

An Appraisal of Nigerian Legal System in the Light of Savigny's Philosophy of Law

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ABSTRACT

Upon the monstrous advent of the colonial masters and the parochial amalgamation of 1914, different cultures, politics and religion were forcibly fused and draconian Laws distinct from the people, were made to safeguard and keep in check, these distinct entities. This was done with impunity without regard to the 'Spirit' of these various communities, therefore running contrary to the merits of the Historical School of Jurisprudence as championed by F.K Von Savigny. The result was the massacre of 1966, the 1980 Kasuwan Magani incident, the Kafanchan bedlam of 1987, 1991 Tafawa Balewa, 1992 Zango Kataf, 2010 Boko Haram bomb blast, Religious intolerance in all parts of the country, continuous disregard of the Law and the insurgence of the Boko Haram sect. Some have opined that a true deduction of the law must follow from the premise of the commander and the command and therefore the subject has no voice but to bow for fear of sanction. Others in philosophizing severed the Law from the Volk. Amidst these turbulent winds, this research seeks to delve into the merits of the Volksgeist as a

concept in historical school of philosophical thought, with a view of exposing the reason behind the non-workability of Nigerian laws and the problem of the sustainability of 'One Nigeria'. Indeed this analysis will not only affect the Nigerian country but every other multi-ethnic cum multi-lingual country within the international sphere. The analytic method of philosophy is used.

Keywords: *Savigny, Legal System, Nigeria, Confederalism, Culture, Custom, Philosophy of participation, Philosophy of Law, Volksgeist, Nigerian Constitution, Islam, Nigerian Customary Law, Jurisprudence, Right to cultural identity, Emmanuel Okonkwo*

1. INTRODUCTION

1.1 A Background to the Study

The German Historical School of Law is a 19th-century intellectual movement in the study of German law. With Romanticism as its background, it emphasized the historical limitations of the law, and what the law ought to be. It stood in opposition to an earlier movement called *Vernunftrecht* (Rational Law).

The Historical School is based on the writings and teaching of Gusto Hugo and especially Friedrich Carl Von Savigny. Natural lawyers and philosophers held that law could be discovered only by rational deduction from the nature of man. While the Positive School of philosophical thought, maintained that Law must be deduced from the 'command theory'. The subject's duty is to obey the Law as posited, irrespective of his sentiments, for fear of 'sanction'. Indeed the Positivists (excluding certain positivists) took an existential but drastic view.

The basic premise of the German Historical School is that law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the people, in the same manner as language, customs and practices are expressions of the people. The law is grounded in a form of popular consciousness called the *Volksgeist*. The term was also later used to explain and theorize on other disciplines like politics, religion and diversities of culture.

Laws can stem from regulations by the authorities, but more commonly they evolve in an organic manner over time without interference from the authorities. The ever-changing practical needs of the people play a very important role in this continual organic development. Therein lies the blindness of both the Natural and Positive school of philosophical thought.

In the development of a legal system, it is the professional duty of lawyers – in the sense of the division of labour in society – to

base their academic work in law on ascertaining the will of the people. In this way, lawyers embody the popular will. This was the work Savigny set out to do.

The German Historical School was divided into Romanists and the Germanists. The Romantists, to whom Savigny also belonged, held that the *Volksgeist* springs from the reception of the Roman Law. While the Germanists (Karl Friedrich Heichom, Jacob Grimm, et al) saw medieval German Law as the expression of the German *Volksgeist*.¹

Adaramola informs us that the reason behind the emergence of the German Historical School of Jurisprudence includes the provocation and unacceptability of the Natural School (which maintained *inter alia* that certain trend are universal and so tend to say laws can be universal) and the Positive school of thought (which forces the compliance of law against the will and history of the people). He enumerated further reasons:

The eventual defeat and overthrow of Napoleon Bonaparte after a period of French hegemony in Europe and the foisting of the Napoleon Code (an alien law) on Germany and other conquered territories and peoples, encouraged a

resurgence of nationalism and even patriotic chauvinism, especially in Germany. Failure of the French Revolution to achieve its objectives in France itself. This failure fuelled Savigny's stiff opposition to codification of German laws which would have meant a virtual adoption of the French legal system via the Code Napoleon.²

It is a popular Latin maxim that nothing can stand on nothing – *Ex nihilo fit*. This simply means that when the foundation is bad, anything build on it will continue to fall. In truth, nothing can be built on it. The singular mistake of a convenient amalgamation without a prior scrutiny of neither the *Volksgeist* of the people nor the aftermath effect, has led this country into a precarious brickwall and chaos. The result is a continuous but fruitless change from one type of government to another - Mallemei.³ Furthermore, certain religious sects are resolved never to kowtow to the Supreme Law of the Land for the reason that it conflicts with their cultural and religious heritage. The sect which has become the scarecrow of our Nigerian government is the Boko Haram.

Despite the uncountable Laws in Nigeria, the degree of deviance shows some demerits in the Austinian postulation of what the Law is. And it is also a far cry from the Rationalist view of what the Law ought to be. Indeed, the various schools must accept each other for an holistic conceptualization of the Law. Perhaps, in an historical trace to the spirit of the people lies the missing part of what the Nigerian Law should be.

The significance of this research therefore, is that Savigny's concept of *volksgeist* affords Nigeria an opportunity to think back into history, see where we got it wrong, recouch our legal system and type of government based on our good existing culture, jettison any negative trait in our culture and rebuild our nation to fit our cultural personality. America did the same having felt the cold hands of Britain. Its whole structure, even the language and spellings were modified to suit their original identity.

1.2 Explication of Fundamental Terms.

1.2.1 *Volksgeist*

The concept of the *Volksgeist*, or “the spirit of the *Volk* (people),” was developed by German philosopher Johann Gottfried von Herder (1744–1803). The application of Herder's theory to law was made by German jurist and legal historian Friedrich Karl von Savigny (1779–1861).

Volksgeist is a manifestation of the people; it animates the nation. Every *Volk* is, as an

empirical matter, different from every other *Volk*, each nationality characterized by its own unique spirit. Every people possesses its own **cultural traits** shaped by ancestral history and the experience of a specific physical environment, and mentally constructs its social life through language, law, literature, religion, the arts, customs, and folklore inherited from earlier generations. The *Volk*, in other words, is the family writ large.

Laws, too, must be adapted to the spirit of each nation, for rules applied to one nation are not valid for another. The only legitimate governments are those that develop naturally among particular nations and reflect, in their differences from other polities, the cultures of the people they govern.⁴

1.2.2 Religion

The term religion has proven problematic to define. This might be because it is two faced. It is both metaphysical and social. While the first limb deals with the divine, the second connotes man's way of life as it affects him and other beings around him. Okwueze notes that it is 'a regulated pattern of life of a people in which experiences, beliefs, and knowledge are reflected in man's conception of himself and...others...the physical as well as the metaphysical world.'⁵

One thing is certain in most pluralistic states, different beliefs and experiences on the subject of the divine and the physical, abounds. Hence, religious pluralism in Nigeria. Madu recollects, 'during the thousands of years of mankind history, man's search for God has led down too many path ways. The result has been the enormous diversity of religious expression

found worldwide'.⁶ In Nigeria the three main religions recognize are Christianity, Islam and Traditional Religion.

1.2.3 Culture

According to Opatá, the concept of culture has undergone a long evolution and has, therefore, acquired an elasticity of meaning such that everything under the sun can be subsumed under the umbrage of culture; hence we have mass culture, elite culture, scientific culture, techni-culture, yam culture, dance culture etc. (Ndianefoo)⁷ Ndianefoo went on to warn that the variety of meaning which culture has acquired should not deter us from probing further for roots original meaning. Infact he traced the origin of the word to Latin, meaning 'cultivation of the soil' but in its metaphorical sense, and according to the Encyclopedia of Philosophy, it means 'cultivation of the mind'. It was during the 18th and 19th where the word extrapolated to include 'beliefs, ideas, attitudes, artifacts, etc'. No wonder Wiredu pontificated that culture is a complete phenomenon including everything that is connected with a people's way of life.

In this work, culture will continue to mean not only the cultivation of the mind, but also the beliefs, ideas, attitudes et al, of the various Nigerian communities especially before colonialism and neo-colonialism.

1.2.4 Politics

Politics is one of the most abused words today. The term invokes negative connotations in the minds and eyes of every Nigerian. This explains the saying 'politics is a dirty game'. This erroneous believe has made some loose definitions like 'It's a struggle of who gets what, how and when'.

However we must not be like the blind men of Hindostan who went to see the elephant; each describing from a blind and inexperienced point of view.

Politics is the science which is concerned with the state and the condition which are essential to its existence and development – Appadorai (see Ekpo).⁸ No matter how we look at it, it seems we must necessarily come to this junction that politics in its theory and science, either socially or technically, involves organizing the society. Prior before such theory or dream of organizing, it may be the struggle for power. Upon attainment, it involves organizing and perhaps the struggle to remain in power. Thus, politics goes beyond power tussle and struggle.

This work will see politics from this various conceptions, but focus more on the theory of governance, with a view to finding whether democracy, federalism or confederalism is the right machinery for the Nigerian politics, bearing in mind the concept of Volkgeist.

1.2.5 Law

According to Okunniga, quoted by Sanni, ‘Nobody including the lawyer has offered, nobody including the lawyer is offering, nobody including the lawyer will ever be able to offer a definition of law to end all definitions’(2006:25-26).⁹ This was why Thurman Arnold declared that obviously Law can never be defined.

Without prejudice to the various definitions or Austinian idea of law, this study will see law as a set of rules backed by sanction or not, accepted by a particular community as binding on them. Thus in this sense, the Koran and other laws of Islam, including the various customs of various ethnic groups,

are seen as law, even though some may have no sanction as its backbone. The reason behind this approach is to illuminate into the various communities and have a philosophical and holistic picture of the divergent culture and laws of these communities, so as to ascertain whether our recognized Laws are true manifestation of the people’s spirit. The constitution of Nigeria and other received English Laws, together with the codified customary laws are hereinafter referred to as Laws. This is without prejudice to the arguments and conclusions that may hereafter be reached.

1.2.6 Participation

The philosophy of participation is the inverse of inherence. It is the act of taking part or sharing in something. It is believed that man shares in the essence of life. That not to participate is to exist without living. The existentialists opined that it is in man’s nature to live with others less he feels isolated and cannot find himself.¹⁰

The act of participation is defined and enhanced by Law among other things. Thus the question is – to what essence can different species be joined under one Law? What is the source of that Law? Was the Law structured after taking into cognizance the different nature of the species? Or was it unilaterally and forcibly made? In fact, to what extent can different beings participate?

2. AN APPRAISAL OF NIGERIAN LEGAL SYSTEM IN THE LIGHT OF SAVIGNY’S PHILOSOPHY OF LAW

2.1 A Philosophical Investigation into the Merits of Savigny’s Philosophy of Law.

Before we can criticize or condemn we must have appreciated. Before one can understand hunger, one must first appreciate taste. Thus before we can use Savigny's philosophy of Law as an apparatus for exposing some of the problems with our Nigerian laws, we must appreciate the merits and criticism of the said philosophy. Savigny's philosophy of Law is intrinsically tied to his concept of the *Volksgeist*. Infact, for Savigny, the hallmark of what the law should be or be concerned with must be seen from the light of the 'spirit of the people'.

The concept of *Volksgeist* is a manifestation of the people; it animates the nation. Every *Volk* is, as an empirical matter, different from every other *Volk*, each nationality characterized by its own unique spirit. Every people possess its own *cultural traits* shaped by ancestral history and the experience of a specific physical environment, and mentally constructs its social life through Law. According to Adaramola, *Volksgeist* 'is a unique ultimate and often mystical reality, which is inseparable linked to the biological trait of the people'.¹¹ It holds the peoples culture, fine-tunes their religion, forges their politics, and the Law can only be superimposed upon it so as to ensure a continuous action of the *Volksgeist* on its development. Failure to cautiously follow suit, will lead to chaos, deviance or later, a possible revolt of the illegitimate law.

The gravamen of Savigny's postulate therefore, is that Law must be linked to the history of the people. For in that history lies the biological trait or the Spirit of the people. Savigny's postulation plunges us

into a world of philosophical enquiry and makes us realize the non-adequacy of the other schools of thought and the significance of marshaling the Law in accordance with the cultural trait of the people. Thus it demonstrated the need for legislators and Judges to take serious cognizance of the essential nexus between Law and historical/cultural factors.

Rather than tarry on the mere semantic analysis of Law and legal concepts, the school delved into a different reality of Law and opened the way to socio-cultural cum economic jurisprudence in the form of synthetic jurisprudence. Savigny exposes the modern Legislator into a better understanding of the past so as to understand the present. Therein lies the importance of history.

More importantly the evidence of the importance and success of Savigny's postulations is revealed in our **Nigerian Customary Law**. Prior before the advent of the colonial masters, our customs existed. And after the independence and reception of Law, the Legislators saw the need to maintain and sustain our customary way of life, although this was done with great limitations the evidence of which is revealed in the present bedlam.

The present **Land Use Act** safeguarded the customary philosophy of land but limited the concept by naturalization of land.

Family Law as promulgated in the **Marriage Act/Matrimonial Causes Act** saw the importance of customary marriage

and included it in its provision. Again, it was greatly limited by provisions relating to statutory marriage.

Also our **Evidence Law** recognizes the customary way of proof i.e Witness. And even the Court takes it upon itself to judicially notice certain customs. However, this is grossly hampered by the *Repugnancy Test. Et al.*

Unfortunately, some philosophers have severely attacked the importance or relevance of Savigny's postulation. Many did so because they had a mere trembling grasp of the concept. And until we analyze these issues, the Historical School and its concept of Volksgeist will remain shrouded in the dark envelope of oblivion. First let us correct the idiosyncrasies which do not form the true meaning of the concept nor the part that concerns this research.

The concept does not reject the codification of law merely because written law is evil, but rather stipulate that any codification of law must reflect and safeguard the common spirit of the people. Repeals and reviews or amendments must also reflect this. Otherwise codification must be rejected for it would make the customary law stagnant and staid.

The argument espoused by Savigny in his *Vom Beruf Unserer Zeit Fur Gesetzgebung Und Rechtswissenschaft* (Law Codification) is not limited to 'Rome' as Savigny himself used. Rome was the case in point used by Savigny to espouse his argument and for this he was greatly criticized by both Americans

(who broke free from European control)¹² and even the Germans who realized later that codification was necessary to ascertain the Laws of the land. No doubt the concept holds good if we don't dogmatically tie it to Roman Law.

Again, that a minority of tyrants or a particular piece of legislation succeeded in going against the Volksgeist does not disrupt or make less true the truth or need for safeguarding the concept. The question is was there an unwanted consequence of such neglect?

Furthermore, that a nation is practicing Federalism or that a nation is multi-cultural does not rule out the importance of Volksgeist nor keeps it in oblivion. Rather, in such scenario (as it is in Nigeria), the Federal and State Laws must safeguard the cultural trait of each community and the common trait of the whole community as a State. Therein lies true Federalism. Indeed Nigeria's Legal System is a far cry from true federalism.

However, there are some strong arguments against the concept of Volksgeist that are capable of crumbling Savigny's philosophical thought. We must delve into them with an open mind and see if any merit remains of Volksgeist. Hence:

Case 1: Volksgeist is merely a priori

Philosophers like David Hume, Olivecrona, Dias and even Adaramola,¹³ had accused the Historical School and its concept of Volksgeist as a mere hypothesis devoid of

experiment. Infact in Hume's famous pontification he asked "what harm must we do? ...we must burn them for they contain nothing more but mere sophistry and illusion!"

It is argued that Volksgiest cannot be touched or seen, it does not even exist and Savigny is guilty of making it up. What is the Volksgiest? Who created it? How can we ascertain its reality? Does it exist of its own or is it a mere illusion of the mind? Where lies its cause? What is the corresponding effect?

Olivecrona refutes any external or objective standard of validity of Law. The idea is simply to him, a positive law where people are bound to obey, not because it corresponds to their qualities or Volksgiest, but because man is psychologically conditioned to obey the law as given by authorities who also has the power of sanction.¹⁴ Therefore, to say that law should be structured on the History or Volksgiest of the people makes no sense nor throw any light to the concept of Law.

This argument will no doubt force us into the old-aged intellectual battle between the Empiricist and the Rationalist.

The philosophical truth is that any argument which questions the existence of a phenomena or belief or hypothesis must necessary contradict itself in explaining the non-existence of the *a priori*. This is the problem with the philosophy of language; a revelation of Socrates question of Justice. Even Hume was not too skillful in avoiding

same. Hume's concept of *pleasure and pain* begs the question of the existence of the said phenomena. We only understand the existence of pain and pleasure when we are stimulated by certain events. From such cause we realize and can even foretell that the effect would be pain or pleasure. But the appellation 'pain and pleasure' has no place of abode but in our minds. It is the man who gave it the name it bears.

Similarly, when a community of persons has a tradition or common spirit of doing things together, taking decision together and I mean only together, should a tyrant emerge and make laws which will obstruct the system of communality (the cause), there is bound to be conflict of interest, chaos, power tussle and superiority, deviance from the Law, war and more importantly, discordance and loss of communal identity (the effect). This is what Savigny expresses as 'Volkgeist' (the spirit of the people). Just like we can observe and feel pleasure and pain, so is the concept observable and felt. Just as we cannot touch pleasure and pain, so we cannot touch the Volksgiest. Since the remedy of prevention to certain effects lies in altering its cause (*Machiavellian philosophy*), Law must therefore reflect the peoples historical trait (spirit) less the above effects will necessary follow. And therein lies, the reason why the Nigerian Laws as failed to bring the people to the anticipated development. Rather it has remained a palliative to our ailment.

Case 2: The Cultural Volkgeist of the People being Dynamic, no Law can be placed on it.

It was Heraclitus who discovered the only permanent thing in life – *Change*. The principle of change finds itself in sociology where every community is found to gradually change its belief, way of life, philosophy and even Law.

For Jeremy Bentham, the acclaimed Father of English Jurisprudence, this change would be characterized by the *Utilitarian* needs of the people. Thus the pleasure and security of the people is what the law should be concerned with, and if such need is changing, the legislature must necessarily follow suit.¹⁵

A deeper investigation into the above issue will reveal that it does not displace the merit of Savigny's concept. Indeed culture is dynamic and thus ever changing. Although one will observe (as do many anthropologists, sociologists, and linguists) that there is a *Cultural Identity and Uniqueness*. There is this common trend that makes the Igbo's so. A trend that makes us say 'here is a true Yoruba man'. It is that common trend that holds and bonds a particular community and distinguishes them from another. It is that common trait, which is historical, that Savigny refers to as the *Volksgeist*. It follows that the criticism of Cultural dynamism is misconceived and Savigny's concept poorly digested.

Again, can it be said that due to cultural changes, countries do not and cannot make their law? That would be a grave fallacy. Besides, Savigny did not arrogate a fixed spirit to the concept, neither did he say that Laws couched within the *Volksgeist* cannot

be revised. Just like the review of our laws are made from time to time to reflect present needs, so it would follow that Law must reflect the historical trait of the people since history is a ever going-concern encapsulated in human time. Yet a look at the continuous chain of history will always reveal the ubiquitous or omnipresent *Volksgeist* of the people. In other words, the *Volksgeist* moves with the change in historical development while retaining its identity. It is likened therefore to substance and not form.

Case 3: Customs owe their Origin to mere imitation of other people's way of life rather than to the inborn characteristics of the particular community.

Dias struck a deep blow when he said that customs owe their origin to mere imitation of other people's way of life rather than to the inborn characteristics of the particular community.¹⁶ The effect of this on Savigny's *Volksgeist* would be that there is really no original spirit and what is referred to as the spirit of the people, is but a common prostitute for everybody's bid. If this is the case, it would mean that any country can be colonized, any form of law and governance can be introduced, such forms of law or governance can be enforced, and subsequently these changes can instill itself as the custom and spirit of the people. This is the merit of the cultural diversification theory.

If Dias assertion is conclusively true, then there would be no need for this research, and Savigny will die a natural death save for the remnants of his theory of *possession*. But is

Dias criticism actually founded? While we may concur that the people over time, borrows and adapt to certain alien attitude or belief (cultural change), do they really lose their original content? Would they change their total identity in the cause of wearing a borrowed robe? Is it really true that any such law or alien custom can be infused without revolt? Did the Germans not respond to the Code Napoleon? Did the indirect rule, which is abhorrent and inimical to the way of life of the Eastern Nigeria, not meet revolt? Was there no 'Famous Aba Women Riot? Were we not awakened by the cacophonies of South Africa? The truth therefore, is that there is always a clarion cry against such unwanted victimization or change. The changes the people accept therefore, and are often too slow to embrace it, are those which are compatible or not destructive to their tradition. In that part jealously safeguarded, lies their *Giest*.

For instance, music was our tradition generally in Nigeria. The modern music was accepted by the youth and it was not so much frowned upon by the elders, because it is perceived as an extended type of the music tradition. But ruling or taking decisions without a consensus is abhorrent to especially the Igbo man. While such compatibles may be embraced and even relation to other tribes may be possible on this ground, such cultural contact, should not lead to alienation of their fundamental right to cultural identity.

Case 4: Some important rules of law develop as a result of conscious and violent struggles between opposing interests within

the society, and has no link or importance to the evolution of law based on Volksgeist.¹⁷

Dias criticism here, is well founded and perhaps, irrefutable. For instance, what does the procedure for bringing an action in court, got to do with the spirit of the people? With the advent of technological development, laws on cyber crime becomes inevitable. In such instance, there is no relation of the law with the historical trait of the people. Although it can be argued that such technological development is the necessary change or movement of history, upon which the ubiquitous *Volksgeist* moves with. Thus to the extent of not providing explanation to these circumstances, Savigny seems not to have a holistic answer to what the Law should be concerned with. However, where such Law is likely to derogate from the consciousness or *Geist* of the *Volks*, then the Lawmaker must beware. It follows therefore that the concept serves two purpose:

- (a) setting the Law in accordance with the peoples spirit (the legislature) and
- (b) using the knowledge of that concept as a yardstick or guard against derogating from the spirit of the people (the judiciary).

Accordingly, this research does not arrogate a holistic mandate to the acceptance of the concept as a tool in every ramification; rather this research is an eye opener to the importance of fashioning the Law in accordance with the people. It lays emphasis on the need to remember the Historical

School and the concept of Volksgeist while making Laws or interpreting them for the nation. That was the admonition from Savigny on the Legislature and Judges. For instance, it is the neglect of bearing the Volksgeist in mind that has led to the present conflicts between Islamic Sharia and the Constitution.

2.2 The Right to Cultural Identity: An Appraisal.

In Nigeria Jurisprudence, not all rights are fundamental. Indeed rights are only fundamental when they are so enshrined by the Constitution in Chapter 4. In Chapter 4, no such right as to cultural identity was provided. Hence before now, such right is merely mystical but unenforceable. The situation was role played in the case of *Fawehinmi V. Abacha* where the court held that any reference to alien laws as ratified in treaties or any un-enshrined rights are merely persuasive but unenforceable except if such law is domesticated by an act of the national assembly (Section 12 of the Constitution).

The effect of such pronouncement is that since the Cultural trait or identity of the people is not recognized, then the Volksgeist is obliterated by the Law of the land. In following Holfield's analysis, it becomes a privilege, not right. Yet, one may ask, is it the law that gives the people their right or are these rights inbuilt and inalienable?

In recent time however, the **African Charter of Human and Peoples Right 1981** was domesticated. **Articles 15, 16** and

17 introduced certain international rights of which right to cultural identity is inclusive. The effect is that it now forms part of the enforceable rights, and being so, the right to cultural identity is fundamental. It no longer forms part of the state policies and objective which are non-justiciable under Chapter 2. This being so, the cultural identity or custom or Volksgeist is recognized by Nigerian Law. The effect of such domestication is that it now falls as part of the constitutional rights and can only be limited or curtailed by the constitution itself.

Now, the right to cultural identity is not among those limited by the constitution in section 45. The African Charter itself provided no such restriction expressly. Yet this right now enjoys a constitutional flavor. Cultural Identity (Volksgeist) therefore no longer should sit under the restricted emblem of customary law, but is now an issue of constitutional law! Thus while customary law must kowtow to the *repugnancy test*, the Volksgeist must only kowtow to only the constitution. A dual recognition is formed. Under customary law, the Volksgeist is recognized but must not be incompatible with any other written law. Under constitutional law, the Volksgeist can only be limited when the constitution allows it by any other express provision or power allowed in the constitution and not just by any law.

Unfortunately, most legal practitioners, philosophers, traditionalist, sociologists, anthropologists and historians are yet to realize this. And whether the Nigerian courts will be ready to give this irrebutable law its

full effect is highly dubitable. But this is the law and its philosophical conclusion. If the *Biafrans* or the *Boko Haram* or the *Niger-Delta's* et al, are therefore crying for some cultural preservation, then they come within the ambit of the Law. If a community is aggrieved by the revocation of their land without substitution, wherein their cultural identity is formed, then their right is being or likely to be infringed. It is true as held by the courts that human right matters must be construed holistically and interpreted widely.

However, the legal and political framework structured by the constitution hinders the full development of the *Volksgeist*. The Constitution seems to have taken while giving. Hence the conflict between the Constitution and the Islamic religion and other conflicts in the Nigerian Legal System:

2.3 The Conflict between Islamic *Volksgeist* and the Nigerian Constitution.

With the independence of 1960 attained, the various constitutions tried to hold different realities together, by proffering unity. The 1999 constitution has this enshrined in section 15(1). Section 14(1) categorically states that Nigeria shall be guided by the principles of 'Democracy' and social justice. Subsection 3 states '...in such a manner as to reflect the federal character of Nigeria and the need to promote national unity...loyalty...*no predominance of persons from a few states or from a few ethnic...*' National integration was encouraged and discrimination on grounds of Religion, prohibited.¹⁸ It is to be

remembered that the Constitution is the supreme law of the land (**section 1 (3)**). The problem however with our constitutions from independence till date, lies in the fact that none has been consequent upon a popular democratically elected constituent assembly.¹⁹ Hence the neglect of the spirit of the people in these constitutions has served has a debacle towards the realization of its stipulations.

Again, the stipulations of the constitution seem to be in conflict with the Religious laws and way of life (*Volksgeist*) of the Muslims, who has been claimed to occupy 50% population of Nigeria.²⁰ The problem becomes more glaring knowing that Islam is a Religion which specifies the way of life and holds its tenets as supreme over every other law. Succinctly put, the penal code, the penal code law, the Sharia courts, the State laws, *et al*, are all subject to the Quran and teachings of the holy prophet Mohammad (*sunna*). This is because the Quran is believed to be the direct words of Allah (God).²¹

It has been said that the best way to identify a problem is to begin at the source. This is perhaps the tragic flaw of most scholars and leaders who have tried to reconcile the two systems. As noted before, Islamic sharia is a way of life for the Muslims, as such; every Law, acts or omission must be as directed by the Islamic law. The Quran is the highest of all laws and cannot be derogated from. In the words of Oraegbunam, 'Sharia then becomes in Kelson's language, the groundnorm... in Islam.'²² On the other hand, the constitution in section 1 (1) - (3),

makes it clear that any other law that is inconsistent with its provision is to the extent of its inconsistency, void! The question then would be – what part or parts of Sharia is inconsistent with the constitution?

It is believed that the very section 1 of the constitution is already breached by the tenets of Sharia that ascribes superiority to the Quran. This Islamic stand is exhibited in Adewale's address when he said 'there is a need for the review of our Nigerian constitution... And if the conflict through a review proved irreconcilable, then the Islamic provision must CONTINUE to have priority.'²³ This statement as poignant as it may sound, also carries an inherent truth. That truth is the fact that the fundamental human rights are rights inherent in humans and it is as old as mankind. The import therefore is that we need no constitution to stipulate our fundamental right before it can be recognized as fundamental. To this extent, with all due respect, is Oputa JSC (as he then was) wrong when he said in *Kuti v A.G Federation & ors* that '...they are fundamental because they derive from the premise of inalienable right of man...AS ENshrined IN SUCH COSTITUTION'²⁴ The statement by his Lordship begins to tally when these humans agree to limit there fundamental rights through the making of a constitution. As identified in the words of the preamble to the constitution, 'We the people of... Nigeria... having firmly and solemnly resolved... do hereby make... to ourselves the following constitution...' of course such actions becomes necessary in the solitary and brutish life of man. And for

the salvation of the society, such law becomes the groundnorm. But the question is – was the Nigerian Constitution autochthonous? Most scholars will have a sonorous no! It is the above questions and feelings of marginalization that has led the Moslems whose customs and religion are inseparable, to question the supremacy of the so called Groundnorm.

The question or controversy then in the Quran or its interpretation (considering the attitude of the northerners and the Boko Haram Sect), is – how can a religion which means and teaches peace be against compromise, unity, justice, fair laws and peace itself?

2.4 Exposition of Further Conflicts.

There are various ways of life of all the people of Nigeria some of which are similar to others whereas some others are different from other aspects of the culture. So... it is not all that correct to say that Nigeria as an entity has a common culture. That is because of the multilingual nature of the country and language being a principle, cultural aspect draws the boundary for cultural differences.²⁵

These conflicts are all historical. Olatunji lamented on the fallen values of the Yoruba pre-colonial politics. He noted 'all the Yoruba tribes have kings as their political

and religious leaders.²⁶ Leadership was closer to them. Land was owned communally, but the King owned them in trust for the community. Marriage was not at the exclusive jurisdiction of the contracting parties – *Asa igbeyawo ati eto idi re kii se adase larin oko ati aya*. The parents have the final say and defaulters can be disowned. The head of the extended family shares deceased property and the children no matter how grown or first child syndrome, kowtow to the integrity and powers of the family head.

Now upon the advent of the **Land Use Act**, all Lands including urban and rural were naturalized. The Governor became the Owner of Lands and whether it is in trust for the people or not, such issue is yet to be resolved. Thousands of cases of land dispute emerged. The problem came to light upon the independence of Nigeria, the sense of communal ownership having been disrupted. Partition of land and ownership became possible and the unity was broken. Many died in land quarrels and even brothers killed each other. Till present, the situation remains the same but it is downplayed because the Nigerian people are used to it. The effect here is that certain values and identity are taken away. The Laws on Land has failed. It is rumoured to be the most controversial piece of legislation in Nigeria.

Again, the consciousness of the people is that, marriage was a union of not just the contracting parties but a union of two families. The consent of the family head becomes paramount. The **Matrimonial Causes Act** disrupted this lovely bond in a

bid to embrace an alien law, and the family cord was broken. Upon the attainment of majority age, the parties could ignore the consent of the parents. The validity of customary marriage is overtaken by the superiority of marriage under the act. The wife married under the act becomes the recognized and most privileged in terms of the benefits that may accrue. Segregation sets in, and the peace is broken.

On the other hand, in the pre-colonial Igbo, the king owns no land for the community. Any partition is done based on consensus of all involved. Now the Governor can unilaterally revoke land and claim it is for public purpose. The other characteristics are similar above. But other aspects like politics and kingship etc. defers.

For the Hausa, there was a political belief of the 'born to rule'. Takeovers, wars and defense are matters upon which their valour is tested. This remains a lingering trait in present politics. While the concept of unilateral revocation by the Governor can work here, it was seldom to succeed in the East.

Some other aspects of our Laws are also made outside the scope of the *Volksgeist*. i.e Constitutional Law and Administrative Law. However, Law of Contracts, Corporate Law and Criminal law tend to conform to the custom and the needed developmental change of the people, except for the fact that some of them are against the spirit of Sharia Law which is almost if not absolutely linked with the custom of the Moslems. This is one of the reasons canvassed for trying to make

Nigeria an Islamic State or at least a total change or break for the Northern states.

2.5 Volksgeist and the Philosophy of Participation: The Reconciliation.

It was Aristotle who pontificated that man is a social animal. Duguit postulated in his *The Principle of Social Solidarity*, that man (or a particular community), cannot live alone. He is dependent on other members of the society for his wants and aggrandizement. This conforms to Heidegger's existential theory of *dasein-in-the-world*. Thus man and even a community are always in a search to find and better themselves. Therein lies the conglomerate in Rome that formed what became known as the International Community. The very structure of globalization is built on this truism. The questions that arise are – can a particular community live solely on its own? In a federal state like Nigeria, are their better chances of survival in amalgamation? If yes, should the enabling Law sweep the entire historical trait or common spirit of the community to be joined?

Rudolf Stammler in his *Two Principles of Participation* posited that:

- (a) No member of a legal community or a particular community must be excluded from the others in any circumstance whatsoever.
- (b) Any limitation must operate only in their context and must leave the other remaining rights unimpaired.²⁷

Stammler seems to maintain that participation is a necessary effect that must not be disallowed. On the other hand, he realizes the difference inherent in two entities that are to be joined. He therefore posited that while some sort of refrain may be allowed, but such limitation must only be within the peculiar entity. The rights or privilege of the other people must not be hampered.

For Karol Wojtyla, in his *Against Alienation*, he posited that the man as a rational being try's to find and develop himself. This is made possible in his contact with his community, which is described as the *I-You and I-we* relationship.²⁸ The community of *We* forms a bond and becomes entitled to *act together*. The *We* relationship does not only help them to develop themselves, but helps them (within the ambit of the Law) to interact with other communities and thereby discover themselves fully. It is on this unique opportunity that Karol concluded that any form of *alienation* on this is evil. He describes alienation as that which negates the person. That which renders the *I-Other* relationship impracticable. It weakens the ability to experience the other community. It is a personality problem and should be avoided.²⁹

The nexus between the philosophy of participation and the Volksgeist is that while the concept of Volksgeist insist that there is a special spirit or consciousness embodied in every particular community and such trait is different from every other community, the philosophy of participation rather insist that

the very idea or possibility of the *human person* is tied to the interaction with not only the members of his community, but to the society at large. The problem then is, what would be the capture of the Law in reconciling both position?

To explain it in the Nigerian context, while the concept of *Volksgeist* insist that the Igbo's, Yoruba's and the Hausa's are different because the common trait, the historical consciousness, the common spirit of each of these communities are radically different, the theory of participation maintains that *Okonkwo* cannot survive without the Igbo community, and the Igbo community cannot fully discover herself without interaction with the Yoruba or Hausa community. And if they all come as one, they would keep *Transcending* (either empirically or rationally) in discovery of themselves within the interaction of the outer world (international community).

One thing is certain; the theory of participation does not disclaim the difference or uniqueness of each person or community. On the other part, the concept of *Volksgeist* does not entirely refute participation with others. It is simply saying that the common historical trait or spirit of a particular community should not be ignored or discarded. Why? It is what makes them, them. It is their cultural identity. They lost that, and they may never fully understand themselves nor discover themselves. This is what the Legal System must retain while advancing participation.

It follows therefore, that there is no real conflict between the concept of *Volksgeist* and Participation. In fact, they both need each other to survive. In logic, there is no reconciliation necessary since there has been no separation; rather what is needed is infusion of both theories. The colossal question then is - to what extent can both concepts be applied within the Nigerian Legal System? Is Federalism an option?

The constitution proffered a federal system of government in line with democratic principles, but the past experience of Nigeria since 1999 till date, has shown the flaws of such a system of government. Even if true federalism is practiced, it still does not remove the problem that Muslims will not kowtow to a constitution superior to the Quran. It still does not remove the hidden fact that they want an Islamic state. Neither does it elevate the status and structure of Sharia towards embracing the mechanisms for the actualization of fundamental human right. Differences of languages exist. Cultural diversities remain.

It therefore follows that the best system of Law and government that can support the participation theory and retain the *Volksgeist* of the people, is one which allows for the dominance of power in each community to make suitable laws that would reflect their cultural identity while making provisions only for certain areas of international interest with other communities to be governed by a confederate. The individual communities must be largely independent. The constitution which shall bind them on only areas of common and

accepted interest, must contain no more but that delegated to it. Each State Law must be holistic, far more than what we presently have. Indeed the only system of government and Legal system which suits this conciliation is a *Confederal System of Government*.

3. RECOMMENDATIONS

The problem of choosing a legal system that would reflect the uniqueness of the various ways of life of the Nigerian communities, together with the problem of accepting the supremacy of the constitution is not an easy task. It is much more problematic than meets the eye. This perhaps, explains why so many unworkable or incoherent recommendations have been made. For instance Odoh recommends religious and cultural tolerance both from worshippers and the political leaders.³⁰ But this recommendation with due respect, does not explain the threat of losing one's cultural identity nor the incompatibility of their laws (including the Quran) with the Constitution. It is tantamount to saying that religious worshippers should sacrifice their basic teachings on the altar of the constitution. I think Odoh underestimates the power of religion. Religious intolerance alone cannot solve the problem in practical reality.

For Mgbada,³¹ the Federal Government must be made to live to its oaths and safeguard the constitution and clamp on any recalcitrant state. But would this act wipe away the crisis and conflict? Experience has shown that the *Geist* of the people and their religion hardly die away. More deviants may rise again i.e Boko Haram. Would it remove

the conflict of law? I do not think so.

For Oraegbunam³², he recommended that Sharia and Islam should be reformed so that one can authentically be an Islam and a Nigerian. He calls for rationality in interpretation and neutrality of the government. With greatest respect, that Sharia should be reformed is a subjective matter. It is subjective to the Islamic leaders. The erudite writer seems to underestimate the practical stand of these Muslims. While they may subscribe to rationality and interpret same subjectively, they cannot and will not do away nor change their Islamic laws which they have taken to be their *Volksgeist*. It would be like asking the Christians to change the Bible. Sanusi Lamido puts it clearer when he said:

But the fact remains that theology is embedded in the Sharia and no interpretation of the Sharia will be acceptable to the Muslims unless it is based on a hermeneutic of the theoretical constants of Islamic law and most particularly, the Quran and the traditions of the Prophet. I will argue that the attempts to seek a 'reform' of Sharia based on arguments that the law is 'outdated' are counter-productive.³³

It is upon this critical findings and interviews, that I HEREBY RECOMMEND A TRUE CONFEDERAL SYSTEM OF GOVERNMENT. What is a confederal

system of government? It is a type of government which consolidates authority from other autonomous bodies. In the context of different indigenous tribe, it is a semi-permanent political and military alliance consisting of multiple nations (tribes) which maintained their 'separate leadership' and spirit.³⁴ The confederate government only handles those matters member states have assigned to it.³⁵ Its advantages include the fact that:

- (a) It keeps power and sovereignty at the local levels.
- (b) It allows for retainment of separate identities and culture.
- (c) It also makes for sincere co-operation on matters of common concern.

The Iroquois confederacy, former USA, former Commonwealth of Soviet Union, Germany et al, were countries that once practiced it. The only two strong arguments against confederacy are that it leads to a weak central government and that it allows for disunity. Yet these reasons are not strong enough. Firstly, it is not true that it breeds disunity; rather it is because tribes have realized their differences and understood the importance of unity that they decide to confederate. There is a reasonable content of participation. The confederate is not needed to govern the states or make laws for them. Thus each state will have its laws and religion if it so wishes. In such laws, a state may make room for the foreigners who are expected to comply or refrain from entering such a state. After all, any Nigerian going to other countries must kowtow to the laws of that state, diplomatic immunity or nationality notwithstanding (these matters are firstly guided by treaty). Each state

becomes independent and only subject to those matters it allows for the confederate. The disadvantage here is that citizens living in other state may have to go back to their indigenous place and start afresh, yet it is better Nigeria starts afresh less we will continue in our ridiculous attempt to catch the wind. This way, the problem of legal pluralism, political conflict, intolerance, etc. will be a thing of the past.

The only question that remains to be answered therefore is – what matter can be successfully delegated? There is no known custom or Islamic law rejecting the importance of defence, trade, and neutral meetings with the world. Truly speaking, these are the basic reasons why states subscribe to international organizations. In any matter that would be contrary to the spirit of the community, they could instruct the confederate that they have no interest in such matter. The confederates therefore, are the agents of the state.

The Nigerian Legal System therefore, needs to be restructured to bring it at par with the spirit of its distinct community zoning. A total disintegration of Nigeria would lead to rivalry of different sub-tribes and insecurity, poverty and extinction will be the order of the day. A further march with Federalism I am afraid, will lead to more insecurity, deviance from the Law, poverty, intolerance and possibly, the feared civil war II.

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Emmanuel Ifeanyi Okonkwo is a male Nigerian citizen who resides in the city of Lagos. Born on the 9th of October. He hails from Anambra State, from Mmiata-Anam (Anambra west). He did his secondary school in Amuwo Odofin High

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DEDICATION

This research work is humbly dedicated to four fine scholars I know, who have left the pleasures of other things for pursuit of their love for knowledge – Prof. Ike Odimegwu, Rev. Dr. Ikenga K.E Oraegbunam, Rev. Dr. Chika Okpalike and Dr. Ifechi Ndianefoo.

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