

THE CONSTITUTION OF THE HOLY
ROMAN EMPIRE AFTER 1648: SAMUEL
PUFENDORF'S ASSESSMENT IN HIS
*MONZAMBANO**

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ABSTRACT. *The examination of Pufendorf's Monzambano shows that he was strongly interested in the question of sovereignty, and that the complex reality of the Holy Roman Empire demanded a completely new approach to the question of where sovereignty within the Empire lay. Pufendorf developed his account of the Empire as an irregular political system by using essential aspects of Hobbes's theory and thus departed from all previous writers on the forma imperii. But Pufendorf's writing on the Empire has not only to be linked with political and philosophical discussion about sovereignty within the Empire but also with his own main writings where he developed a more detailed theory regarding the issue of sovereignty in general. The peace of Westphalia was not only an international settlement but it also shaped the constitution of the Empire to a considerable degree, and this is of crucial significance for the history of political thought during the seventeenth century.*

The peace of Westphalia was not only an international treaty which ended the Thirty Years War, but it also shaped the constitution of the Empire. Arguably 'a fundamentally new approach to the understanding of the Empire emerged'¹ after this treaty. Samuel Pufendorf (1632–94) is widely regarded to have been at the heart of this development, but although he was very well known in England from the time of his first scholarly writings on natural law, his work on the constitution of the Empire was never of great interest to English scholars.² Thus the main concern of this article is Samuel Pufendorf's *De statu*

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¹ J. G. Gagliardo, *Reich and nation: the Holy Roman Empire as idea and reality, 1765–1806* (London, 1980), p. 40.

² By contrast with France, where there is 'considerable evidence of interest' in Pufendorf's writing on the Empire (K. Malettke, *Frankreich, Deutschland und Europa im 17. und 18. Jahrhundert* (Marburg, 1994), p. 190, contemporary English observers seemed remarkably uninterested in the constitution of the Empire in general and Pufendorf's writing on this matter in particular. See H. Duchhardt, 'Pufendorf in England. Eine unbekannte Übersetzung von Pufendorfs Reichsverfassungsschrift aus dem Jahre 1690', *Archiv für Kulturgeschichte*, 72 (1990), pp. 143–52.

imperii Germanici,³ published in 1667 under the pseudonym *Severini di Monzambano*. In this article I intend, first, to examine Pufendorf's place among the writings on the constitution of the Empire. As a second step I will discuss whether Pufendorf succeeded in giving an accurate description of the constitutional reality of the Empire as it emerged after the peace of Westphalia.

I

Earlier discussion of the Empire's constitution had been shaped by Jean Bodin (1529/30–96), who, alongside adherence to classical Aristotelian political forms, developed a theory of sovereignty which did not accept any form of mixed government. As the first to employ sovereignty as the main criterion in assessing a political body, Bodin faced the dilemma of deciding where sovereignty rested within the Empire, but he still sought to resolve this issue within the framework of the classical Aristotelian forms of government. Eventually he decided that the Empire was an aristocracy, because 'les sept Electeurs ont peu à peu retranché la souveraineté, ne laissant rien à l'Empereur que les marques en apparence, demeurant en effect la souveraineté aux estats des sept Electeurs, de trois cents Princes ou environ, & des Ambassadeurs deputed des villes Imperiales'.⁴ All the subsequent constitutional discussions of the *Reichspublizisten*⁵, as they were known, followed this lead when dealing with the controversial question to whom in the Empire sovereignty was to be attributed. Thus the essential question seemed to be whether the Empire was a monarchy or an aristocracy. On the one hand, the most famous advocate of the interests of the Emperor was Dietrich Reinkingk⁶ (1590–1664), who maintained the view – against Bodin, but employing his theory of sovereignty – that the Emperor was in possession of sovereignty within the Empire. On the other hand Hippolithus a Lapide (i.e. Bogislaw Philipp Chemnitz)⁷ (1605–78), who influenced and stimulated Pufendorf's writing on the constitution to a considerable degree, argued aggressively against the Emperor and maintained the view that the Empire was an aristocracy.

³ If not stated otherwise, all quotations are drawn from the English translation by Edmund Bohun, *The present state of Germany written in Latin by the learned Samuel Pufendorf under the name of Severinus de Monzambano Veronesis* (London, 1696).

⁴ J. Bodin, *Les six livres de la Republique* (Paris, 1583), p. 321. See R. Hoke, 'Bodins Einfluß auf die Anfänge der Dogmatik des deutschen Reichsstaatsrechts', in H. Denzer, ed., *Jean Bodin: Verhandlungen der internationalen Bodin-Tagung* (Munich, 1973), pp. 315–32.

⁵ See H. Dreitzel, 'Zur Reichspublizistik. Forschungsergebnisse und offene Probleme', *Zeitschrift für Historische Forschung*, 5 (1978), pp. 339–46; M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland 1600–1800*, 1 (Munich, 1988), pp. 225–67.

⁶ D. Reinkingk, *Tractatus de Regime seculari et ecclesiastico* (Frankfurt, 1651). For Reinkingk see Christoph Link, 'Dietrich Reinkingk', in M. Stolleis, ed., *Staatsdenker in der Frühen Neuzeit* (Munich, 1995), pp. 78–99.

⁷ Hippolithus a Lapide (i.e. B. Ph. Chemnitz), *Dissertatio de ratione status in Imperio nostro Romano-Germanico* (n.p., 1640; 2nd edn, Freystadt, 1647). For Chemnitz see R. Hoke, 'Hippolithus a Lapide', in Stolleis, ed., *Staatsdenker*, pp. 118–28.

Veit Ludwig von Seckendorff⁸ (1626–92) and Johannes Limnaeus⁹ (1592–1663) put forward a moderate argument which considered that the Emperor and the estates of the Empire (*Reichsstände*) shared sovereignty within the Empire, in order to avoid supporting any exclusive view of the Imperial constitution as solely monarchical or aristocratic, which would not have matched the political reality. Limnaeus stressed the difference between the *majestas realis* and *majestas personalis*. In order to maintain an undivided sovereignty he differentiated between the forms of government rather than between the forms of the state. Thus he was able to develop a theory which came much closer to the reality of the constitutional situation of the Empire, but this conception could not be satisfactory if a theory of sovereignty was assumed which asserted that sovereignty could only be indivisible.

It was Pufendorf who approached the matter of sovereignty and the Imperial constitution from a distinctly different angle. His work *De statu imperii Germanici* appeared in 1667 in The Hague (although Geneva was given as the fictive place of publication) at a time when Pufendorf already held a chair at the University of Heidelberg in natural law and philology.¹⁰ His essay on the constitution of the Empire in its first form of 1667 is written in a wide-ranging rhetorical style, including slightly ironic remarks, some strongly sarcastic ones, and even rather crude mockery. The form of an account by an Italian traveller to his brother at home is employed throughout the whole text. This has a certain charm, and might well be compared to Montesquieu's *Lettres Persanes*. The most distinguished *Reichspublizist* Johann Jacob Moser (1701–85) for example praised Pufendorf's style with warm affection: 'His style is so very cultured, thorough, full of character and has been so successful in mockery and argumentation, that any adversary, who took objection to his writing would not come clear unscathed.'¹¹ The liveliness of the language is missing in the posthumous edition because in this edition – which had been revised by Pufendorf himself – he moderated his attacks (notably against the Emperor)

⁸ V. L. von Seckendorff, *Ius publicum Romano-Germanico* (Frankfurt and Leipzig, 1686); idem, *Teutscher Fürstenstaat* (Frankfurt and Leipzig, 1656). For Seckendorff see M. Stolleis, 'Veit Ludwig von Seckendorff', in Stolleis, ed., *Staatsdenker*, pp. 148–71.

⁹ J. Limnaeus, *Juris publici Imperii Romano-Germanici libri IX* (Straßburg, 1657). For Limnaeus see R. Hoke, *Die Reichstaatsrechtslehre des Johannes Limnaeus* (Aalen, 1968).

¹⁰ See D. Döring, 'Untersuchungen zur Entstehungsgeschichte der Reichsverfassungsschrift Samuel Pufendorfs', *Der Staat*, 33 (1994), pp. 185–206. Döring provides interesting insights into the relationship between Pufendorf and the Palatine Elector, under whose authority the university was run. Moreover, Döring opens up the perspective towards the impact of the so termed *Wildfangstreit* and Pufendorf's consideration of the potential interests of the Palatine Elector. All these aspects add to the general importance of Pufendorf's writing on the Empire, but as Döring himself admits, the most important aspect has to be seen in Pufendorf's concern about the German constitution in general, which lies at the heart of this article as well.

¹¹ J. J. Moser, *Bibliotheca Juris publici*, II (Stuttgart, 1730), p. 543: 'Seine Schreib-Art ist dermassen cultiviert, durchdringend, piquant und im railliren und judizieren so glücklich gewesen, daß nicht leicht ein Adversarium, welcher einmahl in Schrifften mit ihme angebunden, ungehudelet von ihme loskommen ist.' I would like to thank Raphael Utz (Heidelberg) for his advice on some stylistic aspects regarding this article and particularly this translation.

while his reasoning became more cautious. The form had also changed, because Pufendorf had revealed his authorship of the *Monzambano* and therefore the form of an account from one Italian brother to another and the dedicatory letter were left out.¹²

The new approach by Pufendorf, however, is to be seen in his assertion that it was impossible and senseless to attribute any of the Aristotelian categories to the Empire. Arguably, Pufendorf was influenced by Thomas Hobbes (1588–1679) who had elaborated a theory of regular and irregular political bodies.

Having spoken of the Generation, Forme, and Power of a Commonwealth, I am in order to speak next of the parts thereof. And first of Systems ... by [which] I understand any numbers of men joyned in one Interest, or one Businesse. Of which some are *Regular*, and some are *Irregular*. *Regular* are those, where one Man, or Assembly of men is constituted Representative of the whole number. All other are *Irregular*.¹³

We know that Pufendorf was aware of this form of argument in Hobbes's *Leviathan*, because he had drawn Christian Thomasius's (1655–1728) attention to this part of the book in a letter to his disciple and friend at Halle.¹⁴

After giving a detailed account of the historical and present constitution of the Empire in the first five chapters of his *Monzambano*, Pufendorf moves in the following chapters to consider the form of the German Empire. This embodies the crucial and revolutionary break with all earlier scholarship on the Empire, and Pufendorf seemed well aware of it. 'We must therefore the more accurately enquire what its true form is, because the far greatest part of the *German Writers* have made gross and foolish Mistakes, through their Ignorance in Politicks' (VI–1, p. 135). For the assessment of a political body Pufendorf maintained the view that as for natural and artificial bodies the harmony and connection of the different parts was essential for its health and aptness. One therefore has to assess whether 'the Parts of which they are composed, are found well or ill formed and united together, and consequently as the intire form or whole of them are elegantly or irregularly and disorderly formed and united' (VI–1, p. 135). The result of Pufendorf's reasoning is his supposition 'that the Government, State, or Empire of *Germany* hath something of Irregularity in it, which will not suffer us to bring it under any of the simple or regular forms of Government, as they are usually described by the Masters of Politicks' (VI–1, p. 135).

The assessment of individual *Reichsstände* was much easier for Pufendorf

¹² When Christian Thomasius announced his lecture on the *Monzambano*, Pufendorf commented on this in a letter to Thomasius: 'Wenn der alte dr. Schwendendorffer noch in leben were, würde er sich sehr darüber scandalisieren, daß man nun den gefährlichen Monzambinum, wie er ihn nannte, publice zu lesen sich unterstünde. Ich habe wohl eine editionem postumam verfertigt, darin viel dinge ausgelassen, so eigentlich nicht ad rem dienen, viel auch hinzugethan. Aber weil ich mich solange nicht selbst für den autorem bekennet, so will ichs auch noch nicht thun.' Pufendorf to Thomasius (Berlin, 9 Apr. 1692) in S. Pufendorf, *Collected works*, ed. W. Schmidt Biggemann, 1: *Briefwechsel*, ed. D. Döring (Berlin, 1996), p. 340.

¹³ Thomas Hobbes, *Leviathan*, ed. R. Tuck (Cambridge, 1992), ch. 22, p. 155.

¹⁴ See Pufendorf to Thomasius (Berlin, 9 Apr. 1692) in Pufendorf, *Briefwechsel*, p. 340.

because they did not differ from a regular form. Therefore he considered them as monarchies, although he added in the posthumous edition that they were not perfect states at all. What he wanted to stress, however, was that the attribution of sovereignty was very straightforward for particular *Reichsstände*, as long as they were considered in their own right and not in connection with the Empire. For the latter the essential question remained whether one could attribute sovereignty to a certain person or assembly within the Empire. If so, it was to be considered as a regular state. ‘But... the German Writers are by no means agreed what Form belongs to the whole Body of the German Empire, which is an infallible sign of an irregular Form, and no less also of the Ignorance of the Authors’ (vi–3, p. 137).

In his major work on natural law, *De jure naturae et gentium libri octo*, which was first published in 1672 during the time when Pufendorf was employed as professor by the Swedish king at the University of Lund, and where he was lecturing on natural and international law, Pufendorf’s theory about sovereignty was still very much concerned with the regular and irregular forms of the state. Thus Pufendorf argued that ‘the Sovereign Command is, by no means, such an entire Compound Being as is made up of Heterogeneous Parts, which as they are join’d and knit together, by some common Band, compose one Body, yet so as that each Part is capable of subsisting separately by its self’.¹⁵ In this passage Pufendorf defined sovereignty *ex negativo*, but if one were to apply it to the condition of the Empire, one would have to say that it corresponded almost exactly with its reality. Therefore it would have to be maintained that the Empire could not hold any rights of supreme sovereignty on its own behalf, simply because the whole Empire itself consisted of heterogeneous parts. Pufendorf’s abstract reasoning about sovereignty in this work proves that he was concerned with devising a new and more ‘applicable’ theory of sovereignty regarding the Empire. Even in this later work, which is not at all concerned with the Empire, he maintains the view

that there is so near and so necessary a Connexion between all the parts of the Sovereignty, as that not one of them can be separated from any other, but the regular Frame of the Commonwealth must be destroy’d, and instead of it an irregular Body must start up, held together only by an infirm and ineffectual Covenant.¹⁶

Arguably, the different parts of the Empire were separated to a considerable degree, which became particularly apparent after 1648, when the *Reichsstände* had gained the right to form alliances with foreign countries.¹⁷ Therefore, the consequence of this reasoning would be that the form of the Empire had been turned into an irregular one.

As already suggested, it was exactly along those lines that Pufendorf had argued in his work on the constitution of the Empire. Thus Pufendorf came to

¹⁵ S. Pufendorf, *Of the law of nature and nations*, trans. B. Kennet (London, 1717), p. 490 (vii–4, p. 1).

¹⁶ Pufendorf, *Of the law of nature*, p. 494 (vii–4, p. 11).

¹⁷ This aspect will be dealt with in full in the second part of this article.

a conclusion which was not meant to be an insult to the dignity of the Empire, but simply a more accurate description of its constitutional form:

There is now nothing left for us to say, but that *Germany* is an Irregular Body, and like some mis-shapen Monster, if it be measured by the common Rules of Politicks and Civil Prudence. So that in length of time, by the Lazy-easiness of the Emperors, the Ambition of the Princes, and the Turbulence of the Clergy or Churchmen, from a Regular Kingdom is sunk and degenerated to that degree, that is not now so much as a *Limited Kingdom*, (tho the outward Shews and Appearances would seem to insinuate so much) nor is it a *Body* or *System* of many Sovereign States and Princes, knit and united in a League, but something (without a Name) that fluctuates between these two. (VI–9, p. 152)

It is no surprise at all, and indeed a well-known fact, that Pufendorf's writing caused grave agitation among the *Reichspublizisten* and other writers who were concerned with the theory of politics.¹⁸ But it is essential to stress that *irregularity* and *monstrosity* were almost synonyms in the seventeenth and eighteenth centuries.¹⁹ It is worth drawing attention to the common contemporary understanding of these notions, such as can be found for example in Zedler's *Universal-Lexikon* of 1745: 'Freak [or indeed monstrosity] (in Latin Monstrum) ... is actually a natural birth, which in some respect differs in class and form from its species.'²⁰ Pufendorf himself had made this point in an annotation to his *Dissertation on irregular republics* where he stated that the word 'monstrosity' was only used to indicate the striking and unusual irregularity.²¹ Last but not least it should be stressed, as Bernd Roeck pointed out, that Pufendorf simply deleted the comparison of the Empire with a *monstrum* in the posthumous edition²² and referred only to the notion of irregularity.

Therefore, one would be well advised not to bother too much about possibly emotive connotations of the word 'monstrosity', but rather to consider how Pufendorf's description of the Empire relates to its reality and to the contemporary discussion of it. This might tell us how far, by reading Pufendorf, one might gather insights into the admittedly complex constitutional structure of the Empire. His distinct new approach, however, ought to be seen in light of

¹⁸ See F. Palladini, *Discussioni seicentesche su Samuel Pufendorf – scritti latini, 1663–1700* (Bologna, 1978), pp. 111–62.

¹⁹ Pufendorf's use of 'monstrosity' troubled even modern scholars but their misunderstanding of Pufendorf's notion of 'monstrosity' has already been sufficiently pointed out by several scholars and is therefore widely known. One might therefore have assumed that their misleading interpretation is no longer current.

²⁰ J. H. Zedler, ed., *Großes vollständiges Universal-Lexikon aller Wissenschaften und Künste*, XXI (Leipzig and Halle, 1745), p. 486: 'Mißgeburt (lat. Monstrum) ... ist eigentlich eine natürliche Geburt, die auf einige Weise von der Ordnung und Gestalt ihrer Gattung abweicht.'

²¹ S. Pufendorf, 'Addenda Dissertationi de Republica Irregulari' in *Dissertationes academicae selectiores* ... (Frankfurt and Leipzig, 1678) pp. 572–621. 'Quod vocabulum [monstrum] citra omnem injuriam positum nihil aliud notat, quam insignem aliquam & inusitatam irregularitatem praesertim cum morborum velut agmina, & partium in diversa commoda tendentium studia eandem comitentur.' Quote: p. 619.

²² B. Roeck, *Reichssystem und Reichsherkommen: die Diskussion über die Staatlichkeit des Reiches in der politischen Publizistik des 17. und 18. Jahrhunderts* (Stuttgart, 1984), p. 28.

the previous discussion about the form of the Empire which had become obsolete with the entry of the parameters of *regularity* and *irregularity*, into the discussion. Thus Pufendorf shaped, to a considerable degree, subsequent debate about the constitution of the Empire. Among the many critical accounts and reactions to Pufendorf's *Monzambano*, Leibniz's implicit attack on Pufendorf reveals for example that the employment of 'monstrosity' was perceived by Pufendorf's contemporaries as an insult to the Empire. When Leibniz discussed the Diet or German assemblies he pointed out that 'some others, who have expressed themselves a bit freely concerning our state, think them monstrous'.²³

As we know, Pufendorf's answer was that none of the regular forms applied to the Empire. Pufendorf was deeply concerned with the problem that one could not simply attribute sovereignty within the Empire to the Emperor. He perceived the right to form alliances which was exercised by the *Reichsständen* as the main obstacle to regular monarchical sovereignty in the Empire. His account of the individual princes and their tendency towards independent sovereignty tells us a good deal about the importance of the right to form alliances, and deserves therefore to be quoted in full:

None of the *German Princes* or States will acknowledge, that the Dominions which are under them are more the Emperor's than they are theirs, or that they are bound in the Administration of them to have respect more to the Service of the Emperor, or the People, than to their own Personal Profit and Advantage. But on the contrary, every one of them is so far a Sovereign, that he makes War upon his Neighbours at home or abroad, and entereth into Leagues with his Neighbours or Foreigners, without ever consulting the Emperor. (vi–8, p. 151)

Thus Pufendorf not only perceived the Empire as an irregular political body, but recognized a political and constitutional deadlock between the territorial powers on the one hand and monarchical power on the other. The substantial difference in comparison with earlier writers, who were concerned with the constitution of the Empire, is to be found in the fact that Pufendorf did not try to resolve this by applying the inflexible Aristotelian categories of political bodies on the Empire. More or less all previous attempts to resolve the Bodinian question to whom sovereignty within the Empire should be attributed could be summarized in the endeavour to attribute it either to the *Reichsständen* or to the Emperor or, alternatively, and profoundly against Bodin's theory of sovereignty, to argue for any kind of mixed monarchy. Pufendorf argued that all these attempts were in vain and not applicable to the Imperial constitution, because of its irregularity.

Both the *Reichsstände* and the Emperor tended towards contradictory

²³ G. W. Leibniz, 'Caeserinus Fürstenerius', in *Political Writings*, ed. P. Riley (Cambridge, 1989), p. 119. The relationship between Leibniz and Pufendorf deserves much more research, especially their concepts concerning the Empire. For a first discussion of Leibniz's writing on the Empire see N. Hammerstein, 'Leibniz und das Heilige Römische Reich deutscher Nation', *Nassauische Annalen*, 85 (1974), pp. 87–102.

positions which put the constitution of the Empire in jeopardy: ‘This Irregularity in its Constitution affords the matter of an inextricable and incurable Disease, and many internal Convulsions, whilst the Emperor is always labouring to reduce it to the condition of a Regular Empire, Kingdom, or Monarchy; and the States on the other side are restlessly acquiring to themselves a full and perfect Liberty’ (VI–9, p. 153). Apparently Pufendorf was far from being satisfied with the conclusions he reached about the constitution of the Empire. He stated that Germany could not revert to a regular monarchy without great disruption. It was much more likely, he told a general audience rather than a fictive Italian brother, that Germany would develop almost naturally into a federation of states. He argued that ‘Germany, without great Commotions, and the utmost Confusion of all things, can never be reformed or reduced to the Laws of a Just and Regular Kingdom, but it tends naturally to the state of a Confederate System’ (VI–9, p. 153).

We need to look at Pufendorf’s reasoning in his theoretical writings in order to obtain a clue to his *Monzambano* which itself is lacking any profound theoretical reflection. Pufendorf’s employment of the term ‘system’ in the *Monzambano* deserves closer scrutiny and has also to be interpreted in the context of his other writings. As we have shown above, Pufendorf’s theory concerning sovereignty was decisively influenced by Hobbes, who had employed the notion of a political system²⁴ which could have been either regular or irregular and Pufendorf was using this term to develop a new theory of state forms in order to overcome the older Aristotelian theory, especially that of mixed government. As already suggested, his major work on natural law refers extensively to the theoretical aspects of regular and irregular states, and to the theory of political systems. For Pufendorf,

in order to completing the Essence of a just and regular State, such an Union is requir’d as shall make things which belong to the Government of it, seem to proceed from one Soul. Now hence it is manifest, that the former way of Mixture constitutes such a Body as is held together not by the Bond of one Supreme Authority, but barely by Compact; and which therefore is to be rank’d, not amongst the regular, but amongst the irregular States.²⁵

The notion of irregularity alone was not sufficient to develop a new theory of state forms, which could replace the theory of mixed governments. So far, all states where no single location of sovereignty could be attributed were classified as irregular states but could nevertheless also still be classified as states of a mixed government. Given that there were many states which were precisely lacking such a clear definition of sovereignty, it was important for Pufendorf to develop this argument further. It was the description of a system which enabled him to differentiate between regular and irregular states without employing the notion of mixed governments. He argued, ‘if some one Person be endued

²⁴ See further references and discussion in N. Bobbio, *Thomas Hobbes and the natural law tradition* (Chicago and London, 1993) p. 180 n. 11.

²⁵ Pufendorf, *Of the law of nature*, p. 508 (VII–5, p. 13).

with high degrees of Authority, and several parts of the Supreme Power above others in the Council, then the State will be plainly Irregular, lying between such a Monarchy as is over-awed by an assuming Senate, and a *Systematical Form*.²⁶

Thus the idea of irregular state forms and the description of state systems lay at the heart of Pufendorf's new approach to the definition of sovereignty; indeed, his concern about state systems can be found right from the beginning of his political writings.²⁷ Pufendorf complained in his major work that most political writers 'had scarce any Word left to express it [i.e. not simple forms of government], besides the Name of a *mixt* Government'.²⁸

His own criterion of regularity seems to be similar to the unity of the sovereign power, but in fact it was fundamental for his theory of state forms. Pufendorf assessed not only simple forms of state but also composite ones by the standard of regularity. In this context the idea of state systems was crucial: 'Of *Systems* properly so call'd, these Two kinds do especially fall under Notice: One, when two or more States are subject to one and the same King; the Other, when two or more States are link'd together in one Body by virtue of some League or Alliance.'²⁹ Thus Pufendorf perceived a state either as a simple one or compound one which was embodied in the idea of a system of states. He then made a distinction between regular and irregular systems of states which allowed him four different types of state, viz., a regular simple state and a regular composite state, and their irregular forms. The irregular forms of these two forms had been transformed somehow from their earlier regular form into an irregular one. The transformation from a regular simple state into an irregular one is easy to perceive, but the transformation of a composite state or system of states needs further explication. Pufendorf argued 'that where-ever Business is decided by Plurality of Voices, in such a manner as that the differing Parties are likewise bound to stand to the Resolution; there the Regular Form of *Systems* or Confederacies is deserted, and the Members either break into an irregular Body, or close together in one undivided State'.³⁰

Pufendorf perceived the Empire as an irregular form of a simple state, but similar to a regular system of states, and argued that it had been transformed from its previous regular form. But the assessment, as for example by Volker Press, that Pufendorf sought to transform the structure of the Empire into a federation of states³¹ does not correspond to Pufendorf's own writing. He described the status quo after 1648 by his new theory rather than advocating

²⁶ Ibid.

²⁷ See Pufendorf's early dissertations in *Dissertationes academicae selectiores*, esp. 'De Republica irregulari' (1669), pp. 381–452; 'De Systematibus Civitatis' (1668), pp. 264–330; and also 'De rebus gestis Philippi Amyntae filii' (1666), pp. 109–95. See now the excellent article by A. Defour, 'Pufendorfs föderalistisches Denken und Staatsräsonlehre', in F. Palladini and G. Hartung, eds., *Samuel Pufendorf und die europäische Frühaufklärung* (Berlin, 1996), pp. 105–22.

²⁸ Pufendorf, *Of the law of nature*, p. 500 (vii–5, p. 2). ²⁹ Ibid., p. 511 (vii–5, p. 17).

³⁰ Ibid., p. 515 (vii–5, p. 20).

³¹ V. Press, *Kriege und Krisen: Deutschland, 1600–1715* (Munich, 1991), p. 326.

any change. By assessing the constitution of the Empire in the light of his new theory of sovereignty, he tried to overcome the strict and inflexible Aristotelian theory of state forms, which had – particularly in connection with Bodin's theory of sovereignty – caused so much agitation and strife within the Empire. There was no reconciliation between the contradicting claims of the *Reichsstände* and the Emperor as long as sovereignty was assessed by Bodin's theory; but the older Aristotelian theory of mixed government did not solve the issue of sovereignty either.

Apart from Pufendorf's new theoretical approach, the remedies he recommended for the constitutional structure of the Empire were crucial. As I have already stressed, Pufendorf perceived the right to form alliances as one of the main reasons for the irregularity of the Empire. If he were not interested in the maintenance of the Empire as a whole, but rather in favour of independent sovereign princes, as, for example, Press claimed, then it is inconceivable why he was troubled so much by this particular right and its potential abuses. He argued that great damage is caused by the fact

that the Princes of *Germany* enter into Leagues, not only one with another, but with Foreign Princes too, and the more securely, because they have reserved to themselves a Liberty to do so in the Treaty of *Westphalia*, which not only divides the Princes of *Germany* into Factions, but gives those Strangers an opportunity to mould *Germany* to their own particular Interest and Wills. (vii–9, p. 182)

Pufendorf's patriotism in favour of the Empire (*Reichspatriotismus*) is clearly apparent, and his strong rejection of an increasingly aggressive French policy becomes manifest in this passage as well.

The other difficulty, Pufendorf perceived, for the union of the Empire was to be found in religious factionalism within the Empire. This is very much in accordance with the faithful Lutheran Protestant, who 'regarded the Roman Catholic religion as quite simply an obstacle to union in the German Empire'.³² One argument against the Catholics, of course, was that the Catholic clergy 'depend upon another Head, who is no part of the *German Empire*, but a Foreigner, and an everlasting Enemy to their Country' (vii–9, p. 180). But apart from Pufendorf's aversion to the pope, which incidentally revealed the Protestant background of the fictional Italian *Severinus de Monzambano*, he argued that 'the Difference of Religion... divides *Germany*, and distracts it' (vii–9, p. 181). Both aspects of these religious and secular problems in the constitution of the Empire were dealt with in the peace treaty of Westphalia. The religious strife – not only over the issue of true salvation, but also over ecclesiastical dominion – was more or less settled by the *modus vivendi* which had

³² J. Moore and M. Silverthorne, 'Protestant theologies, limited sovereignties: natural law and conditions of union in the German Empire, the Netherlands and Great Britain', in J. Robertson, ed., *A union for Empire: political thought and the British union of 1707* (Cambridge, 1995), pp. 171–97. Quote: p. 183. The account by Moore and Silverthorne about the constitutional situation of the Empire is far too much in favour of the territorial princes and neglects the influence the Emperor still possessed even after 1648.

been employed with the *Normaljahr* of 1624,³³ although a *reservatio mentalis* against the other religion was still existent.

More crucial, however, was the question of the right to form alliances because it put the whole structure of the Empire in jeopardy. Thus it is no wonder that Pufendorf referred constantly to this matter. When he eventually suggested his own remedies for the Empire, it is striking that he claimed: ‘in the first place, [one has] to take care that none may league with one another ... against any of the Members of it [the Empire]’ (VIII–4, p. 195).

In discussion with Hippolithus a Lapide, he developed his own surprisingly meagre suggestions (cf. VIII – 1–3). It proved to be extremely difficult to offer reasonable proposals that would recognize a particular state’s interest and, at the same time, apply to the Empire as a whole, because Pufendorf perceived it to be such an irregular state. For every particular form of the state was required a formulation of a particular reason or interest of state. Therefore Pufendorf had to start with this consideration once again:

I lay this as a Foundation to all I shall propose, *viz.* *That the depraved state of Germany is become so inverte and remediless, that it cannot be reduced back to the state of a Regular Monarchy, without the utter Ruin of the Nation and Governments.* But then, seeing it comes very near to the state of a *System of several Independent States united by a League or Confederacy*, the safest course it can possibly take, is to follow those methods which the Writers of Politicks have prescribed for the well-governing such Societies, the first which is, That should rather be solicitous to preserve their own, than think of taking any thing from their Neighbours. Their next greatest care is to preserve Peace at home, and to that end it is absolutely necessary to preserve every one in the Possession of his own Rights, and not to suffer any of the stronger Princes to oppress any of the weaker, that so, though they are, as to other things, not equal, yet in the point of Liberty they may be all equal each to other, and alike secured. (VIII–4, p. 192)

It is worth stressing again that Pufendorf by no means demanded that the Empire should be transformed into a federation of states and drew his conclusions from this. He merely described the irregular form of the Empire as being akin to a federation of states. A letter from Pufendorf to the Landgraf Ernst von Hessen-Rheinfels sheds light on Pufendorf’s own perception of the Empire from a different angle. He wrote that ‘the abuse of the liberties and the right to form alliances causes the greatest irregularity for our commonwealth (if I were allowed to use the term of the awful heretic Monzambano)’. He concluded his letter with the gloomy supposition that ‘our commonwealth will muddle through further, because its crooked shape is so stiff that one would rather break it than bring it back to the right shape’.³⁴ Therefore he concluded that the reasons of state which were applicable to the Empire were to be derived from the same source as those which were recommended by the political

³³ See *Instrumenta pacis Westphalicae*, ed. K. Müller (Bern, 1975). IPO v–2: ‘Terminus a quo restitutionis in ecclesiasticis et quae intuitu eorum in politicis mutata sunt, sit dies 1.1. 1624.’

³⁴ Pufendorf to Landgraf Ernst von Hessen-Rheinfels (Berlin, 1, Nov. 1691) in Pufendorf, *Briefwechsel*, p. 333.

literature for federations. What Pufendorf essentially suggested therefore was basically to maintain the status quo.

One of the substantial differences between the first edition under the pseudonym of *Monzambano* and the posthumous edition is that Pufendorf had toned down his critique of the Habsburgs. In the first edition he argued more strongly against the Emperor and perceived him as a threat to the liberties of the *Reichsstände*. But in the posthumous edition he demanded considerable cooperation from the Emperor as well as the *Reichsständen* to preserve the status quo of the Empire. ‘Therefore the Emperor ought to omit all attempts to drive the Empire towards a real Monarchy again, while the princes have to suffer the uniting bond and are not allowed to long for entire independence and liberty.’³⁵ This shift in Pufendorf’s argument reveals that he realized the importance of the Imperial constitution to provide peace and security for its members, which was only available by a permanent compromise between the Emperor and the *Reichsständen*. Arguably this shift was influenced by the aggressive policies of Louis XIV and his constantly increasing threats towards the *Reichsständen* along the Rhine.

Both his letters and the later change in the posthumous edition strongly suggest that Pufendorf did not argue in favour of further changes within the Empire, towards a system of confederates.³⁶ The irregularity of the distribution of sovereignty led Pufendorf to stress the importance of a permanent council which would more or less serve as a substitute for the lack of a clearly defined sovereign power possessed either by the Emperor or by the *Reichsständen*. The Diet of the Empire seemed fit for this purpose, which again supports the view that Pufendorf was mostly concerned with sustaining the fragile status quo:

The place of such a council is almost served by the diets, who are in session since 1663 for such a long period now, that they almost tend to become a permanent assembly and common bond which keeps the Empire together. Such a place of a permanent assembly where all public affairs could be negotiated is very much in the interest of the Empire.³⁷

The description of a system of states implied that the individual states of the Empire were not allowed to use their right to form alliances without any hesitation, because the substantial restriction was that the system would not be put into jeopardy by any of the members of it. Interestingly, Pufendorf refers to

³⁵ This part is added in the posthumous edition and therefore not translated by Bohun. The Latin original is not to be found either in ‘Samuelis B. de Pufendorf, sive antea Severini de Monzambano, De Statu Imperii Germanici ex autographo B. Autoris Recognitus, cum prioribus Editionibus collatus, ac selectis variorum Notis illustratus, curante D. Gottlieb Gerhard Titio’, Lipsiae (Leipzig) 1708, because Titus provides only the text of the first edition and his own annotations. Thus one has to refer for the Latin original to the second edition.

³⁶ Roeck, *Reichssystem*, maintains this view. J. Robertson, ‘Empire and union: two concepts of the early modern European political order’, in Robertson, ed., *A union for Empire*, pp. 3–36, argued along the same lines, when he had claimed that ‘the *De Statu Imperii* closed with an impassioned argument that the “state interest” of the German Empire lay in the continuation of this process [towards a federation], until it formed a true system of states’ (p. 26).

³⁷ This part, too, is added in the posthumous edition and therefore not translated by Bohun. See n. 35.

this matter again when he is dealing with the Diet and demands once more that ‘most of all it should be avoided that the particular *Reichsstände* enter into alliances among themselves or with foreign powers against any part of the Empire’.³⁸ One approach to prevent the radical transformation of the Empire by the unrestricted use of the right to form alliances lay in the sense of unity which the Diet provided.

Thus more and more the Diet seemed to become the real location of sovereignty within the Empire as a whole.³⁹ The monarch was restricted by fundamental laws and the consensus of the assembly of the Empire. This does match with Pufendorf’s theory of sovereignty which ought to be quoted here in full:

Monarchy is brought into much narrower Bounds, and under much stricter Ties, if at the first conferring of Sovereignty, it be expressly covenanted between the People and the Prince, that the latter shall govern according to certain Fundamental Laws, and in all such Affairs as are not left to his absolute Disposal, shall have recourse to a Council of the Commons, or of the Nobles, and determine nothing without their Consent ... A People, who constitute a King over them in this manner, are supposed to have promised him Obedience, not absolutely and in all Points, but so far as his Government is agreeable to the Original Contract and the Fundamental Laws.⁴⁰

Although Pufendorf had not explicitly elaborated a consistent theory of sovereignty in his *Monzambano*, he nevertheless succeeded in applying a conception of the Empire according to his theory of sovereignty, which did not need to misrepresent its constitutional reality. He was very well aware that there was no other choice than to maintain the fragile balance between a restricted monarchy and a federation of states, if one wished to sustain the constitutional structure of the Empire. Thus Pufendorf shaped the discussion of the Empire by his new approach in describing the Empire as an irregular form of a state, very similar to a system of states. But the only solution he provided for this irregular political body was to advocate a careful treatment of this weak system in order to prevent any disruption of it. In this respect Pufendorf was profoundly conservative and the experience of the Thirty Years War might have had its impact on his passionate plea to maintain the Empire as the best available means for peace.

II

How does Pufendorf’s account of the Imperial constitution match with its reality after 1648? And how did the treaty of 1648 shape the Imperial constitution? On the one hand, the peace congresses of Osnabrück and Münster, the locations for the separate sets of negotiations collectively known as the treaty of Westphalia, were congresses of delegates from the warring

³⁸ This part, too, is added in the posthumous edition. See n. 35.

³⁹ It would be interesting to pursue the importance which Pufendorf gave to the Diet in his historical writings on the Elector of Brandenburg – a task beyond the scope of this article. See S. Pufendorf, *De rebus gestis Friderici Wilhelmi magni, electoris Brandenburgici commentariorum libri novendecim* (Berlin, 1695).

⁴⁰ Pufendorf, *Of the law of nature*, p. 527 (vii–6, 10).

powers of the royal houses of Sweden and France, and the Emperor. But on the other hand, the Emperor was not seen as the only representative of the Empire, and therefore all ranks of the Empire (*Reichsstände*) who had held seats and suffrage at the Diet were finally allowed a presence with the right of suffrage at the congress as well.⁴¹ The foreign royal houses put forward contradictory arguments, claiming that they were only fighting against the Habsburgs and not against the Empire, but also maintaining the view that the Emperor alone was not able to negotiate the conditions for peace but that all estates of the Empire should enjoy a suffrage.

Thus neither the Emperor nor the Electoral princes alone represented the Empire, but the entirety of the *Reichsstände* and the Emperor together. The procedural problems created by this representation and decision-making system were extremely complex. The confessional antagonisms in particular were a substantial obstacle which could only be overcome by dividing the Protestant and the Catholic ranks. Therefore the Protestants assembled at Osnabrück together with the Swedish delegates, whereas the Catholics assembled at Münster together with the French. The different colleges of the Electoral princes (*Kurfürsten*), princes (*Fürsten*), and cities gathered in separate sessions before they met together again. Then they had to agree with their confessional counterpart at Münster or Osnabrück, before their proposals could be negotiated with the Emperor. Only after this exhausting procedure could the Emperor deal with the foreign powers.

The importance of the peace of Westphalia for the constitution of the Empire can hardly be overestimated. Arguably from 1552 onwards none of the proposed remedies succeed in solving the constitutional conflict, which in turn was overshadowed by the religious strife. As far as the constitution was concerned, the fundamental matter at stake had been how far the Emperor had to share rights with the *Reichsständen*. Thus, constitutional issues appeared again at the peace conference of 1648. They were introduced by France and Sweden on the one hand, and some Protestant princes under the leadership of Hessen-Kassel on the other. The Emperor tried to maintain his position that constitutional matters should not be discussed at the international peace conference but were only to concern the estates of the Empire.⁴² It was therefore a significant success of the Emperor's policy that many important decisions on the constitutional issues were consigned to the next Diet; and not a failure of the peace conference, as Hanns Gross has implied by his statement that 'the Peace of Westphalia made no positive contribution to the reform of the Empire'.⁴³

Nevertheless, the Emperor was obliged to give ground on his assertion that all necessary changes to the constitution had been already carried out by the

⁴¹ See F. Dickmann, *Der Westfälische Frieden* (Münster, 1985), p. 188.

⁴² See *ibid.*, pp. 325ff.

⁴³ H. Gross, 'The Holy Roman Empire: constitutional reality and legal theory', in J. A. Vann and S. W. Rowan, eds., *The old Reich: essays in German political institutions, 1495–1806* (London, 1975), p. 13.

peace treaty of Prague in 1635,⁴⁴ because too many estates of the Empire were prepared to side with the French and Swedish position, and these European powers were very interested in this alliance with the princes of the Empire. The Emperor, therefore, could not maintain his view that no constitutional issues were a matter of any concern or a cause for negotiation between the foreign powers and himself. One position he could successfully maintain against external opposition was a strict refusal to give up the possibility of an election of the King of the Romans *vivente imperatore*, because here he shared similar interests with the Electoral princes against the French and Swedish demands.

This collective defence of the principal of Imperial pre-election emphasizes a general point that it would be extremely misleading to suggest that the evolution of the constitution of the Empire presented just two, stark alternatives: a strong 'absolutist' Emperor or a conglomerate of independent medium and small states. The *corporate* self-perception of almost all estates within the Empire still provided the framework for its future constitution. It is certainly true that the greater states of the Empire in particular pursued their own interests and tried to gain more territorial power and independence. But nevertheless all of them knew that they derived their existence from a larger security framework which only the Empire could provide.⁴⁵ Thus the interests of France and Sweden differed crucially from the interests of the estates of the Empire, even when those were notionally allied with these external powers. It should be emphasized that most matters concerning the Imperial constitution were entrusted to the Diet (*negotia remissa*). This manner of negotiating issues indicates a fundamental difference between the constituent states of the Empire, who accepted a system in which they considered they had representation, and those foreign powers who perceived the constitution essentially as a kind of power base for the Emperor. 'The crowns [France and Sweden] had to accept the fact that although they could expect a good deal from the German princes, they could never expect a clear opposition to the Emperor.'⁴⁶ Although the foreign powers made an attempt to break up the bonds of loyalty between the *Reichsstände* and the Emperor, they never ceased to exist.

It appeared that the fundamental element of the constitution of the Empire was embodied in the disagreement over the right to form alliances (*ius foederis*). Among all the *iura reservata* held by the Emperor, the right to decide about war and peace on behalf of the Empire – which effectively lay at the heart of the *ius foederis* – was the most important one. As far as the rights of the *Reichsstände* to form alliances were concerned, Ferdinand made it explicitly clear in the peace treaty of Prague what his perception of the future Empire was. It stated that

⁴⁴ The peace treaty of Prague was signed after the defeat of the Swedes at Nördlingen. The Emperor held a very strong position, and did not resist the temptation to enforce one-sided peace conditions which excluded some of his major opponents within the Empire from the peace. Thus his greatest political mistake was that he refused a general amnesty for *all* fighting *Reichsstände*, which implied that the peace remained fragmentary. On the reasons of the failure of the peace of Prague see A. Wandruzka, *Reichspatriotismus und Reichspolitik zur Zeit des Prager Friedens von 1635* (Graz, 1955). ⁴⁵ See J. Burkhardt, *Der Dreißigjährige Krieg* (Frankfurt, 1992), pp. 108ff.

⁴⁶ Dickmann, *Der Westfälische Frieden*, p. 330.

‘moreover all unions, leagues, federations, and suchlike contracts are to be entirely dissolved after the agreement and publication of the peace treaty.’⁴⁷ The right to form alliances was the essential precondition of independent foreign policies conducted by the estates within the Empire. The loss of this right effectively meant that the *Reichsstände* had to give up the right of peace and war (*ius pacis ac belli*).⁴⁸ It appeared that the whole question of these rights was rooted in the twofold question of sovereignty, i.e. first, whether only the Empire as a whole could exercise sovereignty with respect to external affairs or if the territories could do so on their own behalf as well. And secondly whether the Emperor could exercise the sovereignty on behalf of the Empire, or if he had to share this right as far as the Empire was concerned with the *Reichsständen*? This matter was of vital concern for the constitution of the Empire because it shaped its whole corporate structure. The ‘absolutist solution’ of Ferdinand to the crucial issue of the right to form alliances failed. Therefore, this was to return to the agenda of the peace congress at Münster and Osnabrück.

Unlike the peace treaty of Prague, foreign influence was now used as a threat by the Protestant princes to force the Emperor into further concessions. Most constitutional questions and also the French demands had already been negotiated by the summer of 1646. But because of the crucial negotiations about the Swedish demands it took another two years until the treaty was eventually signed. Ironically the increasing levels of hostility and opposition encountered by Mazarin within France and the disagreement about Alsace delayed ratification in 1647. Therefore it was in the Swedish headquarters at Osnabrück where on 6 August 1648 the stipulations of the peace were first declared and the *Reichsstände* urged to sign the contract. But out of consideration for her French ally, Sweden was not yet prepared to sign the treaty. However, the delegates of the Emperor and of Kurmainz (archbishop and prince-elector) in representation of the Empire pledged that they would consider the treaty as signed and would not seek any alterations. Thus the constitutional changes were first fixed in the treaty of Osnabrück between the Emperor and the queen of Sweden rather than in the treaty of Münster between the Emperor and the king of France, which basically deferred to the stipulations of the treaty of Osnabrück. The treaty itself reflects the twofold aspect of its aims, stating that it was first meant to be a peace between the fighting parties and that secondly, ‘this present Transaction shall serve for a perpetual Law and Pragmatic Sanction of the Empire, inserted for the future like other Fundamental Laws and Constitutions of the Empire, particularly at the next Diet of the Empire, and the Capitulation of the Emperor’.⁴⁹

⁴⁷ F. Dickmann, ed., *Geschichte in Quellen: Renaissance, Glaubenskämpfe* (Munich, 1982), p. 330.

⁴⁸ See *ibid.*, pp. 329ff.

⁴⁹ IPO xvii–2: ‘haec transactio perpetua lex et pragmatica imperii sanctio imposterum aeque ac aliae leges et constitutiones fundamentales imperii nominatim proximo imperii recessui ipsique capitulationi Caesareae inserenda’. The English quotations are drawn from one of the rare English editions of ‘The articles of the treaty of the peace, signed and sealed at Munster. Westphalia’ (London, 1697), p. 41–CXIX.

This placed the Peace of Westphalia amongst the fundamental laws of the Empire similar to the Golden Bull or the Eternal Peace (*ewiger Landfriede*), which were themselves guaranteed by the peace treaty. But the Empire was also still shaped by the ancient structure of feudatories, stretching down from the Emperor to the Imperial knights (*Reichsritter*). This gave the Emperor a considerable degree of influence, because the ancient rights of the specific German feudal structure provided the system of customary law which was relevant if no positive law of the constitution applied. Within this structure the Emperor and the *Reichsstände* tried to acquire more rights on their behalf, which was encapsulated in the formula of the *iura reservata* and the *iura committalia*. The Emperor had always claimed that all matters which were not settled in any specific law belonged to the *iura reservata* and therefore to his jurisdiction. The argument about the *iura reservata* and *iura committalia* was therefore of crucial importance.

As we have seen, the fundamental constitutional question of the Empire lay in issues regarding sovereignty. It was in the interest of the foreign royal houses to establish the *Reichsstände* as independent and sovereign powers, given that at this time they were only associated in a somewhat loose congregation called the Empire. But the foreign perception of the Empire apparently underestimated the political necessity of, and loyalty of the *Reichsstände* to, the idea of the Empire itself. This ambiguous situation is reflected in the outcome of the negotiations concerning constitutional matters.

The first paragraph of the eighth article (or according the English translation §LXIV) began with the declaration that ‘every one of the Electors, Princes and States of the *Roman* Empire, are so establish’d and confirm’d in their ancient Rights, Prerogatives, Liberties, Privileges, free exercise of Territorial Right’.⁵⁰ Thus the hierarchical structure of feudatories with the Emperor at its head was challenged by the federal structure of the political body of the *Reichsstände* which exercised their explicitly guaranteed *ius territorialis*. Nevertheless, the Empire was still based on the structure of feudatories and the Emperor derived his greatest influence from the small *Reichsständen* who failed to establish their own territorial power and felt threatened by the greater territories who tried to gain more power and consolidate their territories even at the cost of their weaker neighbours. Therefore the Emperor became important for his old clientele as a guarantor of their independence and undisturbed existence.⁵¹

Even more crucial was the second paragraph of the eighth article which stated explicitly that all the above mentioned *Reichsstände* ‘shall enjoy without contradiction, the Right of Suffrage in all Deliberations touching the Affairs of the Empire’.⁵² All rights which were usually linked with the notion of sovereignty were apparently attributed to the Imperial Diet, because all affairs which concerned the Empire such as entering into alliances or making peace,

⁵⁰ ‘Articles of the treaty’, p. 23–LXIV. See IPO VIII–1.

⁵¹ See K. O. Freiherr von Aretin, ‘Das Reich in seiner letzten Phase 1648–1806’, in idem, *Das Reich* (Stuttgart, 1986), pp. 19–51.

⁵² ‘Articles of the treaty’, p. 23–LXV. See IPO VIII–2.

raising taxes, recruiting soldiers, or building fortresses could not be decided ‘without the Suffrage and Consent of The Free Assembly of all the States of the Empire [*Reichsstände*]’.⁵³ All political decisions were to be carried out together by the Emperor and the Empire as represented in the Diet, a concept which became encapsulated in the famous phrase of *Kaiser und Reich*. What was new about this procedure was that the peace treaty of 1648 had, for the first time, guaranteed the participation of the *Reichsstände* in all essential matters. Thus the Emperor could no longer maintain his position that for example the right to sign peace treaties belonged exclusively to his *iura reservata* and could only be exercised by him. All crucial affairs were explicitly declared as *iura committalia* and had to be exercised by *Kaiser und Reich*, i.e. the Emperor and the *Reichsständen* together at the Imperial Diet. After 1663 the Diet in Regensburg remained in permanent session, but the most significant development became the instigation of a *congress of delegates*, because the representation of the several *Reichsstände* at the Imperial Diet was no longer exercised by the rulers of territories in person. Many of the smaller *Reichsstände* had been prepared not to maintain an expensive permanent representation at Regensburg, which effectively meant that many of them were represented by others. Again, the Emperor managed to take advantage of this situation and strengthened his position by representing the interests of most of the smaller *Reichsstände* and thus uniting this clientele behind him. Nevertheless, the main concerns of the Diet were still the *negotia remissa*, which occupied most of the debates. These matters caused the perpetuation of the Diet and through the negotiation and postponement of them, one could estimate ‘the growing strength of the Emperor at the Diet’.⁵⁴ The Emperor was very interested in further delaying these remaining issues; the Diet was a rather clumsy instrument of ancient feudal provenance, and tiresome negotiations were needed to establish a consensus. The decision-making process was mainly shaped by the Emperor, represented by his *Prinzipalkommissar*, and the archbishop of Mainz (or his designated official) who presided over the Diet as archchancellor of the Empire. Out of the three colleges of the Diet, the college of Electors and the college of princes were the most important ones. Although the treaty of 1648 gave the decisive vote (*votum decisivum*) to the third college, formed by the free cities of the Empire,⁵⁵ the other two colleges were keen to curtail their influence: ‘By unwritten understanding, either the first two councils did reach agreement, or the matter was simply never formally voted on, and therefore dropped altogether.’⁵⁶ Thus there was still scope for the Emperor to engage in political manoeuvring.

Of all stipulations of the treaty, the second part of the second paragraph of the eighth article is particularly important because it shaped the constitution of

⁵³ Ibid.

⁵⁴ A. Schindling, *Die Anfänge des Immerwährenden Reichstags zu Regensburg: Ständevertretung und Staatskunst nach dem Westfälischen Frieden* (Mainz, 1991), p. 182.

⁵⁵ See IPO VIII–4.

⁵⁶ Gagliardo, *Reich and nation*, p. 24.

the Empire more than anything else. It is worth quoting in full, moreover, because Pufendorf has referred repeatedly to this stipulation:

Above all it shall be free perpetually to each of the States of the Empire, to make Alliances with Strangers for their own Conservation and Safety; provided, nevertheless, such Alliances be not against the Emperor and the Empire, nor against the Publick Peace of this Transaction, and without prejudice to the Oath by which every one is tyed to the Emperor and the Empire.⁵⁷

The above mentioned *ius territorialis* was only aimed at internal policies of the particular territories. In addition to this internal sovereignty of the territories, the right to form alliances (*ius foederis*) completed the territorial power of the *Reichsstände* insofar as the *ius foederis* was directed at the external or international policy of the territories. Thus these stipulations ensured the political capacity to act at international level for the individual *Reichsstände*, which was very much in the interest of the foreign powers because it potentially gave them greater influence in their own foreign policy towards the Empire.

The French proposition of 1 June 1645 for this part of the stipulation had gone even further and employed explicitly the idea of sovereignty: ‘Que tous les Princes et Estats en général et en particulier seront maintenus dans tous les droits de Souveraineté, qui leur appartiennent et spécialement, dans celuy de faire des Confédérations tant entre eux qu’avec les Princes voysins, pour leur conservation et sureté.’⁵⁸ But the Emperor at least managed to impose a reservation in this crucial stipulation. Thus, effectively, the French proposal, combined with the reservation of the Emperor, emerged as a compromise between the different interest groups.⁵⁹ The sovereignty of the territories was restricted by the reservation that none of their alliances should be directed against the Emperor and the Empire. Moreover ‘the peace of Westphalia with its wide-ranging rights for the *Reichsstände* remained a programme which only some of the princes were able to execute’.⁶⁰

The treaty of Westphalia guaranteed confessional equality, but nevertheless the fact that the Emperor was Catholic was an essential advantage for the Catholic party. Thus the treaty introduced the idea of *itio in partes* of the *corpus catholicorum* and the *corpus evangelicorum*. To ensure the equality of Catholics and Protestants, both parties should have the right to claim that in all conflicts which involved religious matters the Diet should vote in two separate *corpora*. This procedure was supposed to ensure that the Protestants were not out voted by the Catholic majority. But what had been designed to protect the Protestants, recognizing their experiences after 1555, turned out to be yet another structural problem for the Imperial constitution. The Protestants realized immediately that they could exploit the right of separating into two

⁵⁷ ‘Articles of the treaty’, p. 23–LXV. See IPO VIII–2.

⁵⁸ J. G. von Meiern, ed. *Acta pacis Westphalicae publica oder Westphälische Friedens-Handlungen und Geschichte, Erster Theil* (Hanover, 1734), p. 444.

⁵⁹ See E.-W. Böckenförde, ‘Der Westfälische Frieden und das Bündnisrecht der Reichsstände’, *Der Staat*, 8 (1969), pp. 449–78.

⁶⁰ Press, *Kriege und Krisen*, p. 384.

different religious congregations for their own ends. By claiming that most of the disputed matters were matters of religious controversy, and thus enforcing the *itio in partes*, they were able to assert that the decision reached in the particular Protestant corpus was the only binding agreement for them, and that the Catholics had no right to intervene or challenge these discussions.

This tactical manoeuvring impeded the Diet seriously, while the Emperor attempted to stress the unity of the Empire. He was at least able to use the institutions of the Empire which were separated from the Diet: above all the aulic council (*Reichshofrat*) provided him with a strong platform for exercising his power in the Empire.⁶¹ Against the stipulation of the treaty of Westphalia, the Emperor enforced the new order for the aulic council (*Reichshofratsordnung*) of 1654 without the participation of the *Reichsstände*, but merely by his Imperial authority. The aulic council was superior to the imperial cameral tribunal (*Reichskammergericht*) because it was financially better provided for and could react faster than the former. Thus the Emperor managed to maintain a role as arbiter within the Empire. The stipulation of 1648 stated explicitly that the imperial circles (*Reichskreise*) were to be established again. While the development of these circles was extremely varied, nevertheless some of them 'became the chief arena for the transactions of imperial and religious business'.⁶²

Volker Press had described the constitutional situation of the Empire as a deadlock, because the two possibilities of either sovereign territorial states or a sovereign monarchy acted as mutual impediment. According to his assessment 'this deadlock was fixed in the peace treaty of 1648'.⁶³ Thus, he argued, the territories developed under the umbrella of the constitutional framework of the Empire, 'but all efforts to establish an oligarchy of Electoral princes ... failed'.⁶⁴ The Empire was neither a federation of sovereign states nor a monarchy with a sovereign monarch at its top. Nevertheless, it contained aspects of both of these classical Aristotelian political forms and it was not only the princely territories who took advantage of further developments. Because the Emperor allowed himself to be guided by the articles of the peace of Westphalia, he managed to gain ground within the Empire and to increase his influence by using the possibilities which the treaty provided. However, 'it remained impossible to decide to whom sovereignty could be attributed within

⁶¹ Interestingly, older German scholarship had maintained that the Emperor possessed much more influence in the Empire than has been commonly assumed. See particularly H. E. Feine, 'Zur Verfassungsgeschichte des Heiligen Römischen Reiches nach dem Westfälischen Frieden', *Zeitschrift der Savignystiftung für Rechtsgeschichte*, 52 (1932), pp. 65–133. 'Schien das kaiserliche Regiment im Reich mit dem Westfälischen Frieden endgültig begraben worden zu sein, so bemerkt man doch in dem Jahrhundert danach auf verschiedenen Gebieten ein deutliches Wiederaufleben der kaiserlichen Macht im Reich.' Quote: p. 79.

⁶² G. Strauss, 'The Holy Roman Empire revisited', *Central European History*, 11 (1978), pp. 290–301. Quote: p. 295.

⁶³ V. Press, 'Die kaiserliche Stellung im Reich zwischen 1648 und 1740 – Versuch einer Neubewertung', in G. Schmidt, ed., *Stände und Gesellschaft im Alten Reich* (Stuttgart, 1989), pp. 51–80. Quote: p. 55.

⁶⁴ *Ibid.* p. 55.

the Empire.⁶⁵ Although the crucial question concerning the constitution and its attribution of sovereign rights was centred in the issue of the *ius foederis*, it is apparent after this brief outline of the complex structure of the Empire that the issue of sovereignty could be also assessed by its institutions such as the Imperial circles (*Reichskreise*), the Imperial Diet (*Reichstag*), and the Imperial courts (*Reichskammergericht* and *Reichshofrat*). Pufendorf deals with these aspects mainly in a descriptive historical perspective, but he nevertheless attributes these matters to the fundamental issue of sovereignty. In his view the Imperial circles disrupt the sovereign power of the Empire as a whole and consequently increasingly undermine its union rather than improve it: ‘Yet a man may well question, whether this Division doth not rend more to the Distraction and weakening of *Germany*, than its Perservation, the whole Body being by this means made less sensible and less regardful of the Calamities which oppress or endanger the Parts of it, and threaten (though at a distance) the Ruin of the whole’ (II–15, p. 49).

The Imperial courts are seen as far too inefficient; especially the *Reichskammergericht* at Speyer (later Wetzlar), which ‘doth not depend on the Emperor only, but acts in the Behalf, and by the Authority of the States of *Germany*’ (V–20, p. 120), failed to ensure an efficient jurisdiction, because the court was the inappropriate body ‘of executing the Sentence’ (V–20, p. 121). The confusing legal situation within the Empire and its system of almost competing different sovereign rights is clearly mirrored in the fact that there were two courts established which in theory held the same rights and were the highest courts without the possibility of interfering into each other’s jurisdiction:

There is also in the Emperor’s Palace another Court, which pretends to the same Authority with that of *Spire* ... They both say, that a Suit begun at *Spire* cannot be withdrawn and removed to *Vienna*, and so on the contrary ... It is not hard to guess what was the true reason why the Emperors instituted this Court; to which purpose it will be fit to consider, that these Princes observing, that all Appeals being tried and determined at *Spire*, and that place frequented on the account of Justice, the Court at *Vienna* was in the mean time neglected, to the great dishonour and dissatisfaction of the Family of *Austria*: For flying to them for Relief, is the greatest of the Glories of a Prince; and their Majesty is then most resplendant, when it gives men their Due, and repells their Injuries. (V–21, pp. 121ff)

The question of sovereignty remained the fundamental issue which was neither solved through any institutional means nor by the constitutional framework of the treaty of Westphalia. Pufendorf dedicates the last third of his fifth chapter to the Imperial Diet, but this is merely a historical account and contains only a list of the different rights held either by the Emperor or the *Reichsständen*. It did not contribute to the urgent debate about the location of sovereignty, but as we have seen, Pufendorf perceived the Diet as the place where his idea of a

⁶⁵ K. O. Freiherr von Aretin, ‘Reichssystem, Friedensgarantie und europäisches Gleichgewicht’, in idem, *Das Reich*, pp. 55–75. Quote: p. 67.

system was embodied. Pufendorf's work on the constitution of the Empire was the first which shed light on this puzzling issue of sovereignty from a distinctively different angle. He did not attempt to continue the debate about the *forma Imperii* and emancipated further discussion from the Aristotelian categories which had shaped the work of earlier theorists.⁶⁶ He exposed the problem of the *forma Imperii* as an artificial one, suggesting that the status quo of the Empire could only be understood as an irregular form similar to a political system of states. Therefore there was neither scope nor any need to describe it by any of the common Aristotelian forms of political bodies. Pufendorf avoided any of the extreme positions which had been occupied earlier – those for example of Reinking or Chemnitz. He not only emancipated the *Reichspublizistik* from the Aristotelian classifications, but he advanced a much more realistic account of the Imperial constitution as well.

Moreover, his writing suggests that the peace of Westphalia is not only an interesting event for the historian of international relations but also for the historian of the history of political thought. The complicated and complex balance of power within the Empire was widely perceived as a pattern for a peaceful settlement of international relations. It is too frequently asserted that the stipulations of the peace treaty simply broke the imperial hegemony of the Habsburgs; it is far too simplistic to claim that 'the pattern of international relations in Europe was drastically changed: over three hundred political entities were now entitled to conduct foreign relations... and the Holy Roman Emperor could not employ force in the conduct of foreign policy... without the consent of the individual members of the Empire'.⁶⁷ The reality of the Empire was much more complicated, and contemporaries in Europe were aware of its complexity. The description of the Empire as a composite and balanced system was transferable to the international system of states. It is therefore also misleading simply to assume that international relations after the peace of Westphalia could be measured against a pattern of uncomplicated sovereignty. The assumption of scholars of international relations that 'an absolutist states-system was initialled at Westphalia',⁶⁸ does not take into account its complexity which was mirrored in the system of the Holy Roman Empire after 1648 and which was sketched by Pufendorf.

The question of where sovereignty in the Empire lay remained unanswered, but it became a less troubling one because at least a formulation had been found for this puzzling reality. To a considerable degree political theory had

⁶⁶ But see M. Stolleis, 'Textor und Pufendorf über die Ratio Status Imperii im Jahre 1667', in idem, *Staat und Staatsräson in der frühen Neuzeit* (Frankfurt and Main, 1990), pp. 106–33, who claims that 'the outstanding qualities of *Monzambano* are rather due to the brilliant style than to its actual new approach', p. 132. However, Stolleis himself admits in the same article that 'Textor relies more closely on the older literature', p. 110.

⁶⁷ K. J. Holsti, *Peace and war: armed conflicts and international order, 1648–1989* (Cambridge, 1991), p. 35.

⁶⁸ J. Rosenberg, *The empire of civil society: a critique of the realist theory of international relations* (London and New York, 1994), p. 138.

surrendered before the complicated and perplexing reality of the Imperial constitution. Moser's dictum 'Teutschland wird auf teutsch regiert'⁶⁹ indicates that following generations have had the same problem, and in fact nobody has been able to resolve this problem more convincingly than Pufendorf had done in his *Monzambano*. Thus even today his writing regarding the constitution of the Empire offers a profound insight into its puzzling complexity.

⁶⁹ J. J. Moser, *Neues Teutsches Staatsrecht*, 1 (Stuttgart, 1766), p. 550.