

PROPRIETY AND CHALLENGES OF CONTINUOUS APPLICATION OF THE ENGLISH DOCTRINE OF JURISDICTION IN *PERSONAM*

Abstract

The paper evaluates the propriety of the English doctrine of jurisdiction in personam which tends to allow a forum court to assume jurisdiction on a matter in which it has no connection with the subject matter of conflict. The doctrine is anchored by service of processes on the non-domiciled defendant without regard to the ends of justice. Regrettably, the doctrine has become quite unpopular with the European Union States and thus regarded as exorbitant. It is curious, however, to find the English courts have continued to apply same to non-European Union defendants by depending on its internal rules of procedure against the demands of justice, hence the potential mischief capable of being occasioned by the doctrine to unsuspecting non-European defendants. Granting that the application of the doctrine to non-members is sanctioned without a proven reasonable cause, it is considered rather unfair and unjust to belabour non-members of the European Union with the doctrine. Since the continued application of the doctrine under the circumstances somewhat undermines the pursuit of justice achievable in international commercial intercourse, narrow or cautious application of the doctrine whenever necessary may be desirable to sustain the teaming international commercial relationships amongst subjects of different nations.

Key words: *Jurisdiction in Personam, Service of Writ, European Union Member States, Exorbitant Rules.*

1. Introduction

The common law doctrine of jurisdiction in *personam* which applies to defendants not domiciled within jurisdiction of the forum court, based on the service of writ alone is no doubt a very contentious rule. That, the rule is capable of doing mischief cannot be over-stressed. Judicial jurisdiction all the world over is regarded as fundamental to the proper determination of issues brought before a court of law. The jurisdiction of a court is usually conferred upon it by Constitution and in most cases by Statute. As a general rule, no court can assume upon itself powers which are not constitutionally or statutorily conferred.¹ Every jurisdiction conferred upon a court has either subject matter or territorial limits to which the court can exercise the powers so conferred. And in very rare situations especially as relating to international commercial and contractual dealings and in tortuous acts connected thereto, parties to such transactions can by consent confer jurisdiction on a court within the locality of the transaction or on a foreign court depending on the nature of the transaction and the circumstances which may surround its operations.

Jurisdiction in *personam* on the other hand, is a self-assumed jurisdiction which a court purportedly confers upon itself and exercises on person (s) by the issuance of a writ or claim form. Its basis is a transient presence of the defendant within jurisdiction and a successful service of the claim form on the defendant. The rule also allows the service of the claim form outside of the forum court's jurisdiction on the defendant notwithstanding the fact that the defendant is not present transiently or domiciled in the jurisdiction of the court. It does not matter that the defendant is a foreigner or does not domicile in England and that the cause of action has no connection with England. Yet at present, the effectiveness of this traditional rule in England and its continual application is doubted on the face of the English's adoption of the EU Regulations and the Brussels I Regulations which are currently being observed by all European Member Countries. Curiously a writer pointed out that 'this widely regarded as exorbitant rule' applies to cases outside the scope of the Brussels I Regulation and the Lugano Convention.²

As exorbitant as jurisdiction in *personam* seems and has been so regarded- hence the coming on board of the European Council Regulations, the Brussel I Regulations and the Lugano Convention. It is very disheartening to discover that many courts in Nigeria still exercise jurisdiction on the basis of service of writ when the causes of action is not related to any of the matters to which the court has been conferred jurisdiction with. This is why this paper, while commending parliamentary and judicial activism in India and Canada in not applying the jurisdiction in *personam* doctrine hook sink and line, would censure every trace or attempt of adherence to the doctrine by Nigerian Courts without mutatis mutandis. This substance-bereft but procedural based exercise of judicial jurisdiction at the international arena and domestically in some common law countries, especially Nigeria is an affront to the fundamental principles associated with the exercise of judicial jurisdiction.

*By **Christopher ASIAFITI**, Lecturer, Faculty of Law, Yenagoa Campus, Ovom, Niger Delta University, Wilberforce Island, Bayelsa State, asiafitic@yahoo.com, Phone No: 08035432747

¹Except for powers that are said to be inherent in nature, such as the power to discipline or try a lawyer who insults the integrity of the court which are also incidental from the constitutionally and statutorily conferred powers.

² These means cases that are connected to persons who are not nationals of any European Member Country and which practice the common law legal system.

It would be contended in this paper, therefore, that, there has not been any cogent rationale for its practice over the years. Thus, since the doctrine has become exorbitant for the European Nations, its perpetual employment and application to cases outside Europe is baseless. This application of the doctrine outside of the confines of the European Nation cannot be justified with all its intents and purposes and therefore cannot be said to be a just pursuit of the ends of justice which the court is set out to achieve in judicial adjudication.

2. The Concept of Jurisdiction *in Personam*

The concept, 'jurisdiction' has many faces. Its use and application is quite multifarious. It thus depends somewhat on the context in which it is put or intended. Jurisdiction, said Professor Agbade, is a word which bears diverse meanings, depending upon the purposes or nature of enquiry at hand.³ Putting it more generally, Malcolm said jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations.⁴ Confining it to the ambit of Private International Law, Morris opined that it is the rules as to jurisdiction which determines whether or not a court can hear a case.⁵ More precisely, they identify the country or countries whose countries can appropriately deal with a case.⁶ Therefore, for purposes of conflict of laws and most particularly for our purpose in this paper, it has been described as the power of a state to create or affect legal interests which will be recognized as valid in other states.⁷ According to Agbade this definition may only be valid for inter-state situations but inadequate for international purposes as there is no supranational authority outside the treaty areas to compel the enforcement of rights created by a court of one state by a court of another state through the exercise of its legitimate powers or jurisdiction.⁸

Stating it most copiously, Agbade said, it is the authority of a court to hear and determine an issue upon which its decision is sought.⁹ This authority may vary, depending on whether the issue is purely domestic or foreign.¹⁰ Jurisdiction in *personam* is thus the court's exercise of authority over a person's personal right rather than property interest.¹¹ This kind of jurisdiction as practiced by the English courts under the jurisdiction in *personam* doctrine is extra-territorial in character. It is an exercise of judicial authority which has a foreign element. It is justified on the procedural question of whether a writ can be served on the defendant. It does not matter that the defendant is not domiciled in England neither does it matter that the cause of action is not connected to England per se.¹²

Jurisdiction, whether for the purposes of international law, conflict of laws or for inter-state judicial exercise of authority over persons and things, as earlier pointed out in this paper, has its root in the constitution and statutory enactments of every Sovereign States across the globe. It is vital and very fundamental to the proper determination of a cause of action before a court of law for the primary purpose of achieving the ends of justice. This is why one tends to wonder the extent to which exercise of the doctrine of jurisdiction in *personam* has rendered the ends of justice considering the hardship capable of being inflicted on the defendant who is not domiciled within the jurisdiction of the forum court.

3. Nature of the Common Law Doctrine of Jurisdiction *in Personam*

The Common Law Doctrine of Jurisdiction in *Personam* is otherwise referred to as the Traditional Rules of Jurisdiction in actions in *Personam* under the English Legal System. These rules, according to Morris, are imbedded in the English Civil Procedure Rules which base jurisdiction on the presence of the defendant in England; the submission of the defendant to the jurisdiction; and the service of process abroad.¹³ The doctrine of jurisdiction in *personam* applies to defendants who are not domiciled in Europe. They also apply to cases outside the scope of the Brussels I Regulation and the Lugano Convention.¹⁴

³I. O. Agbade, *Conflict of Laws*, (Ibadan, Omo-Ade Printing Press, 1989), P.238.

⁴N. S. Malcolm, *International Law*, 5th Ed., (Cambridge, Cambridge University Press, 2003). 572.

⁵ See J. H. C. Moris, *Conflict of Laws*, 8th Ed. (London, Sweet and Maxwell, 2012), 57.

⁶ *Ibid.*

⁷ American Restatement Second, Section 42 cited in Agbade, p. 238.

⁸ *Ibid.*, p. 238.

⁹ See the case of *Society Bic S. A. v. Charzin Ind. Ltd* (2014) 234 LRCN SC 182, at 187 where the Supreme Court of Nigerian defined jurisdiction as the dignity which the Court has to do justice in a cause or complaint brought before it. It is the limits imposed upon the power of a validly constituted court to hear and determine issues with reference to subject matter, the parties and the relief sought. See also the cases of *Ikine v. Edjerode* (2001) 92 LRCN 3288 at 3316.

¹⁰ *Ibid.*, p. 239.

¹¹ B. A. Garner (ed), *Black's Law Dictionary*, 8th Ed, p.. 870.

¹² I. O. Agbade, p. 242. This question will be discussed later in this paper.

¹³ See Morris, p. 111.

¹⁴ See Liverpool University Weekly Notes on *Conflict of Laws in Business and Commerce* (2013), P. 1.

Under common law, the extra-territorial jurisdiction of the English Court is invoked when a defendant was present in England when he was served with a claim form by the claimant and if the defendant submitted to the jurisdiction of the English Court.¹⁵ Moreover even though the defendant may not be present in England, by virtue of the Extended Jurisdiction Rules contained in the Civil Procedure Rules, a claimant can seek the leave of the Forum Court to serve the claim form on the defendant outside England and secure jurisdiction on the English court with jurisdiction in *personam*.¹⁶

It must be pointed out that the presence rule applies irrespective of nationality, or domicile, or usual place of residence, or of the nature of the cause of action.¹⁷ This doctrine was demonstrated in the case of *Maharanees of Baroda v. Wildenstein*,¹⁸ where an Indian Princess, resident in France, brought an action against an American art dealer, also resident in France, for rescission of a contract to sell her a picture. The contract was made in France and governed by French law. The writ was served on the defendant at Ascot Races during a temporary visit to England. It was held that the court had jurisdiction.¹⁹ Expressing resentment on the doctrine, Agbade said thus:

Surely, to base judicial jurisdiction on transient presence within the jurisdiction may result in trying a suit in a state in which no part of the operative facts occurred and in which neither parties live. The defendant may [as a result] be called upon to defend himself under a legal system with which he is unfamiliar. The forum court itself may not be in a favourable position to deal either with facts or with the applicable rule.²⁰

And in the opinion of Morris, the doctrine of jurisdiction in *personam* has been viewed critically, especially through the eyes of foreign lawyers as a principle which appears to rest upon a confusion of ideas.²¹ He expressed this critical view point of foreign lawyers in the following words:

Service of a claim serves a vital procedural purpose, that of putting the defendant upon notice of the claim being brought, and every legal system makes some provision to that end. But there is a distinct logical leap in moving from the proposition that a claim form is a necessary procedural step to that which makes a sufficient basis for jurisdiction. As a basis for jurisdiction, it is widely regarded as exorbitant and its use is excluded under the Brussels I Regulation.²²

This authority of the English Court to assume jurisdiction in the absence of any connecting factor whatsoever but based on procedural grounds is highly questionable. The authority with all intent and purposes is too audacious and has very wide extra-territorial tendencies without any conventional backup. This is where the attitude of the Nigerian Courts in assimilating the rule without *mutatis mutandis* would be irksome. It is therefore not surprising that the other common wealth countries such as Australia, Canada and India refused to imbibe the tradition. It is contended that the doctrine is an affront to the Sovereignty of Nations and should therefore be sanctioned. The English court has no right whatsoever to assume such authority upon itself and by its procedural rule not minding the ends of justice as well as the diplomatic protection of nationals by sovereign states in the international community. That, the doctrine is a glaring disregard by the English Court of the Principle of Comity and Sovereignty of Nations cannot be successfully impeached with all sense of responsibility.

4. The Doctrine of Jurisdiction in *Personam* in some other Common Law Jurisdictions

Indian Courts do not exercise jurisdiction on a person simply by the service of a writ or a transient presence of the person in India.²³ An Indian court assumes jurisdiction over a suit if the defendant actually and voluntarily resides or carries on business, or personally works for gain, at a place within the jurisdiction of the court, or where the

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ See Morris, p. 112.

¹⁸ (1972) 2 Q.B. 283

¹⁹ This decision however would have been different if it were held now by virtue of the Exorbitant Rule as provided under the Brussels I Regulation and the Lugano Convention to which France is a member of the European Union. Therefore at present the doctrine of jurisdiction in *personam* does not apply to any member of the European Union

²⁰ I. O. Agbade, Op. cit. p. 242.

²¹ Morris, Op. cit. p.112

²² Ibid. It should be added that an American judge criticized the rule as compelling the traveler to run the gauntlet of litigation under threat of snap judgment and as offering premiums to scavengers of sham and stale claims at every centre of travel. See J. Hammersley in *Fisher, Brown & Co. v. Fielding* (1895) 67 Conn. 91 143 34 All, 714,729- cited in I. O. Agbade, p. 245.

²³ Atul M. Setalvad, Conflict of Laws, (2nd Ed, LexisNexis- Burrerworths Wadhwa, India, 2009), PP. 193-194.

cause of action, or part of it arises within the jurisdiction of the court.²⁴ In the case of *Mohankumaran Nair v. Vijayakumaran Nair* AIR²⁵ the court pointed out that the relevant point of time is when the suit was instituted: if the defendant resided outside India at that time, the court had no jurisdiction, and it is immaterial that he subsequently resided within the jurisdiction of the court.

Furthermore, in determining whether a court has jurisdiction under section 20 of the Civil Procedure Code, the nationality of the defendant is irrelevant,²⁶ and provided the cause of action or part of it has arisen within jurisdiction of the court, the court can proceed against non-resident foreigners.²⁷ This is a clear departure from the England position which assumes jurisdiction irrespective of the fact that the matter is not connected to England but based primarily on effective service of the writ on a person who may be out of jurisdiction or was present within jurisdiction transiently. It is contended that the Indian position on jurisdiction in *personam* appears fairly reasonable. Yet the point should be stressed that except as relating to transient presence of the defendant in India plus the cause of action having to be connected to India either in part or whole which properly determines the courts' exercise of jurisdiction, where the defendant voluntarily submits to jurisdiction, the court will have authority to entertain the suit.²⁸

Another country which has applied the Common Law Doctrine of Jurisdiction in *Personam* a bit differently is Canada. Here consent of the defendant to the jurisdiction of the court is sacrosanct. A person is regarded as having consented to jurisdiction if he approaches the court as a plaintiff in a counter-claim or by choice through an earlier agreement made voluntarily to confer jurisdiction on the court in relation to a given dispute.²⁹ Most importantly however, the Canadian Courts have generally declined to exercise jurisdiction in cases where the defendant is temporarily present within jurisdiction and the matter has no real connection with the forum.³⁰

5. Application of the Doctrine of Jurisdiction in *Personam* in Nigeria

The English Doctrine of *Jurisdiction in Personam* was introduced into the Nigerian Legal System by the West African Court of Appeal in the case of *Bruce v. Barrett*.³¹ Following this introduction of the doctrine, the court in *Olayiwola v. Nwadike*³² exercised jurisdiction on a matter even though it lacked the power to entertain the suit brought before it for determination. While confirming the lack of express jurisdiction on the cause of action, Beckley, J. stated as follows:

It is my view that in spite of the absence of specific provision in Order 6 of the High Court Rules...the High court, under the principle of effectiveness and/or submission has jurisdiction to take and determine a suit in torts where the cause of action arose within its jurisdiction.³³

Application of the doctrine, nevertheless, was made clearer in the case of *Bazarsi v. Visinoni Ltd*³⁴ when the learned judge adopted as the law in Nigeria the legal proposition contained in the *Halsbury's laws of England*.³⁵ Here it was stated that the English courts have jurisdiction to entertain an action relating to a contract, wherever made, in all cases where the parties are effectively before the court.³⁶ It is doubted if this is the current position with regard to exercise of jurisdiction by the Nigerian courts.

²⁴ See section 20 of the Indian Code of Civil Procedure, 1908.

²⁵(2007) 14 SCC 426.

²⁶ See the case of *VE Smith v. Indian Textile Co.* AIR (1927) All 413.

²⁷*Rambhat v. Shankar Baswant* (1901) ILR 25 Bom 528, 3 Bom LR 82.

²⁸ This is regarded as an exception to the traditional jurisdiction rule of presence and service of writ. See also the case of *British India Steam Navigation Co. Ltd v. Shanmugha Vilas Cashew Industries* (1990) 3 SSC 481.

²⁹ See Castel and Walker, *Canadian Conflict of Laws*, 6th Ed. Para 11.7- cited in Atul, M. S. *Conflict of Laws*, 2nd Ed. (LexisNexis Butterworths, New Delhi, 2009), P. 193.

³⁰*Ibid.* Yet the point may be stated of the fact that despite this general apathy by the Canadian Courts, in most cases as was opined by Castel and Walker, *jurisdiction in personam* is exercised by courts by virtue of presence, domicile and when the defendant submits to the jurisdiction of the court or when the cause of action has real or substantial connection to the province.

³¹1 W.A.C.A. 116.

³²(1967) N.M.L.R. 15.

³³ It is contended that the principle of effectiveness and submission are necessary implications of service of writ. The fact that the judge did not expressly indicate the court's application of the doctrine of *jurisdiction in personam* is immaterial.

³⁴(1973) N.N.L.R.I.

³⁵I. O. Agbade, p. 244.

³⁶ *Ibid.* p. 245.

Generally, courts in Nigeria do not exercise extra-territorial jurisdiction. It is contended that by the provisions of the Constitution of the Federal Republic of Nigeria, each court created or established therein has limited jurisdiction in respect of the subject matters to which it is conferred by the constitution,³⁷ and if created by statute, the court can only exercise jurisdiction on the matters it is therewith empowered and not more as the English Courts do.³⁸

Illustrating the fundamental importance of jurisdiction in the case of *Dosumu v. N.N.P.C.*³⁹, the Court of Appeal, Lagos Division stated as follows:

The issue of jurisdiction in any given matter is very fundamental. It is so fundamental to the extent that it is never conferred in obscurity. Jurisdiction is a veritable judicial power that is so crystally obvious to all beholders of the Constitution vis-à-vis the conferring law. Thus, microscopic eyes are not required to discern it.⁴⁰

In determining the issue of jurisdiction, it is the claim endorsed on the Writ or stated in the statement of Claim that will be considered, not the facts averred in the Statement of Claim or the affidavit evidence to be relied on by the plaintiff.⁴¹

In view of these cases, would it be correct to say that exercise of jurisdiction is still based on the service of writ? This is very much doubted. Yet, the point must be emphasized that the courts did not make reference to cases involving foreign elements. And it is doubted if a court of law is constitutionally or statutorily endowed with authority to exercise jurisdiction extra-territorially. This is why the audacity of the English court to exercise jurisdiction on a matter that is not connected to it in any form whatsoever is considered as being too overreaching. It is not out of place, therefore, that European Union Member Countries unanimously regarded the practice rather too exorbitant in character and ultimately excluded its practice and application to EU Members. What is nevertheless curious and rather disheartening is its application to matters involving defendants who are not of EU origin.

6. The Doctrine of Jurisdiction in *Personam* in Present-day England and Europe

Very surprisingly, the common law doctrine of *jurisdiction in personam* which is also referred to as the traditional rules of jurisdiction does not apply to members of the European Union. The rules have been regarded as being exorbitant.⁴² Thus, the doctrine can only be used in England by a plaintiff against a defendant who is not domiciled in any of the European Union Member countries. A number of European Union Conventions to which the United Kingdom has subscribed have significantly altered the law.⁴³ For instance, the United Kingdom is a party to the Brussels and Lugano Conventions and has implemented them. As a result, jurisdiction of English Courts at present, in England, is regulated by the terms of the Conventions.⁴⁴ These conventions, however permit the application of the doctrine in England and to members outside of the European Union, namely because it is considered exorbitant to other European Member Countries.⁴⁵

7. Mischief of the Doctrine of Jurisdiction in *Personam*

The doctrine of *jurisdiction in personam* has been regarded as being exorbitant. Consequently, European Member Countries have agreed that the doctrine should not be applicable to member countries. Nonetheless the doctrine has

³⁷ See for instance Chapter VII of the 1999 Constitution (as amended) which created different courts of superior records as well as the adjudicatory powers of each of the courts therein created, including the Supreme Court of Nigeria. See particularly sections 232, 233, 239, 240, 251 and 271 which stipulates or prescribe original and appellate jurisdictions of courts of superior records in Nigeria. Other courts which are creation of state laws, the jurisdictions are accordingly prescribed.

³⁸ For instance the National Industrial Court is created by the Legislature to exercised jurisdiction over matters relating to labour disputes. With respect to issues affecting the Federation, it is the Federal High Court that has primary jurisdiction to determine such. The Federal High Court does not have jurisdiction over matters which fall within the confines of the states and vice versa.

³⁹(2014) 6 N.W.L.R Pt 1403, 286.

⁴⁰ See also the cases of *Mandara v. A.-G., Federation* (1984) 1 SCNLR 311; *A.N.P.P. v. R.E.C. Akwalbom State* (2008) 8 NWLR Pt 1090, 453.

⁴¹*Society Bic S.A. v. Charzin Ind. Ltd* (2014) 234 LRCN 182,188. See also the case of *A.-G., Lagos State v. A.-G., Federation* (2014) 9 N.W.L.R. SC 217, 231.

⁴² See Article 3 (2) of the Council Regulation (EC) No. 44/2001.

⁴³ See M. S. Atul, p. 189.

⁴⁴ *Ibid*, p. 192.

⁴⁵ Yet it is not exorbitant to defendants who are not domiciled in Europe. What reasoning!

been permitted to apply to defendants who are not members of the European Union. The exercise of jurisdiction on the basis of mere presence of the defendant in England when the cause of action is not connected to the court in any manner cannot be a valid basis for the exercise of jurisdiction.

As was correctly pointed out in the case of *Dosumu v. N.N.P.C* supra, exercise of jurisdiction should not be shouldered on obscurity or in vacuum. Jurisdiction in *personam* with all intent is an authority of the court exercised in space. Even if the defendant succumbs to it, to the extent that the cause of action is not related to the forum court, should be a good ground for the court to refuse to accept the matter for determination. Judicial adjudication of private rights of individuals should be the convenience of the parties, the court and the ends of justice.⁴⁶ Putting it more succinctly, Agbade said:

Rules of jurisdiction for international situations must have as one of their primary objectives, the effort to achieve an equitable balance between the protection of the plaintiff against an elusive defendant and the protection of the defendant against the whims of a vindictive plaintiff.⁴⁷

In view of the above, it stands to reason that *jurisdiction in personam* as practiced in England is not set out to achieve such expected ends of justice. It is believed that the English court does not consider the ends of justice and the likely inconvenience of the defendant. The English court places more premiums on the interest of the plaintiff than that of the foreign defendant who is not domiciled in England for the purposes of the cause of action. This is why Canada must be commended for declining to exercise jurisdiction in cases where the defendant is temporarily present within jurisdiction and when the matter has no real connection with the forum. As for Nigeria, it has not been made abundantly clear as to whether the English doctrine of *jurisdiction in personam* is applied hook sinker and line. The cases reviewed supra seem not to suggest the contrary.

8. Conclusion

The doctrine of *jurisdiction in personam* with all intent appears to be an exercise of a court's authority in obscurity or vacuum. It would be proper, therefore, that it should be applied alongside jurisdiction in *rem*. This will render the authority of the court constitutional as well as statutory as is the traditional requirement in almost all of the countries. Jurisdiction in *personam*, which somewhat seems to be an exercise of an extra-territorial adjudication lacks any form of international sanction. Consequently, to the extent that it is not convenient, unconnected to the real cause of action and seems to betray the ends of justice, it should not be applied in any form. Its application should, thus be discouraged except in cases where it would be just and most practicable in the given circumstances.

Because jurisdiction in *personam* is exorbitant in character as well as cumbersome in operation, the European Union Members have agreed to exclude its application to member countries. It is, however, surprisingly sad that the Convention sanctions the application of the doctrine in cases involving Non-European Union members. The rationale behind the application of the doctrine to cases outside the European Union has not been justified and is inherently unjustifiable by whatever standard conceivable and, therefore, largely unacceptable. What has become exorbitant for European Union Members should in all dimensions be for non-members. This is why Nigerian Courts must endeavour to remove every trace of application of jurisdiction *in personam* in our legal system and judicial adjudication. In this regard, the court's exercise of jurisdiction should be constitutional and statute-based. It is time the Nigerian Legal System did away with exorbitant common law principles. The rules in England are changing. We should thus be proactive and make laws that are peculiar and relevant to our needs and suitable to our local circumstances.

⁴⁶I. O. Agbade, Op. cit., p. 251.

⁴⁷ Ibid.