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Carl Von Savigny's Perspective And The Trajectory Of Nigeria's Legal Experience

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Abstrat
This paper examined Carl Von Savigny's Perspective and the Trajectory of Nigeria's Legal Experience. The paper discussed important areas on the historical school such as: the trajectory of Nigeria Legal Development from pre-colonial periods to the present time, some rules of Customary Law, gradual stages of the changing in Constitutional Law, Savigny's views and the changing dynamics of the Nigeria Constitutional process going through the history of the development of equity from common Law and the reception of English Law in Nigeria, the turning points on recognition of offspring of polygamous marriage while doing away with the English tradition of denying products of polygamous marriage the right of succession to their father's property on the ground of public policy that the Law should discourage all acts of promiscuity. The paper discussed the relationship between English law vis-à-vis the rules of Customary laws, where those rules of customary laws are incorporated insofar as they survived the three tests of repugnancy, incompatibility, and public policy. In giving effect to the traditional rules of Customary Law, the Court premised its decisions on common Law and decency. The paper stressed the fact that the relevance of Savigny's perspective lies in the fact that the marriage of English law to Customary Law in Nigeria is that of historical significance and the culmination of the effects of colonialism that witnessed the emergence of schools, industries, import and export businesses, the petty trading metamorphosing to the existence of corporate bodies and corporations, an entirely new form of government which necessitated radical changes in Nigeria law. A qualitative research methodology familiar with the social sciences was adopted in this paper. The Finding revealed that Savigny's postulation that the Law of a country could be complemented with one's native Law is unassailable. It is a fact that in drafting a nation's Constitution, there is always broad consultation with the people. Thus, the volks geist, i.e., the thinking minds, are behind its making. Finding further shows that even in construing an Act of Parliament, since the legislators are also representatives of their people, they are deemed representatives of the minds of their people. Thus, in every real democratic setting of the modern state, the thinking minds roared in the making of genuine laws.

Keywords: Savigny, Perspective, Trajectory, Nigeria, Legal, Experience

1.0 Background to the Historical School

The Historical School of Jurisprudence emerged in the late 18th and 19th centuries. The School conceptualised law as an organic, evolving entity, deeply entrenched in a nation's history, custom, and popular consciousness and that Law develops from the spirit of the people, who are embroiled in the customs and tradition that produce the fertile ground on which traditional Law is rooted.[1]

1.1 The Conceptual Focal Points

From the above conceptualisation by the Historical School of jurisprudence, the focal points of this definitional approach are[2]:

i. First, the Law is rooted in society. This explains the social root of Law. It is where two or more people live together as one, and the rules of Law evolve from that social union. According to Hobbes, a state of nature compels man to appoint a powerful person as a sovereign, unto whom all is subservient, but him been subservient to no one. Hence, Law continues to emerge from the people's minds to guide the conduct of the ruler and their subjects.

ii. The idea that Law is rooted in a nation's history is one of the testaments from the historical schools. As a nation starts from a community of socialised human beings or from a set of people interacting, its laws develop as their history is in motion. New codes are introduced as society progresses.

iii. From the above, the Law is ever evolving. Law shed itself of its old shields which are undesirable, and continue to grow, and susceptible to changes, as there are new developments in every facet of lives, and as the people continue to relate with people of outside culture either as a result of colonial experience, migration, education, industrial growth, development in medical science, trading, aviation, banking, system of adjudication and many other factors that bring about changes in the relation of man.

iv. Law emanates from the minds of the people. Man evolves the idea of new things through the mind, the seat or the faculty of reasoning, thinking and talking. This interchange of ideas between people of a particular culture leads to the production of

[1] Curzon L.B. (1998) Leisure note of jurisprudence, Routledge-Cavendish
[2] *Ibid.*

the rules of customs and traditions of the people. For this reason, the members of the historical school profess that Law emanates from the volk geist, otherwise known as the spirit of the people – "The thinking mind". In essence, Law is far from being a set of universal abstract principles, since nations take from each other the niceties in the traditions of principled nations.

From the above, Law emanates from the popular will of the people who dialogued, debated and produced their Law through collective will, and learnt lessons by which they develop upon those laws as they progressively interact with others. They also move away from interactions with some harmful elements. While developing laws is to move with possible sets of people, and move away or extradite the set of people that might pose a danger to their well-being,

1.2 Key Figures in the Historical School

The key figures of the historical school include: Friedrich Carl Von Savigny, Sir Henry Maine, George Friedrich Puchta, Karl Friedrich Eichhorn, Rudolph Von Sohm, and the German Otto Von Gierke.[3] Carl Von Savigny, widely considered the school's originator, stressed that Law emerges from the volksgeist or the common consciousness of the people and from its organic nature, continuing to evolve and advance with time. However, Sir Henry Maine stressed the historical development of legal institutions and concepts in ancient societies. In addition, Eichhorn contributes to knowledge by writing on the historical development of legal concepts. Meanwhile, Von Sohm, a German jurist, emphasised the understanding of the legal principles. Otto Von Gierke focused on the historical development of legal concepts in their interlinks with social and political institutions.[4]

1.3 The Genesis of the Historical School

The historical school sprang up first due to their **rejection of the principle of universalism**, which states that legal principles that apply to all societies spring from a universal legal principle. The school stressed that the legal principle of a particular society is distinct from another society's historical experience and cultural background. Another core belief of the historical school, forming its spring bud, is the **rejection of legislation**. The conceptualisation is that the Law of a particular society could not be traced to the deliberation and the eventual codification of the result in a statute book. The school held up tenaciously to the fact that this view could disrupt the understanding that Law evolves naturally from people's historical experience. In this contract, it is here opined that legislative enactment is distinct from constitutional Law. A constitution is the supreme Law of a society. It guides the conduct of all governmental institutions in their relationship inter se, with others, and with the people generally. This is the document that emanates from the historical experience and general will of the people. It guides the way in which legislative enactments come into being. It is the grundnorm that any legislative enactment that contradicts the Constitution is null and void to the extent of its inconsistencies. It is in the sense that legislative enactment is not the core law of the people. It is secondary to the Constitution of a nation state, since the Constitution determines the existence of any legislative enactment.[5]

The Historical School **rejects the static nature of Law**; instead, it believes that Law is organic in that it follows an evolutionary trend. This exodus to no particular destination explains the changing nature of Law as the product of continual historical experience. Based on this, the historical school increases our knowledge of the nuanced understanding of Law in its intertwining with the society and culture of a particular people. Thus, the Law exhibits a dynamic reflection of societal evolution.

2.0 Savigny's Perspectives on the Historical School

The historical approach in jurisprudence reflects the belief that a deep knowledge of the past is essential for comprehending the present. In essence, it implies that a thorough understanding of the existing legal institutions and contemporary legal thoughts demands understanding their historical roots and patterns of their development. In this respect, one of the jurists of the historical school was selected for study, Friedrich Carl von Savigny.[6]

Savigny (1799 – 1861), a Prussian stateman and historian, was experienced, cultured and spirited. As Curzon puts it, 'for Savigny, ancient custom guides the law, and the growth of legal principle is evidence of 'silently operating force' and not the result of deliberate decisions. Savigny lived during an era dominated by the effects of the French Revolution and the Napoleonic conquests.[7] The destruction of the French feudal order, the spread of revolutionary ideology and the belief that, henceforth, the general and legitimate will of the people was to be guided by reason, produced in Savigny and many other European jurists a deep and abiding hostility to the philosophy of the revolution.[8] In Germany, the concept of liberty and equality were rejected where a reaction set in, authority, tradition, the creative spirit of the people's folk core, were stressed, cosmopolitanism was dismissed, the creative role of national character was emphasised; and the origin and essence of the Law would be discovered by an understanding of the people's spirit – the volks geist.[9] Savigny's work, *Tract, of the Vocation of our Age for Legislation and Jurisprudence* (1814) written as an answer to those who urged the preparation of a civil code for a united Germany, set out the essential of features of his outlook thus; We first enquire of history, how Law has actual development

[3] Retrieved from Historical School of Jurisprudence, https://www.encyclopedia.com.
[4] *Ibid.*
[5] *Ibid.*
[6] Rodes, R.E. (2004), "Savigny and the Historical School of the Jurisprudence", 53 Law Quarterly Review 32
[7] *Ibid.*
[8] *Ibid.*
[9] Curzon L.B.,

among nations of the nobler races, that which binds a people into one whole is the common conviction of the people, the kindred consciousness of an inward necessity excluding all notion of an accidental and arbitrary origin.[10]
For Savigny, the Roman Law of the classical period seems to have eternal significance. Its doctrine can constitute a fortress within which German legal tradition, nurtured by the Volkgeist, might be sheltered from the assaults of French revolutionary doctrine. The profound certainties of the corpus juris would provide lessons the German people could use to their advantage.[11]
Savigny's vast History of Roman Law in the Middle Ages (1837) seems to suggest that there are concepts within Roman Law which might reflect the nature of things. Principles of a universal nature could be deduced from those concepts. Hence, some legal rules in Savigny's day were denounced as logically impossible because they appeared inconsistent with Roman principles. Therefore, what is logically impossible cannot be justified legally.[12]

2.1 Criticisms of Savigny's Doctrine
The criticisms levelled against Savigny's doctrine range from the condemnation of the concept of the volksgeist as a reactionary, unscientific fiction, to a rejection of his version of the relationship of custom and legislation. These criticisms, as enumerated by Curzon, are as follows:[13]
i. **Highly Selective Investigation**: The first criticism against Savigny's thesis is that his view of history appears highly selective. He wrote history based on the factual situation of his own time, particularly from his subjective feeling of hostility to the French revolution, which was said to colour his view of historical development. This fallacy of taking the particular for the universal led to an undue reverence for the past with little comprehension of the forces that led to his day's French Revolution of his day.
ii. **Volks Geist (The Spirit of ohe People) A Mere Fiction:** Many critics rejected the volks geist and described it as a mere fiction, cloaking or harbouring a narrow or nationalistic attitude. According to the critic, the concept of volks (people), which Savigny failed to define, other than to state that it resembles a spiritual communion of people living together, using a common language and creating a common conscience, involves a loose statement incapable of proof and little value in jurisprudential analysis.
iii. **What is Communal Conscience:** Critics also query Savigny's allusion to communal conscience. What is the communal conscience, and how does the concept apply to a nation deeply divided on legal matters? What is the relevance of communalism where we have entrenched divisive opinions devoid of a nationalistic dream? Savigny's failure to make significant advances in the Law, occasioned by political and legal conflicts within a nation or Law transplanted due to conquest and even colonisation from one culture to another, crucified his thesis that Law results from a people's feeling for right and wrong.
iv. **Law often Based on Pragmatism:** Critics of Savigny's position expressed the view that Law has often been created in times past and present as the result of a pragmatic reaction to immediate problems. Reference was made to the critical *Statute Quia Emptore* 1290, which was a reaction to specific estate issues in land, and was in no sense an emanation from the dark well springs of the people's unconscious feelings.
v. **Custom Exaggerated:** Another criticism is that it is wrong for Savigny to elevate customs into a vital or veritable source of Law. Put differently, he exaggerated the significance of custom in the history of legal institutions. It is the critic's view that custom is local and may affect a relatively small segment of the community where the community is located. More critical is that custom may not be quickly responsive to change conditions and when this happens, such custom has to be ignored or supplemented with formal legislation.
vi. **Grey Criticisms on Common Consciousness and the View that Lawyers are Trustees of the People:** Grey, an American jurist, criticised Savigny. How can Law be the product of ordinary consciousness? He cited the example of the Law in the two states of the United States of America, which are opposed to each other. For instance, in Massachusetts, a contract by letter is not complete until an answer of acceptance is received. But in New York, such a contract is complete when the answer is mailed, following the rule in *Adams v. Lindsell.*[14] For example, in Massachusetts, a contract by letter is not complete until an answer of acceptance is received. Grey also attacked Savigny's view that lawyers are the trustees of the people. According to him, the jurists set forth the opinions of the people and no other specially educated people or class in a community set forth the views of the community. Each set it up in its sphere. Consequently, lawyers in no way set forth the volks geist in the domain of Law as educated physicians set forth the volks geist in medicine.
vii. **The Paradox of Roman Law for the German People:** Paradox is a figure of speech in which a statement appears to contradict itself. Savigny was said to involve himself in a paradox by firstly presenting Law as reflecting nationhood, and at a glance, advocating a refined system of Roman Law for the German people. How can that conception align with his definition of communal conscience, when he defines the phrase as people living together, using a common language? Thus, it is apparent that a law based upon the spirit of the principles of Roman Law, a country very far away from Germany, with dissimilar customs and culture, could not in any way coincide with the demands of the German folk spirit. The argument is illogical and, therefore, unsustainable.
viii. **The Role of Social Pressures in Legislation can not be De-Emphasised:** Another criticism of Savigny's position is that the exaggerations and mystical trapping of his volksgeist doctrine should not prevent us from acknowledging the role of

[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] (1818) IB& A 681.

social pressures in the promulgation of Law. For example, in a democratic setting, the pressure of public anxiety plays a significant role in the community consciousness that sometimes leads to the promulgation of Law, as the pressure of public anxieties led to enacting the Children Act 1978. Thus, social pressure may lead to a recalcitrant or reluctant Government enacting new laws. Haas said this might be what Savigny had in mind when he lauded a people's spirit and feelings of Justice and right. Thus, it would be more hyperbole (extreme exaggeration, overstatement, magnification, amplification, embroidery, an embellishment) to speak of these feelings as the special product of a people's genius reflecting its folk-spirit.

ix. **Impossibility of Imagination that a Nation's Legal Process could be Manipulated by a Tyrant:** Sir Carl Von Savigny could not have envisaged that the legal process of a nation could be hijacked and manipulated by a ruthless tyrant like Adolf Hitler in a country like Germany. Germany of Hitler's era found itself in a situation where the spirit of the people was replaced by the will of the all-powerful monster exemplified in the German Führer, later addressed as the Reich[15] , who ruled Germany from 1933 to 1945. In his 1925 book, Mein Kampf, i.e. My Struggle or My Fight, Hitler described how he became anti-semitic, and outlined his political ideology and plans for Germany. He spoke about the deplorable condition in Germany and the establishment of the National Socialist German Workers Party. He envisaged the superiority of the Red Race of Germans over all the other world races, and how Germany would rule the whole world for one thousand years. The Germans were carried away by the euphoria of the content of the book until Hitler clandestinely became Germany's leader and virtually substituted his will as the Law in Germany. With this development, which Savigny could never have imagined, Germany was led into the catastrophic Second World War that took the life of Hitler himself.

Nevertheless, Savigny ought to be credited for informing us that genuine Law and Constitution ought to spring from the spirit of the people. Further, the springboard for the emergence of genuine Law should lie in communal conscience. This aligns with the principle that political sovereignty should remain with the people inhabiting a nation.

3.0 Examining Savigny's Perspective on the Trajectory of Nigeria's Legal Development

The Area now known as Nigeria is administered separately as three principal ethnic groupings of Hausa/Fulani, Yoruba, and Igbo, with more than 200 ethnocentric groupings like Nupe, Igala, Efik, Ibibio, Igbos, Ijaw, Itsekiri, Ekiti, Ijesha, Egba, Igbomina, Ibolo, Yagba, etc. Each of these groupings has its native laws and customs. The Yoruba of South West Nigeria's political order puts the King at the head of the Administration. There is a centralised government system in that each town has its 'Baale'[16] under the Oba, the Compound head known as 'the Baale'[17], and the 'Baale' to administer every village and Hamlets under the King. Therefore, a Yoruba king in each town is the equivalent of an emperor in each city, with many village heads under him. The traditional government is, therefore, multicentralised. Among the Igbo people, otherwise known as the Ibo land of Eastern Nigeria, there was initially no centralised system of government. In the Eastern part of Nigeria, there was no equivalent of a king. Their clan system of Administration is headed by two crucial institutions: the 'Ozo' and the 'Ofo' title holders. But presently, we have the equivalent of a king named 'Obi' in Eastern Nigeria.[18]

In the North, following the conquest of the Hausas by the Fulani Islamic Jihadists in 1894 (Circa), the Fulani Emirs. These Emirs founded a centralised system of Administration. Order in the Emirates goes to the Emir's delegates, and the Alkalis are judges and judicial officers in charge of the Administration of Justice according to the Maliki School. Thus, when the British Colonial Government annexed Lagos, and the indigene were subdued, they tagged Lagos a British Colony. When they moved to Western Nigeria, they stopped many inter-tribal wars, orchestrated mainly by colonial slave trading, and they tagged the areas inhabited by the Yorubas, and the East occupied by the Igbos, the British protected areas, christened 'Southern Protectorates of Nigeria.' From, Lokoja Town, up River Niger and Benue, they crossed to the North and named the North as Northern protected Area, shortened to the Northern Protectorates.[19]

In 1914, the Lagos Colony, the Southern Protectorate, and the Northern Protectorates were amalgamated to what is now known as Nigeria. The name Nigeria was the formulation of Lady Lugard, otherwise named Mrs Flora Shaw. Meanwhile, there are a few rules of local customs and traditions which were firmly entrenched in the people before the colonial era, some of which survived the colonial onslaught and are listed as follows;[20]

(i) The kings, Emirs and Obis (later introduced to Eastern Nigeria) were at the Apex of Government to whom all appeals went. In essence, the King was the last arbiter in case of disputes. The system of government was monarchical, except in the East, where we have pre-colonial collegiate groups of clan leaders at the Centre of Administration.

(ii) The existence of an effective system of checks and balances. There is no room for autocratic leadership, especially in Yoruba land. Any Yoruba king who ruled autocratically would be compelled to commit suicide. This is achieved when they opened a calabash containing pigeon eggs for the King. Once this is done, the Oba must commit suicide. So, it was the death penalty for any Yoruba recalcitrant king. A chief who misbehaved would also have his chieftaincy title revoked by removing the traditional beads at the order of the King.

(iii) The system of government is like a quasi-cabinet system of government, but with individual responsibility. In essence, the principle of collective responsibility is out of place in the pre-colonial rule system. What applies is collective governance by group wisdom.

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[15] A term used to describe the official Nazi designation for the regime in Germany from January 1933 to May, 1945.

[16] Translate to mean Head of the Community or a Village head.

[17] The word 'Baale' and 'Baale' have similar spelling but are pronounced differently. 'Baale' here implies the Compound Head.

[18] Political Science and Government of West Africa

[19] *Ibid.*

[20] *Ibid.*

(iv) The decision-making process in politics involves three stages. The Assembly of the Community was the first stage. The King and a committee of High Chiefs who oversee the community's affairs will order the 'town crier' to notify the community that all the heads of compounds should meet at the palace for deliberation on essential issues. This democratic process is where issues of general interest are discussed in the community's overall interest. The second stage was the General Assembly of Traditional Chiefs. All the Chiefs would scrutinise the outcome of these deliberations. The result of the deliberations of the General Assembly of Chiefs would now be forwarded to the Head Chiefs who are principal king makers. The Head Chiefs would discuss with the King. Their final resolve would be the outcome which everybody in the community must abide with.
(v) The Benin kingdom of Nigeria have a customary law principle of primogeniture and inheritance. Under this customary Law, the distribution of the deceased man's property, most essentially the property where he lived prior to his death is governed by the principle of primogeniture. Under this principle, the 'Igiogbe's that is the property where the deceased leaves before his dead is giving to the eldest surviving son in the family as his inheritance. But where there is no surviving son, the 'Igiogbe' is distributed among the surviving daughters of the deceased, and in the absence of a surviving daughter, the eldest surviving brother of the deceased, or a male grandchild, may inherit the property.
(vi) Another rule of Customary Law in the Efik tribe of Nigeria is that transferring the paternity of a child to another man. In Nigeria, in pre-colonial era, an Efik customary law allows a person who is not the biological father of a child born by his divorced wife to another man, the former husband of the divorced wife, to have paternity and take custody of that child due to the failure of the birth father so far as he returns the bride price to the birth father who was the first husband.
(vii) Another one is the traditional customary rule on the selection of a king. In the Yoruba tradition, the kings wear a hereditary crown. After the death of a king in Yoruba land, the next lineage would present their candidates. Traditionally, all the sections in the lineage would present candidates to the vacant stool. The candidates would present their candidates to the kingmakers. In the pre-colonial era, the kingmakers had no direct say in selecting the person to become a king. The kingmaker's function is to invite the 'Head Diviner' who would, in the presence of the kingmakers, present each candidate to a body of esoteric knowledge which is the 'Ifa Oracle' to choose the King divinely. The result of this process would determine the person to be the next King to fill the vacant stool. The Ifa Oracle is the equivalent of Urim and Thummim in the Bible.

4.0 Historical Development of Equity and Common Law in Nigeria

The strict application of positive laws exemplified at the Common Law Court led to the development of the Law of Equity and Trusts. The historical development of equity from the common Law also demonstrates the role of Law as an instrument of social engineering. According to Professor J.O. Fabunmi in his book EQUITY AND TRUSTS IN NIGERIA, 2nd edition, the learned author stated that by applying what is fair and just, equity attempts to eliminate the harshness of strict Law.[21]
In England, the Chancellor was the Secretary of State for all departments. It was his duty to draw and seal the royal writs. His power to invent new writs to meet the needs of changing society received a radical check in the latter half of the 13th century. This arose from the parliament's realisation that the chancellors' power of indirectly making Law by inventing new writs challenged its power to legislate. Thus, the development of common Law by issuing new writs was, therefore, frozen by the *Provisions of Oxford, 1258*.[22]
Thereafter, common Law was rigid and inadaptable to meet the constant social development of society. The result was that there were wrongs to which the Law provided no remedy. Thus, petitions were sent from the people to the King and dealt with by the Chancellor, a leading member of the Council. The ideas of conscience, good faith and reason guided the Chancellor in exercising his powers. The objective of the Chancellor was not only to grant relief where the common Law denied it, but also in cases where the common Law was defective. From the above development, it became apparent that conflict between the Chancellor and the Common Law judges was imminent as the Chancellor extended and consolidated his jurisdiction.[23]
In *Neath v. Rydley*[24], the common Law Judge established the rule that the common-law Court could prohibit the Chancery from interfering where any matter was properly traceable to common Law. Again, in *Courtney v. Glanvil*[25], the Chief Justice of the Common Law Court, Sir Edward Coke held that where a court of Common Law had decided a case, the Court of Chancery was powerless to interfere. He threatened to imprison any party to such a suit who appealed to the Chancellor after losing at common Law Court for relief.
The conflict came into the open in the *Earl of Oxford's case*[26]. In that case, the plaintiff's lease assignee had built a house on a parcel of land, the subject matter of the lease agreement, and had planted trees in the garden. The defendant assignor forcefully ejected the plaintiff, who sued the defendant in the Common Law Court for wrongful ejectment. The Common Law Court gave judgment for the defendant. The plaintiff then brought an action in the Court of Chancery, praying the Court to grant a common injunction to restrain the defendant from ejecting him from the House he had built on the leased land. The Court of Chancery granted the injunction.
Sir Edward Coke, the Chief Justice of the Court of the King's Bench, protested that the Chancellor should stop frustrating the rules of Common Law. The Chancellor denied that he was frustrating Common Law rules, but maintained that he was only applying his own rules to them to effect Justice. Lord Ellesmere delivered a decisive judgement based upon Chancery's jurisdiction to interfere with the judgement at Law. He said that 'by the Law of God, he that builds a house must live in it, yet

[21] Fabunmi J.O.
[22] *Ibid.*
[23] *Ibid.*
[24] Neath v. Rydley[24] (1614) Cro.Jac. 335
[25] Courtney v. Glanvil[25] (1615) Cro Jac 343
[26] Earl of Oxford's case (1615)

the defendant in this case would have the homes, gardens and orchards which he did not make or plant. He argued, therefore, that equity and good conscience favoured the plaintiff.[27]
Soon after this case, the judges, led by Edward Coke, Chief Justice of the King's Bench Division, made a determined attempt to put an end to the Chancellors' interference. The conflict was referred to King James 1, who resolved the matter favouring the Chancery. It was implicit in the ruling that the rules of equity would prevail if there were a direct clash between the two systems in any situation. This pronouncement was subsequently incorporated into the Judicature Acts of 1873. With the intervention of the Chancery Division, the anomalies at common Law were progressively removed. Finally, in 1875, the Judicature Act merged the Administration of the two systems, i.e., the common Law and equity.[28]

4.1 Nigeria Constitutional Development and Exodus from the Westminster Model to the American Presidential Model

After Savigny viewed customs of the people as that which binds people together and referred to it as a veritable source of Law developed through the trajectory of history, he still believed that the Germans of his time could borrow from Roman Law, which has eternal significance. As Savigny puts it, *"the Roman Law of the classical period seems to have eternal significance, the doctrine can constitute a fortress within which German legal tradition as nurtured by the volksgeist might be sheltered."*
Meanwhile, some writers criticised this aspect of Savigny's view by stating that Savigny involved himself in a paradox by presenting Law as a reflection of nationhood, nurturing the customs through the volksgeist and at the same time advocating a refined system of Roman Law for the German people[29]. It is submitted that nothing stops a nation from borrowing, mimicking or aping a foreign nation's Law to complement a national law. The origin of the Senate, the upper House of the parliament in any Federal establishment in all modern states, is of Roman origin. The name 'senate', in the Latin word 'senatus', means an assembly of the senior, the older, or old comers from Ancient Rome.
In ancient Rome, the Senate was the most permanent element in the Roman Constitution. The Senate is the governing and advisory body. When the monarch was established in 509 B.C, the Senate became the advisory Council of the consuls. In 1787, the framers of the United States of America Constitution established Article I, dealing with the structure and powers of Congress. Following this, the second chamber of parliament, the Senate, was established in the United States of America, on the basis that each state, regardless of population, has equal representation in the Senate. In 1979, the Nigerian Constitution, which was coined from the Constitution of the United States of America, also established the second chamber of parliament with additional constitutional arrangements setting out the extent of its power.[30] This is how nations can copy their laws from other advanced countries. These are exactly Carl Von Savigny's perspectives.

4.2 Savigny's and the Changing Dynamics in Nigeria's Constitutional Process

The forces or relationships influencing the legal process in Nigeria were transformed when the British Colonial Government was in full operation in Nigeria. The transformation of the geographical entities, known as Nigeria, started with the establishment of a legislative council by the Lugardian Nigeria Constitution of 1914. This Council was expanded by the Clifford Constitution of 1922, though with a white majority. The Clifford constitution also introduced the Executive Council. Barnard Bouillon who became the next Governor in Nigeria suggested that: first, before the making of another constitution, there must be due consultations with the diverse elements that made up the newly established Nigeria state as a first step to know the minds of the people of Nigeria, ie., touching Savigny's volks geist; second, that such Constitution must promote the unity of the various ethnic and ethnocentric grouping that made up Nigeria. This was followed by the Richard Constitution of 1946 and the Macpherson Constitution of 1951. The Macpherson Constitution 1951 introduced regionalism in Nigeria with its separate legislative chambers and Quasi-Federalism[31]. It was to the credit of Sir John Macpherson that before the Constitution was introduced, the government allowed discussions which commenced from Hamlets, to villages, to the Native Councils, to the regions, before the final deliberations and discussions at the Centre, that led to the promulgation of the Constitution. It is clear that before the Constitution came into force, the people's minds were sought, showing the truism of Savigny's claim, since it is clear that the state's Constitution is rooted in the volksgeist.
In 1954, the Littleton Constitution of 1954 was put in place. The Constitution was followed by the 1957/58 Constitutional Conferences, whereby the minds of Nigerians were consulted through their representatives that gathered in Nigeria, and later London, after which Nigeria adopted full-fledged federalism. At independence, Nigeria adopted the British parliamentary system of government, otherwise known as the cabinet system, with a ceremonial president and prime minister at the Federal level. At the same time, each region has a premier to manage regional affairs. In the second and third Republics, Nigeria adopted the executive presidential system of the United States of America model. Though the trajectory of constitutional development in Nigeria is historical, Savigny's view is fully squared. Both the British Constitution and the United States of America Constitutions were foreign to Nigeria, but Nigeria adopted both in 1963, 1979 and 1999[32] after due consultation with the local people. At this stage, it is essential to distinguish the process leading to the promulgation of a constitution from the process leading to the enactment of a legislative act.
Under the Nigerian experience, the executives picked the accredited representatives of well-enlightened people with undoubted integrity, who the government selected from all the segments of the society to form a body known as the Members

[27] Fabunmi J.O., Op.cit
[28] *Ibid.*
[29] Curzon L.B., op.cit.
[30] Gampar, A. Second Chambers in Federal States, Retrieved from http://50shadesoffederalism.com
[31] Olawale, J.B., (1985*), Topic on Constitution*, Vol.1, Ilesa, Nigeria, Jola Publications
[32] *Ibid.*

of the Constituent Assembly. This is the body that would visit all nooks and corners of the country to gather the opinions of the people from the hamlets, villages, towns, local government headquarters, state headquarters, before moving to the nation capital to do the final work of drafting the Constitution designed to meet the needs, yearnings, and expectations of the whole nation. If honestly done, it means the minds of the people, the Savigny's volk geist was at work. The modernisation of the Law was owing to the development brought by colonialism such as: the emergence of schools such as primary, secondary, technical colleges, nursing and midwifery schools, universities; new system of governance, emergence of corporate bodies and corporation, new system of transportation, commercial exporting and importations, industrial developments, all which must be taken care in details by the Constitution as the growth continues. Even in the business of legislation, since members of the parliaments are drawn from the people while exercising their preferences from the presented candidates, we have to assume that the people's minds are the pacesetters of every legislative enactment. Thus, Savigny's volks geists, the oracle minds, are at the Centre of the activities.

Then the next question is: what happens to Nigerians' pre-colonial rules, regulations and customs as a result of introducing every aspect of British laws through the Receptive Laws of the Commonwealth Countries, of which Nigeria is a prominent member. The Receptive Law introduced **the repugnancy test** into the Nigerian legal system. The repugnancy test is to the effect that the customary laws must be applied in appropriate cases, so far as it is not repugnant to national Justice, equity, and good conscience. The rationales for the repugnancy test are as follows[33];

i. It acts as a safeguard to ensure that traditional customs are compatible with fairness and morality.
ii. It is to be used to assess the validity of customary laws.
iii. It is designed to invalidate customary laws that are barbaric.
iv. It is also put in place to invalidate any unfair customary law.
v. It is used to render nugatory, any customary law that is unfair or repugnant to the principles of natural Justice, equity and good conscience.
vi. To determine whether a custom is compatible with modern legal standards.
vii. It is designed to significantly shape and modify customary Law to conform to acceptable international best practices.

Apart from the Repugnancy Test, there are other tests by which a customary law could be scrutinised, including the **Incompatibility Test** and the **Public Policy Test**[34]. Interestingly. These tests demonstrate how a foreign law could refine existing local legislation brought about through the spirit of the people and their historical experiences. This is precisely where Savigny's perspective is of eternal significance in studying jurisprudence. Where the rules of customary Law that are rooted in the minds of the people's history and their cultures conform with the validity test, the courts in Nigeria enforce such rules of customary Law without much ado. Conversely, where the rules of customary Law fail any of the tests, the Court's attitude in Nigeria has totally disregarded those unfair legal rules. Suffice it to say, as this paper revealed through the considered case laws, the law courts in Nigeria still enforced these customary laws rooted in Savigny's volksgeist, the thinking minds of the people.

4.3 The Repugnancy Test and Customary Law.

The first case where the Court tested the validity of customary Law in Nigeria arose from the decision of the Privy Council in the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*[35], where Lord Atkin held that; *The Court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character, it must be rejected as repugnant to natural Justice, equity and good conscience*.[36] This represents the Law in Nigeria, and the converse is also the Law recognised by statute in the new Evidence Act of Nigeria[37]. In the case of *Edet v. Essien,*[38] the Court in Nigeria declared a customary law that transfers the paternity of a child of another marriage to another father as repugnant to the principle of natural Justice, equity and good conscience.

In the case of *Mariyama v. Sadiku Ejo*[39], the customary Law under the judicial scrutiny was that when a child was born to a divorced woman within ten months of divorcing the previous husband, the child of that pregnancy belonged to the divorced husband. On appeal to the High Court, the Court held that the Law was repugnant to the principle of natural Justice, and therefore, the child must be returned to the father. In the case of *Okonkwo v. Okagbue*[40], the Supreme Court held that the custom of woman-to-woman marriage is repugnant as it offends against the principle of morality and good conscience.

The Law and custom of the Yoruba people that all legitimate children are entitled to share in their father's estate was tested in the case of *Alake v. Pratt.*[41] In that case, the question before the West African Court of Appeal was to determine at the hearing of the appeal, whether the appellants, Adeyinka and Adenike Coker, who are children out of wedlock to their late

[33] Gbolagunte O. (2016), Repugnancy Test: Positive Aspect of British Colonialism or colonial denigration of Nigeria Customary Laws. Retrieved from https://www.linkedin.com.
[34] Fabunmi J.O. op.cit.
[35] *Eshugbayi Eleko v. Government of Nigeria, No.1* (1928) NGSC 1 (19 June, 1928)
[36] *Supra*
[37] Thus, by statute, the Nigeria Evidence Act, section 16, cap 214, Laws of the Federation of Nigeria, 2011 provides that in case of any custom relied upon in any judicial proceedings, it shall not be enforced as law, if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.
[38] *Edet v. Essien (1932) 11 NLR 47.*
[39] *Mariyama v. Sadiku Ejo (1961)* NRNLR 81
[40] *Okonkwo v. Okagbue (1994) 9 NWLR (Pt. 368) 301*
[41] *Alake v. Pratt (1955) 15 W.A.C.A 20.*

father Dudley Theodore Coker are entitled to share in his estate together with the respondents who are the children of a marriage contracted by the deceased under the marriage Ordinance.
The Learned trial judge concluded that, if it had been satisfactorily proved that under the Native Law and custom of the Yoruba people, paternity of the two persons concerned having been acknowledged by the deceased during his life time, they are to be regarded as legitimate under the Law in Nigeria, there be no doubt. But his Lordship thereafter held that;
Although legitimate under the Law of this part of the country, it was incompatible with public policy that children born out of wedlock should be placed on the same footing as children born in wedlock.
As the learned Judge puts it[42]: Where there are children born in wedlock, children born out of wedlock should be excluded from participating in the distribution of the estate of their father, but if the children of the deceased are all of the same status, that is, born without marriage, they could inherit their father's property. Ostensibly, the trial judge was influenced by three factors[43].
(i) The rule at common Law is that any claim contrary to public policy shall remain unenforceable.
(ii) That the encouragement of promiscuous intercourse must be contrary to public policy.
(iii) There should be a significant caveat supporting the idea that a person born out of wedlock must be considered legitimate.
However, while the West African Court of Appeal overruled the learned trial judge, the Court held that[44];
i. If the native Law and customs are to the effect that a child born out of wedlock is legitimate in Nigeria, there cannot be different grades of legitimacy.
ii. The evidence in this case is that under Yoruba law and custom, all legitimate children are entitled to share in their father's estate, and the appellants, having been held to be legitimate, the question of their parents' marriage could not be a relevant subject for investigation.
iii. Since the Law of this country confers the status of legitimacy, and there is no doubt as to the domicile and origin of the appellant as of this country, they are entitled to the property of their deceased father and his other legitimate children.
According to Foster Sulton, P., with whom the other judges, Coussey J.A., and Abbott. J. concurred:
The question of legitimacy is one of status and is to be determined by the Law of the country of a person's origin. This was held to be the Law by the majority of the Court of Appeal in the case of the Goodman's Trust[45] (1881) 17 CH. D. p.266, and so far as I am aware, that case has not been dissented from since.

In Elesie Agbai & 5 Others v. Samuel Okigbue[46], by custom, the respondent was a member of the Umunkalu group in their village, and the age grade had undertaken to do specific communal work. The question before the Court was whether the seizure of the assets of someone withholding another person's money was justified as security to compel the release of the funds payable to a member of the age grade. The Court held that the custom of the plaintiff's people to seize and keep any asset of a person who fails to pay to another his share for the work done as a communal project until the person pays is not repugnant to natural Justice, equity, and good conscience.
In Re Sarah I. Adadevoh and Ten Others v. Herbert Samuel Heelas Macaulay[47] . The deceased was the issue of a marriage contracted under the Marriage Ordinance (Cap. 128), and he contracted a marriage under the same Ordinance. The matter concerns persons and property in the Colony of Nigeria, the estate distribution governed by section 36 of the Marriage Ordinance. The deceased was married under the Ordinance in December 1898, and his wife died in May 1899, leaving no issue. At various times, both before and after this marriage, the deceased begat many children, two of whom predeceased him, through some women. The Administrator General brought an application as administrator of the estate of a deceased person seeking a declaration as to the persons entitled to share in the real and personal property of the deceased. Out of these children, the appellants were cited as respondents to the application for directions, claiming to be entitled to the deceased's estate. The learned Judge was satisfied that four of the women by whom these children were born were married to the deceased per native Law and custom. As to the others, he directed that further evidence be sought regarding the nature of their relations with the deceased. He further directed that an enquiry should be made to ascertain whether there is any next-of-kin entitled to succeed upon the failure of the appellant's claim. Meanwhile, the relevant section of the Ordinance was section 36, which the learned Judge in the Court below applied to the facts, and the section provides that-[48]
"When any person who is subject to native Law and custom contracts a marriage following the provisions of the Ordinance and such person dies intestate . . . leaving a widow or husband or any issue of such marriage; and also, where any person who is the issue of any such marriage as aforesaid dies intestate. "The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed following the provisions of the Law of England relating to the distribution of the personal estate of intestates, any native law or custom to the contrary notwithstanding.

[42] Supra
[43] Supra
[44] Supra
[45] Gbodman's Trust (1881) 17 CH. D. p.266
[46] Elesie Agbai & 5 Others v. Samuel Okigbue, (1991) 7 NWLR (pt. 204) 39
[47] JELR 82885 (WACA) West Africa Court of Appeal, West Africa [For WACA cases] Coram VERITY, C.J. (NIGERIA), LEWEY, J.A., JIBOWU, J.
[48] *Supra*

The question is, which Law should apply in the instant case? To have a proper grasp of this case, and the preamble from where the Court drew the inference to arrive at the just and reasonable decision, it is better to read through the argument presented by Chief F. R. A. Williams, of blessed memory. The Court stated this on the submission[49]:

Mr. F. R. A. Williams submits it, to whom we are indebted for his careful and well-reasoned argument, that the appropriate rule is that set out in Halsbury's Laws of England (First Edition, Vol. XI, page 19) in the following terms (inter alia) :- "Subject to the rights of the husband or the widow (if any) the personal estate of an intestate who leaves issue is distributed by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children in case any of such children be then dead . . ." The learned author having further set out certain matters which are not relevant to the present issue proceeds:[50] "the word 'children' means 'legitimate children'. The question of legitimacy is one of status to be decided by the Law of the domicile; therefore, if a child is legitimate by the Law of the country where at the date of its birth its parents were domiciled, the Law of England (except in the case of succession to teal estate in England) recognises and acts upon the status declared by the Law of the domicil."

Mr. Williams submits that[51]:

i. By section 36 of the Ordinance, the estate of a person who is the issue of a marriage contracted under that Ordinance shall be distributed in accordance with the provisions of the Law of England relating to the distribution of the personal estate of intestates.

ii. It is to the rule enunciated by the learned author of Halsbury's Laws of England that effect should be given. From this, it would follow that any child recognised by the laws of Nigeria as legitimate is entitled to share in the deceased parent's estate.

iii. If, therefore, the appellants can be shown to be legitimate children of the deceased under native Law and custom, then not by applying such customary Law, but by the Law of England they are entitled to share in the estate distribution.

iv. The words of the section, which apply the Law of England "any native law and custom to the contrary notwithstanding", refer solely to the distribution of the estate and not to the right of succession, which is determined by the status of the claimants.

Chief F. R. A. Williams (of blessed memory) supported the above positions by reference to certain decided cases and more particularly *Re Goodman's Trusts (1),* in which it was held that a child who was legitimate according to Dutch law, her parents having been domiciled in Holland. However, according to the Law of England then, she would have been illegitimate and could have claimed as a "brother's child" within the Statute of Distribution. In this case, Lord Justice Cotton said[52]:

"If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicile of origin, I cannot understand on what principle if he be by that law legitimate he is not legitimate everywhere, and I am of the opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England . . . recognises and acts on the status thus declared by the law of the domicil."

In the same case, Lord Justice James said:[53]

"This is a question of international comity and Law. According to that Law and that comity as practised in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the Law of the country of his origin, the Law under which he was born"

And further, with particular reference to the Statute of Distribution, his Lordship added:

The principles thus laid down were referred to by Lord Maugham, L.C., in delivering the leading opinion in the Sinha Peerage Case (2). As reported in a note to Baindail v. Baindail (3), the then Lord Chancellor said it cannot, I think, be doubted now. . .that a Hindu marriage between persons domiciled in India is recognised in our Court, that the issue are regarded as legitimate and that such issue can succeed to property in this country. "

In resolving the complex issues presented in the appeal in this case, His Lordship, Verity, C. J. adopted the trajectory below[54]:

i. Examine the precedents that contradict the position of the lower Court.
ii. Examine the position at the Turning Point.
iii. Outlining the danger of abiding by the position of the lower Court and giving effect to common sense and decency.
iv. Arriving at a just and reasonable conclusion.

a. Examining Precedent

First, his Lordship considered a case decided by this Court in 1941, *Estate of F, A. Somefun-in re Williams*[55], where the learned Judges of the appellate Court held that the learned trial Judge "was correct in holding that a person whose right depends on native law and custom and not on English law is excluded from the succession on the death intestate of a person who is the issue of a marriage under the Ordinance". Concerning this case, his Lordship felt that in the terms in which this conclusion was stated, it appears the position was irrefutable, in so far as the word "succession" is employed. His Lordship stated further that, but it begs the question now raised by Mr, Williams in the present case which is whether the issue of a customary marriage are by the Law of England entitled to share in the distribution of the estate of an intestate who is the issue of a marriage under the Ordinance, I think it is clear from earlier passages in the judgment that their Lordships thought that such issue are not so entitled[56].

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[49] *Supra*
[50] *Supra*
[51] *Supra*
[52] *Supra*
[53] *Supra*
[54] *Supra*
[55] JELR 83735 (WACA)
[56] *Supra*

b. The Turning Point in Recognising Marriage by Polygamists.

As Verity. C.J. puts it, going by the above position, this would appear to mean that by the Law of England, the children of a polygamous marriage are not entitled to share in the distribution of an intestate estate, even though by the Law of the domicil, they are legitimate. His Lordship, however, observed that, 'bearing in mind the observations of Lord Justice James in *Goodman's Trusts*[57] that the law of distribution "applies universally to persons of all countries, races and religions whatsoever", it appears open to the gravest doubt whether that Law can be said to contemplate solely a monogamous marriage, for in many countries, among many races and under the tenets of more than one religion, polygamy is to be found[58]'.

However, his Lordship cited the case of *Baindail v. Baindail*,[59] where the question was whether the Law of England would recognise and act upon a polygamous marriage. In that case, an English woman who had married the appellant in that case and who had subsequently discovered that he had, some years before this marriage, married a Hindu woman according to Hindu rites, the Hindu wife being still alive, sought a decree of nullity. His Lordship cited The Master of the Rolls, whose judgment Lords Justices Morton and Bucknill agreed with as, held that, although "there cannot be any hard and fast rule relating to the application of the law of the domicil as determining status and capacity for transactions in this country", that is to say, in England, yet on principle it seemed that the Courts were bound to recognise the Indian marriage, although polygamous, as a valid marriage and an effective bar to any subsequent marriage in England[60].

"Is it right that the Courts of this country should give effect to a marriage ceremony, the result of which would be to put the respondent in such a position?" (His Lordship then referred to the marriage ceremony in England.) "It seems to me that effect must be given to common sense and decency. On a question not covered by authority, considerations of that kind must carry great weight." His Lordship was emboldened to state the Effects of Unjust Laws[61]. While dialoging with common sense, his Lordship said that:

'I am emboldened by these words of so great an authority to consider what is that effect of holding that because the children of an intestate are the issue of a polygamous marriage, they are to be excluded from succession to their father's estate. By the decision of this Court in re Williams the widow and children of the deceased, despite the validity of the marriage and the legitimacy of the children by the Law of their domicil, native customary Law, were excluded from all share in the estate in favour of other issue of the parents of the deceased. In other words, if that decision is to be followed, it means that the widow of an intestate and his children, though lawful by the Law of the domicil, were to be left destitute. At the same time, the estate of the husband and father went to the next-of-kin by his parents' marriage because his parents had chosen one lawful form of marriage rather than another.

Surely this would not be giving effect to "common sense and decency", and in the absence of authority, Lord Greene believed that "considerations of that kind must carry very great weight"[62].

c. Giving Effect to Common Sense and Decency

Distilling from the wisdom of his Lordship that effect ought to be given to common sense and decency, his Lordship raised the following posers[63]:

i. I am in complete agreement that it is to the Law of England that the local Ordinance directs that reference should be made,

ii. However, I consider that it is to distribution and not to succession that accuracy demands the application of that Law. The ultimate resort must be, therefore, to the Law of England,

iii. But to the question as to what is that Law upon this complicated matter, reference was indeed made to the English rule as to distribution in the circumstances of an intestate leaving a widow and children, of a polygamous marriage.

iv. However, the vital question of how the Law of England would view the position of the widow or children was never fully considered.

v. Also, was any such authority as to the judgment of the Court of Appeal in *Goodman's Trusts*[64] or the vital opinion of Lord Maugham in the *Sinha Peerage Case*[65] either cited or considered?

vi. I believe that the learned Judges acted *per incuriam* and that this Court is not now bound to follow that decision if we think that it is wrong after due consideration of those aspects of the Law to which their Lordships' attention was never directed.

vii. Bizarre was the fact that the learned Judges referred in their judgment, somewhat obscurely, to the question of polygamous marriage, nevertheless, gravely concerned by the fact that in this matter there does appear to be an authority in Nigeria contrary to the view put forward on behalf of the appellants in this case: the decision in re Williams. Therefore, we have been at pains to refer to the record of the hearing of the appeal in that case. The decision of the Court, so far as is disclosed by the judgment, appears to have turned upon the interpretation placed by the Court upon the words of section 36 of the Marriage Ordinance of England.

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[57] *Goodman's Trusts, Supra*
[58] *Supra*
[59] *Baindail v. Baindail* (1946), 1 All E.R. 342
[60] *Supra*
[61] *In Re Sarah I. Adadevoh and Ten Others v. Herbert Samuel Heelas Macaulay*
[62] *Supra*
[63] *Supra*
[64] *Supra*
[65] Hansard, 12 December, 1935

viii.It is in my opinion, therefore, that this Court is now entitled to examine the question as though there were no local authority binding upon it, and it is my view that, regarding this issue, with a desire to give effect to common sense and decency, we should be prepared to hold and acknowledged the principle as laid down in *Goodman's Trusts*,
ix. Whereby concerning the Statute of Distribution, the status of persons claiming rights in English law thereunder is determined by the Law of the domicil, which should be applied in such cases as the present, irrespective of whether the marriage upon which such claims are founded is monogamous or polygamous.

d. The Question for Determination.
Regarding the appellants, therefore, the question to be determined are:
i. Whether under the provisions of the Law of England relating to distribution they are the children of the deceased, that is to say his legitimate children, their status as such being determined, according to the Law of England, by reference to the Law of the domicili of their parents at the time of their birth.
ii. If, as it appears to have been assumed throughout the proceedings the deceased was a person subject to native Law and custom (and only in such cases would section 36 of the Marriage Ordinance apply), then the Law to be used in ascertaining the legitimacy of the children is the native Law and custom applicable to him, subject, of course, to such modification and qualifications as may be imposed by statute.
iii. It will be necessary for the Court below to hear evidence of the Law and custom in this regard.
iv. In this connection Mr. Williams submitted that it might be possible to establish that by native Law and custom, notwithstanding that no marriage has been contracted thereunder, any child, the paternity of which had been acknowledged by the deceased during his life, would be deemed by such Law and custom to be legitimate and that in such case any child would be entitled to share in the distribution of the estate as a child of the deceased.
v. No such thing has been claimed or established in the Court below. I would not exclude the possibility, but should such a claim be received at a further hearing, the Judge would be at pains to satisfy himself first that:
a. such a law and custom is established and secondly, that it is not repugnant to natural Justice, equity and good conscience,
b. nor incompatible either directly or by necessary implication with any law in force in Nigeria, and
c. Therein, the rules of the common Law are included as to the unenforceability of claims contrary to public policy, bearing in mind that the encouragement of promiscuous intercourse must always be contrary to such policy.
While allowing the appeal and remitting the application brought by the Administration General as the administrator to the estate of the deceased back to the lower Court, his Lordship, Verity C.J., with whom Lewey J.A. and Jibowu J. I concurred, added this caveat:
I am fully alive to the fact that grave inconvenience may arise from a judgment of this Court in such a matter which reverses a view of the Law which has been held for upwards of ten years, but when the Court is faced with the alternative of perpetuating what it is satisfied is an erroneous decision which was reached per incuriam and will, if it be followed, inflict hardship and injustice upon generations in the future or of causing temporary disturbance of rights acquired under such a decision, I do not think we should hesitate to declare the Law as we find it.
His Lordship further directed that:
I would, therefore, allow the appeal in this matter and remit the application to the Court below with the direction that upon a correct interpretation of section 36 of the Marriage Ordinance (Cap. 128) all those children of the deceased who, by the Law of England, would be entitled to share in the distribution of the deceased's estate, that is to say, those children who are legitimate according to the native Law and custom to which the deceased was subject as modified or qualified by statute, shall be entitled to participate in the distribution of the estate in the manner and to the extent prescribed by the Statute of Distributions in force in England at the date of the commencement of the Ordinance; and with further directions that the Court below require that the parties to the application shall adduce evidence sufficient to satisfy the Court as to the legitimacy of the appellants in accordance with such native Law and custom, including, in so far……as may be necessary to determine the legitimacy of such children, proof that any marriage according to native Law and custom put forward in support of such legitimacy was in fact contracted in due form, it not being in the opinion of the Court sufficient that the alleged spouse should herself testify to the bare fact that her marriage was so contracted, without such particulars as shall enable the Court below to determine the validity of such marriage in accordance with such Law and custom. I would further direct that, in the event of any such marriage being established to the satisfaction of the Court below, a sum equal to one-third of the value of the estate falling for distribution be reserved, pending any claim by the widow or widows, the relicts of such marriage, to share in the estate, and until such claims shall be heard and determined. Finally, I would direct that if no such marriage shall be established, and if none of the appellants shall be found to be the legitimate child of the deceased, then that enquiry be made as to the next-of-kin, and if no next-of-kin shall be discovered so that any portion of the estate should escheat to the Crown, then that such portion of the estate shall be distributed in such manner as shall be in accordance with native Law and custom and such portion shall not become a portion of the casual hereditary revenue of the Crown if there be any person or persons entitled thereto in accordance with such Law and custom.[66]

5.0 The Relevance of Savigny's Perspective to Nigeria's Jurisprudence.
It is a truism that the Law of society is somehow rooted in its culture and historical experience. The fact also remains that the emergence of any customary laws of the people is earned from the spirit of the people, commonly expressed in their general will. This is precisely where the concept of Savigny's volkgeist derives its relevance. However, the fact that Savigny advocates a refined system of Roman Law for Germany does not contradict his idea of nationhood expressed through the volkgeist. Nothing stops a nation from putting its Law on the proper track by exemplary foreign law principles. This is the essence of the critical principle of 'jus Cogens', which implies compelling Law from English peremptory law. It also refers to certain overriding principles of international Law. Nothing stops a nation from engaging other foreign laws to enhance the principle

[66] *Supra*

of fairness and equity. This is the way to reconcile Savigny's feelings. In Nigeria, for example, in the case of *Edet v. Essien,*[67] the Court in Nigeria declared a customary law that transfers the paternity of a child of another marriage to another father as repugnant to the principle of natural Justice, equity, and good conscience. By implication, nothing stops the Court from calling in aid a foreign law to enhance and improve upon its Law by subjecting the volksgeist to check.

However, where a customary law has become so notorious as to enjoy the notification by the Court, such laws as expressed through the Volksgeist might be immune to judicial alteration. This is the situation in Edo Land, under the Benin Kingdom's Customary Law of Inheritance. Under this Law, property law relating to the Customary Rules of Inheritance is categorised into three:

a. Customary Law of inheritance relating to land and landed properties,
b. Customary Law relating to valuable trees and plants, and
c. Customary Law relating to movable properties such as household properties, livestock, money, and indebtedness.

In the Benin Kingdom, the Law relating to the customary rule of inheritance favours male offspring overwhelmingly over their female counterparts. First, the inheritance of landed properties follows the principle of primogeniture.[68] Under this system, the larger portion of landed properties goes to the eldest son, whilst the rest is shared among the other sons of the deceased. If the deceased has no son, the land, by the customary rule of inheritance, devolves to the deceased's brothers in order of seniority.[69]A part of the above Law was in contention in the case of *Edward Omorodion Nwaifo v. Stanley Uyimwen Nwaifo,*[70] where the Supreme Court of Nigeria upheld the principle of primogeniture under the Benin Customary Law of Succession, which entitles the eldest son in the family the principal home where the deceased lived and died, known as 'Igiogbe'. The fact of this case was that Pa. Daniel Ediagbonya Nwaifo, who died testate in 1985, left a will wherein he bequeathed the two houses to his other sons, but disentitled his first son, Mr. Edward Omorodion Nwaifo, who was left out of his will completely. Mr. Edward's prayer to the Court was that the entire will be set aside, invalidated, or vitiated on the ground that it violates the Benin tradition of primogeniture. The Supreme Court granted the prayer in part, in that the Court invalidated the will to the extent that it had devised the 'Igiogbe' to someone else, contrary to the plaintiff's entitlement under the Benin Customary Law of Inheritance; but rejected the prayer that the will be invalidated in its entirety.

It should be noted that, in the above case, the Supreme Court is not here setting a new precedent. Still, instead, the Court upheld the principle of primogeniture, a notorious rule previously upheld by the Court on many occasions. For instance, in the case of *Arase v. Arase,*[71] the Court established that under the Benin native law and custom, the eldest son of a deceased person or testator has the right to inherit without questioning the House where the deceased testator lived and died. By implication, a testator cannot validly dispose of the 'Igiogbe' by his will to another person, except to his first surviving male child. Thus, any disposition to another person through the will is void. See the case of *Agidinghi v. Agidinghi*[72]. "However, the leftovers are distributed among the other children of the family. See *Idehen v. Idehen*[73].

Meanwhile, the above, as a matter of history, culture, and historical affiliation, has been the Benin Kingdom's Customary Law of Inheritance for a long time before colonial rule in Africa. This emanates from the spirit of the kingdom's people, the spirit which Savigny refers to as the volksgeist. Nevertheless, despite this well-established legal culture, the principle of subjecting the Customary Law of inheritance to the complementing rule relating to the repugnancy test implies borrowing from the civilised legal system just as Savigny felt the necessity of advocating a refined system of Roman Law for the German people. Hence, to avoid the devastating effect of completely sweeping aside the rights of female children to inherit parts of their father's assets, the Supreme Court of Nigeria made a significant 'U-turn' in the case of *Ukeje v. Ukeje*[74] where the Supreme Court applying the English Principle of Repugnancy doctrine had invalidated Igbo Customary Law denying female descendants their right of inheritance.

In the case of *Ukeje v. Ukeje*[75], which originated from the Lagos High Court of Nigeria, Lazarous Ogbonna Ukeje, a member of the Benin Kingdom via the Igbo Ethnic Group, died intestate in 1981. Lois Chitum Ukeje (the deceased wife, and plaintiff's stepmother) and Enyinnaya Lazarous Ukeje, the deceased's son and plaintiff's half-brother) had applied and obtained a letter of Administration to manage the deceased's estate in total exclusion of the plaintiff from inheritance. After the success of plaintiffs both at the High Court, and the Court of Appeal, the plaintiffs as respondents before the Supreme Court had prayed the Court to invalidate the letter of Administration granted to the defendants/applicants or included her name in the list of the administrator as administratrix, to order them to account for all the monies received from the estate of the deceased, and included her name in the list of the beneficiaries of the estate of the deceased.

The judgment of the Court, which marked a departure from the Customary rule of inheritance, was the one that disinherited the member of the feminine gender in the family. In *Ukeje v. Ukeje,*[76] the Supreme Court held that the Igbo Customary Rule

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[67] (1932) 11 NLR 47.

[68] Obiora. F. I - et.al (2001) Understanding African Traditional Reasoning, Jurisprudence, and Justice in Igbo Land

[69] Wigwe, G.I. "Igbo Land Ownership, Alienation, and Utilization: Study in Land as a Source", in Igbo Jurisprudence, Law and Order in Traditional Igbo Society, p. 32, 39. 9 G.M. Urezurike et.al, eds: 1986.

[70] (2013) LCN/ 4159 (S. Crt.)

[71] (1981) N.S.C.C. p.101 at p. 104.

[72] (1966) 6. N. W. L. R. p.302

[73] (1991) 6N. W. L. R. p. 387.

[74] LS. 224/2004; (2014) LPELR 22724 (SC); (2014) 11 N.W-L.R. p. 384.

[75] *Supra*

[76] Supra

of Inheritance that excludes women from inheritance violates the 1999 Constitution of the Federal Republic of Nigeria. According to Bode Rhodes-Vivour Jsc, who delivered the minds of the Court:
No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her Late Father's estate. Consequently, the Igbo Customary Law, which disentitles a female child from partaking in the sharing of her deceased father's estate, is a breach of Section 42 (1) and (2) of the Constitution of the Federal Republic of Nigeria, which guarantees that the Fundamental Rights Provision is guaranteed to every citizen.

5.1 Nigeria Supreme Court and the Historical School
In the case of *Savannah Bank v. Agilo*, the Supreme Court traced the history of the Nigerian land law that formerly permitted two types of tenure:
(i) freehold interest, and
(ii) leasehold interest.
According to the Supreme Court, these tenures constitute the mischief that the Land Use Acts aimed to eradicate. The Court held (inter alia) that under the Land Use Act, we have a single tenure in that the Land Use Act had converted any interest in land to leasehold. Hence, a person's highest interest in land is a leasehold interest. And in Nigeria, under S.I. of the Act, the Governor is the Trustee of the Land. Then, any transaction on land without the governor's consent is null and void. This historical background explains why the mortgage deed and everything done about it were held to be nugatory. Apart from this, the Supreme Court imbibed the positivist legal theory by adhering to the strict Law that *ex-turpi causa, non oritur actio*

6.0. CONCLUSION: In conclusion, it is pertinent to state that a customary rule, as the product of the volksgeist, adopting Savigny's terminology, could be avoided or complemented to arrive at a just and equitable decision on three grounds. First, based on the repugnancy test, the Customary Rule is repugnant to the principles of natural Justice, equity, and good conscience. Second, under the 'Incompatibility Test' where any particular custom conflicts with any of the explicit provisions of the Constitution and to that extent null and void, the Constitution being the Grundnorm in Hans Kelson's terminology or law 'as it is ' according to the Positivist Legal theorist's position in which case such Customary Law cannot survive. Third, after the Court had subjected the Customary Law to 'Public Policy Test' to see whether such Customary Rule is in tandem with Public Policy, according to Section 18 (3) of the Evidence Act of Nigeria, 2011 or if such Customary Law fails the 'Public Policy Test'. In *Ukeje v. Ukeje,*[77] it is submitted that, although the Supreme Court outlaws gender-based discrimination, it should be quickly added that the notorious Law on 'lgiogbe' subsisted and survived *Ukeje v. Ukeje*[78] , going by the decision of the Supreme Court of Nigeria in April 2013. Also, the tenor of the case of *Edward Omorodion v. Stanley Uyimwen Nwaifo*[79]established that it is trite Law that no one should be made to suffer any deprivation due to the circumstances of their birth. Finally, the following should be noted:
i. Before the advent of colonialism in Nigeria, each tribe and various ethnocentric groupings had their system of law-making, policy-making, and adjudication.
ii. With the advent of colonialism and the stages of constitutional development, Britain's law system was fused with that of Nigeria.
iii. At independence, the doctrine of common Law, the principles of equity, and the statute of General Application, which became applicable in England on January 1, 1900, became relevant in Nigeria together with the existing native Law and customs in Nigeria.
iv. Since the native laws and customs of the people could not be eradicated, it became the rule that such laws and customs were applicable insofar as they were not repugnant to natural justice, equity, and good conscience.
v. At this stage, it is no use saying that this is precisely where Carl Von Savigny's perspective on the historical school comes in;
a. First, our native laws and customs are rooted in the spirit of the people, i.e., the Volkgeist.
b. Second, Savigny's perspective that the Germans of his day could borrow from civilised society, such as Roman Law, to complement their Law is not a contradiction, as infusing colonial laws into our Law is not an aberration. It only serves to complement our laws.
Thus, the 'Igiogbe' inheritance system is never an aberration; likewise, it is not inequitable. However, where discrimination on the ground of gender comes in, the Court will declare such illegal. Our Constitution clearly states that nobody should be made to suffer any deprivation due to the circumstances of his or her birth. S. 42 (2) of the Federal Republic of Nigeria Constitution 1999. Thus, customary rule could be avoided on the following ground;
i. First, based on the repugnancy test, see *Edet v. Essien.*[80]
ii. Second, based on an incompatibility test, such as when it is not compatible with the provisions of the Constitution.
iii. For the public policy test, see *Ukeje v. Ukeje*[81] , *Edward Omorodun Nwaifo v. Stanley Nwaifo*[82] , etc.

[77] *Supra*
[78] *Supra*
[79] *Supra*
[80] *Supra*
[81] *Supra*
[82] *Supra*