

SOVEREIGNTY AND LEGAL PERSONALITY: A LESSON FROM EUROPEAN UNION'S EVOLUTION TO SUPRANATIONALISM

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Abstract

Sovereignty remains a crucial debate in international law. Simultaneously, regionalism offers a new pathway for which sovereignty is often contested whether it surrenders due to economic interests. This paper revisits the notion of state sovereignty in the light of economic globalization and enquires about legal personality in international relations. Overall, this paper emphasizes revisiting the concept of sovereignty and legal personality in this 21st century, which has evolved amidst the more globalized world due to international economic relations. The present study was based on historical and analytical methods as doctrinal research. The historical approach was adopted to study international treaties and agreements to know the historical background and evolution of international economic law institutions. Then, it exemplified the European Union's evolution that transcends the state boundaries, following the debate on the relevance of the state sovereignty after the Brexit case under the discussion of the waning of the state sovereignty. Finally, this discussion ended with the international legal personality owned by regional bodies, taking the EU and ASEAN as the comparison. At the outset, the EU was projected as the new governance structure that gradually disrupted the state concept under the Westphalian Peace 1648 due to its member states' desire to form the state-level structure. The European Union redefines the new model of sovereignty against the Westphalian model, which is incomparable to the ASEAN intergovernmental model and other regional bodies regarding sovereignty concerns and legal personality.

A. Introduction

In the aftermath of World War II, state sovereignty has become the pivotal element. Also, in the current more globalized world, state sovereignty remains essential by considering the recent issues about the rise of China¹ and the United Kingdom (UK) withdrawal from the European Union (EU).² These two examples represent state sovereignty as a critical issue among the global facts of the increasingly boundless international arena. Nevertheless, state sovereignty often links to the more considerable debate on the domestic power to manage and legislate under the right to self-determination. While new underdeveloped and developing countries arise as decolonization, the current debate does not merely center on the sentiment of colonialism and imperialism. The problematic intersection of globalism and the emerging hypernationalism has entered the contentious landscape of national interests among industrial countries. It also puts a crucial debate within developed countries as which it refers to the Westphalian model.

Accordingly, in this globalized world, the state cannot survive alone. Each state needs cooperation in compliance with other states' interests on peacekeeping and economic reasons. It affirms that states cannot avoid cooperation and friendly relations in establishing global peace. The establishment of the United Nations contemplates this concerning issue. A globalized world encourages each to promote reciprocal relations, especially after World War II, primarily concerning economic matters. Although sovereignty has grown the discussion to the extent of its implication to domestic affairs,³ it has never been understood as an absolute.⁴⁵ For instance, international security will be materialized if each state involves cooperation through treaties or other particular consensual agreements.

The cross-border relationship also needs cooperation among states in terms of economic activity. It is commonly agreed that the inception of the World Trade Organization (WTO) is an example of reflecting the importance of economic relations among states. Through the WTO, each state has a trade institution to develop negotiation forums and settle trade disputes. The establishment of the European Communities also invokes economic interdependence among states in Europe. The European states' desire to establish a single community generated the European Union, which applies a single commercial policy within member states. This emergence brings a new trend in domestic and international law. Domestic policies have been gradually shifted to supranational power. The EU, which comes as the regulator of the common policy among states, raises sovereignty among member states. It is one of the phenomena the globalizing world inevitably redefines state sovereignty.

This paper aimed to revisit the notion of state sovereignty in the light of economic globalization. It also deals with the advent of the EU as a powerful institution in regional coverage, which dramatically enters into a global system. This paper aims to provide a literature review by revisiting the concept of sovereignty and legal personality in international relations dealing with the European Union in exercising its powers. Since its beginning, the European Union has been projected as the new form of governance structure. It disrupts the state concept under the

¹ While Chinese leaders under the Chinese Communist Party (CCP) embrace globalization, China has attempted to control and regulate its socio-economic and political effects domestically with the aim to counter the so-called "negative" effects through the twin vehicles of nationalism and sovereignty. Andrew Coleman and Jackson Nyamuya Maogoto, "'Westphalian' Meets 'Eastphalian' Sovereignty: China in a Globalized World," *Asian Journal of International Law* 3, no. 2 (July 2013): 240, <https://doi.org/10.1017/S2044251313000179>.

² Michael Gordon, "Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit," *European Constitutional Law Review* 16, no. 2 (June 2020): 213, <https://doi.org/10.1017/S1574019620000152>.

³ There is no clear definition of sovereignty. It is the power of an individual state to act independently. Karen E. Bravo, "Challenges to Caribbean Economic Sovereignty in a Globalizing World," *Mich. St. U. Coll. L. Int'l L. Rev.* 20 (2011): 34.

⁴ Vaughan Lowe, "Sovereignty and International Economic Law," in *Redefining Sovereignty in International Economic Law* (Oxford; Portland: Hart, 2008), 77.

⁵ Matthias Herdegen, *Principles of International Economic Law* (OUP Oxford, 2013), 65.

Westphalian Peace 1648 due to its member states' desire to form the state-level structure. Even if the European Union ceased to exist to have the constitution due to the rejection under the sovereignty concerns from some member states, it remains to become a new governance model. It lasted with the debate over to what extent it reconfigures the sovereignty.

The present study was carried out based on historical and analytical methods as doctrinal research. The historical approach was adopted to study international treaties and international agreements to know the historical background and evolution of international economic law institutions concerned. The work mainly used library and doctrinal with historical and analytical methodology traits. The primary sources of information were collected from the declaration, charter, treaties, international agreements, acts, books, case-law, and journals on the topic research. The historical study was proposed to adopt a comparison concept or model in the past and the present conditions and to suggest some important measures on the problem. This paper consists of three parts of the discussion. The first part overviews state sovereignty through the lens of history. The second part analyzes sovereignty in international relations, encompassing state sovereignty in the globalized world. It also highlights the discussion about the waning of sovereignty. The third part discusses the concept and the spectrum of international legal personality.

B. Discussion

1. Revisiting State Sovereignty

The state sovereignty represents the basic constitutional doctrine, which governs a community, mainly encompasses a state that has a uniform legal personality. Sovereign states mean that they are equal. Their sovereignty becomes significant in other states and organizations of states defined by law.⁶ The term sovereignty describes legal competence that refers to a particular function by providing a rationale for its exercise.⁷ However, this paper will argue that it has a lengthy and troubled history. In other words, it is susceptible to multiple meanings and justifications. In this case, sovereignty is not to be equated with any specific substantive right. It is a precondition related to a specific jurisdiction, including a legislative body over national territory called sovereignty or sovereign rights. The correlative duty of respect for territorial sovereignty and territorial jurisdiction privileges refers to sovereign state immunity. Therefore, sovereignty characterizes powers and privileges resting on customary law independent of another state's particular consent.⁸ The state sovereignty in international relations has the primary role in meeting other states' constitutional independence. James's words deal with national independence by referring to the constitution as the supreme source, not part of a broader constitutional arrangement.⁹ It asserts that states should freely regulate domestic affairs without other states or parties' pressure or interest.

Crawford introduces sovereignty as a legal, absolute, and unitary condition. Legal means that the state is not subordinate to another sovereign.¹⁰ Absolute sovereignty is either present or absent, and a sovereign state is a supreme authority within the national jurisdiction.¹¹ It applies to all states, whether the unitary or federal constitutional structure, due to a sole authority in external relations remaining in the central government.¹² Otherwise, it would be more than one

⁶ James Crawford, *Brownlie's Principles of Public International Law* (OUP Oxford, 2012), 447.

⁷ Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 1973).

⁸ Crawford, *Brownlie's Principles of Public International Law*, 448.

⁹ Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge Studies in International Relations 12 (Cambridge: Cambridge University Press, 1999), 32.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

state, each with the unitary attribute.¹³ In federal states, the external affair is the responsibility of the national government.¹⁴ In this regard, the federal government has conferred the power on behalf of the government into international relations to satisfy the local and federal governments' interests.¹⁵ Therefore, although the federal system adopts a system that gives more power to the local or regional government, it reserves external relations retained by the federal government.

Historically, sovereignty was the substantial monopoly of power for the highest authority. It evolved as the nation-state began with the 1648 Treaty of Westphalia. This notion developed into the sovereign's absolute right and what we call the Westphalian sovereignty.¹⁶ As the concept to be prominent globally, laying the foundation of state theories, the US Government official has defined the concept and its problem:

[H]istorically, sovereignty has been associated with four main characteristics. First, a sovereign state enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Fourth, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What significant today is that each of these components---internal authority, border control, policy autonomy, and non-intervention---is being challenged in unprecedented ways.¹⁷

Some discussions about sovereignty's role focus on the principle of subsidiarity.¹⁸ They stand for the proposition that governmental functions should be allocated among hierarchical government institutions. Some believe that a higher government level requires special justification to achieve the desired goals.¹⁹ After World War II, the evolution of sovereignty continued, contrasted to the integration of Europe. It refers to establishing the European Communities and the notion of sovereignty transformed with the customs union and market integration. It also evolves sovereignty dealing with human rights, which solicits justice to the international community in the globalizing world. The shifting concept of human rights from constitutional to international law also brings consequences to the enforcement and fulfillment of human rights through international law mechanisms. It also shifts human rights enforcement on the municipal and supranational levels at the EU by establishing the European Court of Justice. The phenomenon categorizes one of the critical challenges of sovereignty, primarily when it deals with the state's powers and territories.

In trade policy, the sovereignty concept may result in scrutiny. The WTO fits as an example. Its membership is not exclusively sovereign entities. Instead, it also includes separate customs territory possessing full autonomy in its external commercial relations like Hong Kong Special Administrative Region.²⁰ The claim by political sovereignty is different from democratic constitutional law as the legal basis of constitutional sovereignty and democratic and individual sovereignty. Adhere to this view, the increasing economic, political, legal, and other limitations of political sovereignty justify the current globalization pathway. It includes the re-allocation of government powers to democratic people, indigenous people, international organizations, and individual human beings as legal subjects of inalienable rights. This dynamic

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ John H. Jackson, "Sovereignty: Outdated Concept or New Approaches," in *Redefining Sovereignty in International Economic Law* (Oxford; Portland: Hart, 2008), 8.

¹⁷ *Ibid.*

¹⁸ European Union, "The Lisbon Treaty: The Principle of Subsidiarity, the European Summaries of EU Legislation," accessed April 15, 2015, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm.

¹⁹ Jackson, "Sovereignty," 9.

²⁰ *Ibid.*, 10.

transformation of international relations and international law entails a tension between UN member states' sovereign equality as one of the UN Charter's constitutional principles (Article 2).²¹

a) Territorial Sovereignty and Non-Intervention

Territorial sovereignty becomes the boundaries of the sovereignty of any state or state. It possesses its own (trust territory) *nullius* and *res communis*. A *res nullius* consists of an area legally susceptible to acquisition by states but not placed under territorial sovereignty.²² A *res communis*, comprising the high seas (which for present purposes include exclusive economic zone) and outer space, cannot be placed under sovereignty.²³ With the government and the population within its boundaries, state sovereignty constitutes its physical and social base. The state's legal competence and the rules for their protection depend on and assume the existence of this stable, physically identified (and typically legally delimited) base.²⁴

Sovereignty and sovereign equality require that each state can freely determine its domestic affairs without intervention from the outside. The principle of non-intervention is universally recognized as one of the cornerstones of international law. The International Court of Justice (ICJ) refers to the principle of non-intervention as the freedom of choices in the absence of external coercion. The principle forbids all states or groups of states to interfere directly or indirectly with other states' internal or external affairs. Accordingly, a prohibited intervention must be one bearing on matters in which each state is permitted to decide freely by the principle of state sovereignty.

The principle's discussion closely deals with the choice of a political, economic, social, and cultural system and foreign policy formulation. Therefore, the intervention is wrongful when using coercion methods with such choices, remaining free. The coercion is particularly apparent in an intervention that uses force support for subversive or terrorist armed activities without another state.²⁵ Economic pressure as such will, in principle, not be classified as an intervention. The intervention measure usually requires a noticeable physical element. However, it has become controversial whether economic pressure can be so compelling as physical coercion to come within reach of intervention. The Charter of Economic Rights and Duties of States of 1974 prohibits using such economic measures, aiming at the subjection of one state to another in exercising sovereign rights.²⁶ The principle of non-intervention was often mobilized against the condition for credits and other financial benefits by the World Bank and other institutional lenders. Payments may be tied to specific structural reforms and other conditions without a legal claim to unconditional financial assistance. At least, as long as they do not affect the core of self-determination.²⁷

b) Sovereign Immunity of State

The root of state immunity from jurisdiction and enforcement measures of other states comes from sovereign equality of states, known as *par in parem non habet imperium*.²⁸ The principle asserts that each sovereign power cannot exercise jurisdiction over another. Also, one country's courts cannot hear cases brought against the government of another country. Thus, courts

²¹ Ernst-Ulrich Petersmann, "State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?," in *Redefining Sovereignty in International Economic Law* (Oxford; Portland: Hart, 2008), 28.

²² Crawford, *Brownlie's Principles of Public International Law*, 203.

²³ *Ibid.*

²⁴ *Ibid.*, 206.

²⁵ Herdegen, *Principles of International Economic Law*, 68.

²⁶ *Ibid.*

²⁷ *Ibid.*, 68–69.

²⁸ *Ibid.*, 69.

cannot involve themselves in the internal affairs of a foreign country.²⁹ Consequently, state immunity rules govern judicial and administrative proceedings and enforce judgments or arbitral awards in other states. States may renounce their claim to immunity either before a dispute arises or after the start of judicial proceedings. The waivers of immunity in favor of creditors are often attached to the emission of state bonds.³⁰

The classic customary law is known with the doctrine of absolute immunity as it still prevails. It is substantially concerned that states could claim immunity for all their activities with a few exceptions. However, modern international law follows a more functional paradigm and merely recognizes the restricted model of a relative immunity. This immunity only covers sovereign acts (*acta iure imperii*) and does not extend to non-commercial activities (*acta iure gestionis*).³¹ When engaged in business transactions like a private person, states are subjected to foreign courts' jurisdiction like other actors. Several international agreements and municipal laws have adopted the restrictive concept of immunity. It underlies the European Convention on State Immunity of 1972, the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, the US Foreign Immunities Act 1976, and the British Immunity Act 1978.³²

International organizations may also invoke immunity under certain circumstances. As a rule, the agreement between the organization and the host state (where the organization has its seat) or the founding treaty will define the extent of immunity. The scope of immunity in customary law, which is relevant *vis-a-vis* non-member states, is highly disputed. A generous view will grant immunity to all acts covered by its purposes set out in the founding treaty. As a somewhat questionable consequence, the distinction between sovereign and commercial acts would become irrelevant. However, it is hard to understand why an international organization should enjoy broader immunities than its founding states. Therefore, international organizations' immunity under customary law should follow similar states' immunity and exclude commercial activities.³³

c) Sovereignty and International Organizations

The institutional aspects of states result in an actual qualification of sovereign equality. In an organization subject to most weighted voting, organizations may be allowed to make decisions and even make binding rules without all member states' express consent. However, each member consented to the institutional aspects before joining the organization. Thus, formally, the principle that obligations can only arise from states' consent and the principle of sovereign equality is satisfied.³⁴

On the other hand, international organizations can evolve and assume roles very different from those initially contemplated. In the UN's case, the organizations have interpreted the Charter under the principles of effectiveness and implied powers at the expense, it may seem, of Article 2 (1) and (7). In certain expenses, the court held that in the absence of any particular

²⁹ Richard Schaffer, Filiberto Agusti, and Beverley Earle, *International Business Law: A Conceptual Approach* (New Delhi: Cengage Learning India, 2009), 78.

³⁰ Herdegen, *Principles of International Economic Law*, 69.

³¹ The concepts of *jure imperii* and *jure gestionis* are two things different. First deals with the state's action to enter into international agreements with other states or international organizations. However, the second deals with the entity which may enter into a private contract with domestic law's private entity. In the context of intergovernmentalism, it describes two instances: the EU, which has *jure imperii*. The second is ASEAN, which has *jure gestionis* so that ASEAN is treated as a private entity. Hikmahanto Juwana, "ASEAN's Legal Personality," 2010, <http://www.thejakartapost.com/news/2010/08/26/asean%E2%80%99s-legal-personality.html>.

³² Herdegen, *Principles of International Economic Law*, 69.

³³ *Ibid.*, 72.

³⁴ Crawford, *Brownlie's Principles of Public International Law*, 451–52.

procedure to determine the UN's institutions' acts' validity, each of them must determine its jurisdiction. Some 40 years later, this position arguably enabled the Security Council to pass several resolutions using its Chapter VII Powers. These resolutions require states to enact particular domestic laws, supplanting the General Assembly's recommendatory role, treaty-making process, and consent principle. The Security Council has always had the power to bind UN members to the point of overriding other treaty obligations. However, legislative resolutions require members to respond to a general phenomenon rather than a specific situation involving a particular country or region at odds with the original conception of the Security Council as a force for the maintenance of international peace, not the alteration of world order.³⁵

While an organization substantially encroaches on members' domestic jurisdiction, the structure may approximate a federation. Given the modern relationship between states and international organizations, such a position seems inherently unlikely. In any event, the consent-based conception of this relationship precludes the argument that state sovereignty faces a threat from some form of overarching world government.³⁶

2. Sovereignty In International Economic Relations

As we have faced in the 21st century, states have built alliances to materialize cooperation and friendly relations and deepen market integration in the current globalization era. Though some decades after the final days of World War II, every state has immensely built and reconstructed its domestic problems. The War results had deteriorated the prosperity of almost every state. Every state thought that a world alliance and cooperation were excellent solutions to maintain peace and avoid war. The UN's establishment is one of the instances why the alliance to build cooperation matters. The establishment of the IMF, the IBRD, and the GATT/WTO asserts to catalyze every state's reconfiguration. It desires to enter into international economic relations states are categorized as underdeveloped countries, developing countries, or even developed countries. In terms of economic relations, it imposes reconfiguration of the state's sovereignty in economic sectors by establishing modern international economic law.

The fundamental role of this modern international law deals with reflections of the reality of human, economic, social, political, and environmental relationships across the international community; enhancement of the overall capacity of states and the international community to manage global threats, such as climate change, protectionism, and violations of human rights. This role is set against the historical foundation of international economic law as it is developing.³⁷ As discussed earlier, sovereignty has different meanings, dimensions, and attributes. Its correct understanding depends on the context used. Thus, sovereignty is inherently unstable and constant in its core criteria subject to contestation and change. Consequently, no single or indeed authoritative definition is given to the idea. Sovereignty has been described variously---as an essentially contested concept, referring to a question to allocating power, typically through the government's decision-making power. At its core, sovereignty focuses on "the monopoly power."³⁸

a) Economic Sovereignty in A Globalizing World

Economic sovereignty deals with the state's economic powers in international economic relations. The state sovereignty connotes juridical independence from other participants' authority in international economic relations as constrained and augmented by the equality between states. Article 2 (1) of the UN Charter explicitly affirms states' sovereign equality.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Asif Hasan Qureshi and Andreas R. Ziegler, *International Economic Law* (Sweet & Maxwell, 2011), 47.

³⁸ *Ibid.*, 48.

Similarly, the principle of equality and independence has been revealed in various UN instruments in the economic and judicial decisions.³⁹

In this sense, there are two domains of economic sovereignty, *inter alia*, internal and external domains. In general terms, the internal domain has been aptly described as the power of a state to freely and autonomously organize itself and exercise a monopoly of legitimate power within its territory. An essential aspect of this sovereignty substantially deals with the right to development, a recognized international law principle. There has been much discourse between states and academic commentary regarding a state's sovereignty over its natural resource. However, the state's permanent sovereignty over its national resources can no longer be considered isolation. International environmental law and human rights development have gradually eroded the permanent sovereignty principle's exclusivity. In particular, when it deals with basic human needs. This inclusivity has found succor in the principle of sustainable development.⁴⁰

The state's sovereignty in terms of its ability to determine its economic system is considerably inalienable. However, it is, to be sure, *de facto* subjected to impact to the globalized economy. Further, given developments in the international economic order, there is now a question of the extent to which this inalienable domain at the level of general international economic law is intact. It has been suggested, for example, that there is now, in fact, a comparative advantage model of international economic law wherein the state has withered away. Indeed, some of the practices of the Bretton Woods institutions would tend to suggest such development. However, whether they lead to the development of customary international economic law norms remains to be seen. In the first place, these multilateral agreements still do not enjoy full universal membership of the international community, exemplified as conventional international law practice. Secondly, both the IMF and the WTO tend to focus mainly on external economic relations on the whole. The IMF case has both a past and ongoing record of memberships of states with non-market orientated systems. To be sure, the IMF Articles of Agreement do not stipulate a particular economic system as a condition of membership. Finally, critical components of state authority still elude multilateral control, such as the power and manner of state taxation.⁴¹

b) Sovereignty Concerns of Regional Organizations

The sovereignty concerns of regional organizations can be exemplified by the Association of Southeast Asian Nations (ASEAN) and the European Union (EU). These two entities are both regional organizations that apply the economic community, albeit they have different sovereignty implications. ASEAN is an intergovernmental organization within Southeast Asia established in Bangkok on August 8, 1967, with five original Indonesia, Malaysia, Philippines, Singapore, and Thailand. ASEAN members have indicated the fast-growing regionalism by including Brunei Darussalam, Cambodia, Lao PDR, Myanmar, and Viet Nam. While the EU is a pivotal regional organization playing a significant role in members' domestic matters, ASEAN members retain their powers over ASEAN due to sovereignty. After World War II, ASEAN is considered one of the most successful regional organizations. It was an organization to fortify member states from the spreading of communism to shift into regional cooperation. It is believed that ASEAN progressively transforms a region after the EU by following the EU model. ASEAN has had tremendous efforts after more than four decades, in which the evolution delivered ASEAN to conceive blueprint. In its progressive trajectory, ASEAN started by priority as a regional organization into a stable, prosperous, and highly competitive region, at equitable economic development and reduced poverty and socio-economic disparities (ASEAN

³⁹ *Ibid.*, 50.

⁴⁰ *Ibid.*, 61.

⁴¹ *Ibid.*, 62.

Vision 2020). It was followed by the ASEAN Summit in Bali in 2003 (Bali Concord II), which declared the ASEAN Economic Community (AEC) as the goal of regional economic integration by 2020. In 2007, the 12th ASEAN Summit affirmed their strong commitment to accelerate in establishing the ASEAN Community by 2015. It became the progressive step that transformed ASEAN into a region with free movement of goods, services, investment, skilled labor, and more unrestricted capital flow.⁴²

The cooperation strategy of ASEAN consists of two key elements. First, ASEAN seeks to deepen and accord among its members by developing an ASEAN Community with three inter-related components, *inter alia*, economic, political-security, and socio-cultural. Second, ASEAN strives to consolidate its position at the center of cooperation in East Asia overall. The ambitious step taken by ASEAN through the creation of AEC affirms that ASEAN desires to transform its region. AEC is designed with a single market and production base to enter into a worldwide competition with free movement of goods, services, investment, skilled labor, and freer capital flow. The single market and production base also include two essential components: the priority integration sectors and food, agriculture, and forestry.

The creation of AEC is evidence of the new step taken by ASEAN in promoting cooperation from merely a regional cooperation to a broader range of regional cooperation with the economic community within the region. The history of the European common market arguably reflects ASEAN. An economic community is an essential part of achieving more significant benefits in international economic relations. In Europe, the economic community began with the free flow of goods (integration of trade), the free flow of capital (integration of investment), and the labor movement.⁴³ However, ASEAN does not set the Customs Union as applied by the EU in establishing AEC.⁴⁴ It makes a difference in the step taken between ASEAN and the EU about regional economic integration. ASEAN economic integration is characterized by market-driven, while the EU is government-driven. Market-driven makes ASEAN feasible to adopt an "open regionalism" framework, which widens ASEAN's economic cooperation to non-member states.

In contrast, the EU's customs union is an exclusive trade liberalization among its member states.⁴⁵ This different pattern of economic community between ASEAN and the EU brings about the consequence regarding sovereignty concerns. Market-driven in creating an economic community shows that ASEAN did not intend to create a single supranational authority to regulate the market as it has done by the EU. Therefore, sovereignty concerns are essential for ASEAN in establishing a regional community without impeding each member's sovereignty.

On the other hand, the EU, either institutionally or constitutionally, has a different pattern from ASEAN. The EU and ASEAN take a different path in adopting the economic community to create a single market: the EU comes with a governmental approach. ASEAN rises with the market approach. These two approaches bring different consequences to the policies applied to the member states of both organizations. Although the debate on the sovereign concern of the EU is still going on, the transformation of the European countries which adopt a single market into the EU has a clear line. The EU's government-based approach brings to the political union

⁴² ASEAN Secretariat, *ASEAN Economic Community Blueprint* (Association of Southeast Asian Nations, 2008), 5.

⁴³ A. M. El-Agraa, ed., *The European Union: Economics and Policies*, 9th ed. (Cambridge, UK; New York: Cambridge University Press, 2011), 34.

⁴⁴ The European Economic Community began with the customs union. There is free trade in all goods that come through any union members, even imports from outside the customs union. Thus, it has a common customs tariff and, under its operating treaties, has the power to negotiate with other countries on behalf of its member states.

⁴⁵ Kiki Verico, "Can ASEAN Achieve Economic Community?," *The Jakarta Post*, accessed December 29, 2017, <http://www.thejakartapost.com/news/2012/12/24/can-asean-achieve-economic-community.html>.

in which the member states are integrated into single governance under the EU. Thus, the EU can create and regulate policy to be applied to the member states.

Irrespective of this debate, the EU has characteristics of a governmental system in which the EU enters into international relations on behalf of the member states to certain international agreements with other states or international organizations. Also, this system applies division of power between the EU and member states. Insofar, the federal government reserves some powers to the state (local) government that the central government may not exercise. These similarities conclude that the EU's characteristics are inclined to apply the federal system rather than exercise to be a just regional organization. The EU takes several parts, which are the domain of the member states. It can be exemplified by the Common Commercial Policy (CCP). It applies uniform trade relations with third countries, mainly through common customs tariffs, exports, and import policies. Thus, this policy has been widened by the Treaty of Lisbon, which came into force in December 2009. Article 207 of this treaty includes some foreign direct investment elements (FDI) to the common commercial policy.

c) **The Warning of the State Sovereignty**

The classical concept of international law presupposed that the states are equal. It only deals with the interaction of states. However, international organizations' emergence, especially after the international organization is deemed the subject of international law, brings a dynamic picture of international law today. Thus, the state's sovereignty, which formerly should satisfy other states' constitutional independence, evolves with different spectrums. It may widen, which is no longer concerning the constitutional independence of other states. However, it should satisfy other entities' constitutional independence (including states, international organizations, and multinational enterprises). In this case, the state is bound by the agreements by entering into international agreements. As a consequence, the independence of the state is restricted by agreements. However, in this era, the state needs to deepen interaction with other entities, especially other states and international organizations.

Such organizations likewise govern policy, which should be implemented at the national level by the states. For instance, membership in the WTO brings the consequences of applying the policy governed by this institution. In another case, the EU's establishment brings us to rethink the sovereignty of its member states. The member states are subject to the common commercial policy, common monetary policy, and political union through the institutions under the EU. In respect of the jurisdiction, the EU exercises powers beyond the state. For example, the European Court of Justice functions as the higher suit other than the Supreme Court of the member states. Each EU citizen can challenge supranational judiciary organs to satisfy justice, which was not compiled by the member state jurisdiction. It affirms that the emergence of dynamic state relations renders today's sovereignty in the modern world. Besides, it occurs by establishing a regional union with political union patterns such as the EU. It generally affects the concept of sovereignty to transcend the limits of sovereignty and jurisdiction. The globalizing world is the reason for this challenge. Modern globalization today transforms dynamic political and economic relations among states and entities. Besides, the worldwide liberal regulation by reducing tariff barriers to trade WTO law is also an instance of this transformation toward waning of state sovereignty.

However, the debate over state sovereignty becomes impossible to avoid in the UK's constitutional politics, particularly from the pre-Brexit to the post-referendum. Following the contentious withdrawal of Britain from the European Union, the discussion has re-emerged on the importance of the sovereignty issue among EU member states.⁴⁶ Indeed, the UK was not part of the EU original members, which asserts that the UK participation in the EU did not

⁴⁶ Michael Gordon, "The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond ...," *King's Law Journal* 27, no. 3 (September 2016): 333, <https://doi.org/10.1080/09615768.2016.1250465>.

influence the EU governance model to the supranational level body that the original members designed. While the UK participation has questioned the importance of sovereignty, British constitutionalism has been designed explicitly and significantly by the concept of sovereignty. In particular, Britain's referendum on EU membership in 2016 has been a centerpiece to intensify sovereignty's legal and political dimensions. The debate often refers to the misunderstanding of the constitutional doctrine that counters parliamentary sovereignty to the EU's pooled competence from the member states. Gordon argues that this debate that enquires the proper balance between national and EU powers and competence will remain even after the Brexit.⁴⁷ While Agnew concludes that the UK's taking back control reflects British inconvenience as a royal state which then cooperates with the framework of granting significant national authority to supranational entities.⁴⁸

3. International Legal Personality

The root of international legal personality comes from international law. However, it also represents one of the pillars of municipal law. To better understand the notion of legal personality, it needs to review the function of personality in municipal, private law. A legal system has to determine whom it endows with the rights and duties and whose actions it takes into account by attaching legal consequences to them. To this effect, municipal law usually includes a law of persons. Historically, persons' law comprised classes like nobles, clerics, serfs, or slaves. It allocated a different degree of personality in law. Most of these distinctions vanished from the private law of persons in the nineteenth century. As an effect of the emerging right to form groups and associations in most countries, new categories of legal personality, in respect of corporate nature, were introduced into the private law of persons. For law, these recognized groups and associations were regarded as distinct entities from the individuals composing them.⁴⁹

In international law, it has to be determined which entities have rights and duties and act legally. The notion of legal personality is traditionally employed and accordingly called international legal personality.⁵⁰ This notion of International legal personality comes from the view of the entity entitled to rights and duties derived from international law. The entity accrues the importance of legal personality to such an entity because it has rights and duties to operate in the international arena.⁵¹ Therefore, international persons can claim direct protection by international law to fulfill their rights and duties. The international legal personality is given to the entity when such entity has legal capacity entitled rights and duties to enter into international relations, including international agreements with other entities. If the entity does not have such capacity, it cannot have an international legal personality.

a) The Spectrum of International Legal Personality

Some views presuppose an entity to have an international legal personality. In the view of Portland, there are at least five concepts of international legal personality identified as being present in international legal argument comprising: (a) the states-only conception; (b) the recognition conception; (c) the individualistic conception; (d) the formal conception; and the actor conception.⁵² These conceptions consider different entities to be international persons,

⁴⁷ Ibid., 341.

⁴⁸ John Agnew, "Taking Back Control? The Myth of Territorial Sovereignty and the Brexit Fiasco," *Territory, Politics, Governance* 8 (December 16, 2019): 12, <https://doi.org/10.1080/21622671.2019.1687327>.

⁴⁹ Roland Portmann, *Legal Personality in International Law* (Cambridge; New York: Cambridge University Press, 2010), 7.

⁵⁰ *Ibid.*, 8.

⁵¹ Dapo Akande, "International Organizations," in *International Law*, 4th ed. (Oxford University Press, 2014), 251.

⁵² Portmann, *Legal Personality in International Law*, 13.

contain different mechanisms to become one, and attach different consequences to being more.⁵³ It describes that the conceptions above bring the spectrum of the notion of an international legal person.

First, it is the states-only conception. The first position reserves international personality exclusively to states. There are no conditions for international personality other than having acquired statehood. The corollaries of personality are synonymous with those of being a state. Hitherto, the position is scarce, but it is essential in historical context and is, at times, still relevant for legal issues today.⁵⁴ Second, it is the recognition conception. It asserts to conceive states as the original primary persons of international law. However, other entities can acquire international legal personalities, often called derivative or secondary international persons. The mechanism through which this is possible is an explicit or implicit recognition by states. In order to be international persons, in principle, it entails fundamental international rights, duties, and capacities analogous to those of states.⁵⁵

Third, it is the individualistic conception. It is a presumption for the individual as an international person in the so-called fundamental norms of international law. Also, states and various other entities can be international persons. If international norms address them, individuals become internationally responsible for violations of fundamental international norms irrespective of whether they act in a public or private function.⁵⁶ Fourth, it is the formal conception. It declares international law as an open system. There is no presumption as to who is a legal person. International personality becomes a *posteriori* concept, which means every entity is an international person that, according to general principles of interpretation, is the addressee of international law norms. There are no consequences attached to being an international person.⁵⁷

Fifth, it is the actor conception. It rejects the concept of international personality as traditionally understood. It stipulates a presumption that all effective actors in international relations are relevant to the international legal system. An international decision-making process determines the specific rights and duties of particular actors. The actors themselves participate depending on their effective power.⁵⁸ The column below explains the original assumptions that underlie the conceptions of international personality. As the table indicates, these assumptions differ in several respects.⁵⁹

b) International Organizations' Legal Personality

Although often referred to 19th and early 20th centuries, states were the only international law subjects. It was decisively established in the *Reparation for Injuries* Advisory Opinion that other entities, particularly international organizations, also possess international legal personality. The case arose out of the murder of a UN mediator in Jerusalem by a Jewish group. The UN General Assembly requested an opinion from the International Court of Justice on whether the UN could bring an international claim against Israel to obtain reparation for injuries done to the organization and its agents. Article 104 of the Charter imposes an obligation on UN member states to confer legal personality on the organization within their domestic legal system. Nothing in the Charter expressly grants international personality to the UN.

Nevertheless, the court found that the UN possesses an international legal personality, arguing that this was necessary to fulfill its functions. The court also deduced legal personality from the

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 14.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 245.

powers and rights given to the UN (the power of decision-making, the domestic legal system, immunities, and privileges and treaty-making powers) under the Charter. The organization occupies a position in a certain respect in detachment from its members. The organization aimed to exercise and enjoy function and rights, which can only be explained based on a considerable measure of international personality and the capacity to operate on the international plane.⁶⁰

It asserts that international organizations possessing international legal personality can have international rights, capacities, or duties. However, the possession of international legal personality does not define the particular capacities, rights, or duties that any particular organizations possess, nor does it indicate that they possess the same capacities, rights, or duties.⁶¹ The alternative and better view are that international organizations can attain objective legal personality independent of recognition by performing certain functions on the international plane. It was the position taken by the Court in *Reparation for Injuries*. Then, the International Court of Justice held unanimously that the UN was a legal person with the capacity to bring claims against both member and non-member states for direct injuries. The power to bring such claims was regarded as concomitant with legal personality. However, the court also expressed its conclusion regarding implied powers and effectiveness. Similar reasoning may apply to other organizations. Thus, the capacity to espouse claims depends on the existence of a legal personality. It also depends on the interpretation of the constituent instrument in light of the particular organizations' functions.⁶²

C. Conclusion

Given the globalization that offers more reciprocal relations between states, state sovereignty remains the crucial issue. The problematic intersection of globalism and the emerging hypernationalism has entered the contentious landscape of national interests among industrial countries, exemplified by the UK that left the European Union. It also puts a crucial debate within developed countries as which it refers to the Westphalian model. Indeed, the European Union's integration has provided a new landscape in international law's state relations. It will influence the future model in organizing power from the state to the regional level. However, the Brexit experience provides the perspective. To some extent, economic globalization aims to liberalize the economic relations between states. However, from the Brexit, the desire for regional integration will face more persistent barriers to establishing a more integrated economy. Other members of the regional organizations like ASEAN will learn from this episode, and it will adversely impact the desire for integration without sacrificing the sovereignty of each member state.

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⁶⁰ Akande, "International Organizations," 252.

⁶¹ *Ibid.*

⁶² Crawford, *Brownlie's Principles of Public International Law*, 180.

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