

EXTRA-TERRITORIALITY AND THE CONFLICT OF LAWS: SECTION 23 (1) OF THE LABOUR ACT¹

*The general and almost universal rule is 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.*²

Introduction

1. Interestingly, the application of Nigerian laws to situations with foreign (international) elements has generated debates in some quarters. Notably, the controversy has recently surfaced in Labour related matters particularly with the respect to the application and scope of Section 23 (1) of the Labour Act³.
2. As a general principle in international law, it is well established that one state cannot take measures on the territory of another state by means of enforcement of national laws without the consent of the latter. As brilliantly noted by a scholar, conflict of laws, as the domestic counterpart of international law, offers insights and analogies on the germane issue of the extraterritorial application of Nigerian law, which, surprisingly, have been rarely exploited or explored.⁴
3. This paper explores the legal principles that sit behind extraterritoriality of statutes, and how such measures have come to be justified. In particular, this paper will explore the impact of this principle vis-a-vis the recruitment of Nigerian citizens when conducted by persons outside Nigeria as contemplated under the Labour Act. In addition, efforts will be made to consider the principle of extraterritorial jurisdiction in international law.

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² *As per Justice Holmes in American Banana Co. v. United Fruit Co. (1909) 213 U.S. Page 356.*

³ *Cap L1, LFN 2004.*

⁴ *Lea Brilmayer, "The Extraterritorial Application of American Law: A Methodical and Constitutional Appraisal", Available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3901&context=lcp> and accessed on 7 March 2015 at 4:18pm. 133 S.Ct. 1659 (2013); Available at <https://supreme.justia.com/cases/federal/us/569/10-1491/#> visited 7 March 2015 at 4:20pm. In that case, it was held that there is a presumption against extraterritorial application, that when a statute gives no clear indication of an extraterritorial application, it has none; see also http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf accessed on 7 March 2015 at 4:32pm.*

4. Essentially, the normal ambit of the jurisdiction of the laws of a State is the territory over which the state is sovereign. It is a well-recognized assertion and trite principle of law that a sovereign cannot legislate for another. Notwithstanding this, a number of cases have arisen where countries have sought to enforce their laws in respect of actions that have taken place within other jurisdictions. As curious as this notion might appear, International law has developed to recognize the rights of a Nation to apply their laws to actions in other sovereign jurisdictions under certain principles.

The Concept of "Extraterritorial Application" of a Statute

5. The general rule is that laws of a State are only applicable within that State and do not have extraterritorial effect. Therefore, the general position is a presumption against the extraterritorial application of laws.
6. According to a learned author⁵, there appears to be six possible reasons for the presumption: (a) international law limitations on extraterritoriality, which the legislature should be assumed to have observed; (b) consistency with domestic conflict of law rules; (c) the need to protect against unintended clashes between our laws and those of other nations which could result in international discord; (d) the common sense notion that the legislature generally legislates with domestic concerns in mind; (e) separation of powers concerns – i.e. that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary; and (f) that having some background rule that when statutes apply, extraterritorially helps the legislature predict the application of its law and the presumption against extraterritoriality is as good a rule as any.
7. Interestingly, only the notion that the legislature generally legislates with domestic concerns in mind is a valid reason for the presumption today.
8. Under the early English common law, particularly the criminal aspect, the law treated itself as completely territorial. Essentially, if the elements of a crime occurred outside England (or, even more restrictively, the venue of the court

⁵ William S. Dodge, *Understanding The Presumption against Extraterritoriality*, Vol. 16 *Berkeley J. Int'l Law*. 85 (1998) <http://scholarship.law.berkeley.edu/bjil/vol16/iss1/5>

hearing the matter), the court could not hear the case. This position was manifest in the famous *Lacey's Case* of 1583, where the defendant attacked a man on board an English ship, but the victim did not die until reaching land. Consequently, neither the Admiralty Court nor the common law courts could convict the defendant of murder, because the death did not occur in the Admiral's jurisdiction, and the attack did not occur in the jurisdiction of a common law court.

9. In essence, the extraterritoriality of one element made the crime itself extraterritorial, and not punishable by the common law. Interestingly, an Act of Parliament was specifically required creating English criminal law as to crimes with any foreign elements, and a presumption against extraterritoriality applied unless the intention of Parliament to do so was clear.

Presumption against extraterritoriality: The United States (US) Approach

10. It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'⁶ As far back as 1909, Justice Holmes noted "that the general and almost universal rule is that the character of an act; lawful or unlawful, must be determined wholly by the law of the country where the act is done" and that this "would lead, in cases of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power".⁷
11. Nevertheless, it is quite pertinent to note that the presumption against extraterritoriality does not prohibit prosecution of crimes committed outside the US where an acceptable basis in international law is found. It simply requires that Congress manifest its intent to extend the ambit of the relevant US statute to such cases. It is worth noting that a carefully delineated presumption against extraterritorial application of US laws can assist those acting outside the US in

⁶ William S. Dodge, "Understanding the Presumption against Extraterritoriality", *Berkeley Journal of International Law*, Volume 16, Issue 1.

⁷ *American Banana Co. v. United Fruit Co.* (1909) 213 U.S. Page 356 and 357.

determining when their acts, and the results of their acts, may subject them to US law.⁸

12. For instance, where a federal statute declares certain acts to be bad or prohibited, and certain results of acts to be wrongful, the application of the statute remains in the core of US lawmaking authority, where either an 'act-element' or a 'result-element' of a crime or cause of action occurs in the US. It is worth noting that the presumption against extraterritoriality would ordinarily come into play when no element occurs in the US. Once the presumption is invoked, it can be overcome only if there is clear evidence of congressional intent that the statute should be applied in the given circumstances. In other words, the presumption applies unless there is a demonstration of Congressional intent for the statute to apply extraterritorially.
13. In two recent cases, *Kiobel v. Royal Dutch Petroleum*⁹ and *Morrison v. Australia National Bank*,¹⁰ the US Supreme Court reaffirmed the presumption against extraterritorial application of federal statutes. In *Kiobel v. Royal Dutch Petroleum*,¹¹ an Alien Tort Statute (ATS) case, the wrongful acts alleged were done in Nigeria and the wrongful results (including death) occurred there as well. In *Kiobel's case*, the Petitioners, Nigerian nationals residing in the US, filed a suit in federal court under the ATS, alleging that respondents—certain Dutch, British, and Nigerian corporations—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The question presented was whether and under what circumstances courts may

⁸ In the United States (US), Federal statutes are presumed not to have effect outside of the territorial jurisdiction of the US except there is a clearly expressed affirmative intent by Congress. See <http://www.supremecourt.gov/opinions/09pdf/08-1191.pdf>

⁹ 133 S.Ct. 1659 (2013); Available at <https://supreme.justia.com/cases/federal/us/569/10-1491/#> visited 7 March 2015 at 4:20pm. In that case, it was held that there is a presumption against extraterritorial application, that when a statute gives no clear indication of an extraterritorial application, it has none; see also http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf accessed on 7 March 2015 at 4:32pm.

¹⁰ <http://www.supremecourt.gov/opinions/09pdf/08-1191.pdf> accessed on 19/3/2015 at 2:47pm.

¹¹ *Kiobel v. Royal Dutch Petroleum Co.* Available at http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf accessed on 19 March 2015 at 4:19pm.

recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the US.

14. However, the US Supreme Court held that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. The point was further made that all the relevant conduct allegedly took place outside the US and that even where the claims touch and concern the territory of the US, they must do so with sufficient force to displace the presumption against extraterritorial application. It is quite pertinent to note that the rationale for the presumption can be said to be “to protect against unintended clashes between our laws and those of other nations which could result in international discord”.¹²

The Lotus Case and Extraterritorial Jurisdiction

15. The starting point for this discussion on extraterritorial jurisdiction is The *S.S. Lotus case*¹³ (*France v. Turkey*) which was decided in 1927 by Permanent Court for International Justice. The lead judgment stated thus: “It does not, however follow that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissible rule of international law. Such a view would only be tenable if International Law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory...”¹⁴
16. As a matter of fact, States have gone ahead to enact laws with extraterritorial applications. In line with this, it is imperative that mention is made of the UK Bribery Act (2010) and the US Foreign Corrupt Practices Act (1977)(FCPA), both of which create liabilities even where the corrupt act occurred entirely outside the UK and US respectively.

Operation of the 'Effects doctrine' under International Law

¹² http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf accessed on 19 March 2015 at 4:52pm. See also *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (*Aramco*).

¹³ 1927 P.C.I.J Reports, Series A, No.10

¹⁴ *S.S. Lotus case (France v. Turkey)* 1927 P.C.I.J Reports, Series A, No.10

17. Notably, the basis upon which International law has permitted a State to exercise jurisdiction is hinged upon certain principles which will be deliberated on subsequently. These principles *albeit* vague have continually received international judicial recognition. The most notable international law principle of jurisdiction upon which a State might lay a claim for jurisdiction to try an offence beyond its borders is the 'Effects' doctrine. This doctrine was expounded upon in the *Lotus Case*.
18. The doctrine states that to the extent that an act of an individual or an entity has a substantial and detrimental effect in a state, that state has the jurisdiction to try such an offence. This is the basis on which the United States of America seems to levy their Anti-trust legislations on. Under these anti-trust legislations, a foreign company having partial operations in the US may be liable to heavy penalties under US law for engaging in anti-competitive practices even if the actual activities took place outside the US.
19. Similarly, the case of *Laker Airways v Sabena*¹⁵ illustrates the application of this doctrine in the context of US anti-trust legislation; here Laker Airways (a United States airline operator) filed a complaint with the US district of Colombia in respect of an alleged conspiracy to restrain and monopolise commerce in violation of US anti-trust legislations (the Sherman Act¹⁶ and the Clayton Act¹⁷) by 6 airlines including British Airways. The US court asserted it had jurisdiction based on the fact that the anti-competitive practices of the defendants produced substantial effects on competition within its territory. The Court held *inter alia* that once US antitrust law was declared to be applicable, it could not be qualified or ignored by virtue of comity¹⁸. This attempt to exercise extra-territorial jurisdiction was halted by the Secretary of State for Trade and Industry of the UK issuing an order and directions under the Protection of Trade Act 1980 prohibiting compliance with any request by the Department of Justice, the grand jury of the district court to produce and commercial information¹⁹. This

¹⁵ (1984) 731 F.2d 909

¹⁶ 15 U.S.C. §§ 1-7

¹⁷ 15 U.S.C. § 12-27

¹⁸ Michael M. Shaw; *International Law Fifth Edition*

¹⁹ *General Direction of the Secretary of State under section 1 of the PTIA, June 23 1983*

Court of Appeal of the UK considered the effect of the blocking orders to be a decisive factor and found that the orders rendered the US District Court action wholly untriable in regard to the airlines, “since they will be unable to defend themselves before the District Court”²⁰

20. The case of *Hartford Fire Insurance Co v California US Supreme Court*²¹ also shows the interesting interpretation of the effects principle and the extraterritorial reach of US anti-trust laws. Here the defendants who were UK insurers did not refute that their activities had an effect within the USA, but rather asserted that the US courts should decline jurisdiction because their acts were lawful in the UK where the actions took place and that any balance in the competing interests of US justice and international comity clearly favored declining jurisdiction. The US Supreme Court found in favour of exercising jurisdiction on the ground that there was no real conflict with UK law as UK law did not compel the UK companies to act the way they and hence there were no balancing interests of justice and comity to consider²².
21. In **United States v. Aluminum Co. of America (“Alcoa”)**, the Second Circuit relied on effects in the United States in holding that the Sherman Act applied to foreign companies acting abroad.²³
22. The effects principle has been said to be one of the most highly grounds on which to base an application of extra-territorial jurisdiction especially as its scope is not well articulated. An increasingly globalized world means commercial actions in one state will have several consequences on the territories of other states.

Nationality Principle

23. Another principle for the exercise of extra-territorial jurisdiction is the Nationality Principle which permits a state to exercise jurisdiction over its nationals wherever they may have been when a civil wrong or criminal offence is committed. This jurisdiction cannot be exercised till the National returns to the

²⁰ *Journal of Competitive Business and Capital Markets; Laker Airways and the Courts: A New Method of Blocking The Extraterritorial Application of U.S Antitrust Laws*

²¹ *113 S. Ct 2891 (1993)*

²² *Martin Dixon; Textbook on International Law Sixth Edition*

²³ *148 F.2d 416 (2d Cir.1945) (L. Hand, J.).*

home state. Closely related to this is the Passive Personality where a State may assert jurisdiction over an offence based on the nationality of the victim of the offence. Under passive personality, a state would have jurisdiction over all crimes where the victim was a national, irrespective of the place where the offence was committed or the nationality of the offender. In the case of *US v Yunis*, the US asserted jurisdiction over a Lebanese national who hijacked a plane with two US nationals, based on the passive personality principle.

24. This wide scope for the assertion of jurisdiction appears to create a calamitous notion of jurisdiction especially in criminal matters where an individual could be open to possibility of trial twice for the same offence; for instance where an act has created substantial effects in two states and both states assert jurisdiction based on the effects principle or where two different states attempt to assert jurisdiction based on the nationality principle and the passive personality principle. It ought to be considered if International law principles recognize and prevent this possibility of trial twice for the same offence.

The Exclusion of Foreign Law

25. It is a well-developed principle of English law that English courts will not enforce or recognize a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public of English law.²⁴ Basically, the general principle of law appears to be that a foreign law, which is otherwise applicable according to the English rules of the conflict of laws, will not be applied or enforced in England if the law, or the result of its application, is contrary to public policy. Per Lord Simon, in *Vervaeke v. Smith*²⁵ held that "There is abundant authority that an English court will decline to recognize or apply what would otherwise be the appropriate foreign rule when to do so would be against English public policy."²⁶

²⁴ *Dicey & Morris, The Conflict of Laws, Sweet & Maxwell, Vol.1, London 1993, Chapter 6, p.88; see also Kahn-Freund, Selected Writings (1978), Chap. 9 cited in Dicey & Morris.*

²⁵ [1983] 1 A.C. 145, 164

²⁶ *Vervaeke v. Smith* [1983] 1 A.C. 145, 164

26. According to Morris, “In any system of the conflict of laws, and the English system is no exception, the courts retain an overriding power to refuse to enforce, and sometimes even to refuse to recognize, rights acquired under foreign law on grounds of public policy.”²⁷
27. However, it is worth noting that under the English domestic law, it is now well settled that the doctrine of public policy “should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.”²⁸
28. In another development, it is beyond cavil that the courts of one country will not enforce the penal and revenue laws of another country.²⁹ As stated by Lord Mansfield, no action lies in England for the enforcement of a foreign revenue law.³⁰
29. However, it should be noted that the assertion of Justice Cardozo; a distinguished American jurist that ‘courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency and fairness’ has received the judicial nod of the English courts. In Justice Cardozo words:
- “the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”*³¹
30. As noted by Morris, the English courts have a residual power, to be exercised exceptionally and with greatest circumspection, to disregard a provision in the

²⁷ Morris, *The Conflict of Laws, Sixth Edition*, Sweet & Maxwell, London, 2005, p. 47.

²⁸ *Fender v. St. John-Mildmay* [1938] A.C. 1, 12; see also Morris, *The Conflict of Laws, Sixth Edition*, Sweet & Maxwell, London, 2005, p. 48.

²⁹ Dicey & Morris, *The Conflict of Laws, Sweet & Maxwell, Vol. 1*, London 1993, Chapter 6, p. 97; see also *Williams & Humbert Ltd. v. W. & H. Trademarks (Jersey) Ltd.* [1986] A.C. 368, 428, per Lord Templeman.

³⁰ *Holman v. Johnson* (1775) 1 Cowp 341 at 343.

³¹ *Loucks v Standard Oil Co.* (1918) 224 N.Y. 99, 111; 120 N.E. 198, 202 cited with approval in *Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 A.C. 883, at para. [17].

foreign law when to do so otherwise would affront basic principles of justice and fairness which the English courts seek to apply.³²

Foreign Laws Repugnant To English Public Policy

31. It is a trite principle of English law that any action brought is subject to the English doctrine of public policy. As noted in Cheshire and North's Private International Law, "Certain heads of the domestic doctrine of public policy command such respect, and certain foreign laws and institutions seem so repugnant to English notions and ideals, that the English view must prevail in proceedings in this country, for SCARMAN J has said that "an English court will refuse to apply a law which outrages its sense of justice and decency".³³ However he also struck a note of caution in suggesting that "before it exercises such power, it must consider the relevant foreign law as a whole."³⁴
32. Nevertheless, it should be noted that it is well-established that English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy.³⁵

The Extraterritorial Reach Of The Nigerian Labour Act

33. Section 23(1) of the Labour Act clearly prohibits the recruitment of citizens for employment workers in Nigeria or elsewhere by any person or association except in pursuance of an employer's permit or recruiter's licence. No cavil manifests in the application of this provision where the recruiter is within the territory where the Act is applicable – Nigeria, as undeniably, a licence would be required to perform recruitment services.
34. However, the issue would arise where such a recruiter undertakes the recruitment of Nigerian citizens from a location outside Nigeria and then the question whether a license is required, as per the Act, becomes pertinent.
35. The broad and far reaching wordings of the provision suggest that a recruiter's license is required regardless of where the recruitment exercise is conducted. Notwithstanding, it is important to consider two possible results – one where

³² *Morris, The Conflict of Laws, Sixth Edition, Sweet & Maxwell, London, 2005, p. 48.*

³³ *Re Fuld's Estate (No. 30 [1968] P 675 at 698.*

³⁴ *Re Fuld's Estate (No. 30 [1968] P 675 at 698.*

³⁵ *Gotcha City v. Sotheby's (No. 2) 1998 Times, 8 October*

the presumption against extra-territoriality is upheld and one where such presumption has been rebutted on an acceptable principle of international law. .

36. As pointed out above, laws generally have territorial effects and apply strictly to acts occurring within the territory for which the law was made. In compliance with the principle that laws do not have extraterritorial application, it means that persons conducting recruitments of Nigerian citizens outside Nigeria are not caught by the provision of the Labour Act and indeed do not run afoul of the law by engaging in recruitment without a license.
37. On the other hand, there is the application of the principle of extraterritoriality which would mean that the recruiter would in fact be in breach of the law if he recruits Nigerians without a license and shall be liable to the prescribed punishment for such breach. This position, to the authors, will be well grounded on the extraterritorial principle of the effects doctrine as earlier discussed.
38. On the basis of the effect doctrine, one could say that to the extent that the activities of the recruiter have any substantial and detrimental effects whether intended or not, the Nigerian Court may have the jurisdiction to penalise such conduct regardless of the fact that the recruitment activities have taken place outside of its territory. Although it is difficult to perceive the possible detrimental effects recruitment may have, where such might arise the effects doctrine may be invoked. We however note that for such an act to be enforced on the basis of extra-territoriality of the Labour Act, the alleged offenders must be present within the Nigerian territory and where this is not the case the only other alternative is to enforce the particular provision of the Act in a foreign court. This would present a great degree of difficulty as the principles on the conflicts of laws which have developed illustrates that the foreign courts are not inclined to enforce the penal or revenue laws of another state. enforcement of the provision against 'offenders', so long as they remain outside the territory, would be near impossible because the foreign States are not inclined to enforce the penal or revenue laws of another State.

Conclusion

39. Whilst there is a general presumption against the applicability of a statute to conduct which has taken place abroad such presumption may be rebutted if it can be shown that there is a legislative intent that the statute is applicable to extra-territorial conduct.
40. Where this presumption has been rebutted, the principles of international law permit enforcement of a statute where the acts in contravention have produced substantial effects within its territory. This is one of the international law principles under which the extra-territorial application of a statute may be justified.
41. Any enforcement based on the extra-territoriality of a statute may only be possible where after the unlawful acts have taken place abroad, the alleged offender is subsequently present within the geographical territory of the sovereign which seeks to apply its laws to the prohibited conduct which took place beyond its territory.
42. Where the offender is not present within the geographical delineation of the sovereign, enforcement of such a law in a foreign court will render such subject to the principles on conflict of laws. The principles have shown that no foreign court will enforce the laws of another sovereign where such laws are contrary to public policy, against the principles of fairness and justice and where the laws sought to be enforced are penal and revenue laws.