

SOURCES OF LAW: THE APPLICATION OF ENGLISH LAW IN NIGERIA

This note will commence with an introduction to the meaning of sources of law, and it will help the reader understand the nature, functions, and types of sources, then it will introduce the discussion on the primary sources of Nigerian law, beginning with the application of English law in Nigeria. The note should help the reader

- a. Understand what is meant by the term 'sources of law'
- b. Distinguish between different types of sources of law
- c. Understand the different ways in which English law is applicable in different parts of Nigeria, and in the country as a whole

The first part of the note will provide a general overview of the meaning of sources of law. The next part will discuss the general applicability of English law in Nigeria, then explain the different types of British rules applicable in Nigeria and how the applicability of British law in Nigeria has evolved in different parts of the country.

GENERAL NOTES ON SOURCES OF LAW

In every society where *law* is applied towards social control or regulation, it is important to know where the law can be found. This is very different from knowing what law is. At this point, it is assumed that the student has come to terms with questions relating to why we need law or what law really is, or is, at best, convinced of the complexity of such questions. The focus is now turned to where one can find the law, a question that is of particular importance to the lawyer and the judge, as will be explained later.

'Sources of Law', therefore, refers to the places where laws can be found, where they originate, or where they are explained. These could be the initial origin where the law was made and stored, or a different location where the relevant rules have been analyzed. Sources are guides which provide assistance in facilitating the lawyer's knowledge of the law, and they are important for the following reasons:

1. **Ease of Reference:** being able to identify the sources of law makes it easy for the lawyer and the judge to know where to look when an issue of legal importance emerges, and they have to argue or decide on such an issue. Where there are no sources, the judges are left to their own devices.
2. **Certainty:** when the sources of law are easily identifiable, it provides a necessary level of certainty in the system. Lawyers and judges have access to the same set of received rules and analyses, and this ensures that cases are determined based on similar rules.
3. **Enhancing Social Cohesion:** Law has been identified as a means of social control, amongst other things. Where the sources of law are easily identifiable, this would assist in establishing and maintaining an important element of the social fabric that holds the society together.
4. **Historical Evidence:** Just as society is dynamic, so are the rules that govern society. It is important to have a record of the development of social rules, so as to understand the evolution of



particular societies, and being able to identify the laws that have governed any society over time will help to effectively collate and understand the history of that society.

These are just some of the many reasons why it is important to understand what the sources of law are and where to find them. Every lawyer must know how to identify the sources of law in the society where he practices, and know what importance to place on any particular source.

Sources of law may be primary or secondary. **Primary sources** of law are those sources where the actual law can be found, such as legislations and judicial orders. They form the basis for the law on a particular issue and serve as binding authority on the position of the law. **Secondary sources**, on the other hand, refer to those places where analyses of the law can be found, such as text books and review articles. They are usually reference materials where those seeking to learn more about the law may find explanation and analyses, and they do not have binding authority nor do they form the basis for the validity of a legal position. While both primary and secondary sources are useful to every law student and legal practitioner, it is very important to know how to find and use primary sources, which form the foundational basis for any legal study or work. This class is concerned with primary sources which make up the Nigerian legal system and will begin with one of the early sources of the modern Nigerian legal system and its institutions, English law.

English Law in Nigeria

In the British-colonized world, comprising several countries in Africa, Asia, the Caribbean and North America, the legal system has its foundation in the English Common Law, which was received into the budding legal systems of the colonies. The Common Law is therefore an important source of law in many parts of the world, although its significance in its original form has been greatly diminished by the development of independent sources in these countries. Nevertheless, the legal systems of these countries are usually based on general rules developed by the Common Law system. Nigeria is an example, as will be seen later. The following section will discuss the different ways through which the English legal system has been applied within the Nigerian legal system.

Extended English Legislations

By English legislations here, we mean the laws made in England, which apply in Nigeria by virtue of English law, so these laws were not 'received' into the Nigerian legal system, but rather were 'given' to the Nigerian legal system. These laws were enacted for Nigeria by Her Majesty's government exercising legislative powers in England for a colony that was seen as comprising part of England. By virtue of the **Foreign Jurisdiction Acts 1890-1913** and the **Colonial Laws Validity Act 1865**, the British Crown was empowered to legislate for all territories under the rule and protection of the British government, and this was done by way of Ordinances. The manner of extension depended on the nature of the relationship between the British Crown/government and the subordinate power in question. Here, it is important to note the difference between a colony and a protectorate. Lagos was a colony but Northern and Southern Nigeria were protectorates before the amalgamation, and the extension of British law to both structures was different, although the difference did not always play out in practice. A colony is an annex of the colonial power, so that it is a mere physical geographical extension of a State, and does not possess separate legal personality or statehood. A protectorate is a separate legal personality from the State that protects it, but it does not possess statehood.¹

¹ Malcolm Shaw, *International Law* (4th ed, Cambridge, Cambridge University Press, 1997) 154.



Since the colony is an extension, it follows that the laws enacted for the Home country would automatically apply in the colony, but this was not always the case. In the case of Lagos, there were specific laws made in Britain that were expressly applicable in the colony. **Section 1 of the Colonial Laws Validity Act 1865**, for example, provides that,

An Act of Parliament, or any provision thereof, shall... be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament.

In the case of the protectorate, the laws made for the Protecting State did not automatically apply in the protectorate, and special laws had to be made in the protecting State, somewhat similar to the practice used in the colonies, to extend laws from the Protecting state to the protectorate. **Section 5 of the Foreign Jurisdictions Act 1890** provides that

(1) It shall be lawful for her Majesty the Queen in Council, if She thinks fit, by Order to direct that all or any of the enactments described in the First Schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the Order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction

(2) Thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession

These legislations remained in force and valid even after independence, until repealed by the colonial, in this case, Nigerian, legislature provided for under the country's independent constitutions. Such laws are subject to local legislation, and many of them have been repealed or re-enacted by local statutes.²

It is important to note that the application by extension of English legislation in Nigeria is not by virtue of any "Nigerian" law, but, rather, by virtue of English law, which means that the English legislations are imposed from outside Nigeria. These laws applied in Nigeria as a result of the political system in operation, since the British government was politically responsible for governance in her colonies and protectorates, which included the enactment of laws.

Received English Law

Apart from the laws which were extended to the Nigerian jurisdiction from Britain, there were also British laws which were *received* into the Nigerian legal system by Nigerian law, and these were, the Common Law, doctrines of equity, and statutes of general application in England on January 1st 1900. These laws were applicable in Nigeria as a result of Nigerian legislation to that effect, and the different components of this category of law will be discussed under this heading. **Section 45(1) of the Interpretation Act**³ provides that

Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in

² See Asein, *op cit*, 100, Note that, at independence, the Nigerian legislature repealed some of the English laws applicable in Nigeria at the time. See Niki Tobi, *op cit.*, p. 44(footnote 105).

³ Now Cap I24, LFN 2004.



force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the federal legislature, shall be in force elsewhere in the federation

Section 45 of the Interpretation Act also provides conditions under which English Law would be received into the Nigerian legal system, and these include local context and jurisdiction, amongst other things.⁴

Common Law

The Common Law, as it is known today, has its origins in old English sociopolitical and legal traditions. It has been described as the 'usage, practice and decisions of the king's courts of justice'.⁵ After the Norman Conquest of England in the 11th Century, there were reforms in the administration of justice, including the establishment of a Supreme Court of Judicature. The King sat in this court to administer special cases in person. The court was finally abolished, and the King appointed *judges* to administer these cases in his stead. Among his reforms as ruler of England, King Henry II instituted significant judicial reforms, which included the distribution of judges to entertain general cases across the Kingdom. These judges, in the exercise of their jurisdiction, proceeded to collect the common customs of the royal courts across England, particularly the usages and decisions that had been applied by the royal courts, which were the Courts of Common Pleas, King's Bench and Exchequer. These courts administered justice mostly by granting damages in monetary value to successful parties, and the rules which they applied soon became the word of law, to be applied all across the Kingdom.

The development of the Common Law began around the 12th century, and continued to broaden its scope and content, even as these laws were spread to the colonies. Common Law is an expression of the *reason* of judges, and with time, even this reason had become rigid, and therefore in need of modification. This is how Equity became an important aspect of English Law, in order to ease the difficulties posed by the application of Common Law.

Doctrines of Equity

As explained above, the rules of Common Law soon became established, as well as the attendant procedures for applying those rules in court. Many of the citizens came to the King with complaints about hardships suffered because of the rigidity of the Common Law, so the King appointed the Chancellor to attend to such cases. Soon, a court of Chancery was established to hear these cases, and with time the doctrines of equity were developed, as the court relied on the reason and good judgment of its judges to handle cases that came before them, and the judges acted with considerable discretion. Where Common Law relied on awarding damages that were attached to the property of the defendant, equity provided remedies that enjoined persons to act or refrain from acting, such as specific performance, rescission, injunction, restitution, and so on. Asein lists some of the doctrines of equity, but that list is not exhaustive.⁶

⁴ See section 45(2) and (3) Interpretation Act, Cap I23 LFN 2004; See also Niki Tobi (1996), *Sources of Nigerian Law*, (MIJ Professional Publishers Limited; Lagos), pp 25-28; *Balogun v. Balogun* (1935) 2 W.A.C.A 290

⁵ Matthew Hale (1820), *The History of the Common Law of England, and an Analysis of the Civil Part of the Law*, 6th edition (Butterworth; London) 23

⁶ *op cit*, pp 105-6.



Naturally, there were conflicts between the Common Law courts and Chancery, and in 1615, in *the Earl of Oxford Case*, the King ruled that Chancery would prevail in any such conflict. It then became an established rule that in a conflict between equity and the law, the former would prevail, and this was provided for in the **Judicature Act of 1873-75**, which also provided for the Supreme Court of Judicature to administer both systems.⁷

Statutes of General Application in Force in England on January 1st 1900

Although, prima facie, it might seem that all English statutes in force at a particular date were received into the Nigerian legal system, this is not the case. There have been disagreements as to the content and extent of English Law to be applied in Nigeria. For example, while some argue that Common Law refers to the Common Law of England, others argue that the term should be interpreted liberally to entertain the development of other common laws in other jurisdictions, as was done, for instance, in America.⁸ There was also uncertainty as to the interpretation of the terminology 'statute of general application'. Osborne CJ, in *Attorney General v. John Holt and Co.*⁹, laid down a test for determining whether or not a statute was of general application or not. He stated that where an Act of Parliament applied to all civil and criminal courts and to all classes of the community, then it was likely to be a statute of general application. Obilade, however, questions the validity of this test, and says that a more valid test would probably be to ascertain whether the statute is of general application in England, and whether it applies to all classes of people in England. Where these two conditions are met, the statute is likely to be one of general application.¹⁰ The Western region of Nigeria, in its applicable regional law, does not recognize statutes of general application as one of the sources of received English Law, but restricts such sources to Common Law and the rules of Equity.¹¹ Hence, in States that were part of the former Western region, statutes of general application do not apply to matters within the legislative competence of the State legislature, but such statutes will continue to apply to matters outside the reach of the State legislature, such as matters within the exclusive legislative competence of the Federal legislature.

Although the influence of English law in Nigeria remains very strong and forms the basis for the foundation of the modern Nigerian legal system, the Nigerian legislature and judiciary have developed new rules in many areas to handle domestic situations based on local circumstances. Nevertheless, it is important to note the role that English law has played and continues to play in the development and practice of the Nigerian legal system.

⁷ See Ogbu, *op cit*, 63; Glanville Williams (1982), *Learning the Law* (Steven and Sons; London) 27

⁸ See Niki Tobi, *op cit.*, p. 34, where the author reveals the disagreement in views on this issue, quoting Allot as referring to Common Law as the Common Law of England, and Nwabueze disagreeing with that limited interpretation.

⁹ (1910) 2 NLR 1.

¹⁰ Obilade A O (1979), *The Nigerian Legal System*, (Spectrum Law Publishing; Ibadan), p. 74

¹¹ See Law of England (Application) Law, Cap 60, W.R.N Laws 1959.

