, evolutions are typical of the persistent and daily qualitative modifications, and not always linear or cumulative. Peculiar debates on the pre-paradigm times do not disappear completely with the establishment of the paradigm. Therefore, it is at least controversial to talk about a “Westphalian revolution”, in the sense attributed to the term “revolution” by common sense. The non-revolutionary character (in *latu* sense) of the Westphalian paradigm, however, does not have the right to withdraw any prestige from it. This is what is found in multifarious Europe from 1648: the Westphalia Peace contributed to the definite secularization of politics and the long process of formation of Public Law in Europe, founded in a secular sovereignty whose high points would be the French Revolution and World War II. In this perspective, 1648, 1789 and 1945 still constitute fundamental dates, real paradigms, even for Eastern’s State, Law and Justice – central categories for our Legal system.

It should not be forgotten that a paradigm, in its best Kuhnian sense, is better articulated and more coherent whenever it gets to each new occasion on which it is submitted to an original or more rigorous condition, in a way that the sovereignty and the secularism from 1648 are not today’s, though in 1648, they still held the capital importance of having definitely included these new regulating principles in the international institutional matrix. A similar point of view is defended by Philpott⁷¹, for whom the Westphalian Peace Treaties should not be understood as an “*instant metamorphosis*”: “*Westphalia consolidated the modern system; it did not create it ex nihilo*”.

In the opposite sense, though in a widely recognized minority position, Beaulac⁷² and Osiander⁷³ establish that the “Westphalian Myth” (*sic*) did not constitute a real paradigm to the developing system of the modern States, since the 1648 treaties did not really alter the European power relation which followed – the Empire continued strong, together with France and Spain (which were

⁷¹ Daniel Philpott, Westphalia, Authority and International Society. 47 POLITICAL STUDIES 566, 579 (1999).

⁷² Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148, 175 (2000).

⁷³ Andréas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*. 2 INTERNATIONAL ORGANISATION. 251, 261 (2001).

already powerful) and the Papacy which was in decadence long before and not necessarily due to the Westphalian peace. Such argument is not sufficient to put apart the central position of the Westphalia peace in the definition of the juridical-political scenery which follows. The realism of this consideration about power factors does not shock the stiffness of the juridical formalism of the sovereignty concept (still undeniable today), upon which all Public Law which follows is set (along with secularism and the reason of state). There is not any incoherence in the judicial/territorial/formal equality among the States and its intrinsic geopolitical/hegemonic inequality just to use a conceptual reference used by Falk⁷⁴. An absolutely unconditional sovereignty, disconnected from pressures of power and economical influences, never existed as a fact. Furthermore, the complexity of the Westphalian phenomenon makes it multiple in meanings.

If, for scholars of international relations, the Westphalia Treaties already have a central meaning, they have even more relevance to jurisprudence, whose normative-prescriptive character finds in those 17th century pacts the formal instauration of an international order based on juridical equality among secular states. As for that, it is fair to recognize that a same paradigm can have distinct values to different study fields such as Jurisprudence and International Relations. It still must be registered that it is exactly because Westphalia affirms a just-political paradigm that can be said today that in 1648 and soon after this paradigm was not completely matured: the conscience of initial anomaly comes from the improvement and refining of the conceptual categories State, Law and Sovereignty along time, what in fact, allowed it to come out as a winner in the eternal conflict with other models, other theories, other paradigms. There is no doubt, however, that Westphalia takes out of place, definitely, the conceptual web through which we understand the State.

It is wrong to infer that the importance of the Westphalia Peace Treaties is just a work from the 19th and 20th centuries, as if by this time there had been a rescue of a historical fact forgotten in History. To the eyes of its contemporaries, the coming of Peace was solemnly and suitably commemorated⁷⁵. Long before and far away from the narrow limits of legal dogmatic, the painter Gerard ter Borch – one of the finest of all Dutch seventeenth-century artists – was sensible

⁷⁴ Richard Falk, *Revisiting Westphalia, Discovering Post-westphalia*. 4 THE JOURNAL OF ETHICS 311, 312 (2002).

⁷⁵ Claire Gantet, *Peace Ceremonies and Respect for Authority: the Res Publica, 1648-1660*. 3 FRENCH HISTORY 275, 276 (2004). In the same sense:

enough to capture with unique perspicacity the distinctness and main consequences of the Westphalia Peace, in his picture “*The Swearing of the Oath of Ratification of the Treaty of Münster*”, painted during the last year of the Thirty Years’ War⁷⁶. In that painting, it is crystal-clear that art does not modify the world as a tool but it has its magnitude: the greatness of art resides in its incapacity of reducing the world to a simple ephemeral and objective representation of the present and of the real – for ideological, pedagogical, hedonistic or religious reasons, for more realistic or figurative it may seem.



The master piece of Gerard ter Borch portrays the main room (*Ratskamer*, after *Friedenssaal*) of the Münster Town Hall at the very moment at which the peace treaty is being sworn by the authorities of Spain and the Netherlands. The center of the screen is occupied by the two versions of the treaty (the Spa-

⁷⁶ Gerard ter Borch (1617-1681), “*The Swearing of the Oath of Ratification of the Treaty of Münster*”, 1648, oil on copper, 45,4 cm x 58,5 cm, London National Gallery (www.nationalgallery.org.uk). The picture (above) doesn’t exactly portray the ceremony of conclusion of the *Instrumentum Pacis Monasteriense*, of Oct. 24th 1648, but the previous treaty from May 15th, 1648, also celebrated in Münster, between Spain and the Netherlands.

nish and the Dutch one, both in Latin), properly sealed, displayed in exuberance on a round table, covered with a heavy green velvet tablecloth. The *leitmotiv* of the painting is not the independence of the Netherlands or the victory of any religious belief or a current political idea but the treaty itself being sworn there. The centrality and the force of Law (symbolized by the peace treaty) are put into relief by the artist in the circular displaying of the authorities who watch the scene and in the use of special light which focus the center of the action, in a way that the light becomes dimmer as the eyes run away from the treaties, in the center of the painting work, either in the horizontal axe or vertical one.

Some other aspects demonstrate the absolute political and religious parity between the present delegations in the well-attended ceremony: first, the picturesque fact that they are both swearing the treaty simultaneously (what, for protocol and practical reasons, is unlikely to have happened); second, the absence of great distinctions among the seventy-seven men who witnessed the swearing in the semi-circle, around the treaty, in spite of being together Catholics and Protestants, Spanish and Dutch, civilians and military, enhances the universal, ecumenical and anti-partisan perspective of the painting; and finally, no authority in particular deserves greater attention in the ter Borch's painting. In the front line of the scene just two characters are different from the others by the color of their clothes: to the left, an anonymous soldier who dresses the colors of the city of Münster, in a reference to the city in which the treaty was signed, who watches the scene from a distance behind an empty chair⁷⁷, closer to what was happening; to the right of the treaties, a diplomat⁷⁸ with a magnificent red toga, gives the exact measure of the importance and prominence that chancelleries would enjoy from then on. The fact that while the six representatives from the Netherlands swear the treaty with the fingers up and the two Spanish ambassadors do it with the right hand over the Bible and the crucifix – both ways, means that Protestant and Catholic have identical dignity to the author. There are no winners or defeated, infidels or heretics in the pictographic space. Only in the top right corner of the screen, Gerard ter Borch made a reference to the clergy: the figure of a monk, maybe the Pryor of Münster, with his habitual brown tunic watches the

⁷⁷ The empty chair (traditional allegory for power) is another indication of the insomnia between the two delegations.

⁷⁸ According to Kettering, the diplomat referred to is the Dutch Johannes Christopherus Belne, secretary of Antoine Brun, the second man of the Spanish delegation in that Conference – ALISON MCNEIL KETTERING, GERARD TER BORCH AND THE TREATY OF MÜNSTER 9 (Mauritshuis/Waanders Publishers 1998).

scene over the back of Spanish Catholics and behind a natty diplomat in red. This order of precedence (opposing red/power to brown/humbleness) certainly is not casual. Although Münster is a Catholic city, the religious signals of that solemn occasion are restricted to the sculpture of a Madonna – recognized by Catholics and Protestants as the mother of Christ-God – who blesses the scene, discretely sculptured in a circular non-lit candle chandelier. Curiously, all light which invades the *Friedenssaal* is the one that enters through by the window of the left superior corner of the room – exactly the same light that illuminated and made all Europe warm in that instant. In this work of art, just like in many others, an opening which reveals a lot about the reason of things and once more it is in the lying of art where the more consistent true can be found .

Today, the international scenery is not any more exclusively state-bound; Sovereignty becomes more and more shared; there is a certain flow of commercial borders and a war in the same shape of that from 1618-1648 seems more and more remote (aspects, no doubt, post-Westphalian)⁷⁹ . On the other hand, the state is still an indispensable actor in the modulation and execution of Law and in the understanding of the international relations. The case of East Timor, the last nation to emerge out of the turbulent 20th century, underlines the power of statehood in the Globalisation Era: for the international community, the new country wasn't too small or too weak to establish itself as a nation-state.

Furthermore, as one easily perceives, in spite of a renovation of religious fundamentalisms in many places (a rancid, eminently pre-Westphalian note), the maintenance of multicultural dialogue and the guarantee of freedom of conscience are a concern on the top of international and domestic political agendas. These two aspects give us a sample of the validity of the Westphalian elements of State, even though these elements are not yet the greatest legacies, responsible for the permanent updating of the old “Westphalian paradigm”. The greatest evidence that the Peace Treaties from 1648 remain central to the understanding of our present State and Legal system models is the fact that more than 350 years after its signature, the constitution of any juridical order claims for a democratic construction, always upwards, from the basis to the summit (from down below), never the opposite way, arbitrarily, or by the hands of a Pope or an Emperor.

The globalization process of the contemporary international economy imposes many important challenges to the State. Such challenges, instead of we-

⁷⁹ See, among others, Stephen Krasner's theoretical contributions in the field of Political Science.

akening the State's authority, demonstrate it still has sufficient vitality and virtues to adapt to the new economic scenario, exercising the sovereignty while deciding for policies capable of placing it within the arena of a new international market. Among these national policies, it can be pointed out the gathering of huge economic regional blocks such as Mercosul and the European Union. In these processes of regional integration, Law exerts a fundamental role. It is through Law (based on the tripod Stateness-rationality-oneness) that more stable and tighter integrative ties are constructed nowadays, in clear evidence that the word won the sword in the field of economic integration.