THE CONCEPT OF SOVEREIGNTY AND ITS CONTINUED RELEVANCE IN INTERNATIONAL LAW AND RELATIONS

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Abstract

Sovereignty remains one of the oldest and most controversial concepts in international law and relations lending itself to diverse interpretations and presentation especially when it relates to political, economic, social issues and most recently, environmental and security issues. This article focuses on the viability of the concept of sovereignty in view of economic and other issues that have transcended sovereign boundaries and practically put the issue of sovereignty behind a veil. The transformation of the concept though continuous is more in form without any significant changes in its authority and power as countries still defend their sovereignty with all their power and resources. Although it has been argued that the concept of sovereignty has outlived its usefulness considering the fusion of several hitherto sovereign states into singular unions such as in the case of European Union, African Union and states being controlled by multilateral institutions such as WTO, World Bank, ECOWAS. This article argues that the concept of sovereignty remains as viable now as they were at the beginning. It contends that what we have is a situation where countries because of their diverse and increasing needs from various frontiers cede some of their competences alongside other countries to be able to address such needs. It is the inherent power in concept of State sovereignty that makes it possible for the countries to cede such competences and enter into such binding international relations. This inherent power cannot be eroded but can only be bent and stretched without losing form or authority. Countries on several occasions in the past have conditionally repressed their sovereignty for the purpose of achieving higher goals mostly economic, security and recently environment by joining regional unions such as African Union (AU), ECOWAS and signing different multilateral agreements such as ACFTA. Using various contemporary examples, the dissertation demonstrates the continued relevance and centrality of the concept of sovereignty in International Law today.

1.0 Introduction

This article is intended to understudy the usefulness of the concept of Sovereignty in its original form to modern international law and relations between countries, multilateral institutions and bodies. The study will also look at the importance of the concept to global economic development in view of the current and emerging global challenges and needs in the area of security, environmental challenges and others.

Every now and then we hear in the news of countries reporting a threat to their state sovereignty by another through actions such as nuclear programmes, trade blockades and outright invasion. The 24th February, 2022 Russia invasion of Ukraine, the 20th February, 2014 Russia Annexation of Crimea and the 2nd August, 1990 invasion of Kuwait by Iraqi are typical examples. This was followed by an ultimatum of the United Nations demanding that Iraq should cease her occupation of Kuwait. The United Nation Charter of 1945[1] prohibits the threat to use force against states. The notion of "state

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[1] art 2(4)

sovereignty" is the basic concept of modern international law; "it is unthinkable without international law itself, as such".[2] New trends in considering the problem of state sovereignty create the necessary prerequisites for understanding the nature and character of modern international law, as well as the content of its basic principles. Sovereignty is a necessary and inalienable political and legal property of any state, its constant attribute. B. L. Manelis, a Soviet legal scholar wrote: "[s]overeignty should be considered as a social phenomenon, which is closely connected with the state, its role in international relations and the regularities of its development".[3] Just as the very international law, sovereignty arose with the emergence of states.

However, in the late 40's of the 20th century individual scientists, in particular I. D. Levin, expressed a later origin of sovereignty, linking it to the period of the collapse of feudalism and the establishment of capitalist production relations.[4] This point of view became dominant in the science of international law and was later recognized as erroneous by the author.[5] Considering the possible occurrence of the phenomenon before the development characterizing its concepts, it would be reasonably safe to say that sovereignty was already inherent in the ancient state. In the initial period of development of the concept of "sovereignty", it was linked with the personality of the monarch who was considered as the bearer of the sovereignty. In that period the very same concept of "sovereignty" served as a "political and legal supremacy designation of royal power in the country; that is to say, over all the feudal lords and its outside independence from the Roman church, Holy Roman Emperors and other feudal monarchs."[6]

In Bodin's opinion, the very founder of the concept, the sovereignty acts as a supreme, absolute and independent of the state's laws power over his subjects, which is, however, limited by divine and natural law. Sovereignty, is something peculiar to the bearer of the supreme state power, that is to say, the absolute monarchy, endowed them the features of absoluteness, universality, limitlessness and eternity. It is noteworthy that in the 12th century Armenian famous thinker, social and political figure and lawyer Gosh, emphasizing the exclusivity of the royal power in his "Law code" dated 1184, presented his interpretation of the concept of "sovereignty": "[k]ings are those who sovereignly exercise dominion over their peoples and tribute from other people, or if do not tribute then (at least) are not themselves taxed tribute to others (kings)".[7] Thus, even at that period a unique approach looms to the concept of sovereignty as the supremacy of imperial power within the state and its independence beyond its boundaries.

The growing number of states and the reinforcement of their leading role in the international arena, as well as the complexity of international life in general, has left a significant imprint on the doctrine of sovereignty, turning it into a complex set of different views, interpretations and approaches to the concept of "sovereignty", by greatly changing the original "Bodinian" structure of the idea of state sovereignty. The very constant changes happening in socio-political life of individual states as well as in the sphere of international relations, the strengthening of integration processes, leading to blurring of

[2] I.D Levin., *On the Issue of Essence and Significance of Sovereignty*. 'Soviet State and Law' 1949, 6th Ed. 35
[3] B.L Manelis., Problems of Sovereignty. Resume of Ph.D. Dissertation, Moscow, 1966, 9.
[4] Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. Global Legal Study. (1999).425, 432-35
[5] I. D Levin, *History of International Law*. (International Publishers, Moscow. 1962) 35.
[6] *Ibid*, 39.
[7] Levin (n5), 33.

the borders between the actual individual states, to strengthening their interconnectedness, prejudge the need for a new approach to a number of problems associated with the principle of State sovereignty.

Whilst the Nigerian government is always in a hurry to say that the international community cannot dictate to them how to handle Nigerian affairs, the same federal government is always sending delegates abroad to engage the government of foreign countries and woo them to allow their citizenry to come and invest in Nigeria and offer the government mouthwatering incentives.

This is the level of change that the concept of sovereignty has experienced and as such we want to use this dissertation to ask if the concept is still viable or needed in view of the fact that the concept can now be enforced and suspended based on what interest it is serving at any point in time.

2.0 The Evolution of the Concept of Sovereignty and its Relevance

Having reviewed some of the notable writings, case laws, relevant international and local laws, it is my contention that the concept of Sovereignty as known to international law remains relevant and very viable at this time and will probably remain so in decades to come.[8] This is despite the prevailing situation in which several countries have come together to form formidable continental social, economic and security organisations such as the EU, AU, ECOWAS and NATO.

It does appear that the questioning of the relevance of the concept of sovereignty emanated from a number of factors which include the following;[9]

a. The series of cooperation amongst states for whatever reason, (This has become a permanent feature of international relations) and the form of 'controlling power' such cooperation has been observed to wield on her member States.
b. Failure to understand and appreciate the difference in the meaning of the word 'Sovereign' and the concept of 'State Sovereignty',
c. Increased global flow of capital,
d. Intensified networks of social interaction, and
e. The emergence of transnational regulatory regimes,
f. Development and environmental concerns and their transboundary impact,
g. Increasing economic, technological, cultural needs and changes at local and global level.

These and more are affecting the ability of national governments to exist by themselves without impacting or being impacted by the actions and inactions of others. The cumulative effect of these factors has been viewed by many authors as a diminution in the efficacy of those levers of command and control such as the concept of sovereignty that have been a common feature of the modern nation-state settlement. These developments have generated a great deal of policy analysis and scholarly examination

[8] <https://www.sciencedirect.com/science/article/abs/pii/0191659996000034>accessed 20 July 2022
[9] (n8)

The resent aggression of the Russian government against her neighbours such as Georgia and Ukraine since 1992 based mainly on the concept of 'Sphere of Influence'[10] have in no small measure contributed to the call for the irrelevance of the concept of Sovereignty

In doctrinal terms, sovereignty expresses the principles of external independence, internal authority, and ultimate legal supremacy of the state. A people occupying a defined territory and equipped with institutions of self-rule presents itself to the rest of the world as a sovereign entity, signifying its independence from subjection to any higher authority. This principle forms the basis of international law, a sphere in which states contract with one another to regulate inter-state relations.[11] Although it may seem that the existence of a set of rules called international law and bodies administering them is in itself is a limitation to state sovereignty, I contend that States may have pledged to restrict the exercise of some of their governmental powers but this is not the same as a restriction on state sovereignty. It is rather the sovereign power of the state that gives it the power to sign and ratify any treaties in international law. Thus, international law, rather than being a limitation is in reality an explication of state sovereignty.

3.0 The Diminution of Sovereignty

The concept of Sovereignty is much misunderstood largely because of its intrinsic political, social, economic, legal and globalization dimensions. It remains a fundamental concept that defines the essence and functionality of these dimensions.

Martin Loughlin aptly describes the problem in his article titled `The Erosion of Sovereignty[12]`. According to him `In their quest for scientific credibility, political scientists have been seeking to discover causal laws of political behaviour and, within such an empiricist mindset, sovereignty was felt to express the metaphysics of a bygone era. To the extent that political scientists continue to invoke the concept, they tend to conflate sovereignty and government. This is because of a failure to maintain the distinction between the concept and its particular 'marks'. Sovereignty expresses a principle of unity: it is an expression of illimitability, perpetuity and indivisibility. Any limit on sovereignty eradicates it, any division of sovereignty destroys it. Yet the powers of rule, the 'marks of sovereignty', not only *can* be divided and limited: for the purpose of generating political power and maintaining political authority, they *must* be so divided and limited. But this is a maxim relating to the phenomenon of governing, not to the concept of sovereignty`

This is further confirmed In Book II of his *Six livres de la république,*[13] where Bodin explained that there is a 'great difference between the state and the government of the state'. Bodin contended that the distinction 'seems to me more than necessary for the good understanding of the state of every commonwealth, if a man will not cast himself headlong into an infinite labyrinth of errors', having

[10] "Sphere of influence." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sphere%20of%20influence. Accessed 6 Jul. 2022.
[11] UN Charter (1945), Art. 2, which recognizes the 'sovereign equality', 'territorial integrity' and 'political independence' of all states
[12] Martin Loughlin, 'The Erosion of Sovereignty 2016 (45)2 doi: 10.553/NJLP/000048 http://njlp.org/article/view/10accessed >24 July 2022
[13] <http://www.yorku.ca/comninel/courses/3020pdf/six_books.pdf>accessed 6 June 2022

forgotten the point of this distinction may be the reason for the questioning of the veracity of the concept of State Sovereignty.

4.0 The Logic of Emerging Positivist Social Science

Léon Duguit[14] on the other hand, following through the logic of emerging positivist social science, maintained that the processes of continuing social evolution that were leading to the establishment of an administrative state had rendered the modern (post-revolutionary) public law inheritance anachronistic. He argued that the entire scheme of public law founded on the principle of sovereignty has being eclipsed and that it needed to be reconstituted on a new foundation.

Duguit argued that the authority of government in the entire modern scheme of public law derives not from rights but from the duties they perform. According to him, the 'real basis' of governmental authority is founded on the fact of 'social interdependence', and this has the consequence that there is 'an intimate relation between the possession of power and the obligation to perform certain services. What follows, Duguit maintained, is that 'public service' replaces sovereignty as the foundation of modern public law.

Duguit offers a theory of public law founded on the entire eclipse of sovereignty. It develops the juristic implications of the social scientific theories of Saint-Simon, Comte and Durkheim, which maintains that society evolves through three main stages: the theological stage, followed by the metaphysical stage, eventually leading to the scientific stage. Sovereignty is claimed to be a product of the metaphysical era's borrowing from the theological and it has no place in the scientific era that is emerging. The gap of this theory to me however is the failure to distinguish the fine and clear line between the activities of a state within the state and what happens between two or more distinct states and how they relate in their quest for continuous growth and aspirations for greatness actualization. Modern society should no longer be viewed through the prism of individual and state; society must be conceived as a collection of groups and the key task for every government is to provide some sound method for coordinating their activities. Else such a State will end up a pariah state with no future or prospects for her people of institutions,

The emergence of objective social law also has implications for understanding the boundaries between national and international law boundaries which had previously been recognized through concepts of state and sovereignty. Once determinate social groups (nation-states) are organized in accordance with the discipline of objective law, bonds of solidarity are formed across groups, and these evolve into a type of 'intersocial law', an embryonic form of modern international law.[28] With the growing interdependence between members of different social groups, a sentiment of intersocial justice emerges and through the 'double sentiment of intersocial sociality and intersocial justice' international juridical norms are created.[15] The authority of these norms does not rest on promulgation by superior will: it rests 'on the consciousness existing in the individuals to whom it applies that this rule should be furnished[16]

[14] <https://www.sciencedirect.com/science/article/abs/pii/0191659996000034>accessed 20 July 2022
[15] <http://www.yorku.ca/comninel/courses/3020pdf/six_books.pdf>accessed 4 August 2022

with a sanction by compulsion'.[29]International law, Duguit argues, now establishes objective (social) norms that governments of all nation-states are obliged to respect.

The great value of Duguit's theory is to have presented the implications and underlying assumptions of his 'eclipse of sovereignty' thesis in a more systematic manner than those who today claim that we are entering an era of 'post-sovereignty'. It is not difficult to identify the developments that ground contemporary claims: since government is ubiquitous and functions mainly through an administrative modality, modern constitutional assumptions rooted in Enlightenment ideas of 'limited government' authorized by 'the people' are undoubtedly becoming strained. But unlike Duguit's theory, which offers a systematic juristic analysis rooted in sociological positivism and underpinned by a specific argument about scientific progress, these elements are invariably absent in those making similar claims about sovereignty today[17]

5.0 Sovereignty incorporates an intrinsic dimension of 'right

Failing to acknowledge the juristic nature of sovereignty, the former group conflates sovereignty with the ability of a nation-state fully to control the material conditions of its existence[18]. There is no doubt that in contemporary conditions governments are obliged to co-operate with other actors, both within the nation-state and beyond. But as has already been explained, sovereignty is not an aggregation of competences. Competence concerns capacity, whereas sovereignty incorporates an intrinsic dimension of 'right'. Once this is recognized, the empirical assessment about the complexity of contemporary governmental networks can be accepted without it following that public law has entirely lost its symbolic power.

The modern discourse of public law seeks to manage the tensions between the conceptual and empirical: it aims not only to identify the formal right to rule but also to specify conditions that maintain the capacity to rule.[19] Consequently, while it can be accepted that the intricacy of contemporary governing arrangements imposes strains on the ability to manage these tensions, it is not obvious that this world of representation must now be treated merely as a façade masking the realities of power networks operating in the world today. [20]Those who do seek to draw this conclusion are obliged to argue, it would appear, that we are now living in a post-jural world.

These arguments are mostly made by scholars who maintain that governmental developments have undermined the normative scheme of modern public law, such that we are now living in a world of ubiquitous governmentalism.[30] But there are also certain jurists who make an almost opposite maneuver and accentuate the normative to the neglect of the empirical. This latter type of post-sovereignty claim founds itself on the argument that legal principles have now evolved beyond the site of the nation-state in which they were originally situated and should now be recognized as establishing a set of self-sustaining universal principles of constitutionality. Whereas the post-sovereignty argument made from the perspective of governmentality is that law has become entirely instrumentalized and has thereby

[17] <http://www.yorku.ca/comninel/courses/3020pdf/six_books.pdf>accessed 21 July, 2022
[18] *Ibid*
[19] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 132.
[20] *Ibid*

lost its structural connection to legitimacy, the argument from hyper-constitutionality is that the concept of legality is now to be fused with legitimacy

Those making the claim of hyper-constitutionality reject the idea that sovereignty constitutes a representation of the autonomy of the political realm, anchored by the political unity of a people or state. They argue instead that modern (i.e. liberal, rights-protecting) constitutions are constitutive of legality and, accepting the universality of the principles of liberty and equality they appear to contain, that this corpus of constitutional principles now possesses freestanding authority.[31] This is a thoroughly normativist argument which, although it signals the emergence of an important phenomenon – the rise of international 'juristocracy' – it otherwise does not bear a strong relation to the realities of today's political world

Duguit's radical analysis focuses on the juristic challenges presented by the growth of administrative government. The administrative developments he documents are undeniable, but his argument that this leads to an eclipse of sovereignty is overstated. The emergence of an 'objective social law' – 'do what you must to promote social solidarity' – is a significant innovation. From the vantage point of the twenty-first century, however, it is evidently an account which is presented as social science but is underpinned by a collectivist political ideology. His objective law accentuates the claims of capacity but underplays those of political right, that is, the symbolic in the constitution of political authority.[21] It envisages a world of *potentia* without *potestas*: there is no established 'right' to govern and the only justification for the exercise of governmental power is derived from the ends it pursues. The hyper-constitutionality argument, by contrast, promotes an argument of right that over-emphasizes the autonomous authority of legality and under-emphasizes the continuing power of the political dimension to sovereignty.

6.0 The Diminution of sovereignty by Continental and Regional Unions (EU, AU, ECOWAS etc.)

The claim that sovereignty is no longer relevant or has now been eclipsed or eroded in international law can best be described at this time as extreme or case of crying wolf as I have so far shown above. This however does not mean that there are no signs of imminent threat, the concept to some extent is affected by the trajectory of governance, social economic, environment developments and concerns. The threat is real but even such can be clarified once the misconceptions surrounding the concept of sovereignty have been addressed. Since sovereignty expresses a relation between right and capacity, there may come a point when developments at the level of governmental organization impose such strains on the 'right-capacity nexus' that sovereignty is unable to carry its meaning as a representation of the autonomy of the political realm. This is the crux of the matter but like a pointed out in the earlier pages of this theses, rather than declare the concept of State sovereignty as irrelevant or as eroded it is better to view it as a situation of 'stooping low to rise higher' in order to remain relevant to global development aspirations.

The emergence of several international cooperative governance configurations such as EU, AU, UN, World Bank etc. since 1945, the space they have occupied and the roles they have played so far in the life of countries can often blur the distinct lines between them, national sovereign authorities and the

[21] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 132.

rules/claims of international law. [22]This is most clearly illustrated in the evolving arrangement of the European Union and supported by the claims of the likes of Neil MacCormick and the European Court of Justice.

Neil MacCormick, argues that 'since no nation-state in the EU is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources', none can be regarded any longer as a sovereign state.[23] He amplified his analysis by claiming that 'absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community' on the ground that 'neither politically nor legally is any member state in possession of ultimate power over its own internal affairs'.[24]

The European Court of Justice on its part in her ruling claimed that the arrangement 'creates a new legal order … for the benefit of which the States have limited their sovereign rights, albeit within limited fields'.[25]

The above claims by the European Court of Justice and Neil MacCormick outrightly overlooks and negates the provisions of Article 5(1) and (2) of the Consolidated Version of the Treaty of European[26] Union which states that **'**the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

Many of the recent confusions in the treatment of sovereignty have arisen in the context of the above discussions and much of the literature about sovereignty has been generated in this context. It is with respect to this that some scholars have claimed that the current configuration of European nation-states signals the emergence of a world of 'post-sovereignty'

Suffice to say here that although EU 'exercises political power on some matters over member states' and that EU legislations 'binds member states and overrides internal state-law within the respective criteria of validity'[27]it does not follow however that 'ultimate' authority ceases to remain within the member states.

The recent Brexit have obviously made nonsense of the postulations of Neil MacCormick, the European Court of Justice and other persons announcing the death of the concept of sovereignty as a result of states joining the membership of international or regional bodies such as EU.

The situation of the member states in the EU is the same with member states in AU, ECOWAS etc. When State enters into a treaty with a clear objective, what happens is that certain powers of the government, often referred to as competences, are limited or restricted to certain sphere, the ones not limited to the state are then handed to the governing body of the union to be exercised on behalf of all the member states. This arrangement has no direct bearing on sovereignty of the member State, it does

[22] Neil (n21)
[23] Neil MacCormick, 'Beyond the Sovereign State,' *Modern Law Review* 56 (1993): 16.
[24] Neil (n21)
[25] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.
[26] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016ME/TXT&from=EN>accessed 20th June 2022
[27] Art. 50, TEU.

not diminish it but rather enhances it. This assertion was affirmed in the successive rulings of the German Federal Constitutional Court which indicated that it is the sovereignty of member states that impose limits on the competence of the EU. Far from limiting, dividing or decentralizing sovereignty, the obligations that a state assumes through treaties are manifestations of its continuing sovereign authority.

Martin Loughlin argued in his article and I agree with him, that what seems to be an erosion of the concept of sovereignty with regards to the EU state is a result of deliberate efforts of the EU institutions rather than the treaty that formed it. He wrote as follows;

> By virtue of its innovative rulings in the 1960s holding that citizens of member states are able directly to acquire rights from EU law and that EU law has primacy over conflicting provisions in domestic law, the Court of Justice has been able to promote the claim that EU law establishes a unique legal order which is distinct from both international and domestic law.[28]
>
> This dynamic has been driven by the Court's teleological method, which dictates that EU law is interpreted in a manner that promotes continuing European integration (to achieve 'an ever-closer union'). Consequently, the capacity of a member state to rule by means of law is restricted by virtue of novel rights and obligations declared by the Court of Justice and which assume priority over domestic law.

The erosion of sovereignty therefore derives from a combination of elements. The sharing of governmental tasks (competences) in itself is not corrosive of sovereignty; these are authorized by member states. Rather, it is the integrationist agenda that has been driven by EU institutions, especially the Commission and the Court, in ways not explicitly authorized by the treaties. This has imposed restrictions on the member states' ability to govern over a broad range of fields in the guise of promoting the 'four freedoms' of goods, services, capital and labour. Of particular significance is that this innovation has been used to promote economic over political freedoms, and using law as an instrument for realizing a liberalizing, de-regulatory agenda.[29]This instrumentalization of law, without the explicit authorization of member states, suggests the deployment of potentia without potestas. To this extent, it amounts to an erosion of sovereignty[30]

7.0 Diminution of State Sovereignty by Contract Agreements

[28] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.
[29] W Fritz, Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); A Vivien, Schmidt and Mark Thatcher, ed., *Resilient Liberalism in Europe's Political Economy* (Cambridge: Cambridge University Press, 2013).
[30] Cf. Damian Chalmers and Luis Borroso, 'What Van Gend en Loos stands for,' *International Journal of Constitutional Law* 12 (2014): 105-34 (accepting the 'police logic' of EU law but following Agamben's argument that the essential element of sovereignty is the power over life, arguing that this instrumentalization of law does not erode 'sovereignty').

Sometimes in August 2020, The Nigeria House of Representative came out with a screaming headline 'ministry signing off Nigeria's sovereignty in Chinese loan agreements.[31]

Federal House of Representatives had initiated a hearing concerning the Chinese loan agreements Nigeria entered into to the tune of $500 million for the part-financing of its rail projects said to be valued at about $849 million. The House of Representatives Committee raised the alarm over an alleged waiver of Nigeria's sovereignty.

In investigating the processing of the $500 million Chinese loan from the Export-Import Bank of China, the Federal House of Representatives, as part of its oversight function, discovered that the loan agreement contained a clause in which Nigeria's sovereignty was supposedly traded off. According to reports, this discovery was made because the agreement entered into, was written in Mandarin, the official form of the Chinese language with the Nigerian officials signing without understanding the full content of the loan document. The controversial clause in this loan case, states that,

> the borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8(5), thereof with the enforcement of any arbitral award pursuant thereto, except for the military assets and diplomatic assets.

In response to this raging controversies, the Chinese Foreign Ministry denied that China had any clause in the contract ceding Nigeria's sovereignty and that it followed its "five-no" approach in loan agreements one of which is "no imposition of our will on African countries" and that it gives full consideration to debt sustainability.

Before the news of the clause broke the history of China's relations with different countries on loan agreements had not been palatable. China had been severally accused of undertaking a global colonisation policy with its debt-trap diplomacy. There had been disconcerting tales for most countries like Sri Lanka, Papua New Guinea, Maldives, Pakistan, Malaysia, Mongolia, Republic of Kazakhstan and Zambia among others that China had given loan facilities. In the event of default, China have on several occasions taken over major assets in the borrowing countries with such takeovers not limited to the projects for which the loan is procured.

Zambia represents the worst case of 'Loan default for Asset' in Africa. China is said to have taken over their National Power Corporation and the Broadcasting Corporation due to loan default.

On the issue of how the clause affects the issue of State sovereignty, it is pertinent to say that the purport of the clause is to prevent the country from relying on state sovereignty as a defense in the event of a default from being subjected to arbitration measures and being bound by the decision of arbitration. Thus, the controversial clause would only come into effect when there is a case of default. The above

[31] https://www.icirnigeria.org/house-of-reps-says-ministries-signing-off-nigerias-sovereignty-in-chinese-loan-agreements/. See also https://guardian.ng/opinion/chinese-loan-and-nigerias-sovereignty/ Published August 11, 2020

means that economic and commercial transactions may through its agreed and written clauses constitute a threat to the concept of State Sovereignty in the event of a default.

8.0 Protecting the Concept State Sovereignty

If the concept of State Sovereignty is based on right and capacity and it is the concept that defines the characteristics of a State in International law and gives it the power to enter into and demand compliance with treaties under the rules of international law as has been discussed in this paper, it then means that all that is necessary should be done to protect the concept from being interfered with or eroded by the increasing powers being exercised by international administrative bodies such as the EU to which States find themselves a member of.

Some checks have been found in the laws of several states. Express restriction clauses proffered by States in some treaties and the rulings of national courts of some states. These clauses and decisions are intended to protect the basic values of national constitutions against perceived incursions from international treaties and bodies. In European Union for example, national courts mostly accept the principle of the priority of EU law, they retain the capacity to determine the limits on EU competence transfers by reference to the necessity of preserving basic constitutional rights[32].

The German Federal Constitutional Court has been described as active and innovative in checking the EU law intervention in German domestic laws and suppression of her State Sovereignty by protecting the German Constitutional law values. The actions of the Court has been traced to 1970 where it maintained that the EU is a confederation (*Verbgg und*) of sovereign nation-states and therefore an institution whose governing arrangements do not affect sovereignty.[33]

In a recent case law on Lisbon Treaty ruling of 2008 the Court set certain substantive limits to EU integration when it held that so long as there are no common European *demos*, EU institutions must respect both the constitutional identity of member states and the core elements of its sovereign powers. The Court defined five areas in which any further transfer of competences would amount to a subversion of sovereignty. The areas are: (i) the state's monopoly on the use of military and police force; (ii) criminal law; (iii) basic fiscal decisions concerning taxation and public expenditure; (iv) social policy, especially family policy; and (v) cultural policies concerning education, religion, media, art and cultural life.[50] The Court then declared the need to protect 'sovereign statehood' which it defined as 'a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination'[34]

Nigeria as a country also have some State sovereignty defense clauses set out in her Constitution[35] starting from the preamble to the Constitution that described the country as a 'Sovereign nation'.

The Constitution goes further to provide that (1) The Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. (2) That

[32] In the Italian Case 6/64 *Costa v. ENEL* (1964) ECR 585. the Court, drawing on the analogy with international law, had rejected the principle of priority of EU law.
[33] *IHT v. Einfuhr und Vorratsstelle fur Getreide aund Futtermittel* [1974] 2 CMLR 540.
[34] *Lisbon Treaty ruling* [2009] BVerfGE 2/08, para 224.
[35] 1999 Constitution as Amended

the Federal Republic shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution. (3) If any other law is inconsistent with the provisions of this Constitution, the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void[36].

The Constitution further provides that "no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."[37]

In the case of *Abacha v Fawehinmi*[38] The Supreme Court of Nigeria ruled on this provision on this provision of the Treaty. In that matter, on January 30th, 1996 at about 6 a.m. Gani Fawehinmi was arrested in his home by 6 men who identified themselves as operatives of the State Security Service (SSS) and the Nigerian Police Force. The Respondent (who was the Applicant at the Federal High Court and Appellant at the Court of Appeal) was taken away to the SSS Lagos office and thereafter to Bauchi prison where he was detained and kept incommunicado. Gani Fawehinmi was not informed of, nor charged with, any offence. Gani went on to apply to the Lagos Division of the Federal High Court, for the enforcement of his fundamental human rights. He sought for a set of reliefs as follows from the court;

a. A declaration that his arrest and detention was illegal and contrary to the Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[39].
b. An order of mandamus compelling the respondents to arraign him before a properly constituted Court or Tribunal as required by Article 7 of the ACHPR Act.

The Appellants (who were Defendants at the Federal High Court and Respondents at the Court of Appeal), raised a preliminary objection to the jurisdiction of the Court. In allowing the preliminary objection and striking out the Appellant's case, the Court decided that the Inspector General of Police had power to detain a person by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended by the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1994. In specific reference to the ACHPR Act, the Court decided that any of the provisions of the African Charter on Human and peoples' Rights which was inconsistent with the Constitution (Suspension and Modification) Decree No. 107 of 1993 was void to the extent of its inconsistency. The Court further held that, "the African Charter on Human and Peoples' Rights has no legs to stand on its own under the Nigerian law. It cannot be enforced as a distinct law. As such, it is subject to our domestic law and ouster decree."

The matter was taken to the Court of Appeal which partly allowed the appeal and remitted the case to the Federal High Court for trial in respect of detention of the Respondent on days that were not covered by any detention order. In arriving at this conclusion, the Court of Appeal held that the learned trial judge was right in coming to the conclusion that the Inspector-General of Police was "empowered to

[36] Chapter 1, Part 1 Section 1(1-3)
[37] s 12(1-3)
[38] 23[2000] 6 NWLR (pt 660) p 228 at 228
[39] Referred as the ACHPR Act

issue a detention Order under the provisions of Decree No. 2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of section 4 of Decree No. 2 of 1984 as amended and Decree No. 11 of 1994, the jurisdiction of the court is ousted to entertain the appellant's case."

With specific reference to the ACHPR Act, the Court of Appeal held that "it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 11 of 1994 cannot affect its operation in Nigeria." It held further that the provision of the ACHPR Act "are provisions in a class of their own. Whilst the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military Government is not legally permitted" to legislate its way out of its international obligations.

The matter was taken further to the Supreme Court where the Court, among other issues considered the ACHPR Act in the light of section 12 (1) of the 1979 Constitution of the Federal Republic of Nigeria[40]." The Supreme Court held that "before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts." The Supreme Court referred to the decision of the Privy Council in *Higgs & Anor v Minister of National Security & Ors*[41] where it was held that:

> In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen' right and duties in common or statute law. They might have an indirect effect upon the construction of statues or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty."

The Supreme Court further held that where, a treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the ACHPR Act, the treaty becomes binding and our Courts must give effect to it like all other laws falling within the judicial power of the Courts. Since the ACHPR Act was a part of the laws of Nigeria, the Supreme Court held that "like all other laws the Courts must uphold it."

With regard to the issue of hierarchy of laws, the Supreme Court held that the ACHPR is not superior to the Constitution, nor can its international flavour prevent the National Assembly, from removing it from the body of Nigerian municipal laws by simply repealing the ACHPR Act. The Supreme Court further held that the validity of another statute is not necessarily affected by the mere fact that it violates the African Charter or any other treaty. However, if there is a conflict between the ACHPR Act and

[40] The section is reproduced verbatim in s 12 (1) of the 1999 Constitution as Amended.
[41] *Higgs & Anor. v Minister of National Security & Ors.* The Times of December 23, 1999.

another statue, its provisions will prevail over those of that other statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. This is probably what was meant in *Oshevire v British Caledonian Airways*,[42] where the Court of Appeal held that any domestic legislation in conflict with international conventions is void.

In arriving at her rulings in this matter, the Supreme Court also relied on the case of *Chae Chin Ping v. United States*,[43] where it was held that treaties are of no higher dignity than acts of Congress, and may be modified or repealed by Congress. Whether such modification or repeal is wise or just is not a judicial question. Although section 12(1) of the Amended 1999 Constitution deals with treaties between Nigeria and other States, its purport extends to treaties between Nigeria and International Organisations.

In closing, it is notable to point out here that the provision section 12 (1) of the Amended 1999 Constitution is similar to what obtains in some other countries including United Kingdom where the House of Lords stated, in the case of *Maclaine Watson v Department of Trade and Industry*[44], that "… a treaty is not part of English law unless and until it has been incorporated into the law by legislation."

The position in the United Kingdom is given by Malcom Shaw as follows:

> The Crown in the UK retains the right to sign and ratify international agreements, but is unable to legislate directly. Before a treaty can become part of English law, an Act of Parliament is essential."[45]

9.0 'Bending and Stretching' of Sovereignty in Form and Nature

By the very nature of international law, nothing can unilaterally be imposed on any country, whether big or small, developed or developing. Every country is always given the chance to consider issue of relationships and cooperation and follow their internal process to ratify, sign and deposit the signed treaty before it can be binding on her. An example of this is what happened with the AU AfCFTA. As at 30th May 2019 when it went into force, only 24 countries had deposited their instruments of ratification with the AU. So far, 36 Countries including Nigeria had ratified the Agreement but it is only a few that has deposited their instrument even though some has concluded the ratification process in-

[42] (1990) 7 NWLR part 163, 519-520.
[43] *Chae Chin Ping v. United States 130 US. 181*.
[44] [1989] 3 All ER 523, 544–5; 81 ILR, p. 701. See also *Littrell* v. *USA (No. 2)* [1995] 1WLR 82. But see R. Y. Jennings, 'An International Lawyer Takes Stock', 39 *ICLQ*, 1990, pp. 513, 523–6.
[45] M N Shaw, *International Law* (6th edn, Cambridge University Press 2009) 149.

country. By January 2021 when implementations began, it is only the countries who had deposited their instrument that are involved in the implementation.

The recent exit of United Kingdom from European Union (BREXIT) and pull out of United States of America from WHO is also informative of the fact that States does not lose nor subjugate their sovereignty as a result of their cooperation with other states or membership of an organization such as WTO with other States.

10.0 State Sovereignty as an Instrument of Defense in Commercial Relationship

The veracity of the concept of State Sovereignty and the possibility that it can be used as a defensive tool to avoid liability may be described as well understood by the Chinese government. This understanding caused the Chinese government to make it mandatory to include a 'sovereignty suspension clause' as a standard clause in all their agreements with other sovereign states as seen in their loan agreement with Nigeria. The clause in the Nigeria China loan agreement reads thus[46];

> The borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8(5), thereof with the enforcement of any arbitral award pursuant thereto, except for the military assets and diplomatic assets.

In the opinion of Dr. Uche Igwe Article[47], 'the clause is said to be included in most standard Chinese agreements. The apparent reason is to prevent countries from raising sovereign immunity as a defence in case of any legal dispute'.

This is indicative of the fact that the concept of sovereignty can be a legal defence that a state can adopt to frustrate a process. This being the case it can therefore not be said that the concept has lost its relevance.

11.0 Conclusion

State Sovereignty therefore remains relevant in international relations and will remain so as any compromise of the concept will adversely affect the very essence of international law and relations.

That the concept of State Sovereignty remains very relevant to international relations in the modern times, although the concept is under siege by globalization and transboundary nature of modern economics of training, international transactions, communication, environment and so on.

[46] What do sovereign immunity clauses mean for Chinese engagement with Africa? By Dr Uche Igwe, Senior Political Economy Analyst and Visiting Fellow at the LSE Firoz Lalji Centre for Africa. lhttps://blogs.lse.ac.uk/africaatlse/2020/12/01/what-do-sovereign-immunity-clauses-mean-for-china-engagement-africa-debt/accessed23/10/22

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12.0 Recommendations

1. That states should be more cautious in the form and contents of agreements or treaties they enter into with other states and international institutions to ensure that their sovereignty is not unnecessarily co-promised.
2. International institutions should also limit their policies and power within those conferred on them by their members Articles of Agreements, as this will sustain the rule of law in international relations and further enhance the progressive growth and development of international law.
3. Due process as provided in the Articles of Agreement should be adopted before any changes or new initiatives are promoted, as this will mitigate the jurisprudence of the erosion of state sovereignty.