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BREXIT A CONSEQUENCE OF COMBINING CONSTITUTIONALISM, NATIONALISM AND REGIONAL INTEGRATION: A WAKEUP CALL FOR THE ECOWAS STATES

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ABSTRACT

The United Kingdom became a member of the European Economic Community (EEC) on January 1, 1973 thus, qualified to join several other associated European institutions including the European Court of Justice. One of the key implications of subscribing to the EEC Treaty was that the EEC laws became an integral part of the United Kingdom domestic laws, in compliance with the European Communities Act 1972. From 1972 onward for more than 40 years, a great number of the British citizens have expressed concerns over the erosion of their national identity and the decaying national sovereignty as the European Union (EU) expanded geographically, politically and legally. In December 2015, the United Kingdom Parliament enacted the European Union Referendum Act. On 23 June 2016, the majority of the citizens voted in favour of the United Kingdom leaving the European Union via a referendum. This paper explores the reasons for the departure of the United Kingdom from the European Union and, argues that, the Economic Community of West African States (ECOWAS) which is developing in exact model as the European Union, will face the same challenges in the near future except it learn from the errors of the European Union and re-configure its organisation.

Keywords: Brexit, ECOWAS, Constitutional Law, Sovereignty.

1. INTRODUCTION

Two concepts are prominent in this discourse namely supremacy and sovereignty. Fitzmaurice explains that the precept of supremacy is "one of the great principles of international law, informing the whole system and applying to every branch of it."[1] It is not a secret that the supremacy of international law often attempts to suppress the sovereignty of states to international law. One of the definite indicators of international law is that it assumes utmost status over and above the laws of individual nations. Consequently, where

[1]Fitzmaurice, Gerald (1957) 'The General Principles of International law Considered from the Standpoint of the Rule of Law' 92 *Recueil des cours* (II) 85

conflicts arise between international law and national laws, international law prevails. Therefore, the international law tends to place specific and general obligations on states with caveat that such compliance must be in accordance with the standards specified by international law. The rationale for the empowerment of international laws over domestic laws are well placed in that, if the states' laws were to be superior then international laws would be undermined and the worth of international laws could be reduced thereby damaging the global legal configuration.

Sovereignty as a legal and political concept simply refers to the rights and powers of an institution or nation-state to administer itself without any external intrusion. It is a functional term that apportions supreme authority to an existing institution or state.[2] According to *Parpworth*[3] sovereignty is the power of law-making that is unhindered by any legal perimeter. Factually, the notion of sovereignty has been of foremost standing to both social scientists and lawyers.

The advancement of the use of the concept of sovereignty is interconnected with the growth of the system of states of Western Europe. Sovereignty was first invoked to pronounce the powers of the monarch inside the State. When transacting with other nations the sovereign proclaimed his autonomous status, and characteristics which, assumed the credentials between the sovereign and his state, committed, also to the State. In view of the fact that the other nations likewise have sovereign monarchs, and viewed themselves correspondingly as sovereign nations, the connexion between such autonomous nations had to be lawfully one of equivalence and independence.

> "On the international [arena], the sovereignty of the "*sovereign*" State is not a truly international sovereignty, but a transposed internal concept of sovereignty - a description of a legal status possessed in some other (i.e., the internal) legal order."[4]

Internal sovereignty has been mainly a substance of constructive control of definitive power in a sequential designed internal legal context, so that interest has reclined in classifying the position of that authority inside the State. However, peripheral sovereignty has been largely a damaging matter of repudiating the presence of peripheral sovereign power, with resulting stress on the impartiality and, individuality as the legal context for global relations. For instance, in the United Kingdom, the country, superficially, is legally equal to and autonomous of all other similar sovereign nations.[5] The global personality is that of the United Kingdom as an independent nation, is represented universally by the Queen as the head of State. Hence, all internal matters such as parliamentary businesses and legislation are generally considered to be done by Parliament[6] on behalf of the Queen of England.

Central to the perceptive pivot of supremacy of British parliament lies the connexion between parliament and the judiciary. It is important to note that, the British constitution though codified, is stunningly fashioned in such a way that the parliament has infinite legislative powers in that, the courts are cognisant of the legal status of parliament.

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[2] Jennings, W. Ivor *The Law and the Constitution* (London: University of London Press, 1st ed., 1933); R.T.E. Latham *The Law and the Commonwealth* (Oxford, Oxford University Press, 1949); Geoffrey Marshall, *Constitutional Theory* (Oxford, Oxford University Press, 1971); *Jackson v. Attorney General* [2005] UKHL 56 at [81] per Lord Steyn; *Harris v. Minister of the Interior* 1952 (2) SA 428(A).

[3] Parpworth, Neil (2002) 'Constitutional and Administrative Law', London: Butterworths Press, p.61

[4] "Sovereignty and the European Communities" Foreign and Commonwealth Office (FCO) 30/1048 – 1971, declassified Government Document under the 30 years rule.

[5] ibid

[6] ibid

The British constitution accuracy can be said to be the "ultimate rule of recognition."[7] Scholars have traced the supremacy of the British parliament to the era of the *Glorious Revolution of 1688.* The supremacy of the British parliament was illustrated in *Manuel v. A-G*[8] where the court held that: "…once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity."[9]

This paper seeks to explore how the erosion of the powers and supremacy of the British parliament by the European Union; the European community laws; the European court of Justice and the European court of human rights, arguably led to the alteration in British sovereignty hence, the clamour for the United Kingdom to leave the European Union.

2. THE GENESIS OF BRITISH DISCOMFORT WITH THE EUROPEAN UNION

As earlier stated, the British constitution is grounded on the canon of parliamentary sovereignty. Each parliament is superlative, supreme and independent to such extent that it does not bind its predecessors and successors. This is accomplished through the principle of implied repeal. However, some Acts of Parliament are exempted from the doctrine of implied repeal. This was illustrated in *R v. Lord Chancellor, ex parte Witham*,[10] the court listed the following constitutional statutes which are exempted from repeal s follows: "Magna Carta; the Bill of Rights 1688; the Act of the Union; the Reform Acts; the European Communities Act 1972; the Scotland Act 1998; the Government of Wales Act 1998; and, the Human Right Act 1998."[11]

Furthermore, on the principle of implied repeal, where two statutes are in conflict, the future will triumph[12] for instance, in *Vauxhall Estates ltd v. Liverpool Corporation,*[13] the court explained that no Act of parliament could effectually indicate that "no future Act shall interfere with its provisions." The principles laid down in Vauxhall explicitly shows that parliamentary sovereignty could encompasses the exclusive power to enact supreme laws that contains three crucial characteristics as follows:[14]

a) Statutes that have been appropriately enacted by the parliament and obtained the royal assent are never professed illegal by the courts. For example, no British court can pronounce that the provisions of any parliamentary statute is contrary to constitutional law, common law, or to any international law;[15]
b) Parliament shall enact any law unimpeded. Thus, every parliament is unique and supreme to such extent that it is not bound by the acts of its predecessors, where there are previous statutes, they are swiftly repealed or amended by the corresponding statutes;[16]
c) No other authority in the land of the United Kingdom shall have legislative powers over and above the parliament.[17]

From the outset of the inception of the European Union, the British critics have expressed scepticism over the possible conflicts of membership of the European

[7] Neil Parpworth, ibid, p.62
[8] [1983] 3 All ER 822
[9] Ibid, per Sir Robert Megarry VC
[10] [1998] QB 575
[11] Parpworth, ibid, p.81
[12] Joanne Coles (2002) 'European Union Law -1999-2000 LLB Examination Questions and Suggested Answers' (University of London External Examinations), p. 72
[13] (1932) 1 KB 733
[14] "Sovereignty and the European Communities" Foreign and Commonwealth Office (FCO) 30/1048 – 1971, declassified Government Document under the 30 years rule.
[15] ibid
[16] ibid
[17] ibid

Community with the British parliament supremacy. As the United Kingdom was deliberating on joining the European Community, the proposition was challenged in the case of *McWhirter v Attorney General*,[18] the claimant contended that if the United Kingdom join the European Community, the association thereof would violate the provisions of the Bill of Rights (1688), which conversed absolute supremacy in the parliament and the crown and that, by joining the European Community, the supremacy thereof will be transferred along with British rights to the European governing bodies.[19] The court held that, "the Bill of Rights did not restrict the Crown's prerogative powers in relation to foreign affairs [therefore] the Crown retained, as fully as ever, the prerogative of the treaty-making power … [and] even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament. Until that day comes, we take no notice of it."[20] Also in *Blackburn v. A-G*,[21] the claimant attempted to obtain a judicial declaration that the United Kingdom subscribing to the Treaty of Rome, would automatically hand over significant portion of parliament's sovereignty to the European Economic Community. The claimant further contended that it was unlawful for the government to sign the said Treaty.[22] In refusing the claim, the court said that even when the Treaty is signed by the United Kingdom, no European laws could become British law until it is "embodied in an Act of Parliament."[23]

It became seemingly evident that, for the rights and obligations flowing from the Treaty of Rome to be effective in the United Kingdom, Parliament had to pass it as legislation for example, the European Convention on Human Rights 1998 became the United Kingdom Human Rights Act 1998 through the appropriate enactment in the Parliament. The processes domesticating European Union Laws in the United Kingdom were given legal authority by the passing of the European Communities Act in 1972.

Since 1972, a large number of the United Kingdom citizens have overtly expressed concerns over the rapidly increasing powers of the European Union which was and still fast developing from an economic association to a very powerful political and legal 'monster'.[24] The vexation of the people Britain was enlarged following the case of *Thoburn v. Sunderland City Council*[25] where the court held that the ECA 1972 cannot be impliedly repealed by the Weights and Measures Act 1985.

Central to the discontentment was the problems of balancing the scale between the retention of the supremacy of the European community laws with the British Parliamentary supremacy.[26] It is against this contextual framework that Parpworth[27] explained that: "If an

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[18] [1972] CMLR 882, 886

[19] ibid

[20] Ibid at p. 886; *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, *On appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85 per Lord Denning MR.* Also in Hilairie Barnett (2002) 'Constitutional and Administrative Law', (4th Edition), London: Cavendish Press, p. 292

[21] [1971] 1 WLR 1037

[22] Hilaire Barnett, ibid, p. 291

[23] ibid, pp. 292-293

[24] According to the Euro-sceptic British group that advocated for the Brexit: "Leaving the EU will allow us in England to get back the human and legal rights we gained from the Magna Carta in 1215, the English Bill of Rights 1689 and English Common Law and have lost due to the EU. We will be trading with 160+ countries on mutually agreed terms and not those of the EU. The growth in trade and the ending of mass immigration will mean more jobs, especially for the young and housing and public services will be more easily available. We will be a more dynamic, more free, more exciting and wealthier society for everyone"[24] Online at: http://www.lawyersforbritain.org/files/article-reason-for-lawyers-for-britain.docx retrieved on 19 June 2017

[25] [2002] EWHC Admin 195

[26] Joanne Coles (2002), ibid, pp. 72 -73

[27] Parpworth, ibid, p. 69

Act of Parliament were able to prevent its future repeal by a later Act, then clearly there would be a restriction or limit on the supremacy of Parliament."[28] The erosion of the supreme powers of the British parliamentary supremacy was erroneously given legal backings by section 3(1) of the European Community Act (ECA) which states:

> For the purposes of all legal proceedings any question as to the meaning and effect of any of the treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and if not referred to the European Court of Justice, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).[29]

Flowing from the aforementioned provisions of the ECA, debates in the United Kingdom on the issues of constitutionalism, supremacy and sovereignty raged for decades.[30] The worries of some critics were beefed up by the decisions of the British courts in response to challenges mounted against the European community laws. For example, in *Macarthys Ltd v. Smith*[31] the court held as follows:

> "Priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law; and, whenever there is any inconsistency, the Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it."[32]

The above expression of the court in *Macarthys Ltd* was not the true state of affair. The decision in the case of *R v. Secretary of State for Transport, ex parte Factortame Ltd*[33] adequately clarified this matter where the European Court of Justice emphatically stated that, "if all that prevented interim relief being granted was a national law, that law should be set aside." In reaching its decision to follow the verdicts of the ECJ, the Supreme Court of England said: "… if the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community… whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was a duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law…"[34] The court further stressed that:

> '… when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to

[28] ibid
[29] Hilairie Barnett (2002) 'Constitutional and Administrative Law', (4th Edition), London: Cavendish Press, p. 296
[30] Parpworth, ibid, p. 76
[31] [1979] 1 WLR 1189
[32] Per Lord Denning, MR
[33] [1990] 2 AC 85
[34] Per Lord Bridge, cited in Parpworth, ibid, p.77

> make appropriate and prompt amendments… national courts must not be inhibited by rules of national law from granting relief in appropriate cases is no more than a logical recognition of that supremacy."[35]

In principle and in reality, the European community laws became stronger and assumed supreme status in comparison to the United Kingdom domestic laws. Section 2(1) of the 1972 Act specifically states: "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …"[36]

3. SUPREMACY OF THE EU LAWS BY DIRECT EFFECT

The supremacy of the European Union laws over national laws were made practicably powerful by the design and enforcement of the principle of *direct effect*.[37] The doctrine of direct effect implies that the laws of the European Union confers various degree of rights on European citizens to the extent that the courts of each and every member states of the Union must recognise and enforce adequately. Therefore, the parliaments of the national courts cannot question the applicability neither do they have to adapt such laws to national laws. The problem is that, the principle of direct effect was a part of the European community Treaties. However, it was developed as a European legal jurisprudence. The principle of direct effect was first recognized by the European Court of Justice (ECJ) in the case of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,[38] where the court stated that:

> "The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislation measure enacted under national law. They are very nature of this prohibition makes it ideally adapted to produce *direct effects* in the legal relationship between Member States and their subjects."[39]

In *Defrenne v. SABENA,*[40] the European Court of Justice listed two types of direct effects namely: *Vertical direct effect* or *horizontal direct effect.* In the vertical direct effect,

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[35] ibid, p.77; Parpworth (2002), ibid, argued that, the case of *Factortame (No.2)* "has come to be regarded as a denial of the orthodoxy that Parliament cannot bind its successors. Since provisions in the 1988 Act were 'dis-applied' under terms of s 2(4) of the European Communities Act 1972, the 1972 Parliament had 'succeeded in binding the 1988 Parliament and restricting its sovereignty, something that was supposed to be constitutionally impossible".[35] He further asserted that "… this amounts to a revolutionary development and that if it cannot be so described then constitutional lawyers are Dutchmen."

[36] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5*

[37] The principle states that individuals can enforce the European community laws against individual or against the government in their national courts. This means that, the EU is essentially monitoring the extent to which state parties are carrying out of treaties obligations.

[38] (Case 26/62); [1963] ECR 1; [1963] ECR 13

[39] ibid

[40] (Case 2/74) [1974] ECR 631.

private citizens can enforce their rights and prosecute their government or any agency of the state as in the case of *Foster v. British Gas plc.*[41] By the same token, horizontal direct effect regulates the relationship between individuals, that is, each private citizen can enforce their European community rights against each other in their domestic courts. For example, in *Defrenne v. SABENA,*[42] the claimant invoked the European directives on "*equal pay for men and for equal jobs*" because she was being paid less than her male counterparts in violation of the European Community Laws. However, the ECJ made it clear that national court must follow the principles laid down in *Comet v. Produktschap*[43] when handling cases where community rights and laws are invoked. The laid down procedures are of two straightforward principles namely: the principle of "equivalence" and the principle of "effectiveness". The principle of *equivalence* means that the procedure for European Union cases must be corresponding to the procedure for domestic cases. The principle of *effectiveness* implies that the procedure for dealing with cases where community laws and rights are invoked should not reduce the law functionality and effectiveness.

4. LESSONS FOR THE ECOWAS STATES

There are several regional organisations in the world similar to the European Union. The Economic Community of West African States (ECOWAS) is one such regional organisation. In 1975, sixteen member states mainly, Anglophone countries in the West African sub-region met and signed the ECOWAS Treaty in Lagos, Nigeria. In July 1993, a revised ECOWAS treaty was signed in Cotonou, Benin Republic by 15 member states.

The ECOWAS Treaty originated on the awareness and the growing necessity of the English-speaking West African countries to align for economic and social cooperation. The member states upon signing the treaty undertook to boost and quicken the regional development by integrating all aspects of commerce for the goal of better economic and social development of member States. The ECOWAS started the same ways and aims that motivated the foundation of the European Economic Community.

To a worrying degree, the ECOWAS is faster developing into a political union that may impinge on the sovereignty of member states and could lead to the infringement on the supremacy of domestic laws and politics of the member states, with the larger states such as Nigeria and Ghana dominating and controlling the affairs of the union to the detriment of the smaller member states. This was illustrated by the ECOWAS its declaration of political principles that was adopted in Abuja, Nigeria at the 14th ordinary session on the Authority of Heads of State and Government on 6 July, 1991. The declaration stipulates the need for the integration of the Member States into a viable regional community and emphasises members states should surrender partial sovereignty by gradually accumulating their national sovereignties to the "community within the context of a collective political will."[44] However, the declaration did not stipulate how and when the members states should start surrendering their sovereignties. It is clear from the wordings of the declaration that, the ECOWAS has started moving from economic association to political and legal association similar to the European Union. The member states also emphasised on the need to form some relevant community institutions to which some powers should be vested. It also decided that:

[41] (Case C-188/89) [1990] ECR I-3313).
[42] (Case 2/74) [1974] ECR 631
[43] (Case 45/76) [1976] ECR 2043
[44] Official legal information bulletin of the ECOWAS. Adapted from the website of the ECOWAS at: www.ecowas.int retrieved on 20 June 2017

"The Heads of States and Government on behalf of their countries accepted the need to face together the political, economic and socio-cultural challenges of the present and the future, and to pool together the resources of their peoples while respecting their diversities for the most rapid and optimum expansion of the region's productive capacity."[45]

Presently, the ECOWAS legal regime is based on the principle of supranational with very little emphasis on the implementation of Conventions and Protocols of the Union. However, there are indications that in due course, the Community Acts shall become "Supplementary Acts, Regulations, Directives, Decisions, Recommendations and Opinion. Thus, the Authority passes Supplementary Acts to complete the Treaty."[46]

Like the present European community model, ECOWAS community laws can be invoked in the institutions of the Community. "Decisions are enforceable in Member States and all designated therein. Directives and their objectives are binding on all Member States. [Although], the modalities for attaining such objectives are left to the discretion of States."[47]

5. CONCLUSION

This paper suggests that constitutional pluralism is a vague concept. It argues that, where conflicts of law arise, one always assumes primacy and the other is discarded. We disagree with the notion that the European laws does not usually conflict with national laws and constitutions.[48] However, in certain instances, negotiation may assist the legal bases to resolve the conflicts, even though such resolutions may not alter the "normative hierarchy between them."[49] According to Komarek,[50] the conflicts of laws are not very significantly large in that, the conflicts only happen in very few instances, hence, "fairly marginal and easily resolved ways."[51] It is also bad that states have to approach the European Union to resolve conflicts of laws, such negotiations implies that national sovereignty is sacrificed.

One of the keynotes of this study is that, the erosion of national sovereignty is prevalence in the rapid expanding scopes of European Union laws spanning into criminal law; security of nation states; immigration and private laws. The chances of conflicts with fundamental national norms, values and lives are more probable. For example, since the court decision in *Macarthys*,[52] the United Kingdom courts have attempted to interpret its national laws to comply with European community laws. Typically, the courts have dis-applied Acts of British Parliament that are in conflict with the European laws and apply the purposive approach and the regular principles of construction where the national laws were not enacted to enforce the European community laws.[53]

Also, the extent to which the supremacy of the European community law is designed are effectively depending exclusively on the extent to which amenability is

[45] Official legal information bulletin of the ECOWAS. Adapted from the website of the ECOWAS at: www.ecowas.int retrieved on 20 June 2017

[46] According to the ECOWAS bulletin, "Supplementary Acts are binding on Member States and the institutions of the Community. The Council of Ministers enacts Regulations and Directives and makes Decisions and Recommendations. Regulations have general application and all their provisions are enforceable and directly applicable in Member States."

[47] ibid

[48] Komarek, J 'European Constitutionalism and the European Arrest Warrant: Contrapunctual [sic] Principles in Disharmony' Jean Monnet Working Paper 10/05; Baquero Cruz n 4 above.

[49] Gareth Davies (2010) Constitutional Disagreement In Europe And The Search For Pluralism. The Eric Stein Working Papers http://www.ericsteinpapers.eu. available at: http://ssrn.com/abstract=1559323 retrieved 19 June 2017

[50] Ibid

[51] ibid

[52] 1979] 1 WLR 1189

[53] *Duke v. GEC Reliance Ltd [1988] AC 618*

observed. The European Court of Justice has been developing the idea of '*vertical direct effect'*, by which any specific provision of the European Community law could be raised by private and cooperate individuals against a member country in their domestic court. This paper has shown that, one of the reasons for the large votes from the United Kingdom which essentially ended the United Kingdom's membership of the European Union was the increasing reduction and curtailment of the legislative supremacy of the United Kingdom Parliamentary supremacy. This is because; the Parliament erroneously enacted European Communities Act 1972. Particularly, the provision of section 2(4) of the 1972 Act essentially forfeited the rights and supremacy of the Parliament to the European Union.[54]

We envisage that the ECOWAS member states may erroneously insist on full or partial forfeiture of national sovereignty and make community laws to become super-laws by which national laws will become weaker and inapplicable where they are in conflict with community laws. The possible demolition of states' sovereignties in favour of 'ECOWAS super-state' shall witness the end of national identities. Consequently, the citizens of the smaller states within the ECOWAS community shall rise and compel their governments for exit from the union.

To avoid the impending disaster, the ECOWAS states should retrace their steps back in time to reconstruct the union within the bounds of economics without the expansion of its scopes to those aspects of the legal variables that borders on forfeiture of national pride, sovereignty and supremacy of domestic laws.

[54] Parpworth, ibid, p.78