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Nicaea and Sovereignty

The Introduction of an Idea about the Beginnings of State Sovereignty

C.G. Bateman

The Emperor and Empire resign and transfer to the most Christian King, and his Successors, the Right of direct Lordship and Sovereignty...

Article LXXIII, *Treaty of Münster*, October 24, 1648

The approaching tercentenary of the Peace of Westphalia would seem to invite a thorough re-examination of the foundations of international law and organization, and of the political, economic, ideological and other factors which have determined their development. It may not be unreasonable to believe that such a broad inquiry, along with important insights in the forces which have shaped in the past and which shape at present the course of international law and organization, might also yield some precise data regarding the ways and means of harmonizing the will of major states to self-control with the exigencies of an international society which by and large yearns for order under law.

Leo Gross, *The Peace of Westphalia, 1648-1948*, 1948

Preface

1. This article is the introduction of an idea. It is a hypothesis concerning the importance of Constantine's Council of Nicaea to the future of European state development, and hence sovereignty in the context of a virtually ubiquitous Catholic Church during the period in question. The reader will no doubt notice that the one historical event placed in the title happened almost seventeen centuries ago, while the theoretical construct which accompanies it could be either argued as the product of the second millennium alone or simply a product of millennia in the history of political development in the "West". This research does not attempt to cover such vast historical geographies, nor could it. Nor does this article attempt to look any further than the experience of one late antiquity religious and political conference to suggest an important political trajectory which was there set as a result and which, subsequently, had a singularly marked impact on the future of the governance of states and state-like entities in the history of Europe up to the Modern Era. The focus of this paper is an argument about the role of the Christian Church in the history of Europe's long march to what is colloquially referred to in the English language as "sovereignty", and more specifically, in a context wherein that word means *state* sovereignty. This research is not a study on the etymology of the word sovereignty, nor is it a study on how the word evolved in the French or German language, but rather a study on how the Council of Nicaea played a key role on the road to what state sovereignty would eventually and generally come to

mean for most of our modern world.¹ The author recognizes the difficulty of taking on a key religious and historical event such as Nicaea, not least because of the highly charged emotional reactions which inure for academics and lay people who treasure a particular faith perspective and will do anything in their power to protect what they see as “their” story. Paul Valéry sternly rebuked this kind of ideological drunkenness writing:

L’Histoire est le produit le plus dangereux que la chimie de L’intellect ait élaboré. Ses propriétés sont bien connues. Il fait rêver, il enivre les peuples, leur engendre de faux souvenirs, exagère leurs réflexes, entretient leurs vieilles plaies, les tourmente dans leur repos, les conduit au délire des grandeurs ou à celui de la persécution, et rend les nations amères, superbes, insupportables et vaines.²

It bears repeating in English.

History is the most dangerous product which the chemistry of the mind has concocted. Its properties are well known. It produces dreams and drunkenness. It fills people with false memories, exaggerates their reactions, exacerbates old grievances, torments them in their repose, and encourages either a delirium of grandeur or a delusion of persecution. It makes whole nations bitter, arrogant (sic), insufferable, and vainglorious.³

Valéry goes on to note that “[l]’Histoire justifie ce que l’on veut. Elle n’enseigne rigoureusement rien, car elle contient tout, et donne des exemples de tout.”⁴ Yet there is the rub, because history comes with examples which suit diverse interpretations of many historical questions. It is the researcher and the reader alone, in this case, who are the judge and jury, not a self-appointed cadre of academics or theologians. The sobering truth is that no one person has any more claim to a history – historical accounts – than anyone else. Documented history, for better or worse, is a written legacy left to everyone. Some have mistakenly taken it unto themselves to act as the sole interpreters of various histories, to make it impugned behaviour for others to even comment on it, or write about it. Even academics, mostly theologians and historians, heady on the fumes of their smoldering structural fictions, are convinced that only certain priestly types will be allowed to comment on “their” treasured area of “expertise.” The real problem is that such an *area* will never be theirs in the deluded sense they believe it is, and to call it an expertise is nothing more than a hopeful fiction that they have interpreted what are murky plotlines, at best, in a way that is historically accurate.

2. The Christian Church post Constantine employed just such a model, condemning the people responsible for such heretical concepts as other expressions of Christianity,

¹ *Vide infra* for explication on this general definition.

² Paul Valéry, *Regards sur le Monde Actuel & autres essais*, nouvelle édition revue et augmentée (Paris: Librairie Gallimard, 1945), 43.

³ Paul Valéry, *Regards sur le Monde Actuel* (Paris, 1949), p. 43, as in David Hackett Fischer, *Historians’ Fallacies: Towards a Logic of Historical Thought* (New York: Harper Torchbooks, 1970), 307-308.

⁴ Paul Valéry, *Regards sur le Monde Actuel & autres essais*, 1945, 43. History justifies what we want. She teaches nothing rigorously, because it contains everything, and gives examples of everything.

scientific discoveries like gravity and the heliocentric universe, and importantly for this research, any other interpretation of the documents of early Christianity which did not accord with their traditions: this just happened to ensure for the Roman Christian Church a dominant role in the governance of Europe right up until, at least, the time of the Thirty Years' War. No, academics and researchers such as myself can only be candid and forthright on what the sources tell us, because that, like repeatable experiments in science, is about the only thing not up for debate. The interpretations of academics and theologians are merely that, one person's interpretation. That is why, on the subject of Constantine, you get such diverse treatments from, say, Jacob Burckhardt⁵ who earlier deduced that Constantine was a brilliant, conniving, political manipulator *par excellence*, using the Church for his own ends, whereas later historians, such as H.A. Drake⁶ and Timothy D. Barnes⁷ painted a picture of Constantine as a genuine Christian leader, only sometimes given to unpleasant or tyrannical behaviour, to put it rather mildly. Even a cursory understanding of the historiography related to these three authors and their own time periods reveals, in the former, the beginnings of post-modern theological and historical critiques which came into full force with authors like Albert Schweitzer and his classic *The Quest of the Historical Jesus*. German academics, inter alia, such as Burckhardt were pulling modern historical assumptions to pieces, and his book on Constantine is just one example of what has been largely a successful and responsible interpretive work. More recent scholars, though, disagree with Burckhardt's interpretations of Constantine and present their own views which appear to be a combination of both modern and post-modern interpretations – or put another way, they have had to adjust modern ideas based on Church traditions and sanctioned interpretations to accommodate the many post-modern critical studies which knocked down their false god of a fictionalized world of holistic and redoubtable truths, just as their Christian cultures, in general, have been forced to do. The coalescence of new ideas with what had for a long time been established makes for a continuing conversation and occasionally there are new versions of texts or, more often, new circumstantial source evidence which raise reasonable questions giving rise to more research. Yet these more recent scholars give us nothing wholly new on Constantine, including myself, primarily because the sources which Burckhardt used are the same ones, in the main, being used today. Again, in the absence of, at least, trace amounts of new direct evidence, which has not surfaced, all the reader can expect from this or any other study on, say, Constantine's impact on the Christian Church, is an interpretation based on a list of direct source texts which have not changed since the time of Burckhardt. What academics do surmise, their conclusions, based on these texts, is something left wholly to the judgment of the reader, opposing opinions can only be justified on a more convincing use of the texts.

3. Academics are not immune from Valéry's rebuke, much less the lay reader, and it is hoped that in this instance the reader will enable themselves to read this research "without prejudice" as we like to say in law, and read it as research based on ancient

⁵ Jacob Burckhardt, *The Age of Constantine the Great*, trans. Moses Hadas (New York: Doubleday Anchor Books, 1956:1853).

⁶ H.A. Drake, *The Impact of Constantine on Christianity, The Cambridge Companion to The Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006). Drake has also written earlier works the likes of *Constantine and the Bishops*, etc. on the same subject.

⁷ Timothy D. Barnes, *Constantine and Eusebius* (Cambridge, Massachusetts: Harvard University Press, 1981).

sources concerning historical events which have been interpreted simply on their own merits to assess the weight of a trajectory which was set and which would subsequently set some of the boundaries for later incarnations of governance in Europe. The author recognizes that while purely objective research is impossible due to human predispositions and the power of our minds to be sub-consciously selective, if one lays the sources out and colors them in with context from other pertinent sources, a certain degree of objectivity *is* possible. All this to say I hope the reader will be able to appreciate a certain degree of objectivity in this research, and that they will think carefully about the historical evidence being presented and *sino indicio ipsius loqui*, or allow the evidence to speak for itself.

4. Initial reactions to this research have ranged from compelling, timely, and original to passionate rejoinders more focused on defending particular religious world views and traditions. All this to warn the reader that interpreting Christian history, even in a responsibly critical matter, is never something easy in a culture where so many academics have both personal and professional interests at stake. Yet, in spite of the diverse reactions, the consensus from everyone who looked at the first drafts was that this paper is indeed original research and a contribution to the larger discussion on the historical foundations of sovereignty. I re-emphasize the fact that I do not attempt to cover centuries of history in less than one-hundred pages, mostly to head off any subsequent and ill-advised rejoinders that I ought to have done this. To cover the period in question would require a twenty-five volume series of one-thousand page tomes, and I admit that I have not yet rallied the hundreds of authors needed for such a project. The one event I do focus on, hence its primacy of place in the title, lasted less than two months in 325 A.D., the Constantinian Council of Nicaea. At this inter-provincial conference of Emperor and Bishops, the Christian Church was being put on a trajectory for political rule⁸ and state sovereignty by Constantine himself. This ultimately led Europe to the Early Modern religious crises that forced the Peace of Westphalia. In contrast to my main focus, Nicaea, I deal with other important historical transactions like Westphalia in merely a cursory way, and only in reference to how they connect to the Council. I had originally chose Westphalia as the event I would include in the title with Nicaea both because of the conciliar relationship between the two events and to give the reader a sense of how deeply ensconced the Church became in affairs of state and to emphasize how long that lasted. Yet, because this paper does not cover Westphalia in any other way than cursorily, I made the change. The importance of the Nicene Council on the future of the Christian Church, specifically relating to the trajectory set for its political involvement in the oft-times sovereign affairs of states for centuries to come, is the focus of this paper.

⁸ From the time of Constantine until the Thirty Years' War, such a political rule was a shared one, the famous "Universal Powers" of Emperor and Pope – the appellation pointing to these two figures is a significant oversimplification which has been adopted in the literature over the centuries, but one which adequately points at the institutions well enough. But is important to this thesis to note that during many periods over the last 1800 plus years in Europe it was the Church who held the balance of power, for a multitude of reasons. What is undeniable is that the Church, whether called the Christian Church, the Western Church, the Catholic Church, or the Roman Catholic Church, saw itself as a sovereign power in Europe during the whole period.

Introduction

5. Stephen C. Neff recently wrote that the paucity of research in the area of the history of international law is nothing less than an intellectual scandal.⁹ This state of affairs is without parallel in both academic disciplines in general, and in other branches of law.¹⁰ For instance, in a recent international law textbook of 1331 pages, the subject of the historical development of international law from 2500 B.C.E. up to the sixteenth century C.E. is given a surprising *nine* pages.¹¹ This anecdotal evidence, while not accounting for the many recent scholarly inquiries in this field, is at least putative according to the assessments of scholars such as Neff. This research contributes to the filling of the lacuna in the subject area of the history of international law by examining the role of the Constantine's Council of Nicaea in 325 C.E. as a trajectory setting event which moved the Christian Church into the arena of sovereign state governance wherein it remained with varying degrees of legitimacy until the Peace of Westphalia in 1648.

6. This research is concerned with the development of international law in so far as it relates to the historical background for the Peace of Westphalia, which itself is understood by some as a seminal event in the history of the growth of both the theoretical notion of sovereignty and, in its present milieu, as an attribute of states.¹² In keeping with the challenge of Leo Gross to re-examine the foundations of international law and organization,¹³ the aim of this research is to get behind Westphalia, to suggest a plausible nexus of ideology and events which led to these treaties, and to focus specifically on the event which I suggest was the *sin qua non* leading to the Westphalian concord. I suggest that the course set for the Church at the Council of Nicaea in 325 C.E. best explains both the context and initial impetus for the treaty-making at the Peace of Westphalia in the seventeenth century. I also suggest that the similarities between the two politically charged congresses are far more than random correlatives.

7. Nicaea was a politically inaugurated conference which aimed at securing Constantine's newly acquired rule via the vehicle of the large and politically organized Christian religion.¹⁴ The Nicene parley achieved this for Constantine in two ways. First, the obvious settling of the Arian dispute – yet only ostensibly as history would prove – was a key factor which boded well for Constantine's relationship with the bishops on the winning side of the debate, such as Athanasius and Eusebius et al. Yet, I suggest that what was more important than the quelling of this dogmatic dispute in securing the rule

⁹ Stephen C. Neff, "A Short History of International Law," *International Law*, Malcolm D. Evans ed., (New York: Oxford University Press, 2006), 29.

¹⁰ Neff, *A Short History*, 29.

¹¹ Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 13-22.

¹² The author is aware of the literature which claims to "de-bunk" the myth of Westphalia's importance, but this present study is not attempting to define Westphalia, but merely highlight a connection between the two seventeenth century congresses and the much earlier Council of Nicaea. As the title implies, the focus of this research is Nicaea, not Westphalia. Westphalia is discussed only contextually and at the periphery of the main argument.

¹³ Leo Gross, "The Peace of Westphalia, 1648-1948," *American Journal of International Law*, vol. 42 (1948): 41.

¹⁴ See Jacob Burckhardt, *The Age of Constantine the Great*, trans. Moses Hadas (New York: Doubleday Anchor Books, 1956), chapter 9, 295.

of Constantine was the emperor's well documented constitutional adoption of the Christian religion on behalf of the Roman Empire. If we turn to consider Westphalia, some thirteen centuries later, we see that here again we are dealing with the congresses at Münster and Osnabrüg¹⁵ which were rooted in, again, another deep split between the two dominant factions within Christianity, the Protestant and Catholic arms thereof. Of course, by then, the two sides of the Christian conflict were defined by nations who represented the two dominant versions of Christianity. While the Christian *religion* was at the epicenter of both these historically separated events, it does not change the fact that both the Nicene Council and the Westphalian settlement were both squarely aimed at vouchsafing a *political* peace via constitutional documents of a legal nature.

8. In this research I will discuss the importance of Nicaea to Westphalia and also discuss some of the historical lineage pursuant to the idea of state sovereignty and look at its ultimate interconnectedness with the Christian religion. My suggestion in this research is that the late antiquity transformation of the Christian church from spiritual and cultural governance to temporal imperial sovereignty in Europe suggests a trenchant indication of what Nicaea represented in terms of setting a trajectory for the church's political sovereignty, a sovereignty which ultimately begun to be wrested back from it at Westphalia.

9. This research will not attempt to deal with the vast time period between these two watershed events, for obvious reasons of length, but also because of the 'sovereignty gap,' which, for Europe, stretches from the end of late antiquity up until the early modern period.¹⁶ In agreement with F.H. Hinsley and Wolfgang Preiser on the subject, this research acknowledges that while many important political developments occurred between Nicaea and Westphalia, hardly any of it had an effect on international law and sovereignty where Europe is concerned. The ubiquitous presence of the two universal powers of Empire and Church were the guarantors of an Augustinian worldview which ran in an almost unbroken nexus from Augustine to Luther. While it is true that many legislatively and politically charged Church Councils took place between Nicaea and Westphalia,¹⁷ the all important precedent had already been set by Constantine in the

¹⁵ Although the treaties were not signed until October 24, 1648, these two assembly's were actually called to begin on the 11th of July, 1643, and met in Munster and Osnabrug, according to the 1710 English edition of the Treaty: *The Articles of the Treaty of Peace, Sign'd and Seal'd at Munster, in Westphalia, October the 24th, 1648*, in *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the present Time* (London: Printed by J. Darby for Andrew Bell in Cornhill, and E. Sanger at the Post-house in FleetStreet, 1710), Treaty Opening, 2. The latter city appears as Osnabrug in this text, although the German city is known today as Osnabrück. The articles of the peace were signed and sealed at Münster, on October 24, 1648.

¹⁶ F.H. Hinsley noted that the idea of sovereignty was largely "irrelevant" pursuant to this period of time: F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 129; Wolfgang Preiser maintained that the lack of equal status between nations for this period was also vexing upon any notion of functional international law: Wolfgang Preiser, *History of the Law of Nations, Basic Questions and Principles*, in *History of International Law · Foundations and Principles of International Law · Sources of International Law · Law of Treaties*, vol. 7 of *Encyclopedia of Public International Law*, eds., Rudolf Bernhardt et al., (Amsterdam: North-Holland, 1984), 137.

¹⁷ 1. Nicaea, 325; 2. Constantinople, 381; 3. Ephesus, 431; 4. Chalcedon, 451; 5. Constantinople II, 553; 6. Constantinople III, 680-681; 7. Nice II, 787; 8. Constantinople IV, 869-880; 9. Lateran I, 1123; 10.

fourth century. Nicaea and the consequent trajectory set for the Church by Constantine at that Council proved to be the anchor which kept the Church wedded to state regulation, legislation, and punitive enforcement until the universal powers began to come unglued: most noticeably during the Early Modern period.

10. The linchpin event which guaranteed the Nicene trajectory towards sovereignty and barely veiled statehood was the instalment of Gregory as pope in 590 C.E. Gregory I (540-604 C.E.) was an upper class and former Roman politician who was essentially press-ganged, both by acclamation of the people and the desperate historical context,¹⁸ into the papal office. Gregory continued the Constantinian tradition of political expansion under church jurisdiction by transforming the vast holdings and interstate clout bequeathed on the Church by Constantine into a powerful tax-collecting¹⁹ quasi-federation. R.A. Markus observes:

Since the time of Constantine churches had built up extensive land holdings. By the end of the sixth century they were the largest landowners in Italy. In Gregory's time the Roman Church must have been by far the richest. It had long had registers (*polyptycha*) of its lands and of the income it derived from them, which were kept up to date. Its possessions were concentrated in Sicily and in Campania; but the 'patrimony (of St Peter)', as these possessions were collectively known, included lands scattered over Southern Italy (Bruttium-Lucania and Apulia-Calabria), Tuscany, and elsewhere in Italy, Corsica and Sardinia, Dalmatia, Gaul, and North Africa.²⁰

It has also been poignantly noted by F.H. Dudden: "It is at least quite certain that at the beginning of the seventh century the Roman Church owned many hundreds of square miles of land and drew annual revenues amounting to hundreds of thousands of pounds."²¹ Henry Maine's 'tax-taking' and 'legislating'²² Roman Empire in the West was now in the hands of the Christian church. The rule of Gregory I and, later on, Innocent III in the late twelfth and early thirteenth centuries were periods which exemplify the historical reality that sovereign power in Europe regularly devolved on the Church with varying degrees of gravity pursuant to the strength of any, but not always as with Gregory, concomitant emperor.

11. While this research does not attempt any thorough treatment of Gregory and his life and times, yet it is important for the reader to understand that with Gregory we see

Latern II, 1139; 11. Lateran III, 1179; 12. Lateran IV, 1215; 13. Lyon I, 1245; 14. Lyon II, 1274; 15. Vienne, 1311-1312; 16. Constance, 1414-1418; 17. Basel, 1431-1445; 18. Lateran V, 1512-1514; 19. Trent, 1545-1563.

¹⁸ See, for instance, Jeffrey Richards, *Consul of God: The Life and Times of Gregory the Great* (London: Routledge & Kegan Paul, 1980), 41; R.A. Markus, *Gregory the Great and His World* (Cambridge: Cambridge University Press, 1997), 3.

¹⁹ Here I refer to money which flowed to the Church under the rubric of the 'Patrimony of St Peter.'

²⁰ R.A. Markus, *Gregory the Great and His World*, 112.

²¹ F.H. Dudden, *Gregory the Great: His Place in History and Thought* (London: Longmans, Green & Co., 1905), i, 296, as in Richards, *Consul of God*, 127.

²² Sir Henry Sumner Maine, *Lectures on the Early History of Institutions*, 7th ed., (London: John Murray, 1914): 330: ...the Roman Empire, while it was a tax-taking, was also a legislating empire. It crushed out local customs, and substituted for them institutions of its own.

the fulfillment of the precedent setting relationship which Constantine began with the Church at Nicaea. With Gregory the religion had finally and inexorably taken on the role of *the* sovereign power in Rome. Over the centuries this sovereign power was ultimately shared between the papal office and Frankish Kings, who were ultimately styled Holy Roman Emperor's. The resilience of the affinity for this imperial designation lasted centuries, even into the Modern era where the Westphalian Treaty opens with:

In the name of the most holy and individual Trinity. Be it known to all, and every one whom it may concern, or to whom in any manner it may belong, That for many Years past, Discords and Civil Divisions being stir'd up in the *Roman* Empire, which increased to such a degree, that not only all *Germany*, but also the neighbouring Kingdoms, and *France* particularly, have been involv'd in the Disorders of a long and cruel War: And in the first place, between the most serene and most Puissant Prince and Lord, *Ferdinand* the Second, of famous Memory, elected *Roman* Emperor, always August King, King of Germany, Hungary,...; and the most Serene, and the most Puissant Prince, *Lewis* the Thirteenth, most Christian King of *France* and *Navarre*, with his Allies and Adherents on the other side.²³

The strength of such terminology gives evidence of just how important the relationship between Church and empire had become throughout the course of European history, and this relationship, quite clearly, began at Nicaea in the fourth century. The robust and far-reaching dominion of the erstwhile Roman Empire had, by then, long faded into the past, but the title remained, and largely due to the Church's desire to keep continuity with their imperially favourable past, and a firm grip on their diminishing power and wealth. The Nicene council was the beginning of a partnership between Church and state, while Westphalia served as the death knell for that same entente.

Historical Inquiry and Policy

12. Wolfgang Preiser once lamented that late nineteenth and early twentieth century historical legal scholars purposefully ignored everything prior to the fourteenth century in international legal development.²⁴ While it may be the case that the balance of historical inquiries have started with Westphalia, I would suggest that these councils in the late seventeenth century were as much a part of the history that necessitated them as they were a harbinger of increased self-determination and sovereignty. In other words, Westphalian sovereignty did not emerge in a vacuum, quite the contrary: Westphalia was necessitated by the immediate contextual factor of the power struggle between the French King and the Holy Roman Emperor and the more distant contingency of the pervasive

²³ *The Articles of the Treaty of Peace, Sign'd and Seal'd at Munster, in Westphalia, October the 24th, 1648, in A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the present Time* (London: Printed by J. Darby for Andrew Bell in Cornhill, and E. Sanger at the Post-house in FleetStreet, 1710), 1 (emphases, italics, punctuation, and spelling in original).

²⁴ Wolfgang Preiser, *History of the Law of Nations, Basic Questions and Principles*, in *History of International Law · Foundations and Principles of International Law · Sources of International Law · Law of Treaties*, vol. 7 of *Encyclopedia of Public International Law*, eds., Rudolf Bernhardt et al., (Amsterdam: North-Holland, 1984), 127

and variegated involvement of the Church in state governance which had begun at Nicaea, centuries before.

13. By suggesting a framework of interpretation for one aspect of the historical development of international law and sovereignty which finds its beginning in Nicaea, I propose to shed new interpretive light on past events which might ultimately aid the policy makers who are, as I write this, continually drafting and re-drafting international constitutional treaties which portend an enormous impact on relations between states in the twenty-first century. My tack towards praxis for this historical inquiry has been strengthened by the keen suggestions of Wayne Hudson who has recently written:

Whereas nineteenth-century European history often sought to confirm the reader's belief in moral values already constitutive of the socio-legal order in which she or he lived, a constructive approach seeks to persuade the reader that socio-legal innovations are needed in light of historical materials.²⁵

Hudson's encouragement of constructive approaches vis-à-vis the rank-and-file method of "pure" historical inquiry has accentuated my own comparative style of analysis, and it is my hope that by "laying out"²⁶ some pertinent historical materials, this research will further inform the ongoing conversation about where sovereignty as an idea stems from, and, perhaps more importantly, how a more nuanced appreciation of that process will help us better steward the boundaries of any future incarnation of the idea. An important aspect of sovereignty's meaning that I assume in this research is that it is dynamic, and subject to historically situated contextual considerations.²⁷

14. By engaging a comparative and constructivist legal history perspective, I hope to move the conversation about sovereignty forward by asking serious questions about its hermeneutical lineage, and by challenging some of the ideas which, historically, were considered fundamental to its existence. By doing this, my aim is to positively contribute to the ongoing challenge of "re-envisioning"²⁸ sovereignty, an idea which touches the lives of us all, and most especially those people in the world who find themselves in desperate circumstances. If Westphalian sovereignty was supposed to have been the harbinger of a safer world where nations respected their promises and would be corporately accountable for their acts and omissions, it has been, in large degree, a failure. This research aims to reflect on the genesis of sovereignty and raise questions which will further add to the conversation on how, if at all, such an idea can be made internationally solvent.

The Multi-National Council of Nicaea

²⁵ Wayne Hudson, *Fables of Sovereignty, Re-envisioning Sovereignty: The End of Westphalia?*, eds. Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (Aldershot: Ashgate, 2008), 21-22.

²⁶ Hudson, *Fables of Sovereignty*, 20-22.

²⁷ Beaulac, *The Social Power of Bodin's 'Sovereignty' and International Law*, 27.

²⁸ Here I borrow the term from the recent book of essays on sovereignty, Trudy Jacobsen, Charles Sampford, and Ramesh Thakur, eds., *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008).

For as, by a sincere confession of the truth, we ourselves, in obedience to the Council of Nice, worship God as the Creator of all things, and as the Fountain of our imperial sovereignty...

Emperors Honorius and Theodosius II, *Letter to Bishop Aurelius* (June 419 C.E.)

15. In 325 C.E., representatives from Libya, Syria, Phoenicia, Arabia, Palestine, Egypt, Thebes, Persia, Scythia, Pontus, Galatia, Cappadocia, Phrygia, Pamphylia, Thracia, Macedonia, Spain, and other imperially governed regions met at the command of a Roman emperor in the city of Nicaea, in what was then Bithynia.²⁹ The mere composition of the summit, alone, leads to the supposition that there was some manner of international conference being held. This “world-wide”³⁰ conglomeration of nationalities, numbering over two-hundred and fifty religious leaders³¹ – *to wit*, bishops of the Christian Church – was convened by the most powerful political leader of the, then, known world. Constantine the Great (272 – 337 C.E.)³² had summoned these dignitaries both to consolidate his own newly acquired political power³³ and because his recently procured imperial peace was being threatened by the real possibility of further conflict. Christian bishops were verbally attacking one another and whole populations were coming close to all out physical confrontation.³⁴

16. What can be known about Constantine’s life and times comes from primarily three extant sources. Eusebius of Caesarea, Bishop of Caesarea during Constantine’s reign, wrote *Vita Constantini* (VC), or *Life of Constantine*, this being the largest work devoted to the Emperor which survives. Zosimus, a pagan historian from the early sixth century,³⁵ wrote *Nea Historia*, or New History, which covers the first four centuries of the Roman Empire and includes a shorter account of the Emperor’s reign and politics. The

²⁹ Modern day city of İznik, in Turkey.

³⁰ Eusebius of Caesarea, *Eusebius: Life of Constantine*, trans. Averil Cameron and Stuart G. Hall (Oxford: Clarendon Press, 1999), 3.6.1, 123.

³¹ Eusebius, *Life of Constantine*, 3.7.1, 124.

³² All dates hereinafter can be assumed to be of the Common Era unless specified otherwise.

³³ Jacob Burckhardt, *The Age of Constantine the Great*, 295.

³⁴ Eusebius, *Life of Constantine*, 2.73, 119-120: But it was too great a matter to be dealt with by the letter, so that the ferocity of the quarrel increased, and the spreading evil reached every province in the east; 3.4, 122: The bishop of one city was attacking the bishop of another, populations were rising up against one another, and were all but coming to physical blows with each other; Paulus Orosius, *Seven Books of History Against the Pagans: The Apology of Paulus Orosius*, trans. Irving Woodworth Raymond (New York: Columbia University Press, 1936), 7.28, 365: When Arius also incited to riot those whom he had led into error, an assembly of three hundred and eighteen bishops was convened at Nicaea, a city of Bithynia. See also Athanasius, *History of the Arians*, *St. Athanasius: Select Works and Letters*, ed. Archibald Robertson, vol. 4, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, eds. Philip Schaff and Henry Wace (Grand Rapids: Eerdmans, 1980), 270 ff.: even after Constantine had mandated a peace by fiat, the battle that had been raging between the two sides went on, and Athanasius, who was Bishop of Alexandria after Alexander, and was against Arius et al., goes on at some length to describe the intensity of the struggle.; Other extant accounts: Theodoret, *The Ecclesiastical History of Theodoret*, trans. Blomfield Jackson, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, eds. Philip Schaff and Henry Wace (Grand Rapids: Eerdmans, 1979), 1.1-1.7, 33-44, as well as Socrates Scholasticus, *The Ecclesiastical History by Socrates Scholasticus*, *Socrates, Sozomenus: Church Histories*, rev. A.C. Zenos, vol. 2, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, eds. Philip Schaff and Henry Wace (Grand Rapids: Eerdmans, 1983), 1.1-1.10, 1-18.

third source is an even shorter work known as *Origo Constantini Imperatoris*, and it is written in the style of an epitome, and therefore it covers the events of Constantine's life in a rather abbreviated matter.³⁶ Although the author is unknown, it has been suggested that it would have been someone writing from the late fourth century.³⁷ All three accounts are rather indicatively coloured by the contexts and intents of their authors, especially the works written by Eusebius and Zosimus. Eusebius wrote the *VC* as a friend and subordinate of the Emperor Constantine, and it is a work which regularly delves into hagiography. Scholars recognize and oftentimes emphasize this weakness, but even Jacob Burckhardt, one of Eusebius' most outspoken critics on record,³⁸ cannot deny the accuracy of much of the historical data contained in the *VC*.³⁹ Burckhardt saw Eusebius as dishonest because he interpreted the events of Constantine's life through a Christian lens, and often exaggerated or filled in details which he had no business doing. Even in light of this, though, the basic details of the *VC* have been treated as reliable in the main.⁴⁰

17. On the other hand, Zosimus, the writer of *New History*, was a pagan historian who described Constantine in the most unflattering terms. Yet here again, regardless of the lack of dispassion on Zosimus' part, the historical details are basically sound.⁴¹ It is the interpretation of the events, as with Eusebius, which has given rise to much criticism.

Context for Constantine

18. From the time of the Roman Empire's crisis in the third century right through Diocletian's Tetrarchy and up to Constantine's own period of accession to Caesar, the vast and unwieldy dominions of Rome had been reeling in social, political, and military chaos. In 325, just prior to the Council in question, the maelstrom had finally paused. In hindsight one wonders whether this period was really a cessation of hostilities or merely the eye of the storm. Constantine had finally put down his last serious rival in the Emperor Licinius, and after first sparing his life at the request of his sister who was married to the man, and "for fear that Licinius might again, with disastrous results for the State, resume the purple which he had laid down,"⁴² Constantine soon had him

³⁵ Ronald T. Ridley, *Zosimus: New History* (Canberra: Australian Association for Byzantine Studies, 1982), xii.

³⁶ A. Diane Boleyn, *Origo Constantini Imperatoris: A Translation and Commentary* (Master's Thesis: Boise State University, 1996), 1.

³⁷ *Ibid.*, 6.

³⁸ Burckhardt famously wrote, 'Eusebius is no fanatic; he understands Constantine's secular spirit and his cold and terrible causes of the war quite precisely. *But he is the first thoroughly dishonest historian of antiquity.* His tactic, which enjoyed a brilliant success in his own day and throughout the Middle Ages, consisted in making the first great protector of the Church at all costs and idea of humanity according to his lights, and above all an ideal for future rulers.' [emphasis added] Jacob Burckhardt, *The Age of Constantine the Great*, trans. Moses Hadas (New York: Doubleday Anchor Books, 1956), chap. 8, 272.

³⁹ Burckhardt wrote, 'Although this story comes from Eusebius, whose notions of paganism in general are not always the most precise, and whose desire for truthfulness is not always compelling, nevertheless in view of the evil and savage nature of Maxentius there is no ground to doubt the tale.' Jacob Burckhardt, *The Age of Constantine*, chapter 6, 200.

⁴⁰ See generally Ramsay MacMullen, *Constantine* (London: Croom Helm, 1969); See also Charles Matson Odahl, *Constantine and the Christian Empire* (London: Routledge, 2004), 3.

⁴¹ Odahl, *Constantine and the Christian Empire*, 7-8.

⁴² *Origo Constantini Imperatoris, The Excerpts of Valesius*, trans. John C. Rolfe, *Ammianus Marcellinus*, vol. 3 of 3, *The Loeb Classical Library*, eds. T.E. Page, E. Capps, and W.H.D. Rouse

assassinated.⁴³ I suggest that it is strongly indicative of Constantine's calculating disposition that he called this council at Nicaea on the heels of a newly acquired and tentative political peace. In other words, Constantine was in no mood for another war. Constantine's Machiavellian⁴⁴ disposition was, according to the Pagan historian Zosimus, well known due to the offhand killing of his own son, Crispus, followed by his brutal execution of the young man's stepmother and his own wife, Faustus.⁴⁵ According to another late antiquity historian, Orosius, Constantine also killed off his own nephew, Licinius.⁴⁶ Zosimus records that Constantine's guilt over killing Crispus and Faustus was the key ingredient to his adoption of Christianity. Apparently an Egyptian Christian, unnamed, of the royal court told him he could be forgiven anything if he adopted Christianity.⁴⁷ We are told that Constantine "abandoned his ancestral religion" and embraced Christianity.⁴⁸ This sea change in the new emperor's religious loyalties augurs importantly when considering the importance of *context* pursuant to the Council of Nicaea, discussed further below.

19. Constantine called the council to vouchsafe and guarantee peace because it was apparent to him that if he did not intervene, more "disastrous results" for his *state* might follow.⁴⁹ So intervene Constantine did. He wrote letters to the two main combatants in

(London: William Heinemann, 1939), 5.29, 525. Diane A. Boleyn translated the passage, ...but Constantine, thinking about the example of Herculus Maximian his father-in-law, lest Licinius again take up imperial power to the disaster of the republic, and having been forced by the outcry of the soldiers, ordered that Licinius be killed in Thessalonica, and Martinianus in Cappadocia.: Diane A. Boleyn, "Origo Constantini Imperatoris: A Translation and Commentary" (MA Thesis: Boise State University, 1996), 5.29, 34.

⁴³ *Origo Constantini Imperatoris*, 5.29, 525. See also, Zosimus, *Zosimus: New History*, trans. Ronald T. Ridley (Canberra: Australian Association for Byzantine Studies, 1982), 2.28.2 – 2.29.2, 36.

⁴⁴ Niccolo Machiavelli, 1469-1527 C.E., wrote famously: When it is absolutely a question of the safety of one's country, there must be no consideration of just or unjust, of merciful or cruel, of praiseworthy or disgraceful; instead, setting aside every scruple, one must follow to the utmost any plan that will save her life and keep her liberty. Niccolo Machiavelli, *Discourses on the First Decade of Titus Livius*, trans. Allan Gilbert, *The Chief Works and Others* (Durham: Duke University Press, 1958), Book 3.41, 519. Such an outlook accords well with what we know of the Emperor Constantine.

Hinsley, *Concept of Sovereignty*, 281.

⁴⁵ Zosimus, *Zosimus: New History*, trans. Ronald T. Ridley (Canberra: Australian Association for Byzantine Studies, 1982), 2.28.2 – 2.29.2, 36. Zosimus tells us that Constantine killed Crispus based on suspicion that the young man had intercourse with his stepmother Faustus. When Constantine's mother proved unconsolable upon the boys death, he apparently killed the mother, his wife, in an overheated bath (2.29.2, 36-37).

⁴⁶ Orosius, *Seven Books of History Against the Pagans: The Apology of Paulus Orosius*, 1936, 7.28, 366.

⁴⁷ Zosimus, *New History*, 2.29.3-4, 37.

⁴⁸ Zosimus, *New History*, 2.29.4, 37.

⁴⁹ On the political nature of Nicaea generally, see: Robert M. Grant, "Religion and Politics at the Council of Nicaea," *The Journal of Religion*, vol. 55, no. 1, (January 1975): 1 – 12; Øyvind Norderval, "The Emperor Constantine and Arius: Unity in the Church and Unity in the Empire," *Studia Theologica* 42, (1988): 113 – 150; T.G. Elliott, "Constantine and 'the Arian Reaction after Nicaea,'" *Journal of Ecclesiastical History*, vol. 43, no. 2, (April 1992): 169; Thomas G. Elliott, "Constantine's Preparations for the Council of Nicaea," *The Journal of Religious History*, vol. 17, no. 2, (December 1992): 136; John E. Lynch, "The Reception of an Ecumenical Council: Nicaea II a Case in Point," *The Jurist* vol. 48 (1988): 457; Leslie W. Barnard, "Church – State Relations, A.D. 313 – 337," *Journal of Church and State*, col. 24 no. 2, (Spring 1982): 346.

the dispute, Alexander and Arius.⁵⁰ What is telling of the serious and widespread nature of this political threat is that these letters, astonishingly, had no apparent effect. Eusebius records that “it was too great a matter to be dealt with by the letter, so that the ferocity of the quarrel increased.”⁵¹ How these letters from an Emperor, who represented such decisive military strength, could not calm the pervasive hostilities perhaps goes to some length in explaining why Constantine, chafed as he was by the conflict, wanted to get this growing unrest settled as quickly as possible.

20. Constantine was also induced to call the general assembly, as Jacob Burckhardt once poignantly suggested, not only to calm internecine conflicts of the Christian Church, but importantly because he saw the political organization of the church as a ready vehicle through which his own power might be further consolidated. Burckhardt wrote:

Constantine found the clergy already so suitably organized for power and so elevated by the persecution that he must either rule through this corporation and its high credit or acquire its irreconcilable enmity. He therefore gave the clergy every possible guarantee of favour, even as far as a sort of participation in rule, and in return the clergy were the most devoted agents for spreading his power, and completely ignored the fact that he still stood with one foot in paganism and that his hands were over and again stained with blood.⁵²

This observation is central to my own unique suggestion that here at Nicaea, the Christian Church was being put on a trajectory for political rule and state sovereignty, which ultimately led Europe to the Early Modern religious crises that forced the Peace of Westphalia. I also suggest that regardless of his *actual* reasons for giving the Christian Church a role in governance in and around the period of the council Nicaea, the important fact is that Constantine did bequeath the Church with political power.

21. For instance, Constantine made the decisions of the bishops binding and no longer appealable to the pagan courts.⁵³ Eusebius writes:

He also put his seal on the decrees of bishops made at synods, so that it would not be lawful for the rulers of provinces to annul what they had approved, since the priests of god were superior to any magistrate.⁵⁴

The fact that he put the bishops on an even footing with the pagan judges shows to what lengths the Church was being moulded in to a sovereign organization. Burckhardt comments on this seemingly surprising move by the Emperor by writing, “what was he to do when, by the general tendency of the age, the Church had turned into the state under

⁵⁰ Alexander (date of birth unknown: died 326 C.E.) was the Bishop of Alexandria, at the time, and Arius (ca. 250-336 C.E.) was a priest in the same city.

⁵¹ Constantine, Eusebius, *Life of Constantine*, 3.73, 119-120.

⁵² Jacob Burckhardt, *The Age of Constantine the Great*, trans. Moses Hadas (New York: Doubleday Anchor Books, 1956), chapter 9, 295.

⁵³ Burckhardt, *The Age of Constantine the Great*, chap. 9, 297.

⁵⁴ Eusebius, *Life of Constantine*, 4.27.2, 163.

his hands and the state into the Church.”⁵⁵ Similarly, Francis Herbert Stead has variously noted that:

In social organization, Christianity was powerfully influenced by the pagan Empire. The Church may in its earliest local phases have owed much to Greek and Roman collegia of various kinds, notably burial clubs, and also to the Jewish synagogue; but the chief formative attraction, whether consciously recognized or not, was Roman Imperialism.⁵⁶

As the city Church extended and had many branches, they were entrusted to presbyters under the superintendence of the bishop of the mother-Church. Gradually the bishops of the greatest cities extended their sway over the surrounding country; and Diocletian’s term – diocese – for a political division of his Empire passed into the Church.⁵⁷

...throughout the provinces of the Roman Empire, the Churches felt themselves to be members of One Universal or Catholic Church. The analogy with the Empire is obvious. The Catholic Church grew to be an Empire within an Empire.⁵⁸

Yet this burgeoning theocracy, according to Burckhardt, was not merely the work of Constantine alone, or even of his attendant bishops, but was rather the necessary result stemming from a process within world history.⁵⁹ Based on the, then, exponential growth of the Christian Church, Burckhardt generally characterizes Constantine’s embracing of the religion as the move of a consummate pragmatist and artificer, and one who knew very well that for a succinct consolidation and legitimization of his rule, the transfer of some aspects of the Empire’s sovereign power to the Church was essentially a *fait accompli*.⁶⁰ The question as to why may be speculated and disagreed upon, but the fact that Constantine opened the door to a shared political rule with the Church seems reasonably clear from the extant texts.

Two Fissures over Two Millenniums

22. Constantine’s Council in 325 was convened to vouchsafe stability and guarantee his own rule in the Empire, to be sure, but this required bringing peace to the dominant religion of Christianity which, above and beyond the societal instability it was causing, was also threatened internally by the growing Arian polemic. A *prima facie* look at the facts pursuant to the internal conflict reveals that there was a doctrinal dispute and the sprawling Christian Church had been consequently bifurcated into two dogmatic groups. A large segment of the Christian population took the side of one Bishop Alexander of

⁵⁵ Burckhardt, *The Age of Constantine the Great*, chap. 9, 297.

⁵⁶ Francis Herbert Stead, *The Story of Social Christianity*, vol. 1 of 2 (London: James Clarke & Co., Limited, 1924), 45.

⁵⁷ Stead, *Social Christianity*, 45-46.

⁵⁸ Stead, *Social Christianity*, 46.

⁵⁹ Burckhardt, *The Age of Constantine the Great*, chap. 9, 297.

⁶⁰ Burckhardt, *The Age of Constantine the Great*, chap. 9, 299: ‘Who could prevent this clergy from constituting itself the state government after it had converted the pagan majority? What means were left to the ruler to remain master, or at least not servant or even pensioner of its priests? Emperor and local bishops alike now had their burial place in the Church of the Apostles at Constantinople...’

Alexandria (died 326), who held that Christ was God and had existed along with him for all time.⁶¹ An equally large segment of the population sided with a Christian priest named Arius (*ca.* 250-336 C.E.), who taught that Christ was the firstborn of all God's creation, and so had a beginning, unlike God.⁶² Each separate camp in this war over dogma eschewed the other's teaching and proclaimed their opponents heretical. The Roman world seemed to be teetering towards another large scale confrontation because of *dogma*. From our perspective in the twenty-first century, such a state of affairs seems odd, to say the least. How could the political stability of the largest empire the world has ever known have been threatened by dogma? I will suggest an answer to this further below.

23. If we move forward in time to the seventeenth century and the Thirty Years' War (1618-1648), there we find, as impetus, another massive and largely doctrinal bifurcation in the Christian religion, that between the Roman Catholic Church and its component nations vis-à-vis the Protestant nations. In much the same way as the vast numbers of Christians in the Roman Empire under Constantine split into two groups who thought the other deeply heretical, so to did the people of Europe in the seventeenth century differ by concomitantly embracing either a Catholic or Protestant Christianity: and in this latter case, the Roman Catholic Church had legislated all Protestants as heretics in the, oftentimes, tragically worded documents issued at the Council of Trent (1545-1563 C.E.). This latter council took place less than a century before the outbreak of the Thirty Years' War. One of the main differences between the two generationally separated conflicts arising out of dogma was that the first ended with an ostensible peace resulting from the Council of Nicaea while the other resulted in a brutal and decimating war. This war lasted thirty years before the various European *Christian* monarchs and statesmen decided to make peace, the Peace of Westphalia.

24. Another important difference between these two historically separated conflicts was the fact that at Nicaea, although the Christian church had threatened the political stability of the empire, there was a more clear delineation between imperial power and the church. Westphalia, on the other hand, was necessitated because the Roman Christian Church had long since evolved into a co-regency of military imperial power and, in the context of having to deal with such powerful combatants, it could not simply do away with the heretics, as was previously so often the case. The protestant heretics, by then, represented whole nations, thanks, in large part, to the reforming work of people such as John Wyclif (*ca.* 1325-1384 C.E.) from England, Jan Hus (1372-1415) in Bohemia,

⁶¹ Bishop Alexander of Alexandria, *Deposition of Arius*, *St. Athanasius: Select Works and Letters*, ed. Archibald Robertson, vol. 4, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, eds. Philip Schaff and Henry Wace (Grand Rapids: Eerdmans, 1980), 69-72.

⁶² Arius, *The Letter of Arius to Eusebius, Bishop of Nicomedia*, in Theodoretus, *Ecclesiastical History: A History of the Church in Five Books, The Greek Ecclesiastical Historians of the First Six Centuries of the Christian Era in Six Volumes* (London: Samuel Bagster and Sons, 1843), chap. 5, 23-25, Arius writes: But we say and believe, and have taught, and do teach, that the Son is not unbegotten, nor in any way unbegotten, even in part; and that he does not derive his subsistence from any matter; but that by his own will and counsel he has subsisted before time, and before ages, as perfect God, only begotten and unchangeable, and that he existed not before he was begotten, or created, or purposed, or established. For he was not unbegotten. We are persecuted, because we say that the Son had a beginning, but that God was without beginning.

Martin Luther (1483-1546) of Germany, and Jean Calvin (1509-1564) hailing from France. Interesting, as well, in this observation is the fact that when we consider that these people lived in three fairly distinct time periods, their locations suggest that the cleavage in Christianity was a pan-European cultural phenomenon. The Thirty Years' War highlighted how divided Christianity in Europe actually was.

25. I suggest that the fact that the Roman Christian Church had moved from spiritual oversight to temporal sovereignty in Europe suggests a trenchant indication of what Nicaea actually represented in terms of setting a trajectory towards political and sovereign governance. The church had taken Constantine's lead in the dance of politics and power, and from Nicaea to Westphalia the Church went from spiritual and doctrinal overseer to a place of political and military imperial power. Of course, the church ended up sharing this role with its concomitant emperors, but the fact that by the seventeenth century they were still so inextricably tangled up in the affairs of state and empire meant that their recalcitrant stance concerning the "heretical" protestant nations was a key impetus plunging Europe into that apocalyptic war. Historian Salomon Reinach once poignantly noted that it was not until Europe's "tardy enlightenment" that the secular power "refused to lend itself any longer to the fury of theological hate."⁶³ The Thirty Years' War and Westphalia would force this point decidedly.

26. In 1648, during the English Civil War, and while at the Westminster School in London,⁶⁴ a sixteen year old boy was forced to come to grips with the results of the genocidal Thirty Years' War which had been responsible for the brutal and seemingly senseless deaths of millions of Europeans. That boy's name was John Locke.

27. I will now discuss the importance of Nicaea as a distant precedent for Westphalia by making some observations about the social and political context wherein this first council was historically situated.

The Practice of Religions and the Council of Nicaea

Jovius Maximinus Augustus to Sabinus. I am persuaded that it is manifest both to thy Firmness and to all men that our masters Diocletian and Maximian, our fathers, when they perceived that almost all men had abandoned the worship of the gods and associated themselves with the nation of the Christians, rightly gave orders that all men who deserted the worship of their gods, the immortal gods, should be recalled to the worship of the gods by open correction and punishment.

Roman Emperor Maximinus, *Letter to Sabinus* (ca. 312 C.E.)

Eusebius, *The Ecclesiastical History*

⁶³ Salomon Reinach, *A Short History of Christianity*, trans. Florence Simmonds (London: William Heinemann, 1922), 2.30, 55.

⁶⁴ W.M. Spellman, *John Locke* (Hong Kong: MacMillan Press Ltd, 1997), 9.

Most important was, of course, the emperor's position as *pontifex maximus*, which gave him *de facto* all-encompassing religious powers in Rome as well as throughout the Empire. The emperor thus controlled, even if only potentially, all religious decision-making, although he was much less interested in actual cult performance.

Michael Lipka, *Roman Gods: A Conceptual Approach*, 2009

28. During the fourth century of the Common Era, and in every place on earth that Roman soldiers cast their shadows, the practice of religion was ubiquitous. Religions were as common then as, say, currency is today. Very few people today get by without money, and those who do, are usually recipients of goods bought with money, so that it touches virtually everyone on the planet. Religion, in the fourth century, had a similar saturation level. While it may be true that one person may have had more of it invested in his life than others, and another preferred certain gods over others, yet everyone, whether sincere or not, participated at some level in the various Roman religions. In fact, in most cases, as far back in recorded history as you wish to look for any given region of the world, you will usually come face to face with a blatantly theistic worldview. Not until the beginning of the Modern era, perhaps, did such a statement cease to be true for much of the Western World.

29. Another analogy which might be helpful towards understanding how politically important religion was to the late antiquity Roman world is to reflect on how we treat politics today. In the United States, for example, people usually fall into two political camps, the Republicans or Democrats. Notwithstanding the nomenclature, people from all income levels, all backgrounds, and all associations can side with either party, it is a distinction which alleges to cut across class distinctions with vigour. In the same way, the vast array of religions in the fourth century, most pointedly for this research, Christianity which favoured the poor, ensured there were choices available to all and sundry. But this was not, however, the case with fourth century Roman politics. There, class contingency was fundamentally institutionalized, dating back to the earliest days of the republican senatorial experiment. I suggest that this general analogy between late antiquity cults and politics forces one to concede that fourth century religions were, at least in some degree, akin to twenty-first century political parties in the way they gave purchase to the political voices of millions of non-elites in a way that ultimately affected the execution of governance. In terms of the Latin world of antiquity, with no religion could this be more the case than it was for Christianity.

30. Due to the keen and incisive work of scholars like Michael Lipka, quoted above,⁶⁵ the absolutely *essential* role played by religions in Greco-Roman societies is fast becoming a commonly accepted fact in the literature. I flag it here to emphasize just how deeply ingrained the role of religion was in the lives of all people, rich or poor,⁶⁶ within Constantine's Roman Empire, including those who governed the state. Scholar A.D. Lee has recently noted that:

⁶⁵ Michael Lipka, *Roman Gods: A Conceptual Approach* (Leiden: Brill, 2009), 176; Lipka cites within, R. Stepper, *Augustus et sacerdos. Untersuchungen zum romischen Kaiser als Priester* (Stuttgart 2003).

⁶⁶ Lipka, *Roman Gods*, 167-185.

The world in which Constantine grew up during the late third century was a world “full of gods.” It was full of gods in the sense that “religion pervaded every aspect of political and social life” and that religious life in the Roman Empire encompassed an extraordinary diversity of deities and of expressions of devotion to those deities.⁶⁷

Constantine was the Roman emperor who, perhaps, best exemplifies the degree to which religion was considered a tenet on which the Roman Empire depended for its relative success or failure. One piece of evidence to this effect is found in a letter preserved by Eusebius of Caesarea 263-339, written by Constantine to all Roman citizens and provincials after he had defeated his enemies and consolidated the Roman Empire in the early fourth century. After waging his final successful campaign against the former Roman Emperor Licinius (250 – 325 C.E.), Constantine wrote two letters to the aggregation of people across the empire’s vast dominions. One of these letters was sent to the Christians in every city while the other was, according to Eusebius, sent to the “outsiders in each city,”⁶⁸ those who had not adopted the new religion. The letters seem to be aimed at explaining who and what had caused the Empire’s recent troubles and also describe Constantine’s subsequent rise to power. The letters also evidence that Constantine had determined to have the many past injustices against Christians put right. Eusebius records that the letters were reproduced in Latin and Greek and sent to all corners of the empire.⁶⁹

31. The letter to the “outsiders” is extant and instructive for this research, especially where it concerns the contextual reality that during the reign of Constantine, from the British Isles to the Fertile Crescent and beyond, all people participated in their respective religions. In fact, such activity was concomitant with the state’s encouragement, participation, and oftentimes regulation.

32. Constantine wrote to those Roman citizens across his vast Empire who had not adopted the new Christian religion in a fashion which is instructive to the main emphasis of this research: that the Council of Nicaea was a key precedent for developments within international law. Constantine wrote his letter to these “outsiders” using a theistically charged delivery and explanation of the, then, recent events, and so in this sense he was clearly not writing to convince them of the existence of *a* god, *per se*, but to direct their attention toward the *Supreme* God, upon whom Constantine credited all his successes. Among other things, Constantine wrote:

For a long time past it has been obvious to those of right and sound views about the Supreme, and to the absolute exclusion of all doubt, how great that difference is which distinguishes the correct observance of the most sacred cult of Christianity from those who are violently hostile and adopt a contemptuous attitude to it.⁷⁰

⁶⁷ A.D. Lee, *Traditional Religions, The Cambridge Companion to the Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006), 159. Cited title and subsequent quote from Keith Hopkins, *A World Full of Gods: Pagans, Jews and Christians in the Roman Empire* (London: Weidenfeld & Nicolson, 1999), 43.

⁶⁸ Constantine, Eusebius, *Life of Constantine*, 2.23.2, 104.

⁶⁹ Constantine, Eusebius, *Life of Constantine*, 2.23.1-2, 104.

⁷⁰ Constantine, Eusebius, *Life of Constantine*, 2.24.1, 104.

For who is likely to meet with any good, if he neither acknowledges the God who is the source of good things, nor is willing to worship him properly? The facts themselves provide confirmation of what has been said.⁷¹

Those, however, who either contemptuously ignored the right, or did not acknowledge the superior realm, who flagrantly subjected to outrages and savage punishments those who in faith pursued it, and who failed to recognize that they were themselves wretched for having punished them on such pretexts, or that those who had gone to such lengths to preserve religious respect for the Supreme were fortunate and blessed indeed, many of their armies have fallen, many have turned to flight, and their whole military organization has collapsed in shame and defeat.⁷²

He [the supreme God] examined my service and approved it as fit for his own purposes; and I, beginning from that sea beside the Britons and the parts where it is appointed by a superior constraint that the sun should set, have repelled and scattered the horrors that held everything in subjection, so that on the one hand the human race, taught by my obedient service, might restore the religion of the most dread Law, while at the same time the most blessed faith might grow under the guidance of the Supreme. I could never fail to acknowledge the gratitude I owe, believing that this is the best of tasks, this is a gift bestowed on me. Now my advance reaches the eastern lands, which, oppressed with graver calamities, cried out for the cure from us to be greater also. Indeed my whole soul and whatever breath I draw, and whatever goes on in the depths of the mind, that, I am firmly convinced, is owed by us wholly to the *greatest God*.⁷³

[L]et each and every one of you observe with close attention what that authority is which has been established, and what grace: it has eliminated and destroyed the seed, so to speak, of the most evil and wicked men, and spreads unstintingly to all lands the newly recovered happiness of good men; it gives back again full authority for the divine Law itself to receive with all reverence the accustomed cult, and for those who have consecrated themselves to this to perform the due rites. If they have as it were looked up out of the deepest darkness and take clear cognizance of what is happening, they will henceforward manifest towards him appropriate religious reverence and corresponding worship.⁷⁴

If these excerpts are from a letter to people who had *not* adopted Christianity, then, clearly, one of the inferences about this variegated group of recipients one can deduce is that they were people whose lives were already decidedly vested in their religious beliefs. If such palpably religious discourse from Constantine was offered to his entire *civitas*, then there must have been an expectation that such discourse would be effective. Constantine wrote this religiously charged letter to a people who were, while not Christian, still deeply committed to the idea that another spiritual world existed which

⁷¹ Constantine, Eusebius, *Life of Constantine*, 2.24.3, 104.

⁷² Constantine, Eusebius, *Life of Constantine*, 2.26.2, 105.

⁷³ Constantine, Eusebius, *Life of Constantine*, 2.28-29.1, 105-106 (emphasis added).

⁷⁴ Constantine, Eusebius, *Life of Constantine*, 2.42, 109.

affected not only their daily lives, but also the success or failure of their state. Augustine's reflections, for instance, in his *City of God* on the integral role of gods in the lives of people within the empire also bears out this point conclusively.⁷⁵ The foregoing observations on Constantine are made in an attempt to better orient the reader, contextually, to the palpable nature of religion's role in the life of not only the most powerful and influential political figure of late antiquity, the Emperor, but also within fourth century Roman society at large.

Lipka's Spacialization Thesis: From International to National Religion

33. Another key to understanding the importance of context in regards to this era is to observe how comprehensively Constantine brought a monotheistic Christianity into confluence with an already poly-theistic society and culture. Michael Lipka has most recently written on the importance of 'spacialization' pursuant to Roman religions. He notes that "all major Roman gods were clearly and emphatically marked by permanent spatial foci of their cults in the city, especially by a temple."⁷⁶ Yet Christianity, prior to Constantine, had no such dominating physical and societal edifices. An obvious reason for this was the fact that, being a persecuted and despised religion, such as they often were for the first three-hundred years of their existence, they could not hope to be as recognizable or associated with "space" as the Roman religions were.

34. Constantine's participation in the issuing of the Edict of Milan, 313 – which had freed the Christians and legislated religious toleration across the empire – had not really changed the essential nature of Christianity as a stateless religion.⁷⁷ The Edict of Milan meant the Romans had acknowledged Christians, but it was not until Nicaea that the adoption became constitutionally entrenched. Lipka, on this transformation, notes that the Christian and Jewish religions had the only 'international gods' in the ancient world.⁷⁸ He writes:

It was the spatial independence that gave the Christian and Jewish gods an advantageous position: first, it made them virtually impregnable and 'immune' to imperial intervention. Since the Jewish and Christian gods were not spacially bound, their cult was elusive and beyond the control of Roman officialdom. Second, such independence made the Christian and Jewish gods extremely marketable merchandises that could easily be accommodated to virtually any environment without further expense. The latter point was reinforced by the monotheistic character of the two gods, allowing their export virtually anywhere without the necessity to accommodate their functions (naturally, a single god was functionally indifferent). In fact, in their striking lack of spatial focalization and functional self-sufficiency the Christian and Jewish gods were the only 'international gods' of the ancient world, the gods, as pointedly remarked by Weber, favoured by "itinerant journeyman", (Weber,

⁷⁵ Augustine, *Concerning The City of God against the Pagans*, trans. Henry Bettenson (London: Penguin, 1984), 4.11, 149-152; see chapter four of *City of God* generally for similar evidences of the role of gods in the lives of Romans. See also, A.D. Lee, *Traditional Religions*, 1999.

⁷⁶ Lipka, *Roman Gods*, 187.

⁷⁷ 'Stateless religion' is my elaboration on Lipka's notion of 'international gods,' Lipka, *Roman Gods*, 187-188.

⁷⁸ Lipka, *Roman Gods*, 187-188.

Economy, 512) or in the words of Ando, "in ambition a truly imperialist cult." (Ando, 2007, 445) It was not until Constantine the Great that the Christian concept of god began to be formed by spacial foci.⁷⁹

Constantine's changes to the practice and "space" of the Christian religion was a monumental shift away from its previously heterogeneous and locally determined existence. This set the Christian religion at the epicentre of the Roman state, and thus state involvement, not unlike the saturation level the pagan religions enjoyed with the empire previous to his reign.

35. Lipka emphasizes that it was with Constantine that the practice of Christianity was converted to reflect a pagan Roman model.⁸⁰ I suggest that an important part of this transformative process was the Nicene episode wherein the emperor convinced the multi-national representatives to agree on the wording of the 'treaty' in a markedly constitutional way. By moving the Church towards this practice of international congresses and precedent setting documents, he moved the Christian religion out of its organic and diverse existence to a pagan model where the practice of the 'ancient traditions' became the all important key to their existence. It can be no surprise then that the Roman Catholic Church ultimately decided that the life of the religion would be guided not merely by the sacred texts, as was the practice of Judaism and early Christianity, but instead decided the Church must be fundamentally informed by tradition. Lipka comments on some unique aspects of this transformation:

In Rome - as in the rest of the Roman World - the systematic 'spacialization' of Christianity was virtually invented by Constantine the Great, who thus adopted the pagan practice of attributing specific space to divine concepts and applied it to his new god (clearly not only for reasons of piety).⁸¹

But not only did Constantine allocate specific urban space to his new official cult, he also set a precedent for a new architectural type of building to make this space, the *basilica*. Inspired by the forms of profane civil buildings and palatial or classical hypostyle architecture, this new edificial type combined pagan traditionalism with Christian innovation.⁸²

In a very acute way, Constantine's adoption and patronage of Christianity meant that the religion was being Romanized according to principles and practices which had erstwhile belonged the traditional religions of Rome. Whatever importance those religions had in the life of the state was now being transferred to Christian religion. The bureaucratic structure that already existed in the Christianity of the fourth century, with its attendant priests and bishops ordering the lives of Christians all across the Empire, was deftly transformed by Constantine in to a centrifugal Roman cult, which, as Lipka's research supports, changed the emphasis from faith to space. In the same way Rome was the spacially located centre of the Roman Empire, now, under Constantine's regime, so it

⁷⁹ Lipka, *Roman Gods*, 187-188.

⁸⁰ Lipka, *Roman Gods*, 28.

⁸¹ Lipka, *Roman Gods*, 28.

⁸² Lipka, *Roman Gods*, 28.

became the centre for the Christian religion. The fact that Rome's imperial ideal could possibly live on in the seemingly prescient presence of the Christian religion in every corner of his Empire meant that his legitimacy could be enforced through an existing framework of local governance, as Burckhardt has suggested.⁸³

36. This settling effect which Constantine's Nicene beneficence had on both the Church and the Roman Empire were, according to Lipka, indicative of the longstanding practice to encourage the centralization of a cult in an Empire which was constantly surfeited with transient populations representing a variety of belief systems. Lipka writes:

In polytheistic culture, demographic density and fluctuation, caused by immigration, were tantamount to a dense and constantly shifting system of divine concepts, all competing with each other. The only guarantee of stability and continuity was a permanent spatial focus for the cult.⁸⁴

Stability and continuity were exactly the traits that the Empire had long been in need of – although it might be a deuce difficult to argue it had ever wholly been the case – and it is interesting to note how Constantine's attention to the Christian religion and its “space” were indicative of his two most monumental achievements, the Nicene Council and the founding of his city, Constantinople. Both these events were fixated on space, and both events were about creating stability and continuity. While the location of Constantine's imperially inaugurated councils changed, their legislation was binding on the whole Empire. In the same way Nicene decisions were made to be precedent setting decisions, Constantinople was to be the precedent setting city.

Constantine's City

37. If the historian Zosimus is correct, Constantine's onetime display of Christian piety in excusing himself from the traditional pagan religious rites upon the Capitol seems to have engendered the hatred of the senate and the people in Rome, and it was apparently due to this political change in climate that he then left to build his new city.⁸⁵ This new venture, built on the site of what was then the city of Byzantium, enabled Constantine to build up from a *tabula rasa* up to his ideal *includior urbis*. Constantine was able to ‘spacialize at will’ at this new site, but as the record shows, he seems to have given both the Christian religion and the ancient religions similar deference based on how he constructed the new city. The historian Zonaras, whose own history was the product of a number of other earlier accounts,⁸⁶ records that Constantine's new building program made the city many times larger.⁸⁷ He writes:

⁸³ *Vide supra*.

⁸⁴ Lipka, *Roman Gods*, 188.

⁸⁵ Zosimus, *New History*, 2.29.5, 37.

⁸⁶ Thomas M. Banchich, *The History of Zonaras: From Alexander Severus to the death of Theodosius the Great*, trans. Thomas M. Banchich and (late) Eugene N. Lane (London: Routledge, 2009), 1-2; Zonaras, *History of Zonaras: From Alexander Severus to the death of Theodosius the Great*, Prologue 1.3-1.7, 23-25.

⁸⁷ Zonaras, *History of Zonaras*, 13.3.17, 155.

Churches were consecrated by him therein and many things were done for its adornment, above all the circular porphyry column, which, the story goes, was conveyed from Rome and set up in the marketplace which was covered with paving stones from which it derived its name “The Plaza.” On it he consecrated a bronze cult statue, a marvel to behold on account of its craftsmanship and size. For it was gigantic, and it exhibited the precision of an ancient hand, almost fashioning things actually animant. It is said that the cult statue was a monument of Apollo which had been transferred from the city of Ilium in Phrygia. That most divine emperor erected the statue in his own name, having fastened to its head some of the nails which fastened the body of our Lord to the salvific cross.⁸⁸

Now the great Constantine adorned the city in many other ways and by elevating Byzantium, which previously was a bishopric of Thracian Heracleia, since it had been subjected to Perinthus by Severus after its capture (as is related in my treatment of Severus), to the patriarchal rank, having preserved seniority for the senior Rome on account of its senior birth and on account of his transference of the sovereignty hither from there.⁸⁹

Perhaps the two most striking aspects of these passages from Zonaras are that, first, Constantine’s centerpiece for the city, the great statue of Apollo, was altered slightly to give some honour to the Christian god, and thus *prima facie* appears as a great confluence of Christianity with the empire’s pagan religious traditions and architecture. Constantine’s ameliorating actions pursuant to his new choice of Christianity as the state religion implies an attitude of toleration, and perhaps a willingness on his part to embrace both Rome’s pagan past and the burgeoning Christian faith. The second notable observation is the fact that Zonaras understands the sovereignty as having been physically transferred from Rome to Constantinople, along with the Emperor. While the sovereignty may have moved with the Emperor on this accounting, one cannot escape the fact that based on the textual evidence, Constantine in nowise intended to take the primacy away from Rome as the Christian centre. This is important to my inquiry since in the West it was the empire that ultimately fell and the religion that lasted. The West’s sovereignty, however tentative such may have been, naturally devolved on his spatially located Christian Church in Rome.

38. The observations from the pages of Zonaras’ history seem to confirm Lipka’s main contention that Constantine was clearly concerned about giving the official cults a geographically bounded space wherefrom they could radiate outwards with the stability and unity for which we know he so dearly longed. Constantine is recorded as having remarked a number of times that “it was necessary that the man in control spare nothing at all, [26] not even his own limbs themselves, to ensure the stability of public affairs.”⁹⁰ Constantine’s Nicene Council and his re-building of Byzantium are surely two of the greatest examples on record of just how serious the Emperor was when it came to stabilizing the Empire. With the foregoing in mind, it is perhaps not surprising then, that

⁸⁸ Zonaras, *History of Zonaras*, 13.3.18, 155.

⁸⁹ Zonaras, *History of Zonaras*, 13.3.19, 155.

⁹⁰ Zonaras, *History of Zonaras*, 13.4.25-4.26, 158.

Christianity, spacially anchored as it would continue to be due to Constantine's efforts, would continue to emanate and be legitimated from the two city centres which he had helped anchor it to.

Far More than a Gathering of Bishops

39. I maintain that Nicaea was far more than a gathering of bishops. In a modern Western society where religion means very little to very many, a gathering of bishops would hardly attract notice; but in a culture where religion was the framework around which people organized their lives, a gathering of multi-national religious leaders summoned by the head of state is tantamount to a *political* conference. I suggest that this first international conference aimed at securing a political peace was both a distant precedent for the Peace of Westphalia and, as well, the primary historical and transformational event which necessitated it. Notwithstanding any twenty-first century objections to the contrary, and as Burckhardt so adeptly noted,⁹¹ the Christian religion in the era of Nicaea was an organized governing body. What has to be kept in mind, as well, is the fact it was Constantine who summoned these religious leaders to convene before him and in no sense did the Christian religion call this conference on their own initiative. This was a political conference with religious connotations and not the other way around.

40. Nicaea was an international council of religious leaders held in a context where the practice of religions was a defining characteristic of the body politic. It also seems reasonable to suggest that while Nicaea was first occasioned by the internecine conflict arising out of dogma in the vast Christian Church, by the time the crisis progressed to the point that Constantine decided to call the council, it seems it was the decision of a calculating emperor looking to guarantee consolidated power rather than an effusion of Christian enthusiasm. With these considerations in mind, I suggest Nicaea is better understood as a multi-national political forum which inextricably set Europe on a course towards the era of the universal powers, and hence, Westphalia.

Nicaea, Westphalia, and Sovereignty

41. Sovereignty is a concept whose theoretical lineage is steeped in the idea that to be effective it must be both moral and coercive. In noting this, perhaps naturally, I mean morally and coercively executed for the benefit of the *civitas* and not the opposite. In a fundamentally unbroken nexus from Socrates to Hobbes, thinkers have long contended that humankind's fundamental flaws, whether arising from unfamiliarity with the "good" or from "original sin", were so fatal that sovereign governance over citizens of a *polis* must be facilitated *via* a coercive regime. These same political theorists, and here I refer specifically to any important thinker who has contributed to the "great conversation" pursuant to civil administration in so far as it concerns the European branch of such thought, have also insisted that this coercive sovereignty must ultimately be for the benefit of those citizens who make up the state. Put simply, political theorists have maintained that citizens on their own are not capable of self-governance and require some form of paternalistic leadership.

⁹¹ *vide supra*.

42. Further, the emergence of state sovereignty is an idea which is supposedly intimately connected with the Peace of Westphalia in 1648. This research recognizes that there are a variety of opinions on the solvency of such a claim, but assuming that the treaties of Münster and Osnabrüg⁹² were important to the development of state sovereignty, this research suggests that an important precedent which necessitated the onset of Westphalia happened thirteen-hundred years earlier at the Council of Nicaea. Thirteen-hundred years is a massive swath of history, but the twenty-one inter-regional Christian Church councils which took place at various points along this historical trajectory may provide the sovereignty discourse with more food for thought as to how Westphalia came about in the first place. In other words, what were the constitutional and conciliar precedents which brought states together at Westphalia to break the ubiquitous cultural and partly political hold which the Roman Church had over the imperial states within Germany? I note that this connection between Church and State was first born at Nicaea, and that just as Constantine represented the real political power at the first conference of bishops, so the representatives of France and Sweden took on a similar role at the treaty tables of Westphalia. France and its allies were now wresting back a similar role of raw political power, however coloured it was with Christian pretext, and thus this event had more certainly set a new trajectory away from universal powers and towards true state and territorial sovereignty.

43. I suggest that the Council of Nicaea in 325 C.E. was a trajectory-setting event in the nexus of transactions which brought the Roman Church into a place of barely veiled state sovereignty by the sixth century. Based on the extant texts and their corroborative evidence, some of the key ones having been noted above, I agree with Burckhardt's emphasis on the political organization and power of the Christian Church even just prior to Constantine's Nicaea. I further suggest that, in raw terms of power and authority, the Church's sovereignty was not so much conceived at Nicaea as it was born. After the sixth century transfer of political control which was necessitated by Rome's fall at the hands of the barbarians, along with their antecedent imperial exodus to Constantinople, the Roman Church was essentially left alone to politically rebuild Europe with the, then, nascent universal power of the Frankish kings. Without wanting to over generalize, it is a commonly known fact that for the intervening period between the two landmark events of Nicaea and Westphalia, the two universal powers of Church and Emperor shared the sovereign territorial control of Europe, and the relative intensity of such control varied concomitant to the relative clout of one *vis-à-vis* the other. Of course, in the latter half of this time period, it was not merely the emperor but a whole array of regional dignitaries representing geographical areas who participated in exercising power over both people and place. Yet for this research, the important observation is that the Church was a key component of sovereign rule in Europe from Pope Gregory the Great, 540-604 C.E., until, at least, the Peace of Westphalia in 1648.

⁹² *The Articles of the Treaty of Peace, Sign'd and Seal'd at Munster, in Westphalia, October the 24th, 1648, in A General Collection of Treaty's, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the present Time* (London: Printed by J. Darby for Andrew Bell in Cornhill, and E. Sanger at the Post-house in FleetStreet, 1710), Treaty Opening, 2.

A Brief Discussion on the Development of the Notion of Sovereignty

O Enlil, the lord who decides destinies, whose commands cannot be altered, who makes my sovereignty magnificent...

King Hammurabi, *Code of Hammurabi* (18th c. B.C.E.)

... περί τε τῆς ἀρχῆς καὶ περὶ τῆς πόλεως, καὶ διὰ μάχης ἐχώρησαν, ἐν ᾗ ὁ Ῥῶμος ἀπέθανεν....

Zonaras 7,3. *Dio's Roman History*

44. From King Hammurabi to the present day, the notion of sovereignty has always been associated with power. The ancient Babylonian King, who bequeathed history with one of the first known written codes of law, was specific to mention in his code exactly who it was who underwrote the sovereignty, and importantly, for his own legitimacy, who executed it. Almost one millennium after Hammurabi of the eighteenth century B.C.E., in the eighth century, we learn from the historian Zonaras that sovereignty, specifically the question of who should wield such, was the cause of Remus' death at the hands of his twin brother Romulus.⁹³ It seems that in the minds of the two founding brothers of Rome, ultimate authority could not rest in the hands of both and thus it ultimately rested with one. Yet Rome's history shows that such an arrangement was unsatisfactory to many of its citizens, and in time kings were replaced with a republican scheme, which was, itself, subsequently vanquished by an imperial system of governance. I note here, though, that sovereign authority in all these circumstances, devolved as it had on various arrangements of interested parties, never wholly moved beyond the class and religious interests which characterized the lives of its executors. In other words, from Hammurabi to Hadrian, and even on past to the Hapsburgs, the only affective benefactor of sovereignty was, at least in theory, the deity. In societies where religion was the fundamental framework of daily life for all classes, rulers, for the sake of legitimacy, had to acknowledge that it was the God or 'the gods' who had bequeathed their sovereignty. In this context sovereignty was never corporately or individually understood as solely attached to either the will or skill of personages.

45. Yet with the Early Modern collapse of Religious hegemony in Europe, and the concomitant dawn of humanism and republicanism, sovereignty was an idea which had to be re-characterized in an effort to understand the concept in a more rationally centered way. God remained the guarantor of European sovereigns, at least on paper, but the untrammelled rights of kings and nobles to direct their affairs as they saw fit without regard to any notion of reciprocal obligations under the law was now being reigned in to mollify the outrage of those who had labored under their oppressive yokes. The most important of those whose rights began to be recognized under the rubric of "sovereignty" were the erstwhile masses of subjects whose cultural and legal status was slowly transforming away from royal property towards a more conciliatory notion of individuals under sovereign rule and junior partners in the life of the state. The seventeenth century joint recognizance in England's *Calvin's Case* – only ten years prior to the start of the

⁹³ '[Romulus and Remus disputed] about the sovereignty and the city, and they got into a conflict in which Remus was killed.' Zonaras 7,3, *Dio's Roman History*, trans. Earnest Cary (London: William Heinemann, 1914), Book I, 17.

Thirty Years' War and thirty years before England's own revolutionary war – that there existed a reciprocal duty between sovereign and vassal was perhaps emblematic in some sense of both the positive trend towards legislated protection of citizens, and yet, as well, the almost imperceptible nature of any change to sovereignty's framework prior to Westphalia.

*duplex et reciprocum legamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex legamen.*⁹⁴

While this classic statement of reciprocal obligations indicated a legal entrenchment of a principle aimed at the safeguarding of both parties within the sovereignty compact, the reality of the context that gave rise to it was one of barely veiled feudalism. Yet the beginning of the end was in sight, and within fifty years from this 1608 case, the English Civil War and Thirty Years' War were both in high gear.

Sovereignty's First Raconteur: Jean Bodin

46. The keystone event which served as the impetus for *all* these fluctuations in political ideology and practice was the Protestant Reformation, which although it had begun centuries earlier with John Wyclif and Jan Hus, was now in full bloom in the fifteenth century pursuant to Martin Luther and his engagement with a corrupt and recalcitrant Roman Catholic Church. Coming on the heels of Martin Luther, and in the midst of the reformation's continuing upheavals, was sovereignty's first raconteur, the French political commentator and attendant of the royal court, Jean Bodin (1530-1596 C.E.). This early modern thinker's attempt to tackle the idea of sovereignty was essentially driven by his desire to put his French King "at the apex of the pyramid of authority."⁹⁵ Bodin was a member of the Catholic Church and wrote under a Catholic King, but it is suspected that his true religious commitments were much closer to Judaism and neo-Platonism.⁹⁶ Notwithstanding the conjecture on his genuine religious sentiments, we are left with the historical fact that Bodin wrote to curry favour with the, then, new Catholic monarch,⁹⁷ King Henri III,⁹⁸ and it cannot be too surprising that his definition of sovereignty should fall most favourably to this same king. In his most famous work, *Les six Livres de la Republique*,⁹⁹ Bodin wrote:

⁹⁴ *Calvin's Case*, ER 77, (1608) Coke 7, 382.

⁹⁵ Stéphane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law," *Melbourne Journal of International Law*, 4 (2003): 25.

⁹⁶ Julian H. Franklin, trans. and ed., *Jean Bodin: On Sovereignty, Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992), xii.

⁹⁷ Beaulac, *Bodin's Sovereignty*, 9.

⁹⁸ Reign: 1574-1589.

⁹⁹ Hereinafter, '*Six Books*,' (Beaulac, ft. 48, 9). The English translation used in this study is from Julian H. Franklin's *Jean Bodin: On Sovereignty*. English translations of this work appeared in 1606 from Richard Knolles and then M.J. Tooley in 1955, but according to Franklin both contain fundamental flaws arising from selectivity as well as lack of scholarly rigour (Franklin, xxxv). Franklin's translation is based on the French edition of 1583 from Jacques du Puys, and it is has been used as the master text for translations into German and Italian, and is the one commonly used by scholars (Franklin, xxxv-xxxviii).

Sovereignty is the absolute and perpetual power of a commonwealth...¹⁰⁰

We thus see that the main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent.¹⁰¹

For if justice is the end of law, law the work of the prince, and the prince the image of God; then by this reasoning, the law of the prince must be modelled on the law of God.¹⁰²

Since there is nothing greater on earth, after God, than sovereign princes, and since they have been established by Him as his lieutenants for commanding other men, we need to be precise about their status (*qualité*) so that we may respect and revere their majesty in complete [212] obedience, and do them honor in our thoughts and in our speech. Contempt for one's sovereign prince is contempt toward God, of whom he is the earthly image. That is why God, speaking to Samuel, from whom the people had demanded a different prince, said 'It is me that they have wronged.'¹⁰³

This same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it – such as declaring war or making peace; hearing appeals in the last instance from the judgments of any magistrate; instituting and removing the highest officers; imposing taxes and aids on subjects or exempting them; granting pardons and dispensations against the rigor of the law; determining the name, value, and measure of the coinage; requiring subjects and liege vassals to swear that they will be loyal without exception [224] to the person to whom their oath is owed. These are the true prerogatives of sovereignty, which are included in the power to give law to all in general and each in particular, and not to receive law from anyone but God.¹⁰⁴

When discussing sovereignty, Bodin is referential, deferential, and preferential to one source as the sole loci for temporal sovereignty: God. The fact that perhaps the most robust and respected theoretical treatment of sovereignty up to and including the modern period is so inextricably woven into a monotheistic worldview is important to both this research and the greater conversation on sovereignty. It is important to this research because it reflects the saturation levels of a Nicene and Augustinian Christian outlook which was still, even at such a great distance, deeply committed to the Platonic idea that the “good,” or God, was the source of all successful political arrangements. The observation pertaining to Bodin's theistic worldview is also important to the greater conversation on sovereignty in that it portrays the necessity of a moral guarantor, and Bodin's enthusiastic subordination of his tenets of sovereignty to God in the pages of his *Six Books* is, if nothing else, an occasion for pause concerning the question of just what

¹⁰⁰ Bodin, *Six Books*, Franklin, 1.8.122, 1.

¹⁰¹ Bodin, *Six Books*, Franklin, 1.8.142, 23.

¹⁰² Bodin, *Six Books*, Franklin, 1.8.158, 45.

¹⁰³ Bodin, *Six Books*, Franklin, 1.10.211-212, 46.

¹⁰⁴ Bodin, *Six Books*, Franklin, 1.10.223-224, 59.

the modern public international law notion of sovereignty rests on besides the brute force that has served as sovereignty's corollary from time immemorial.

47. Bodin's sovereignty gave virtually untrammelled power to the king to both give and repeal laws at his discretion. This law-making power was the absolute apogee of Bodin's sovereignty, and was put in the hands of one person, his king. In theory his king was bounded by only one law: not surprisingly, again, given the context, the law of God. J.H.M. Salmon notes:

Bodin held back from making the legislative sovereign prince truly absolute, or free from any restraint. He was bound to observe Divine and natural law, although no human agency could force him to obey the commands of God and the principles of moral justice. While he was not obliged to fulfil his promises, any more than he was to observe his own laws of those of his predecessors, he had to respect the covenants he made with his subjects, although he was the final judge of the equity of a covenant and of the time when it ceased to be binding because it no longer served the interest of the other party. Yet the sovereign could not change the fundamental or constitutional laws: 'Touching the laws which concern the state of the realm and the establishing thereof, forasmuch as they are annexed and united to the crown, the prince cannot derogate from them, such as is the law Salic.'¹⁰⁵

Salmon noted this central inconsistency of both unhindered law-making power accorded to the king along with restraints on the very same in Bodin's sovereignty schema.¹⁰⁶ Yet some kind of failsafe, such as the ultimate law of God overruling the king, was not to be unexpected either: and as shown above, similar clauses went into most elaborations of the ideal state.

48. D. Engster has suggested there was a contextual reason which prompted Bodin to attribute all sovereignty to the law-making power of the king, that being the context in which he lived.¹⁰⁷ Engster argues that Bodin "proposed his absolutist theory of sovereignty as a way to preserve a minimal point of universal and immutable order for politics in a social world that he perceived as highly disorderly, corrupt and changing."¹⁰⁸ Given the fact that laws were eventually recognized by Bodin to be mutable, Engster goes on to assert that Bodin was transferring the locus of universal right among people from a sovereign law to a sovereign law-maker.¹⁰⁹

49. Bodin wrote his treatise on sovereignty just as the fissures in the great wall of Catholic Christendom's ideological and political hold on Europe were becoming too large to ignore. Bodin had arrived on the heels of reformers like Erasmus (1469-1536 C.E.) and Martin Luther, and was a contemporary of Jean Calvin (1509-1564). It seems likely that

¹⁰⁵ J.H.M. Salmon, "The Legacy of Jean Bodin, Absolutism, Populism or Constitutionalism?," *History of Political Thought*, 17.4 (1996): 503.

¹⁰⁶ Salmon, *The Legacy of Jean Bodin*, 503.

¹⁰⁷ D. Engster, "Jean Bodin, Scepticism & Absolute Sovereignty," *History of Political Thought*, 17.4 (1996): 470-471.

¹⁰⁸ Engster, *Scepticism & Absolute Sovereignty*, 470-471.

¹⁰⁹ *Ibid.*, 471.

Bodin saw the writing on the wall concerning the end of Christendom, and though he does not sever his ties to the Church, his *Six Books* were clearly drafted such that sovereignty's main players were God and the king, purposely giving short shrift to the weakened titular entities of pope and emperor.¹¹⁰

50. Given his context, it seems Bodin was, at least in some sense, trying to salvage as much as he could in terms of the ancient prescriptions for political order by bringing the law-making power in society as close to God as he possibly could. Instead of an order of sovereign power which devolved from God to the laws and then to the king, Bodin presented an order which put the king next in line to God. In this way, the laws were in some sense more directly subject to alteration, and perhaps this was due to the corruption and disorder which Bodin saw as the resultant effects of a late-mediaeval world where laws and tradition ruled out over divine order to the detriment of humankind. In other words, Bodin was fully prepared to jettison the dilapidated and abusive Catholic and Imperial system which was coming apart at the seams, but he could not countenance any shrinking back from the role of God as the source for all ordered and sovereign rule. D. Engster writes:

From a historical-theoretical perspective, therefore, Bodin's more absolutist theory of sovereignty appears not just as a reaction to circumstances, but also as his final solution to the problem of a highly secularized and changing temporal world. Once he decided that there was no universal law underlying the various laws of different peoples, he asserted his idea of absolute legislative sovereignty to serve as a new universal foundation of law and politics. He claimed the sovereign was a point of divine and natural right placed upon earth to impose order upon the otherwise corrupt and mutable social life of human beings.¹¹¹

Bodin understood a God-ordained status for the king which was in keeping with both the God of the Jewish Scriptures, aka the Old Testament, and Pauline Christianity, both of which support the notion that secular rulers are placed on the throne by God alone.¹¹² Bodin's reference, above, concerning God's lament to the prophet Samuel, which implies that rejecting God's prince is rejecting God, gives us perhaps some indication of the level of interconnectedness and indebtedness between Bodin's theistic worldview and his definition of sovereignty. I observe that Bodin, as the first theorist to give traction to the notion of sovereignty, was in both his assumptions and theory a product of his European Christian context. Thus, here again, long after the Greeks, Romans, and Augustine's treatment of the state have passed, we find Bodin in the sixteenth century still deeply

¹¹⁰ Bodin, *Six Books*, Franklin, 1.8.155-156, 38-39.

¹¹¹ Engster, *Jean Bodin, Scepticism & Absolute Sovereignty*, 471-472.

¹¹² 1 Samuel 8:7 reads: "and the LORD said to Samuel, 'Listen to the voice of the people in all that they say to you; for they have not rejected you, but they have rejected me from being king over them.'"; The Apostle Paul's letter to the Romans 13:1-4 reads "Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgement. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God's servant for your good. But if you do what is wrong, you should be afraid, for the authority does not bear the sword in vain!" (NRSV: Anglicized Edition, 1989).

committed to the theologically charged presuppositions of his ideological forebears. I suggest that far more than writing in defence of these ancients, although he does that on occasion,¹¹³ his *Six Books* seems most concerned to defend the political order which comes from God alone.

51. Stéphane Beaulac also notes that with Bodin we are dealing with a definition of sovereignty aimed at the *internal* organization of a society, whereas with a later thinker like Emerich de Vattel (1714-1767 C.E.), the transmutation of the idea of sovereignty was then applied to the *external* and international community of nations.¹¹⁴ Beaulac's assessment of Bodin's sovereignty leads him to suggest that sovereignty is a word that is subject to changes in its nature and effects over time, and the lineal bifurcation in meaning pursuant to its internal and external manifestations bears this out clearly.¹¹⁵ With this in mind, it may then be unrealistic to expect the word sovereignty to "settle" into a set definition either now or at any point in the future.

52. An interesting side bar to both Beaulac's observation about the growth of sovereignty beyond internal boundaries vis-à-vis Bodin's idea that sovereignty relegates to the monarch alone is the question of 'who would Bodin then attribute sovereignty to amongst a congress of nations?' If one person, the king, alone had sovereign power internally, would then one nation be recommended by Bodin as having the sovereign rule over other nations externally?

More Recent Assessment on Sovereignty

And it will be seen that there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.

Lassa Oppenheim, *International Law: a treatise*

53. Lassa Oppenheim's characterization of the general puzzlement which the notion of sovereignty had caused was not unwarranted in his own time in the nineteenth century, and it is certainly *apropos* now.¹¹⁶ A veritable ebullition of opinions and critiques have recently been – and by recently, I mean the last fifty years – aimed squarely at the idea of sovereignty;¹¹⁷ yet, through it all, Oppenheim's lament remains the presiding sentiment. There seems to be a tension over whether sovereignty should remain the same, be re-

¹¹³ Bodin, *Six Books*, 2.1.264-265, 102-103.

¹¹⁴ Beaulac, *Bodin's Sovereignty*, 27.

¹¹⁵ Beaulac, *Bodin's Sovereignty*, 27.

¹¹⁶ Oppenheim, L. (Lassa), *International Law: a treatise*, 3rd ed., vol. 1 of 2, ed. Ronald F. Roxburgh (London ; New York : Longmans, Green, and Co., 1920-1921): 1.1.66, 129.

¹¹⁷ Trudy Jacobsen, Charles Sampford, and Ramesh Thakur, eds., *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008); Neil Walker, ed., *Sovereignty in Transition* (Portland: Hart, 2003); John D. Montgomery and Nathan Glazer, eds. *Sovereignty Under Challenge* (New Brunswick, NJ: Transaction Publishers, 2002); Jens Bartelson, *A Genealogy of Sovereignty*, no. 39, *Cambridge Studies in International Relations* (Cambridge: Cambridge University Press, 1995), 248; F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 232-233.

envisioned, or scrapped altogether.¹¹⁸ It seems sovereignty as a solvent and acceptable concept is something which has yet to arrive, and perhaps the politics attached to both sides of the debate will insure that it never will. Sovereignty as an idea now seems to be “under construction,” in a manner of speaking, and yet it may be that such a state of being will turn out to be its most dangerous incarnation. The transformation of sovereignty that Beaulac highlighted from Bodin to Vattel took two-hundred years and was the result of monumental societal changes, but the current status for theoretical sovereignty is a far more mutable state of being. One of the problems for both practical and theoretical sovereignty may be that with no set definition it will be very hard to either regulate or criticize, precisely because it remains in flux. Yet, even in light of the difficulties, it seems that so long as sovereignty continues to be used by statespersons engaged in international legal relationships, what it means in that context must be of some import, even if there is ultimately room for improvement.

Hinsley's Axiom

54. Sovereignty scholar F.H. Hinsley has indicated in his work that this is precisely the case. As indicated in the historical references already alluded to, Hinsley wrote that sovereignty was long understood as being the only unqualified authority within a political system,¹¹⁹ and that it became an idea which people used to strengthen older forms of legitimation or tailored it in new ways on the way to converting their raw authority into power.¹²⁰ He also poignantly noted that so long as the definition ends with “and no final and absolute authority exists elsewhere,” sovereignty could be satisfactorily defined.¹²¹ Hinsley's apologetic treatise on sovereignty rests on the axiom that the modern complexity of human society demands a functional understanding of sovereign governance, notwithstanding criticisms to the contrary.¹²² He writes:

The concept of the sovereignty of the ruler was at the outset an essential ingredient of these theories for a good reason. When it became one essential feature of political society, this division of power or this collaboration of forces did not dim the importance of another – the need to ensure the effective exercise of power. The function of the concept of sovereignty was to provide the only possible compromise formula by which this primary need could still be met despite the development of this unavoidable association. As the community became still more complex the concept of the sovereignty of the ruler was challenged by the thesis of the sovereignty of the people and even, later, by the thesis that the state was dispensable. These arguments could not meet this primary need, however, the more so as the growing complexity of the community was only serving to emphasize the importance of the state. On both of

¹¹⁸ Martin Loughlin, “Ten Tenets of Sovereignty,” *Sovereignty in Transition*, ed. Neil Walker (Portland: Hart, 2003), 55; Jens Bartelson, *The Critique of the State* (Cambridge: Cambridge University Press, 2001), 1, 161-165. He writes (p. 164) ‘According to Walker, the most important expression of the limit of political imagination is the principle of state sovereignty. Its importance derives from the fact that state sovereignty is thoroughly constitutive of the modern political order and yet is itself constituted in and through political discourse... Within this view, the sovereign state enjoys no existence outside the discursive practices of international relations.’

¹¹⁹ Hinsley, *Sovereignty*, 1.

¹²⁰ Hinsley, *Sovereignty*, 25.

¹²¹ Hinsley, *Sovereignty*, 26.

¹²² Hinsley, *Sovereignty*, 233-235.

these accounts the only recourse was to preserve sovereignty in the society by tightening still further the association between the state and the community at the expense of incurring greater complexity also in the character, the forms and procedures and the conception of the state. It is safe to say that, far from seeking to destroy it, the central developments of modern times in that direction – the rise of legislatures, the extension of suffrages, the introduction of representation and the insertion of constitutional features into the composition or the basis of executive organs – have been produced by the fundamental need to preserve the sovereignty of the state, as the pre-condition of effective action in and by the community, against the growth in modern political societies of other imperative but nevertheless less basic needs.¹²³

Of course, premised as all these changes of the Modern and Post-modern period were on the antecedent Protestant Reformation and rise of humanism, Hinsley's axiom must, then, be altered somewhat to acknowledge that it is not the mere complexity of society which required the need for a functional understanding of sovereign governance, but a complexity which is based on the need to protect and preserve those fundamental human freedoms and rights which were the epicentre of the struggles which ultimately necessitated such complexities in the first place.

55. In other words, just as with the Greek conception wherein sovereignty was thought only to rest in a, first, morally centered, and then, second, coercive framework, it was the attendant positive consequences for the *polis* in general which were the *sin qua non* consideration which justified such paternal measures. In a somewhat similar way, it seems that the same positive consequences were demanded by the peoples of Europe in their march towards the state enforcement and protection of human rights. Merely citing societal complexity as a justification for the sovereign exercise of power would be leaving aside the very heart of what the Early Modern and Modern revolutions in thought and culture stood for.

56. Similar to Hinsley, W.J. Stankiewicz contends that the crux of sovereignty is found in the theory's ability to functionally integrate the 'complex' aspects of rule. He wrote:

It is the ability of the theory of sovereignty to do this – to integrate into a meaningful complex a large number of distinct categories, such as coercive power, community, obligation, legitimacy, and authority – which determines the 'meaning' of sovereignty: not some normative statement that holds true of only one particular society, or some empirical observation about a single element in the sovereignty concept.¹²⁴

Here again, it is the facilitation of the simultaneous functionality of the variegated aspects of state organization which is alleged to hold sovereignty together. Both Hinsley and

¹²³ Hinsley, *Sovereignty*, 233-234.

¹²⁴ W.J. Stankiewicz, "The Validity of Sovereignty," *In Defense of Sovereignty*, ed. W.J. Stankiewicz (London: Oxford University Press, 1969), 294.

Stankiewicz comment on the role which the complexity of human relations played in the growth of state sovereignty. Yet the complexities both of these scholars refer to, in so far as they include the advancement of human rights in the Modern and Post-modern eras, were ones which were laden with morally positive content and outcomes. Some of the burgeoning complexities may have had little to do with human rights, such as the growth of cities and the industrial revolution, but when we look at the transformation of legal instruments and the vast changes in functional political structures in the course of the latter half of the second millennium of the Common Era, we see that the general direction for both these phenomena were towards a greater protection of human and political rights for the people living in these nascent states. From the *Magna Carta* to the Protestant Reformation, and on to the revolutionary wars of the modern period, the orientation of these events was ultimately about the rights of people, however obfuscated the individual events were by the egos of kings, popes, and generals.

57. It would seem that any justification on the need for preserving sovereignty based on the complexity arising from Modern and Post-modern societal change will have to insist that such change be consistent and continual, where necessary, with its original goal of the protection of persons and their concomitant rights. If the international legal community jettison's this moral imperative for sovereignty, I suggest it would negate the legitimacy of it for the primary reason that the march towards the protection of human rights is, taking a long view, the foundation of the idea of state sovereignty within international legal discourse.

Some Observations on Sovereignty and Westphalia

That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty, the house of *Austria*, and its Heirs, and Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of his said Christian Majesty, and all their Heirs and Successors, chiefly between the most Serene Queen and Kingdom of *Swedeland*, the Electors respectively, the Princes and States of the Empire, on the other Part. That this peace and Amity be observ'd and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other; that thus on all sides they may see this Peace and Friendship in the *Roman* Empire, and the kingdom of *France* flourish, by entertaining a good and faithful Neighbourhood.

Article 1, *Treaty of Münster*
October 24, 1648

58. What is fundamentally germane in this opening Article to the importance of the Peace of Westphalia for the development of a system of sovereign states in Europe is the clear recognition of two entities, vis-à-vis one; which had been the status quo up until then. The King of France, styled the "most Christian Majesty," was here apposed to the

Emperor of the so-called “Roman Empire.”¹²⁵ Here, though, the French King is placed on an equal footing with the Holy Roman Emperor, which highlights the re-distribution of sovereignty which was taking place.

59. One of the themes which comes out of the Westphalian agreements and its more recent attendant literature also happens to be a key tenet to this present research, the fact that Westphalia was fundamentally necessitated by the conflicts within the Christian religion. Put simply, the societal bifurcation which led to the Thirty Years’ War in Europe found its genesis in the divergent dogmas which predominated in the Catholic and Protestant arms of the Christian religion.

60. Leo Gross, in his seminal work on Westphalia, emphasized that The Thirty Years’ War was born out of religious conflict and that the Peace of Westphalia established a far reaching and international guarantee aimed at securing religious equality for the Protestant and Catholic states within Europe.¹²⁶ The peculiar note here is that both sides claimed to be *the* Christian religion, and based their claims on much the same kind of dogmatically driven concerns which characterized the Arian split, but which, in this case, had overwhelming political and military implications attached to them. Gross also points to the importance of the peace guarantee itself, specifically the fact that all parties were required to defend it against all others, regardless of which side of Christianity they were on.¹²⁷ Westphalia was a step towards a constitutional Europe wherein all adherents were expected to vouchsafe the terms by intervening in case of a breach.¹²⁸ As much as the two treaties were the beginning of international recognition and mutual obligation between states, it is fundamentally important to appreciate that the context for such correlatives were rooted in the religious divide that existed in Christian Europe. If sovereignty did emerge here at Westphalia, it must be conceded that it was a religiously charged sovereignty. It was, at its core, a right to rule over one’s own *religious* affairs with impunity.

61. Although the great war of the seventeenth century began due to a religious divide, the key implications of its subsequent peace for the development of the international legal system seems to have been more grounded in its tendency to recognize republican states, regardless of their religion.¹²⁹ I would suggest that in the same way Nicaea set the Christian Church on a trajectory for statehood and sovereignty, so Westphalia set the nations of Europe on a trajectory for individual state sovereignty. Nicaea was an experiment in homogeneity: Westphalia, an experiment in heterogeneity. Westphalia was the constitutional act which represented Europe’s emergence from an era of universal

¹²⁵ *Treaty of Münster*, October 24, 1648, *Major Peace Treaties of Modern History: 1648-1967*, vol. 1, ed. Fred L. Israel (New York: Chelsea House Publishers, 1967), Article 1, 9.

¹²⁶ Leo Gross, “The Peace of Westphalia, 1648-1948,” *American Journal of International Law*, vol. 42 (1948): 21-22.

¹²⁷ Gross, *The Peace of Westphalia*, 24.

¹²⁸ David Jayne Hill, *A History of Diplomacy in the International Development of Europe*, Vol. II, 1925, p. 602, cited in Gross, “The Peace of Westphalia,” 24.

¹²⁹ Gross, *The Peace of Westphalia*, 26.

powers to the era of republican states:¹³⁰ and I suggest the former had begun at Nicaea. If Westphalia was the death of the universal reign, then the Council of Nicaea was its birth.

62. The Nicene gathering was the first constitutional partnership between the Christian Church and the state, and with the Emperor Constantine's calling and presiding over the Council, the event's significance in this regard can hardly be exaggerated. Yet by the seventeenth century, not only had the relationship between the emperor and church radically changed, but so to had the relationship of these two powers to the political organization of their "subjects," represented in the emergence of republican states during the early modern period.

63. As mentioned above, the key development moving Europe towards this clash of dogma, military power, and emergent statehood, was the Protestant Reformation. Gross correctly observes that this factor, along with the Renaissance and nationalism, struck a decisive blow to the universal authority claimed by the universal powers.¹³¹ He writes:

The combined impact of these centrifugal forces could not, in the long run, be resisted solely by the writings of the defenders of their authority. To maintain the claims it would have been necessary to display a real overpowering authority. Neither the Pope nor the Emperor, however, was at that time in the position to restrain effectively the centrifugal tendencies.¹³²

No longer was there any Constantine figure to bring to bear any kind of overpowering authority to settle disputes intrinsically grounded in dogma. Constantine's state Church had by then grown far beyond any of its own deontological justifications into the shared governance of Europe. What had begun, at least where the Church was concerned, as a struggle for monopoly on doctrine at Nicaea ended in perhaps a similar way with a war over another dogmatic divide between the Catholics and the Protestants. In both cases, interestingly, it was the political governing power that first showed the Church the door *into* a place of sovereign power, and ultimately showed them the way out, as well.

64. On the political side of the equation, vis-à-vis the religious aspect, while Westphalia represented a shift away from the antiquated system of Europe's erstwhile governance, Derek Croxton has reminded us that no cataclysmic change was characteristic of the Westphalian exercise. He writes:

The Holy Roman Empire did *not* cease to exist in practice or in theory in 1648. Had it been abolished, one could argue that the peace of Westphalia legitimized the de facto independence of the German princes, and thus took a demonstrable step towards the formal recognition of sovereignty. The estates continued after 1648, to think of themselves as a single body.¹³³

¹³⁰ Gross writes it was "the end of epoch and the opening of another," *Peace of Westphalia*, 28. Cited in Gross also, 28: John Eppstein, *The Catholic Tradition of the Law of Nations*, 1935, p.192. 28.

¹³¹ Gross, *The Peace of Westphalia*, 28.

¹³² Gross, *The Peace of Westphalia*, 28.

¹³³ Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review*, 21.3 (Sept. 1999): 574.

The process of undoing the Church and Emperor's power had certainly not reached any end-game by the time of Westphalia, but it cannot be doubted either that with the end of the war and Europe decimated, that things were never going to be the same again. Croxton rightly points out that even Pope Urban VIII, who helped organize the Westphalian congress, refused to act as arbitrator and gave instructions for the papal nuncio not to make any proposals.¹³⁴ Croxton insists that too much has been attributed to Westphalia as some lineally placed panacea which birthed the modern state system¹³⁵ and such an observation seems reasonable in a *prima facie* way. It seems a classic case of taking too little to mean too much. But perhaps, in terms of what my own research aims to do and with a more robust consideration of context, there is the rub.

65. Westphalia looks, at one level, like merely a treaty between two Protestant kings and a Catholic Holy Roman Emperor. But as Gross pointed out, and as the Treaties themselves reveal, Imperial German states having a free hand to choose their own version of Christianity was a marked change from the status quo. In an era where one's religion was meted out on your heretical brethren with swords and bloodshed, and wherein religions were demarcated in a real sense by physical "sovereign" borders, such a release of power as this was sovereignty itself changing hands. Croxton is right that the state system which emerged much later was not present or even considered at Westphalia,¹³⁶ and perhaps the contextual exigencies pursuant to the rebuilding process after the war would have made that impossible in any event. Yet simply because the individual imperial German states did not infer an international system of equal nation states based on their behaviour immediately following the congress, does not then mean that the decisiveness of the legislated international treaty meant any less in the long run to Europe's organization of states.

66. Words were very important to popes and emperors in Europe and had been since the inception of the Christian religion. One only has to look at the legislated enactments of the Church councils, beginning with Nicaea, to understand how much words meant to them. Here at Westphalia, all the brutish invective which had been characteristic of conciliar documents against heretics from Arius to Luther, all the violent acts which had been based on mere 'words,' had finally met a more formidable opponent than themselves. What they met was a concord between nations that their illimitable rule, ostensible or not, was at its end. Westphalia marks the occasion of two legislated documents which disenfranchised the Church and Emperor of a significant amount of political power, and thus by definition, sovereignty.

¹³⁴ Croxton, *Westphalia and the Origins of Sovereignty*, 572.

¹³⁵ Croxton writes: A great deal of creativity is required to attribute sovereignty to the peace of Westphalia in the way scholars have traditionally done. It is more reasonable to treat the negotiations at the congress (as opposed to the treaties that followed) as an important and identifiable stage in the evolution of the states system towards sovereignty. Nobody began or even ended the negotiations at Westphalia with the idea of creating an international system of sovereign, independent states. Many, however, wished to protect their own sovereignty (Croxton, *Westphalia and the Origins of Sovereignty*, 588-589).

¹³⁶ Croxton, *Westphalia and the Origins of Sovereignty*, 588-589.

Wayne Hudson and Possibilities for Sovereignty

67. Wayne Hudson recently noted that even in spite of the classic resistance within the discipline of history towards policy concerns, Michael Mann and John Hall have suggested that we might well be able to notice patterns of long term development and make specific structure-related predictions.¹³⁷ Hudson's 'constructive realism'¹³⁸ approach privileges a 'laying out' of historical materials in an effort to show the reader that new ways framing an idea are in order.¹³⁹ He writes:

A focus on the 'making' of knowledge objects characteristically involves tensions between an emphasis on the 'making' of entities, the claim that entities already made can be made differently, and an emphasis on the role social and economic conditions have in determining how entities are made. I submit that these tensions can be resolved, however, by opting for a form of constructivism which privileges a 'laying out' rather than recursive inquiries into how xs were produced.

A constructive approach of this kind challenges nineteenth-century European history's obsession with narratives, chronicles and stories, and expose (sic) the limitations of a conception of history which implies that truth can be produced by examining the testimony of eyewitnesses (*histor*, and eyewitness). Whereas nineteenth-century European history often sought to confirm the reader's belief in moral values already constitutive of the socio-legal order in which she or he lived, a constructive approach seeks to persuade the reader that socio-legal innovations are needed in light of historical materials.¹⁴⁰

As my own comparative constructivist technique hopes to accomplish, Hudson's approach is also pointedly more concerned with making historical inquiry the hand-maiden of progress, rather than the other way around. Moving the idea of sovereignty from a place of homogeneity to a place of heterogeneity pursuant to its genesis as a "solvent" institutionalizing concept may provide a more robust and morally-centered possibilities for future international arrangements.

68. In this research, I have emphasized the importance of the experience of the Christian religion to the development of the European notion of sovereignty, in so far as the Council of Nicaea set the Church on a trajectory for sovereign power which was then wrested back from it at Westphalia. I have argued that Nicaea must be seen through a historically and contextually rich lens which keeps in the focus the fact that the fourth century Roman world was one fundamentally based on religions. The recent work of scholars like Keith Hopkins,¹⁴¹ A.D. Lee¹⁴² and Michael Lipka¹⁴³ on the essential role

¹³⁷ Wayne Hudson, *Fables of Sovereignty, Re-envisioning Sovereignty: The End of Westphalia?*, eds. Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (Aldershot: Ashgate, 2008), 20. See J. Hall, *Powers and Liberties: The Causes and Consequences of the Rise of the West* (Oxford: Blackwell, 1985).

¹³⁸ Hudson, *Fables of Sovereignty*, 20.

¹³⁹ Hudson, *Fables of Sovereignty*, 21-22.

¹⁴⁰ Hudson, *Fables of Sovereignty*, 21-22.

¹⁴¹ Keith Hopkins, *A World Full of Gods: Pagans, Jews and Christians in the Roman Empire* (London: Weidenfeld & Nicolson, 1999).

¹⁴² A.D. Lee, *Traditional Religions, The Cambridge Companion to the Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006).

¹⁴³ Michael Lipka, *Roman Gods: A Conceptual Approach* (Leiden: Brill, 2009).

which religion served as the ultimate organizing principle of the ancient Roman world suggests that a multi-national gathering such as Nicaea needs to be reconsidered in order to assess both its long term political implications and also to understand the event in a more contextually responsible way. A gathering of Christian bishops in today's world may hardly attract notice and have little political significance, yet if one considers what kind of political impact a gathering of the Islamic religious leaders might portend for the Arab nations and the rest of the world today, one is forced to concede that context must be our guide when assessing the historical impact of a council such as Nicaea. The modern political involvement of religious entities such as Iran's Guardian Council and the Ayatollah Ali Khomeini, for instance, in the tragic election crisis in Iran, 2009, should be evidence enough of just how large a role religion can play, and does play. In states where religion is considered by the majority of people as being far more important than politics, gatherings of a religious nature become *de facto* political. This research suggests that Nicaea was exactly such a gathering.

69. In relation to sovereignty, Hudson sees western political theory's incompetent handling of the importance of religion as symptomatic and 'short sighted.' He writes:

Western political theory has tended to minimize the importance of religion in political and legal contexts. Indeed, many writers on politics assume that religion has no legitimate role. In civilized societies, they assume, religion will either die out or become so emasculated that it can be ignored for most practical purposes. It may play a symbolic role in times of crisis and ornament public funerals, but it has nothing substantive to contribute to the management of the state. This is a very narrow and short-sighted view, and one that takes little account of the role of religion in the Islamic world, in India, in Russia or in Catholic countries such as the Philippines.¹⁴⁴

In today's context of religious diversity management and a worldwide increase in religious adherents, Hudson asks whether the sovereignty/religious governance relationship might be recast as discourse encouraging the social recognition of difference and thus be "constitutive of future legal positivities."¹⁴⁵

70. My own research relies on some contextually rich historical material pertaining to the relationship between sovereignty and religious governance. In relation to Hudson's point about the recognition of difference, it is noteworthy that even at such an early stage in Europe's history, the fourth century, there was a concerted attempt to reconcile different segments of society in the vehicle of the, then, large and growing religion of Christianity. It is interesting to note, as well, that two millennia later we now face another divide in religion which has moved beyond the Christian rubric but which still intrinsically concerns it: and here I refer to the general tension which exists between radical Islamic sects and the "Christian" West. In keeping with the observation above on the changing of the political guard in the West, from religion in ancient times to the modern lionization of finance, so the world is faced today with an oil rich Islamic Middle

¹⁴⁴ Hudson, *Fables of Sovereignty*, 30.

¹⁴⁵ Hudson, *Fables of Sovereignty*, 30-31.

East which supplies a great deal of the world's oil needs and therefore has been, and continues to be, the site of the tragically obtrusive military conflicts of recent memory.

71. It may be reasonable to suggest that while the West has in some manner exchanged their Christian religion for the pursuit of money since the rise of republican states – the pursuit of which is currently dependent on a steady supply of oil – the Islamic nations, however, have chosen not to jettison their religious devotion. How Western nations, fundamentally entrenched as they have been in the Christian religion for centuries, cannot engage a more empathetic approach to dealing with Muslim nations is, at least from a historically architectonic perspective of religion generally – counterintuitive at best.

72. In such a tense and tenuous international environment, it would seem that respect of religious and cultural differences and priorities in the construction of a new notion of sovereignty are paramount pursuant to any chance it might have at being widely adopted. Why other regions of the world should have to countenance and embrace a definition of sovereignty which stems from a Christian era wherein human beings were routinely tortured and killed in maliciously brutal ways, amongst other devastating events such as the almost continual state of war, is a fact which must come across as woefully ignorant, regardless of how mollified the modern “definition” may have become. It would seem that given the concomitant strength and growth rate of Islam along with Christianity's place as the largest religion, any future arrangement of sovereign states and the assignment of the status of “sovereign” amongst states will have to be borne out of a constitutional apparatus which satisfies both sides of this religious equation. Perhaps a corollary to this observation might be the caution that if an arrangement of international sovereign states does become a reality based on the assent of the Islamic nations and their Judeo-Christian counterparts, the other religions and cultures of the world should not be left to one side merely because they have neither the numbers or the financial clout to be heard. I suggest that such a tack would only be repeating the same mistake made by the two religions in question, and mistakes which cost the world millions upon millions of human lives.

73. Most of what lies behind the world's great religions is a plea that humans honour both God and other people. Perhaps such a common and bipartite theme would be enough to form a principle upon which to base future international constitutional instruments. One of the aspirations which the religions of the world will have to set down is any *a priori* expectation that the world will all ultimately convert to their own cosmology, theology, and eschatology. If world history has shown us anything, it is that religions which leave their humble beginnings for participation in state governance almost always use that power to further their religion's cause without any regard for the loss of human lives which accompany such a “mission.” The world has been surfeited with such examples for far too long, and now the cooperative networks amongst states which exist today such as the UN and EU must have as their constitutional goal the furtherance of the principle of religious and ideological tolerance.

Conclusion

74. This present research is not concerned with crafting a nuanced definition of sovereignty based on the host of disparate suggestions, many of which now lay wounded by the side of the hermeneutical road of international legal theory. Instead, this research suggests that the very internal sovereignty which characterized the Late Antiquity Roman Empire¹⁴⁶ was, itself, bequeathed to the Christian Church at Nicaea by fiat. In other words, this research is suggesting a starting point for the development of European sovereignty at which Europe's most enduring institution of eighteen-hundred plus years was the main actor: the Roman Catholic Church. Constantine's fourth century Council and its attendant corollaries of expanded and enforced jurisdiction and wealth for the Church meant that when the Empire finally shuffled East due to the Barbarian assaults on its erstwhile centrifugal city of Rome, the Church was left to pick up the gauntlet, so to speak, and stepped into the sovereignty vacuum left by the sudden absence of the Roman bureaucratic apparatus. Centuries later, when the states of Europe finally emerged with their own version of sovereignty, both internally and externally, the nations states were taking back the same gauntlet which the Christian Church and emperor were ultimately unable to defend.

75. I have cast the beginning of this research by showing that sovereignty was, for centuries past, always justified by deontological considerations. In fact, it is interesting to note that historically, theorists in general really tend to come out of the woodwork, as it were, whenever their society or paradigm is crumbling before their very eyes. This could be said of Plato, Aristotle, Cicero, Augustine, and most pointedly for this research, the political theorists of the cataclysmic Modern Period such as Jean Bodin and a host of others. Perhaps in some way these written works are in some way trying to explain the tragic events while attempting to maintain the core of their widely held beliefs which, in most cases, actually led to the catastrophes. In some sense these theorists may be unconsciously trying to account for their own commitment to these flawed world-views. Their paradigms were, perhaps, still very important to them and their writings are a way of saying, basically, 'while I do not reject the essential truth of my worldview, I cannot endure the tragic consequences which it seems to have produced and so I must reconfigure it with hopes that greater order and civility amongst people will be the result.' Order was the lynchpin aim of all of these theorists, primarily because they lived in contexts of such fundamental disorder. Each of their contributions was an attempt to move the conversation forward such that it would be more effective at "street level," and each of them gave as their guarantor, the deity. Concomitant with the sponsorship of the deity was an assumption that political order stemming from this entity would be as good as the God who delivered it.

76. Not until the last two centuries has the idea of sovereignty been alone propped up by tenets such as interstate recognition, definable territory, and a population, all of which are ideas that are devoid of any stipulative moral content. Sovereign power was always defined in terms of the moral prerogative, and not merely a grocery list of state attributes which fail to insist on any requirement that state sovereignty must also be concomitantly ethical or humane. Of course, as was the case with Europe in the seventeenth century, the

¹⁴⁶ Hinsley, *Concept of Sovereignty*, 276.

fact that contextually necessitated definitions of sovereignty were justified in terms of moral rightness, had no effect on the disastrous outcomes of wars waged by those claiming sovereignty. The same could be said for the Greeks and Romans as well. One might argue that state sovereignty, as a theoretical construct, has never prevented a war or saved one single life, and unless some kind of moral imperative is attached to its designation on states, it may never do. On the other hand, one might alternatively suggest that even in its most brutal and ancient forms, internal sovereign power provided order and some measure of predictability pursuant to the everyday lives of people within states. In that way, then, sovereignty did indeed save lives by acting as a guarantor against lawlessness.

77. As I wrote in the preface, this research is only the introduction of an idea. It is a hypothesis concerning the importance of Constantine's Council of Nicaea to the future of European state development, and hence sovereignty in the context of a virtually ubiquitous Catholic Church during the period in question. I think the evidence shows clearly that just as Julius Caesar is supposed to have remarked, "*Alea iacta est*," on his crossing of the Rubicon, so too could Constantine have said the very same thing at the close of the Council of Nicaea.¹⁴⁷ Truly, the die *had* been cast for the future of the Church and Europe.

¹⁴⁷ The die has been cast.

Human Rights: A Relative, Progressive, Regressive, and Controversial Concept

Sirus Kashefi

First of all, it is important to notice that human rights is a concept that has found neither a clear and common definition, nor a satisfactory application. If we think that it is a concept inherent in human existence, it is not a theory (i.e. an idea in a Hegelian interpretation of human progress, *idealism*) but reality (i.e. a fact in a Marxian, or even Bakunian, interpretation of human progress, *materialism*). Both the theoretical and real aspects of human rights have their own merits and problems that require deep analysis and criticism. Here, I would like to focus briefly on human rights from four angles: *relativity*, *progress*, *regress*, and *controversial*. A legal system can be progressive and regressive at the same time; thus, it can also be interpreted as a controversial institution. For example, it may protect certain children's rights when it destroys the right to life by imposing capital punishment or waging war. Hence, it would be difficult to admit the absolutism of rights that some philosophers and lawyers (e.g. John Locke, William Blackstone, and Hegel) have advocated.

Indeed, human rights are firstly relative, especially because of the diversity of political ideas and of the states (i.e. the judiciary, the executive, and the legislature in Montesquieu's thought) that define and interpret them and claim their protection. They are secondly progressive, and they can thirdly be regressive. They are finally controversial inasmuch as the state, legally, and philosophically known as the principal protector of human rights, is indeed the greatest predator of our rights. As a matter of fact, we would take into account the elements of time (history) and space (country and culture) when we analyze rights. Nevertheless, my interpretation of those aspects (relativity, progressivity, regressivity, and controversiality) would be questionable, since they overlap each other, and, consequently, their boundaries are not always clear. For example, women's rights (e.g. abortion) and LGBT rights are progressive for some people and regressive (e.g. anti-morality) for others.

The Relativity of Human Rights

In fact, human rights are a phenomenon essentially based on relativity and progressive thought inasmuch as it depends on why and how human thought, the society, and political authority progress during human existence throughout time and space. Thus, they can be progressive or even retroactive in a controversial manner. For instance, some philosophers (such as Aristotle, Hugo Grotius, and Locke) and scientists (such as Henri de Boulainvilliers, Arthur Comte de Gobineau, and Francis Galton) have put forward theories about the right to own slaves, when others (e.g. the Sophists and Anarchists) have severely criticized it.

Human rights permanently challenge politicians, intellectuals, and people to renew their political, philosophical, scientific, and experimental ideas regarding the new rights about children, women, sexuality, aboriginal peoples, immigration, science, politics,

economics, culture, art, environment, etc. In other words, our life is an eternal evolution and counter-evolution and, consequently, it requires new rights or renews old rights. Indeed, human rights are neither a closed debate nor an *acquis* forever inasmuch as it can be regressive.

In terms of relativity, the concept of human rights reminds us of an idea whose existence looks like an embryo *in vitro*. Hence, human rights are dependent at the same time as they are independent. On the one side, they are dependent on the state, a lobby (such as mass media), or a power group to guarantee their existence, as a mother would. In this sense, they, like an aborted embryo, can be terminated when they do not profit from a strong political support or lobby to resist in the outside world (namely, the society). In other words, a right (such as LGBT rights in a conservative society) is aborted when it is not sufficiently mature and well-argued to be recognized by the civil society or the state. Besides, the constitutional rights (e.g. Magna Carta, the Spanish Constitution of 1812, the US Constitution, and the French Declaration of the Rights of Man and of the Citizen) have never prevented the greatest predator states (i.e. the British Empire, the Spanish Empire, the US Empire, and the French Empire) from waging war, colonialism, imperialism, and the destruction of other cultures and flora and fauna throughout the world.

On human rights, they are independent inasmuch as they autonomously exist, and they are, at least theoretically, recognized. For instance, LGBT rights and the right to food exist in international law when in almost all countries these rights remain mythical or dead-born, because they only exist in the written laws without application. In this sense, we can speak about “the myth of rights”.

The relativity of human rights, under the disguise of generations of human rights, has already led to the division of them into three groups with a technical (often, legal) language and endless debates: “civil and political rights”, “economic, social, and cultural rights”, and “collective, environmental, and development rights” (also called “solidarity rights”). Due to the evolutionary nature of human existence (individuality and sociality), we live in a world bulging with increasing, progressive, questionable, and controversial rights and freedoms: property right, freedom of speech, freedom of religion, right of the same sex-marriage, right to revolt, right to fair trial, right to the presumption of innocence, right to health care, right to housing, right to a healthy environment, right to die, etc.

One of the big problems of this technical language and hot debates stems from the fact that the lawyers have justified poverty and inequality (in housing and education, for example) by saying that the second and the third generations of rights (such as right to have a clean environment and the right to housing) have the problem of their application inasmuch as they are too vague and despotic, because they require state intervention (the positive obligations of the state) in individual business. Consequently, they believe that the states have no obligation to guarantee these rights for all in their territories.

Firstly, I am against the existence of the state, and, therefore, against its protection. Secondly, human life requires many elements (food, clothing, housing, education,

freedom of speech, the clean environment, and so on) that cannot be separated from each other under the pretext of vagueness. In other words, the fulfilling of a person and the development of the society, need a set of rights. As a result, we cannot let people die from hunger in the name of freedom, as we cannot oppress them in the name of socialism or communism. Thirdly, capitalism (e.g. the French Declaration of the Rights of Man and of the Citizen) has emphasized on civil and political rights while socialism or communism (e.g. the Soviet laws) has underlined economic and social rights. Of course, neither capitalist states nor communist states have ensured those rights – that are written in their Bibles, that is to say, in their Constitutions – for the ordinary people. When they have even decided to destroy or to limit those rights, they have never hesitated. In this regressive case, the Cold War, the War on Drugs, and the War on Terror are typical examples. Fourthly, if human rights are *natural rights*, which belong to humankind and its environment, why the lawyers have separated them and put into question not only their existence but also their application? Who has the power to claim and enjoy all or, at least, the majority of those rights and freedoms?

The Progressivity of Human Rights

Human rights are derived from “the progressive thought” inasmuch as our mind progress parallel to the evolution and improvement of our knowledge (such as science, politics, and culture) and experience, and vice versa. For instance, Aristotle theorized slavery as a “natural phenomenon”, when we, fortunately, no longer accept it as a natural phenomenon. Today we hopefully realize that human beings should not be treated or discriminated against because of their colour of skin, birthplace, ethnicity, and so on. Nevertheless, Michael Bakunin has truly noticed: “*Slavery may change its form or its name – its essence remains the same.*”¹ In this case, wagedom, domestic service, conscription, and human trafficking are some modern forms of slavery in our society that is proud of preaching the protection of human rights in the frame of the rule of law.

Besides, we have been aware of inequality, political oppression, and massacre of, children, women, workers, seniors, handicapped persons, prisoners, aboriginals, immigrants, religious minorities, the environment, and the dangers of unethical science or technology (e.g. biochemical and nuclear weapons). In other words, we have realized that we cannot forget or disregard the state's authority, certain individuals and groups, animals, and vegetation that have their own existence and dignity.

The Regressivity of Human Rights

Although human progress can be relative according to the past, present, future, and during a specific period, human thought can be retroactive insofar as it goes back. Besides, an old thought may coexist with a new thought, and may be hardly eradicated from human mind. For example, racism had been criticized in the West while the Third Reich renewed and developed it with new scientific and philosophic ideas (so-called *scientific racism*). However, racism unfortunately remains in the law, the civil society, or in both.

¹ BAKUNIN (Michael), *Bakunin on Anarchy*, ed. by Sam Dolgoff, New York: Vintage Books, 1972, p. 137.

Many aspects of our lives prove that we regress in respecting human dignity. The wage slavery, war, prison, and pollution are typical examples in this case. Despite all beautiful and charming documents and hot debates in national, as well as international, law about equality, human dignity, peace, and environment, we witness the increasing degradation of humanity and nature through poverty, wagedom. For example, the minimum wages in Ontario and BC are, respectively, \$10.25 and \$8.75 per hour, which is not at all sufficient for a decent life. Homelessness, especially in Canada, which is a huge country with little population, mass murder (e.g. the wars in Afghanistan, Iraq, and Libya), the multitude of problems in prisons (such as torture, violence, suicide, depression), and unruly industrialization around the world. Some may say the laws are good, it is their application which is problematic. It is not evident that our laws are effective in protecting the vulnerable people (such as the minorities, immigrants, poor, women, children, aged, and the disable people). For example, the American laws concerning the so-called *War on Drugs* have drastically increased prison population while they have criminalized many non-violent individuals. As a result, they have carried a heavy burden on American society in many ways, that is to say individual, familial, economic, political, and judicial problems.

In Western societies, we relatively profit from some freedoms that did not really exist in the past. For example, we can express ourselves or manifest our beliefs without fear of oppression or punishment (freedom of speech). This progressive aspect of human rights is fragile. For instance, after 9/11 the Western states passed laws, in the name of national security and the war on terror, that have limited or even destroyed that freedom.² Thus, in order to limit that freedom, Bush played on people's fears in his address to a Joint Session of Congress on September 20, 2001: *"Freedom and fear are at war. The advance of human freedom – the great achievement of our time, and the great hope of every time – now depends on us. Our nation – this generation – will lift a dark threat of violence from our people and our future. ... Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them."*³

The Controversiality of Human Rights

If human rights are "natural rights" or "universal" and, thus, belong to everybody, why and how they are so different not only throughout the world, but also within a given country? Without speaking about the "religious version of human rights" (mingled with natural law) which is itself diverse, the right of the same sex-marriage, the right to practice sadomasochism, the right to die, the right to drugs, gun rights, the right to be lazy (as a reaction to economic exploitation under the wage slavery, and the right to work),⁴

² For example, see RODRIGUEZ (Juan), *Free speech in the age of 9/11, Twitter and Wikileaks*, The Gazette, Apr. 23, 2011 (<http://www.montrealgazette.com/news/decision-canada/Free+speech+Twitter/4662251/story.html>); <http://thefire.org/article/7069.html>; <http://www.globalresearch.ca/index.php?context=va&aid=18994>.

³ http://www.authentichistory.com/2001-2008/1-911/2-timeline2/20010920_Bush_Address_Before_Joint_Session_of_Congress-part3-lyrics.html.

⁴ LAFARGUE (Paul), *The Right To Be Lazy*, Saint Pélagie Prison, 1883: (<http://www.marxists.org/archive/lafargue/1883/lazy/index.htm>); http://en.wikipedia.org/wiki/Refusal_of_work; <http://righttobelazy.com/blog/biographies>; <http://righttobelazy.com/blog/essays-2>.

and the right to practice polygamy are typical examples in this case. Indeed, when there is a right, there is also a counter-right. However, on the one hand, those rights often meet the vehement criticisms and repressive reaction from religious institutions, some citizens, or the state. On the other hand, they have evolved during human history.

There is also a paradox in human rights: the protection by the state. In fact, human rights is a highly paradoxical concept. Since, on the one hand, they want to protect the individual, groups, or the society against antagonists, that is to say against other individuals, groups, and the state. On the other hand, this is almost exclusively the state (especially the justice system) that is fervently called to protect human rights and to remedy their violation. As we know, the state and its agents are most often the principal perpetrators of the worst and most massive violations of these rights. Thus, the potential and dangerous violator is to protect human rights. How can an institution be both the violator and the protector? Is the justice system really an independent and impartial governmental institution? How about when the violation comes from the justice system itself? How can it be the judge, protector, and prosecutor all at the same time? In short, how can the state be both protagonist and antagonist? Is that not the secondary victimization of the ordinary people?

As a matter of fact, I, unlike the legal philosophers, think that the state is not the protector of human rights; on the contrary, it is *per se* the perpetrator of crime against humanity. Indeed, it is the greatest predator of human rights.

Finally, human rights cannot be reduced to a merely theoretical debate, or to divided generations to the detriment of human misery and oppression and of destroying the environment. In other words, our existence and flora and fauna must be respected in all their diversity and complexity throughout our consciousness. If we cherish our freedom, dignity, and ecosystem, we should fight for them because they are not *acquis*.

Aristotle, Anomaly and Legal Theory

Steve Wexler

We speak commonly of “the exception that proves the rule”, but how is this possible? How could an exception prove a rule? If the rule is that only a woman can give birth to a child, finding a man who had given birth to a child wouldn’t *prove* the rule, it would *disprove* it.

When we say “the exception proves the rule” what we normally mean is that the exception is so rare and so small that it demonstrates the overall validity of the rule, but an exception could also be said to “prove” a rule in the old-fashioned sense of putting the rule to the proof. An exception to a rule calls upon us to re-examine the rule, to examine whether the rule is a rule and whether it is properly formulated. It forces us to explain *why* there is an exception. The exception, we might say, “*improves*” the rule by deepening our understanding of it.

The idea that an exception or anomaly deepens a rule comes from Aristotle, but it comes in an anomalous way. Unlike the rest of the ideas we ascribe to Aristotle, the idea that anomaly deepens rules does not come from something Aristotle *said*; it comes from something Aristotle *did*.

Aristotle never spoke of anomaly as deepening rules. Aristotle did not take the Greek word *anomalía* to be significant. He examined a great many other words in his works: “is”, “is not”, “opposite”, “equal”, “responsible for”, “just” and “legal”, but he never examined the word “anomaly”. Aristotle used the Greek word *anomalía* to talk about the regular and irregular movement of heavenly bodies, the unequal division of property in Sparta and straight and bent lines. He did not use the word to express the idea of an exception deepening a rule.

The idea that anomaly deepens rules is contained not in something Aristotle *said*; it is contained in a form that occurs many times in Aristotle’s works, a form of which Aristotle himself seems to have been totally unaware. This form is very Aristotelian because it fits in with Aristotle’s deep concern for opposites.

N+1: A Recurrent Form in Aristotle’s Works

Aristotle is famous for making lists. He has what are commonly referred to as “Four Causes” and “Ten Categories”. What is less well known is that in his works, Aristotle often makes a list with N items, and then, though he presents the list as complete, immediately after discussing the N items on the list, Aristotle adds one more: N+1. In Book III of *Politics*, for instance, Aristotle says “There are four kinds of kingship.”⁵ He numbers them explicitly: “one, two, three and four”. Then he says: “There is still a

⁵ 1285b 20.

fifth kind of kingship”.⁶ He goes on to describe it. In Book IV of *Politics*, Aristotle lists what he identifies as the “four” kinds of constitution; then, immediately, he says there is a “fifth” kind.⁷ In Book I, he lists the “three” primary and smallest parts of a household and then immediately says there is one more part.⁸

Politics, like all Aristotle’s extant works is a collection of notes that were not intended for publication. It is clear these notes were not all written at the same time. One might be tempted, therefore, to suggest that the lists in *Politics* were written at one time and the additions to the lists were made later. This would make the N+1 form an accident without any meaning and the N+1 form is neither accidental nor meaningless. On the contrary, a complete list with one item added expresses something almost prototypically Aristotelian because in every case, the item added to the list, while in one sense similar to the items on the list, might also be said to be the opposite of the items on the list.

Aristotle was very concerned with opposites. In his works, he examined opposition very closely. He said “everything is opposites or comes from opposites”,⁹ and pointed out that contraries and contradictions are opposite kinds of opposites.¹⁰ The opposite of two opposites can be the same. For instance, “some” is the opposite of both “all” and “none”.

Aristotle’s logic is a treatment of the use of the words “all”, “none”, “some”, “is” and “is not”, and Aristotle realized first, that when differences are taken to extremes they become opposites and second, that whenever a difference makes a difference, the things between which it makes a difference are opposites. This is a central realization in law. We speak of legal “marriage” and “common-law marriage” as “different” but what we mean by that is that they lead to opposite legal results. If two people in a common-law marriage have all the same legal rights and duties as two people in a legal marriage, there is no legal difference between legal marriage and common law marriage. “Common law marriage” is “different” from “marriage” only if the two legal states entail “opposite” legal results. If finding that a marriage is “legal” leads to a support obligation or the right to take on an intestacy, but finding that a marriage is “common-law” does not, then legal marriage and common-law marriage are not just “different”, they are “opposites”. “Legally different” means “legally opposite”.

Opposition and the Human Hand

Aristotle saw that opposites can lie in different dimensions and the items he adds to his various lists can be seen as lying in a different dimension from the items on the lists. The simplest example of this is the way a thumb, though a finger, lies in a different

⁶ 1285b 29.

⁷ 1293a 37-39.

⁸ 1253b 5-13

⁹ *Metaphysics*, IV. ii, 1005a 4. The Greek word could be translated as “opposites” or “contraries”. The contrariety of language comes up quite often in *Metaphysics*, e.g. IX, i, 1046 b 5-11 and X. i, 1052b 27. At *Physics*, I. v, 188b 25, Aristotle repeats that “everything that comes in nature is opposites or from opposites” and at I. v, 189a 10, he says “it appears that the beginnings must be contraries”.

¹⁰ *On Interpretation*, II, 17a 26.

dimension from the other fingers. Humans are said to have “opposing thumbs” and the opposition of the thumbs to the other fingers is critical to the working of the human hand.¹¹ This is a striking characteristic of the N+1 form. The opposition of the +1 to the N is significant. We can see this if we look at the three lists from *Politics* mentioned above.

The four kinds of kingship listed in Book III are:

There are then these kinds of kingship, four in number: one belonging to heroic times, which was exercised over willing subjects, but in certain limited fields ...; second, the barbarian monarchy, which is an hereditary despotism governing in conformity with law; third, the rule of the functionary called an *aesymnetes*, which is an elective tyranny; and fourth among these is the Spartan kingship, which may be described simply as an hereditary generalship held for life.¹²

The kind of kingship Aristotle adds to this list, the +1 kind, is “when a single ruler is sovereign over all matters”. As Aristotle himself points out, the fifth kind of kingship is starkly different from the other four. They are all limited in some way. It is not. That difference, that opposition, means something in the analysis of a *polis*.

The four kinds of constitution listed in Book IV are monarchy (rule by one), oligarchy (rule by the few), democracy (rule by the many) and aristocracy (rule by the best).¹³ The Greek word for “constitution” is *politeia*, so each of these four constitutions is a *politeia*. The item added to the list, the +1 *politeia*, is itself called “*politeia*”. As Aristotle himself notes, the fifth kind of constitution is “called by the name common to all the others”. This fifth kind of constitution is usually referred to as “constitutional government”. It is opposite to the other four in that it has no separate name and is not characterized by who is in power.

The three primary and smallest parts of a household are the relationship between master and slave, husband and wife, and father and child. The +1 part, the item added to the list, is “getting money”. This “part” of a household is completely different from the others. It is not a relationship between the people in a household. It is an activity with people outside the household.

Even if he was unaware of it, the form N+1 meant something to Aristotle. His use of it was not limited to *Politics*. The N+1 form plays a role in some of the best known

¹¹ Another example is the goalie in soccer, who is a player like the others, but opposite from the others in that he can touch the ball with his hands.

¹² This translation is in the Loeb edition by H. Rackham (Harvard, 1932)

¹³ Elsewhere in *Politics* (III, vii, 1279a 22-1279b 10), Aristotle breaks the types of government down differently. He says there is rule by one, rule by a few and rule by many. Each of these comes in a bad kind and a good kind. The bad kind is when rule is exercised for the sake of the ruler or rulers; the good kind is when rule is exercised for the sake of everyone. Rule by one is tyranny (bad) and kingship (good). Rule by the few is oligarchy (bad) and aristocracy (good). Rule by the many is democracy (bad) and *politeia* (good).

things Aristotle said. In *On the Heavens*, for instance, Aristotle spoke of fire, air, water and earth, the four elements the Greeks took to be the components of the world.¹⁴ Plato and many other philosophers discussed these four elements. Aristotle said there was a fifth element,¹⁵ which was “more divine and prior to all the others”. It existed above the moon, whereas the other four made up the world below the moon. The fifth element moved differently from the other four; they moved in straight lines, it moved in circles, and its motion was eternal while theirs was not. Aristotle noted that people gave the place of this fifth element the name *aether*, because it “runs forever” (*thein aei*).¹⁶

Another place Aristotle used the N+1 form is when he talked about the senses. He said there are five senses: sight, hearing, touch, taste and smell, each of which senses a “particular” or “special”¹⁷ thing. ¹⁸ The eye sees color, color is the only thing the eye senses and the only thing that senses color is the eye. The tongue senses sweetness and nothing but the tongue senses sweetness. The +1 sense, which Aristotle called the “common sense”,¹⁹ is where the sensations of the other five senses are sensed together, or “in common”.

The five senses see the qualities of things; by putting the five senses together, the +1 sense sees things. The +1 sense makes entities; it identifies things as things. It senses the sugar cube, which the other 5 senses sense as white, sweet, cubic and rough. According to Aristotle, the five particular senses are virtually mistake free. (“If the eye sees white, there is white.”²⁰) It is with the +1 sense that the possibility of error occurs.

The +1 or common sense makes sense of what the other five senses sense. It doesn’t just increase the list by one. It adds something to the other five senses that makes them far more than they were. The same is true for the fifth element, the fourth part of the household, the fifth kind of *politeia* and the fifth kind of kingship. Each of these is not just another item added to a list. The +1 item changes the list to which it is added. By adding another dimension, the +1 item gives the list body or depth. This quality of the N+1 form is easily seen in two examples that are not Aristotelian.

N+1 Outside of Aristotle

¹⁴ 268a 18, I, ii.

¹⁵ 269a 30-34, I, ii. “... elements, four of which Aristotle accepted from the tradition ... and a fifth which he added himself.” Aristotle, *Physics*, R. Waterfield and D. Bostock (Oxford, Oxford University Press, 1996) Introduction, p. xv.

¹⁶ 270b 20-24, I iii.

¹⁷ Aristotle uses the word *idion*. It is the root of our word “idiot”.

¹⁸ Aristotle denied that there was a separate organ for the common sense and his comments about it are very confusing and difficult to understand. I have simplified the discussion and many would disagree with some of what I have said. There can, however, be no dispute about this being another example of the N+1 form.

¹⁹ *De Anima*, II, 6, 418a 17-19. Like “sixth sense”, “common sense” does not mean what it means in English. The Greek for “common” is *onion*. It is the opposite of *idion*. In *Politics*, Aristotle distinguishes between crimes that are, *idion*, like theft, and crimes that are *onion*, like treason.

²⁰ *De Anima*, II, 6, 418a 13-15, III, 3, 428b 18-22.

Euclid's Five Postulates, the basis of geometry, are actually Euclid's 4+1 Postulates and Peano's Five Axioms, the basis of arithmetic, are actually Peano's 4+1 Axioms. Here are Euclid's Postulates.

- 1.** For every pair of points, it is possible to construct a line segment joining them;
- 2.** Every line segment can be extended indefinitely in a straight line in either direction;
- 3.** For every pair of points, it is possible to construct a circle centered at the one point and passing through the other;
- 4.** Any two line segments emanating from the same point determine an angle; and
- 5.** For any line L and point P not on line L , there exists a unique line that is parallel to L (never meets L) and passes through P .

The fifth postulate, the +1 postulate, is different from the first four. The first four are definitions. The fifth one is a claim about reality. For many years it was thought the fifth postulate could be derived from the other four. Mathematicians attempted to accomplish this derivation for centuries but in the 19th century it was discovered that the fifth postulate was not derivable from the other four. The fifth postulate is simply different from the others. It is unique. It is a mechanism by which the other four are applied.

Worded as it is here, Euclid's fifth postulate, which means that two parallel lines remain the same distance apart no matter how far they are extended, applies the other four postulates to flat space. If the fifth postulate is reworded to say that parallel lines converge as they are extended, the fifth postulate applies the other four to the surface of a sphere. If the fifth postulate is reworded to say that two parallel lines diverge as they are extended, it applies geometry to hyperbolic space, the inside surface of a sphere. The first four postulates are the same in flat, incurving and outcurving spaces. The fifth differs in all three.

Here are Peano's Axioms.

- 1.** There is a natural number 0;
- 2.** Every natural number has a successor, denoted by $S(a)$;
- 3.** There is no natural number whose successor is 0;
- 4.** Distinct natural numbers have distinct successors; if $a \neq b$ then $S(a) \neq S(b)$; and
- 5.** If a property is possessed by 0 and also by the successor of every natural number which possesses it, then it is possessed by all natural numbers.

The first four axioms set up the system of natural numbers. This includes zero and all positive integers but leaves out negative integers and fractions. The fifth axiom, called

the axiom of induction, defines induction in arithmetic. Using induction, addition and multiplication can be defined over all the natural numbers. Addition and multiplication are the two basic operations of arithmetic. With induction all of mathematics can be defined. Just as Euclid's +1 postulate makes geometry possible, so Peano's +1 axiom makes arithmetic possible.²¹

As Aristotle frequently pointed out, the relationship $\frac{1}{2}$ is built into the world. If two taut strings whose lengths have the relationship 1:2 are plucked, they produce the same tone an octave apart. This fact about reality makes the relationship $\frac{1}{2}$ look as though it were built into the world. The relationship π between the circumference and the diameter of any circle is also built into the world. The fact that the diagonal of a square is incommensurate with its sides is built into the world. It is not clear whether the N+1 form is built into the world the way $\frac{1}{2}$ and π are built into the world.

Aristotle's 4+1 Causes

Even if it is not built into the world, N+1 is certainly built into the way we think and speak about the world. We see things in terms of certain forms. Oppositeness and N+1 are examples. In Aristotle's work, the most striking example of the N+1 form comes in connection with his famous Four Causes. These are listed in *Physics*, where Aristotle examines the four different answers we might give to the question, What is responsible for the existence of that house?

Aitia, the Greek word for "responsibility", also means "cause",²² so according to Aristotle, there are "four causes"²³ for the existence of that house. We say that house exists because somebody built it. If there had been no builder, there would be no house. Aristotle called the builder of the house its "efficient cause" and the efficient cause is what we normally mean when we speak of the "cause" of something.

But Aristotle pointed out that we could also say that that house exists because there were bricks to build it with. If there had been no bricks, that house would not be there.²⁴ There might be *a* house, but not *that* one. Aristotle called the bricks the "material cause" of the house and he added that just as the bricks are responsible for the existence of that house, so the plans of the house are responsible for its existence. Without the particular plans for that particular house, there might be a house, but not that one. The plans, Aristotle said, are the "formal cause" of the house.²⁵

Finally, Aristotle said, the human need for shelter is responsible for the existence of the house. If people did not need shelter, there would be no houses at all, and if there

²¹ I am indebted for this discussion of Euclid's postulates and Peano's axiom's to Mike McCarthy, who was my student many years ago.

²² This is the original meaning of "cause at law."

²³ 195a 14-15.

²⁴ While law is almost exclusively concerned with efficient cause, it does sort of notice material cause in drug and contraband laws.

²⁵ Conspiracy law recognizes that making the plan is making the act.

were no houses, that house would not exist. The human need for houses Aristotle called the “final cause”.

Aristotle’s classic Four Causes are:

1. the efficient cause – the worker who builds the house,
2. the material cause – the bricks from which the house is built,
3. the formal cause – the plans for the house, and
4. the final cause – the purpose of the house.

After carefully listing these four causes, Aristotle added one more cause, one more thing people say is responsible for something: luck.²⁶ If you go to the market and meet someone you didn’t plan to meet, you say you met that person by luck or “because of luck.”²⁷

Luck is unlike the other four causes. It is an explanation that explains nothing and Aristotle said it was *adêlos anthrôpô*, “unclear to humans”.²⁸ What luck is and how it works was a mystery to Aristotle, but the great thing about Aristotle, the thing that marks him off from other philosophers, is that he did not turn away from things because he did not understand them. People speak of luck as though it was a cause, so Aristotle added it to the list of causes.

Luck is different from the other four causes. Aristotle knew that. The other four causes work regularly. Luck does not work regularly. They can be the subject of study and science. Luck cannot. Luck is a +1 cause, a cause that is opposite to the other causes, a cause in a different dimension.

Because he was very careful, Aristotle’s examination of the +1 cause led him to notice that it had two forms. We say something happened because of luck, and we say something happened “on its own”. The Greek for what happens “on its own” is *automaton*. The difference between things happening because of luck and things happening on their own, Aristotle explained,²⁹ is that luck is always good or bad. The things that happen because of luck are things we would have wanted to make happen or prevent from happening. The things that happen on their own aren’t good or bad. They just happen.

Just as Euclid’s +1 postulate gives bite to his other 4 postulates and Peano’s +1 axiom gives bite to his other 4 axioms, so luck and *automaton*, Aristotle’s +1 cause, give bite to the other 4 causes. Luck and *automaton* are the other side of the world, the inexplicable side. The existence of the inexplicable is what makes the explicability of the explicable so significant. The +1 makes the N meaningful. In Japanese artistic theory this is called *wabi sabi*: an imperfection turns the perfect into art.

²⁶ Aristotle talks about the four causes in *Physics*, II, iii, 195a 15-26 and about luck in *Physics*, II, iv-v, 195b 30-197a 35.

²⁷ *Physics*, II, v, 197a 3.

²⁸ *Physics*, II, v, 197a 10.

²⁹ Aristotle discusses the difference between luck and *automaton* in *Physics*, II, vi, 197a 36-198a 13.

The N+1 Form in Legal Theory

Aristotle organized things and put them in categories. But the categories were only a beginning. Aristotle saw that to every organization, there is an exception, an opposite. This is the overall meaning of the N+1 form. The +1 is the exception that proves the rule, the exception that makes the rule significant. The +1 is the opposite without which nothing exists. It is the anomaly that makes the organization of what is organized meaningful.³⁰

In legal theory, Aristotle's N+1 form can be seen in several places. The most obvious is that if N is law, +1 is equity. Aristotle himself remarks on this point. He says "*epieikes* seems to be justice; the justice that is *epieikes* goes against the written law."³¹ The Greek word *epieikes* means "fitting", but it is always translated as "equitable". Thus, the Loeb translation of *Rhetoric* renders the quoted passage as:

For that which is equitable seems to be just, and equity is justice that goes beyond the written law.³²

Law and Equity

That law and equity are a manifestation of the N+1 form is fairly obvious but it has two interesting ramifications that are not obvious. The first is that equity, justice and Natural Law are all the same.³³ The second is that equity is an unsystematic justice.

To approach these two ideas, we must note that the word "equity" is a horribly inaccurate name for the +1 that reaches beyond law. "Equity" is a terrible name for equity. The word "equity" comes from the Latin *aequus*, which means "equal" and the whole point of equity is that it does not have to be equal. In some cases, doing what is *epieikes* means doing what is equal, but in some cases doing what is *epieikes* means precisely doing what is not equal. As Aristotle remarked in *Politics*, "It seems equality (*isos*) is justice, and it is, but not for all, but for equals; and inequality seems to be justice,

³⁰ Since the N and the +1 are opposites, it should be possible to put them the other way around, with the anomaly first and the organization second. In *Physics*, Aristotle says expressly that the four causes are prior to luck (II, vii, 198a 5-10). This suggests that organization precedes anomaly, but in *Categories*, where Aristotle lists what are traditionally called the "Ten Categories", he turns the N+1 form around. There aren't ten categories; there are 1+9. (IV, 1b 25-2a 4) The anomalous category comes first.

The categories are the different assertions we can make, the different ways we can use the word "is". In Greek, *catêgoreô* means "to accuse". Every time we say something "is", we are making an accusation.

Whenever we speak of anything, Aristotle says, for instance, "that man" or "that horse," we implicitly say it exists. That man "is." That horse "is." This use is anomalous because, as Aristotle points out, we do not usually say this "is" out loud; we simply speak of "that man" or "that horse". The other 9 ways of using "is" say something about a thing that exists; that man is armed, that horse is white. The unspoken use of the word "is", the anomalous use, is prior to the other uses because it states the substance.

³¹ *Rhetoric*, I, xiii, 1374a 26-28.

³² J.H. Freese, *Aristotle, Rhetoric* (Harvard, 1926).

³³ In *Ancient Law*, Henry Maine noted that "Equity and "Natural Law" were names for the same thing. Chapter III. He did not include "justice" in this equation.

and it is, but not for all, but for unequals.”³⁴ The difference between what we call “procedural” or numerical equality and “substantive” equality has been made most strongly recently by feminists, who say it is not always *epieikes* to treat a woman equally with a man. In some situations, a woman must be treated better than a man.³⁵

Equality is regular, structured, systematic. *Epieikes* is fitting and fair but it is not regular, structured or systematic. In Book III of *Politics*, Aristotle said *taxis* is *nomos*, “arrangement is law”.³⁶ Aristotle repeated this equation in Book VII of *Politics*.³⁷ Arrangement is law. Arrangement, organization, regularity, structure, system: these are the N in the N+1 form. The +1 in N+1 is the unarranged, the irregular, the disorganized, the unstructured, the unsystematic. The +1 is the opposite of law.

Law is *taxis*. *Epieikes* is not. *Epieikes* is not arrangement. The historic purpose of English Equity was to remedy particular results of the legal system that were unjust. The Law was the Writ System. It was legalistic and rule-bound and, while Equity ultimately became even more legalistic and rule-bound than Law, it did not start out that way. In its inception Equity was not systematic. It took every case on its own merits and precedent did not apply to it.

Neither *epieikes* nor Equity applies to groups of cases. Neither applies to “men” or “women”. *Epieikes* and Equity both apply to this or that particular woman or man in this or that particular situation and notice that neither *epieikes* nor Equity tells us what we *should* do. They tell us what we should *not* do. Like Socrates *daimonion*, *epieikes* and Equity do not say, “Do this”. They say “Do not do that.”

In his remarks on Equity, Holdsworth spoke somewhat incorrectly of the “distinction between the strict rule of law and modifications of that law on equitable or moral grounds”³⁸ Equity did not *modify* the law. The theory of English Equity was that the Law was the law and could not be changed. Equity applied to one case at a time. The Law was the law, but in this one case, Equity said, a party might be ordered, on pain of his conscience, not to take advantage of his legal rights. Why? Because it was not *epieikes* for him to do so.

Neither *epieikes* nor equity is the same as equality. Neither works by rules. That is the whole point of +1, it is the opposite of arrangement. Sometimes, equality (which is a rule or arrangement) is *epieikes*; sometimes, it is not. The hard thing about *epieikes* is to know when to follow the rules and when to go against (or beyond) them.

Equity and Natural Law

³⁴ III. ix. 1, 1280a 11-13.

³⁵ Some would say “a woman must be treated differently from a man” rather than “better than a man”, but since the “different” treatment” is desirable, giving it to the woman means treating her “better”.

³⁶ *Politics*, III, ix, 1287a 18.

³⁷ *Politics*, VII, iv, 1326a 29-30.

³⁸ *A History of English Law* (1903) Vol. I, p. 446

In the nature of things, equity *cannot* be a matter of rules. It has to be something we know outside the rules. The most a set of rules could say would be: When these rules lead to a result that is unfit, do not follow them. What is unfit must be something we know by intuition and thus, while *equity* is the opposite of law, equity is exactly the same as Natural Law in that people are supposed to “just know it”. This is one of the foremost characteristics of Natural Law: people “just know it”. Thus, Aquinas says:

the light of natural reason by which we discern what is good and what evil, is nothing but the impression of divine light on us.³⁹

When Aristotle speaks of “natural justice” he makes the same point by using the word *manteuontai*, which has to do with oracles and signs.

There is by nature a common justice and injustice, which everyone somehow divines (*manteuontai*), even if they have nothing in common with each other and have not made any agreement (put anything together).⁴⁰

The first interesting and surprising ramification of treating law as N and equity as +1 is the recognition that equity is an unsystematic Natural Law. This is surprising because we think of Natural Law as systematic. We think of it as telling us what is always true. There is no “always” about *epieikes*.

Equity and Justice

The second interesting and surprising ramification of treating law as N and equity as +1 is the recognition that equity is an unsystematic justice. The idea that equity, justice and Natural Law are all the same is surprising (though it should not be); more surprising still is the idea of an unsystematic justice. The idea that justice is systematic is so deeply engrained in us that, while there can be many injustices, there cannot be many “justices” – not in a moral sense anyway. For us, justice is a unitary, singular thing. We may speak of the justices of a superior court, but our language does not permit us to use the plural “justices” in a moral sense.

Aristotle said: “It’s clear that there are more *justices* than one”.⁴¹ When he said this, he used the Greek plural *dikaiousunai*. It is as odd in Greek as “justices” is in English, but the translators insist that it must be translated as “kinds of justice”. Thus, the Loeb translation presents the quoted passage this way:

Thus it is clear that there are more kinds of Justice than one ...⁴²

The Oxford translation presents it this way:

It is clear, then, that there is more than one kind of justice ...⁴³

³⁹ *Summa Theologiae*, Q. 91, a. 2.

⁴⁰ I. xiii. 2, 1373b 6-9

⁴¹ *Ethics*, V. ii, 1130b 6-7.

⁴² H. Rackham, *Aristotle, Nicomachean Ethics* (Harvard, 1926, 1999) p. 252.

And the Penguin translation has:

We may now take it as proved that there is more than one kind of justice ...⁴⁴

Without meaning to be philosophical, these three translations Platonize Aristotle. They make him say justice is a single thing. It can come in different kinds, but it itself is singular and unitary, hence, systematic and coherent. This is not what Aristotle said. Aristotle spoke of “justices” and this is what the N+1 form means. There are many justices. Equity is one of them. Equity is an unsystematic, incoherent Natural Law and also an unsystematic, incoherent justice.

N+1 and the legal philosophies

The second manifestation of the N+1 form in legal theory has to do with the three traditional legal philosophies: Natural Law, Legal Positivism and Legal Realism. There are so many variations of these three philosophies that it is hard to speak simply about them, but it seems fair to say that Natural Law contends that what purports to be law is not law unless it conforms to a moral standard outside itself, while Legal Positivism denies this. Legal Positivism says that what purports to be law is law if it conforms to the legal rules for making law. Whether it is moral or not, is another question.

These two philosophies seem squarely opposed, but the N+1 form reveals that they are both N and Legal Realism is +1. Natural Law and Legal Positivism disagree about what it is that law must conform to in order to be law, but both assert that law must conform to something in order to be law. They both see law as a system of rules.⁴⁵

Legal Realism is +1. It does not see law as a matter of rules. Legal Realism says a thing is what it does. If you have to bribe a legal official to get a particular legal result, the law is that you have to bribe that official. According to Legal Realism, there is no form to which law must conform in order to be law.

To every rule there is an exception and to every exception there is an exception. Aristotle saw oppositions as lying across each other. We can treat Natural Law and Legal Positivism as N and Legal Realism as +1, but we can also treat Natural Law, Legal Positivism and Legal Realism as N and treat Law and Economics, another legal philosophy, as +1. Natural Law, Legal Positivism and Legal Realism all say law is the dog. Law and Economics says law is the tail; the dog is the economy.

That Legal Realism can be both an item in N and +1 shows something about Aristotle’s idea of levels. “Animal” is a species in the genus “living things”: plants, animals and humans are all kinds of living things. But “animal” is also a genus in which humans are a species. “Animal” exists at more than one level. Everything exists at more

⁴³ D. Ross, *Aristotle, The Nicomachean Ethics* (Oxford, 1925, 1998) Revised by J.L. Acryl and J.O. Urmson.

⁴⁴ J.A.K. Thomson, *The Ethics of Aristotle*, (Penguin, 1953)

⁴⁵ This point was first drawn to my attention by Carole Liao. Don McIntyre showed me a new depth to it with his insights about Native jurisprudence.

than one level. Everything is the things it is made up of and the things it is part of. Opposites are the way of the world, or at least of the way we speak and think about it.

N+1 and the Socratic Method

The final manifestation of Aristotle's N+1 form in legal theory requires us to look at the Socratic method that is used to teach law. In *Metaphysics*, Aristotle says: "there are two things that Socrates might rightly be said to have contributed". In Greek, these are *horizesthai katholou* and *epaktikoi logoi*.⁴⁶

Horizesthai katholou are "universal definitions", lines (horizons) that divide the whole world in two. In the dialogues written by Plato, Socrates insists that anyone who knows something must be able to give a universal definition of it; he must be able to give a definition that applies to all cases. Many translators call this a "general definition".⁴⁷ This translation is misleading because it suggests that one could give a definition with the form: "In general, an A is a B". Socrates firmly rejected that kind of definition. He insisted on definitions that applied unequivocally to everything: universal definitions.

Horizesthai katholou are what law professors ask students to provide in the first weeks of law school. When a student does, the professor applies the second blade of the Socratic scissors, *epaktikoi logoi*. *Epaktikoi logoi* are "brought-in words".⁴⁸ Once Socrates got someone to commit himself to a universal definition, he brought in an example that confounded the rule. This is the technique modern law professors call the "Socratic Method". It teaches law students that while the law always starts with *horizesthai katholou*, universal definitions, rules that apply unequivocally to everything, there is always an exception. Words can always be brought in, *epaktikoi logoi*, to unravel the apparent unequivocality.

The Socratic method and what it teaches, the idea of law that is taught to lawyers, namely that there are rules but every rule has exceptions, are both manifestations of Aristotle's N+1 form. N is the *horizesthai katholou*. +1 is the *epaktikoi logoi*. Law is arrangement; lawyers are taught to look for it with examples that do not fit the pattern. They are taught to believe in rules and exceptions: N+1.

⁴⁶ XIII, iv, 1078b 27

⁴⁷ D. Ross, *Metaphysics* (Oxford, 1924); H. Tredennick, *Metaphysics* (Harvard, 1933)

⁴⁸ Aristotle actually used the accusative plural *epaktikous logous*, but because English generally uses the nominative case, it is common to change *epaktikous logous* to the nominative plural, *epaktikoi logoi*.

The usual translation for *epaktikoi logoi* is "inductive reasoning". This translation may be appropriate when Aristotle uses the phrase *epaktikoi logoi* in his comments about how we know things (e.g. *Topics* 108b 7-12). It is not appropriate in Aristotle's comments about Socrates. Aristotle used examples to build knowledge; that is induction. Socrates used counter examples to tear down specious claims to knowledge; that is not induction. Refutation by counter examples is very like inductive reasoning in that both make use of particular cases. But counter examples work differently from examples and serve a different purpose. Counter examples work deductively, not inductively.