The Lotus Flower Bomb: A Look at Jurisdiction and the Evolution of Extraterritorial Jurisdiction

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ABSTRACT

The rapid spread of globalization in the world today is undeniable. The advent of the internet, great advances in technology and social media, have fostered interplay of the world's cultures and greatly boosted the world's status as a global village. Apart from these overt phenomena, there is economic policy, foreign policy and the protective principle policies of the various countries in the world which play all too important roles in the formulation of the legislative and judicial framework of these states. All these and more have greatly contributed to blur the lines of jurisdiction, which although prima facie is only exercisable territorially, has now burst from that cocoon to be exercisable beyond its borders or on non-residents. This article seeks to analyse the evolution of jurisdiction and extraterritorial jurisdiction internationally, taking cognizance of the decision in the case of the S.S Lotus[1].

1.0 JURISDICTION

Jurisdiction is the backbone and essence to any exercise of judicial power. It is the *sine qua non* for the raising of an issue or the

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[1] *S.S. Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

exercise of power by a court.[2]It can be said to be the proverbial key for the almighty court to hear disputes between parties before it. It is the power to speak the law.[3]In many respects, it is entirely correct to say that jurisdiction is one of the most important tools within the judicial process, as without it, any exercise of power is null and void.[4]What is important to note is the fact that jurisdiction as a concept is of extreme importance to all three arms of government in a democratic state.

Being a vital and enigmatic principle of law, it may in fact be seen in different forms;–

- Prescriptive Jurisdiction: - This refers to a sovereign state's ability to prescribe laws that apply to certain categories of people or personalities.[5] This would, of course, be more applicable to the legislature, but may also relate to the judiciary, in some instances.
- Adjudicative Jurisdiction: - This refers to the court's root power to adjudicate[6]i.e. to hear matters or disputes and to pronounce on them or make judicial orders or decisions in respect of them.
- Enforcement Jurisdiction: - This, in simple terms, is the power to enforce the law, i.e. to deploy the coercive

[2] *Madukolu* v. *Nkedilim* (1962) LPELR - 24023 (SC)
[3] Costas Douzinas, "The Metaphysics of Jurisdiction" *Jurisprudence of Jurisdiction,* (London, 2007)
[4] *Funduk Engineering* v *McArthur* (1993) 4 NWLR (Pt. 392)640 at 651
[5]Restatement (Third) of Foreign Relations Law of the United States § 401(a) (1987).
[6]Howard M. Wasserman "Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption" (2011)

> powers of the state to arrest, confiscate, prosecute or punish offenders or defaulters of the law within the state. This can be said to relate more to the Executive arm of government.

The focus of this research would be centred on adjudicative jurisdiction, and would then speak about its peculiarities and then extraterritoriality. It is important; to first understand what jurisdiction truly is, and what its ramifications are. In the case of *Nigeria National Petroleum Corporation (NNPC)* v. *Clifco Nig. Ltd* per Rhodes-Vivour JSC[7], jurisdiction was described as "the heart and soul of a case". It commonly has two connotations. Thus, whenever jurisdiction is mentioned or brought up, what is being referred to is either the applicability or inapplicability of judicial power or pronouncement as to the substance of the law governing a dispute; or the geographical limits to which the powers exercised by the courts can apply[8]

1.1 Substantial Exercise of Judicial Powers

Jurisdiction has been defined in the case of *Board of Trustees Firemen's Relief and Pension Fund of City of Marietta* v *Brooks*[9] as being the authority by which judicial officers take cognisance of and decide cases.[10]This precise connotation as to what the jurisdiction means or describes can also be seen in some of the definitions which can be found in judicial decisions. In the case of

[7]*National Petroleum Corporation (NNPC)* v *Clifco Nig Ltd* LPELR-SC 233/2003
[8] *Ifepe* v *Obi* (1967) F.N.L.R 329 at 330
[9] *Board of Trustees Firemen's Releif and Pension Fund of City of Marietta* v *Brooks* 179 Old. 600, 67 P.2d 4,6
[10]Oxford Dictionary of Law Sixth Edition

Co-operative Bank of Eastern Nigeria Ltd v. *Megwa,*[11] jurisdiction has been taken to mean "the authority which a court has, to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision."[12]

This view of jurisdiction is now commonplace and has seen adoption in a variety of other cases.[13] As stated earlier, the importance of jurisdiction as a pre-condition to the exercise of judicial power cannot be over emphasised, thus, in the case of *Senate of National Assembly* v. *Momoh*[14] it was held that when it can be said that a person or body no longer has the power to declare law (jurisdiction), then the only function remaining to the court is that of announcing that fact.

Once a dispute is brought before a court, the very first call of duty is to see whether or not it is competent to hear that dispute being brought before it.

1.2 Geographical Limits

The usual exercise of jurisdiction is limited to the geographical boundaries within which the laws sought to be applied are concerned or have been promulgated. Thus, jurisdiction also refers to the territorial limits of the reach of the powers of the court in legal proceedings or adjudication.[15]Thus, in usual

[11]*Co-operative Bank of Eastern Nigeria Ltd* v *Megwa* (1977) 1 I.M.S.L.R. 11
[12]A.P.A Ogefere "Definitions In Law: Nigerian Law Through The Cases" Vol. 14 (1997) 14NLTC
[13] *Gwaram* v *Superintendent of Prison, Kano* (1960) N.R.N.L.R 5 at 6; *Denedo* v *Ikie* (1968) M.N.A.L.R 17 at 20; *Ndaeyo* v *Ogunnaya* (1977) 1 S.C. 11 at 24
[14] *Senate of National Assembly* v *Momoh* (1982) 2 F.N.R. 307 at 333
[15] Ifepe v Obi (1967) F.N.L.R 329 at 330

circumstances, the jurisdiction of a court would be linked with the geographical contiguity of the court to the citizen and the law that governs that subject matter.

It is from the questions or controversies surrounding the territorial limits of jurisdiction that the importance of the grasp of the knowledge of the exercise of extraterritorial jurisdiction arises. There are instances where a court or state may wish to exercise jurisdiction beyond its borders, this may either be in form of enforcing its own laws or judicial decisions, or by subjecting citizens or persons outside of its borders to its own adjudicative process. It is accepted domestically and in international law that all sovereign states command a monopoly over the laws and enforcement of such laws within their own borders.[16] The implication of this principle is that any exercise of adjudicative or enforcement jurisdiction beyond the borders of the state would prima facie constitute a derogation or infraction on the foreign state's sovereignty.

In the ever evolving contemporary world which exists today, the different instances in which the law or courts may seek to act extraterritorially increases every day, and in reply the law has also been changing to catch up with the times, and produce a good enough response to these issues as they arise.

[16] Art. 2(1) Charter of the United Nations Charter of the United Nations and Statute of the International Court of Justice, UK: Cambridge Press, 2003); Holmes v Bangladesh Biman Corporation (1989) 1 AC 1112, 1126; 87 ILR, pp. 365, 369, per Lord Bridge

2.0 EXTRATERRITORIAL JURISDICTION

In a variety of instances, especially in modern times, various states have tried to enforce their laws or seek to extend their judicial pronouncements beyond the confines of their territories. There is of course the international principle of "*comity*", which in a judicial context, refers to the deference or respect that states give to the laws and decisions of other states.[17]This means that the decisions of the sovereign courts are to be seen as being of the same hierarchical rank and that in the absence of disparaging views as regards the correctness of the decisions, or if it infringes on other rights within the foreign territory, it should be entitled to enforcement. It should be noted that there exists a presumption against the extraterritorial application of legislation[18].This presumption is even further enshrined impliedly by virtue of the principles of sovereignty. In the Supreme Court of Canada decision in *R* v *Hape*[19]it was stated that "despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationships between independent states".

Also, in the case of *American Banana Company* v. *United Fruit Company*[20], Justice Oliver Wendell Holmes stated that *"*...the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done*"*

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[19] *R* v *Hape* (2007) SCC 26, [2007] 2 S.C.R. 292
[20] *American Banana Company* v *United Fruit Company*, 213 US 347, 370 (1909)

There are many instances in which a state may seek to exercise extraterritorial jurisdiction, and in instances when this jurisdiction is exercised on the basis of territoriality or on the basis of the nationality of the individual concerned, there is usually no controversy.[21]Competition law is the realm in which extraterritorial jurisdiction has arisen the most.[22] However, as regards instances where the basis on which jurisdiction is being exercised is predicated on the harmful effects[23] which an act has caused within a state, then in that instance, where jurisdiction is being exercised a variety of questions then arise. A good example is the adoption of the *Helms-Burton Legislation (1996)* which provided an avenue for US courts to hear matters against foreigners who were accused of "trafficking" in property expropriated by Cuba from Americans. This has caused a plethora of protests around the world which are forcefully against this. In a letter to the US Congressional Committee:

> US Claims to jurisdiction over European subsidiaries of US companies and over goods and technology of US origin located outside the US are contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidiaries, goods, and technology must be subject to the laws of the country where they located.

[21] op. cit
[22] *Standard Oil Co. of New Jersey* v. *United States* 221 U.S. 1 (1911)
[23] *US* v. *Aluminum Co. of America* 148F.2d 416

Raustiala calls this relationship between law and territory "legal spatiality".[24] The evolution of this principle evolved from strict territoriality, this of course has been greatly loosened over the years, as phenomena such as globalisation, the advent of technology and even international trade have all become mainstays in the contemporary world. More functional concepts such as "interest analysis" and "minimum contacts"[25] have taken over and are increasingly favoured over the usual rules of jurisdiction in determining the existence or non-existence of jurisdiction.

2.1 Rules of Extraterritorial Jurisdiction at Private International Law

Private International law seeks to mitigate the controversies of extraterritorial jurisdiction, by providing a rubric for determining what courts would decide or preside over a matter. Thus, in a hypothetical situation where a transaction, or in fact, a cross-border crime has occurred, private international law would look into the species of the occurrence and choose what part of it would be isolated in order to bring down an issue into the realm of the jurisdiction of a court. Thus, a situation where an archer in State A shoots an arrow into State B, which hits a septic tank and causes spillage which affects the livelihood of people via the pollution of water in State C. The answer as to who may exercise the prescriptive jurisdiction boils down to the part of the

[24]Kal Raustiala, *The Evolution of Territoriality: International Relations &American Law*(2005) University of California, Los Angeles School of Law Public Law & Legal Theory Research Paper Series
[25]*Ibid.*

transaction that we choose to focus. Whether it is where the act originated (State A), whether it is where the causation occurred (State B), or where the harmful effect took place(State C).[26]Thus, private international law rules would resolve the conundrum by selecting one element of the multijurisdictional transaction and then localizing the entire transaction based on that element.[27]The problem may be amplified in a situation where the varying states have different conflict of laws rules. Thus, depending on the laws or approach of the domestic court, the judge may exercise extraterritorial jurisdiction.

2.2 Rules of Extraterritorial Jurisdiction at Public International Law

Territorial jurisdiction is a ground for the exercise of jurisdiction which is based upon a confluence between the territory of the sovereign and the right of the state to legislate or regulate all persons within its territory.[28]At public international law, there are two primarily recognised bases for exercising territorial jurisdiction over acts or citizens. They are:-

- Subjective Territoriality Principle: - This principle basically authorises that a state may exercise jurisdiction over any act which occurs within its own borders. It would also give the state the liberty to prosecute a crime or act which

[26] Anthony J. Colangelo, "*What Is Extraterritorial Jurisdiction?*" (2014) 99 Cornell Law Review
[27]Ibid.
[28]Vaughan Lowe, International Law 171 (2007).

started in the state even though it was consummated or completed abroad.[29]

- Objective Territoriality Principle:- Under this principle, a state may exercise jurisdiction or power to adopt a law that applies to acts which take "effect" within its borders regardless of the fact that the act was performed outside of its borders.[30]It is on this principle that the importance of this exercise, especially in light of the emergence of the Internet and the various activities which it hosts have made, that this has become very important.

In *S.S. Lotus (France v Turkey,)* [31]a French steamer collided with another vessel of Turkish origin. The collision occurred in international waters in a region north of Mytilene. Eight Turkish nationals died as a result of the accident. Turkey sought to try the French officer on watch at the time of the accident for involuntary manslaughter under Turkish law. The issue of whether the prosecution violated international law was submitted by the governments of both France and Turkey to the Permanent Court of International Justice, and the court held that a state could exercise jurisdiction over conduct that affects its nationals. The case established the "Lotus principle" which now stipulates that sovereign states may act in anyway that they wish as long as they do not contravene an explicit prohibition. It was reasoned by the

[29] Jurisdiction with Respect to Crime, 29 AM J. INT'L L. 435, 484–87 (Supp. 1935)

[30]www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_16_Text.htm(Accessed on 6 March 2017)

[31]*S.S. Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

courts that a specific rule as to the exercise of jurisdiction could not be laid internationally. The court stated:

> It would....in many cases result in paralysing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their States' jurisdiction[32]

In *United States v. Al Kassar*, [33]it was held by the court that

> Fair warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.

Notwithstanding the various exercises of extraterritorial jurisdiction and its emerging importance in the world, especially in light of phenomena such as globalisation and the internet, it does have its limitations.

3.0 LIMITATIONS TO EXTRATERRITORIALITY

3.1 Comity

Comity is a nearly ancient principle which has subsisted and has become trite under international law. It refers to the cohabitation and relations between all sovereign states as they show and accord one another the mutual respect expected at international law. It is "a practice among different political entities (as countries, states or courts of different jurisdictions)" involving the mutual

[32]Ibid (para 48)
[33] 660 F.3d 108, 119 (2d Cir. 2011)

recognition of legislative, executive, and judicial acts."[34] It also extends to mean "an obligation to apply foreign law."[35]From available case law, it can be seen that the courts, especially US would recognise and enforce the judgements of a foreign court, especially if that decision was decided on its merits, and no violation of rights occurred in the process.[36]

What is very important to note though, is the fact that this principle is inherently and in fact immutably a discretionary decision and not in any way a legal obligation. The U.N. General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that "no state or Group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state."[37] Thus, comity is "ill-defined and entrenched" in international law.[38] In the case of *American Banana Co.* v. *United Fruit Co*[39], it was held that the application of US antitrust laws to wholly foreign conduct would be a violation of the principle of comity.

[34]Black's Law Dictionary (10th ed. 2014), p. 324
[35]Joel R. Paul, "*The Transformation of International Comity*,"(2008) 71 Law &Contemporary Problems pp. 19- 38
[36]Hilton v. Guyot, 159 U.S. 113, 163-64 (1895**)**
[37]Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., U.N. Doc A/8082, at 121 (Oct. 24, 1970).
[38]Dan E. Stigall, "International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law," (2012) 35 Hastings International & Comparative Law Review 323-382
[39]American Banana Co. v United Fruit Co. 213 US 347 (1909)

3.2 The Rule of Reasonableness

The rule of reasonableness as limitation on the exercise of extraterritorial jurisdiction was tersely couched by the American Law Institute, when it stated that:

> A state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable

Thus a court, before exercising extraterritorial jurisdiction over a dispute, would look at whether it would be fair or expedient in the circumstances to do so. Though it must be pointed out that hardly ever is an exercise of jurisdiction avoided on this point, and that the courts would usually refuse or refrain from exercising extraterritorial jurisdiction on the basis of comity.

4.0 CONCLUSION

The utilisation of territorial boundaries to define the limits of the legislative and judicial authority of a state has never been sustainable. With the advent of the internet which traverses geographical borders, this old concept of territoriality is no longer suitable. Also, with other ills such as transnational criminal activity, cross border terrorism, propagation of hate speech, infringement on intellectual property rights, and other forms of legal issues which bring forth pertinent questions on jurisdiction, the absence of a defining line in its exercise may not be the most envisaged circumstance.

The internet especially produces a new dimension to the entire situation. With cross-border transactions and communications occurring on a daily basis, the exercise of extraterritorial jurisdiction becomes more apparent and imminent. A certain and decisive solution which has the assent of the greater majority of countries in the world is the best way to tackle this problem. It is submitted that the internet is of a highly technical nature. By virtue of this fact, it is hoped that the courts would endeavour to permit more frequently, the submissions of experts in the field. This becomes of even greater importance where what is sought is the nature of the online entity in question or the type of transactions. The opinion of experts may also come in handy in assisting the court in localizing a transaction i.e. determining what country an online activity is originated or perpetuated from.

Also, technological aids such as the geo-location filtering ordered by Judge Gomez in the *Yahoo! Case*[40] may also come in handy. This way, reprehensible content may simply filtered from being able to appear within a jurisdiction. This could go a long way to resolving conflict, and avoiding the back and forth that may arise as a result of the divergent policies and laws various jurisdictions.

It behoves on the international community and the comity of nations to produce a document that would do away with the confusion that sometimes occurs. It is submitted that a uniform internationally recognised document would be the perfect

[40] Yahoo! Inc. v. La Ligue Contre Le Racismeet L'Antisemitisme (LICRA) 433 F.3d 1199 (9th Cir. 2006)

panacea towards solving some of the controversies which arise in the exercise of extraterritorial jurisdiction.