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**ISSUE OF JURISDICTION IN CYBERSPACE AND APPLICABLE LAWS**

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## Issue of jurisdiction in cyberspace and applicable laws

### INTRODUCTION

Jurisdiction refers to the power of a government to exercise authority within a territory or restriction or the legal responsibility of a court to determine disputes. This principle of territoriality has been diminished by the digital technologies in the present era which has led to the evolution of almost another international space.<sup>1</sup> As the World Wide Web (“www”) has increasingly become a convenient tool of business and communication, it has led to a virtual world which cannot be defined within a territorial limit, thereby making the issue of jurisdiction in cyberspace complicated. This newsletter explores the existing laws, precedents set by the courts and efforts taken by the international community to identify the issues involved in the sphere of jurisdiction in cyberspace and identify means to “access” extra-territoriality.

#### 1. Cyber-jurisdiction: issues of concern

The internet is network of networks, some of the networks are closed networks, not linked to other computers or networks, but many are connected otherwise, designed to be centralized, capable of rapidly transmitting communication without direct human involvement or control and having the automatic ability to re-route communications if links are damaged.<sup>2</sup> Messages on the internet do not necessarily travel along the same path. Internet is indifferent to the physical location of the machines between which the information is routed and there is no physical connection between an internet address

and a physical jurisdiction. It, therefore, poses diverse practical questions.

Jurisdiction in cyberspace refers to the power exercised by operators or users of www to establish rules and enforce them in cyberspace which is independent of any territorial government. The preliminary issue is how the existing territory based jurisdiction principle be applied in the cyberspace. Further, has the person posting any information on the www to comply with the laws of every state from where this information can be assessed, and, subsequently, do the courts have personal jurisdiction over the creator of the information/operator of the website, are other issues.

What emerges as the major issues of concern are -jurisdiction to adjudicate a dispute at a particular location (a forum/site), the law applicable to the dispute or choice of law and the recognition and enforcement of judgments in courts in foreign jurisdictions. In absence of treaties to harmonize these issues, principles of international laws may be applied to the question of jurisdiction and enforcement.

#### 2. Cyber-jurisdiction in India and applicable laws

There are three principal legislations in India which are of relevance. Each of them is discussed below. The issue of cyber-jurisdiction in India has been equated to territoriality and for extra-territorial reach the effect principle has been used.

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<sup>1</sup> There are three international spaces, namely, Antarctica, Outer Space and High Seas. Darrel Menthe, “Jurisdiction in Cyberspace: A theory of International Space” 4 Mich. Telecomm. Tech. Rev. 69(1998).

<sup>2</sup> A.C.L.U. v. Reno, 5(1929) F.Supp. 824 (E.D.P.a 1996).

## 2.1 The Information Technology Act, 2000 (“the Act”)

The Act brings within the jurisdiction of Indian court any act which is an offence under the Act and committed either within or outside India. Section 1(2) of the Act states that: *“It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention thereunder committed outside India by any person.”*

Further, Section 75 of the Act also extends jurisdiction to any offence or contravention committed outside India by any person. Section 75 of the Act is extracted as:

### **“75. Act to apply for offence or contravention committed outside India.**

- (1) *Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.*
- (2) *For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involved a computer, computer system or computer network located in India.”*

This section stipulates that the nationality of a person is not a relevant consideration. However, the provision specifies that an offence or contravention which was committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network which is located in India.

## 2.2 Indian Penal Code, 1860 (“IPC”) and Code of Criminal Procedure, 1973 (“CrPC”)

Certain provisions of the IPC also suggest applicability of its provisions to illegal actions committed outside India. Section 3 of the IPC reads as: ***“Punishment of offences committed beyond, but which by law may be tried within India. Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the***

*provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.”*

Section 4 of the IPC applies the nationality doctrine:

***“Extension of Code to extra-territorial offences*** - *The provisions of this Code apply also to any offence committed by:*

- (1) *any citizen of India in any place without and beyond India;*
- (2) *any person on any ship or aircraft registered in India wherever it may be.*

*Explanation – In this section the word “offence” includes every act committed outside India which, if committed in India, would be punishable under this Code.”*

This section deals with acts and omissions of Indian citizens abroad and regulates the action of any person irrespective of his/her nationality, if such person happens to be on a ship or aircraft registered in India. Similarly, section 188 of the CrPC provides that even if a citizen of India outside the country commits the offence, the same is subject to the jurisdiction of courts in India.

## 2.3 Territoriality

In India, jurisdiction in cyberspace is similar to jurisdiction as that relating to traditional crimes and the concept of subjective territoriality will prevail. Chapter XIII of CrPC relates to jurisdiction of courts with regard to criminal matters. The primary theory of territoriality is embodied in section 177 of the CrPC which provides that *“Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.”*

Section 178 of the CrPC provides that even if a part of the offence is committed in India, it can be the place of inquiry:

### ***“178- Place of inquiry or trial-***

- (a) *When it is uncertain in which of several local areas an offence was committed, or*
- (b) *Where an offence is committed partly in one local area and partly in another, or*

- (c) *Where an offence is a continuing one, and continues to be committed in more local areas than one, or*
- (d) *Where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.”*

Though the subjective territoriality<sup>3</sup> provides jurisdiction beyond boundaries to a certain extent, the objective territoriality<sup>4</sup> assumes greater significance when offenders involved in cross-border crimes are required to be put on trial in India. Additionally, the “consequence” principle clarifies that where an act is done abroad and the criminal effect is produced in India, the crime is taken to be committed in India. With www giving a much wider and global scope of committing crimes (the consequences of which can be almost anywhere in the world), providing for a global jurisdiction to tackle with the crime can well be justified by acceptance of the principle of “jurisdiction by effects.”

## 2.4 Effects doctrine

Section 179 of CrPC embodies the effects doctrine, which reads as under:

**“179. Offence triable, where act is done or consequence ensues:** *When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued.”*

The Supreme Court in *State of Madhya Pradesh v. Suresh Kausbal*,<sup>5</sup> while discussing the import of this section inferred that section 179 of CrPC contemplates two courts having jurisdiction and the trial is permitted to take place in any one of those two courts. One is the court within whose local jurisdiction the act has been done and the other is the court within whose local jurisdiction the consequence has ensued. The application of this principle in cyberspace has to be espoused owing to the peculiarity of www, which indubitably permits initiation of the crime from any part of the world with

its consequences in any other part of the world without any territorial boundaries.

The Supreme Court in *Dhannalal v. Kalawatibai*<sup>6</sup> held that “there is no wrong without a remedy (*ubi jus ibi remedium*). Where there is a right there is a forum for its enforcement. The plaintiff is dominus litis, i.e., master of, or having dominion over the case. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of the plaintiff’s choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of law.”

With so many outsourcing activities in India and the popularity of networking websites, a fresh continuum of cases related to “Personal Victimization” and “Economic Offences” in the nature of data protection, cyber defamation, security, etc have evolved. Hacking initiated at one place adversely affects any other place/institution and brings them to limbo. These can only be contained by the effective widening of the reach of law. The concept of consequence and cause of action extends jurisdiction but a conflicting situation arises where there is no defined regulation at one of the places. For example, the Act does not provide any provision to catch the internet pornography on foreign websites but only for sites in India.<sup>7</sup> The effect is caused in India as well.

In *SMC. Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra*,<sup>8</sup> India’s first case of cyber defamation, High Court of Delhi assumed jurisdiction over a matter where a corporates’ reputation was being defamed through e-mails and passed an important ex-parte injunction. In *Sony.Sambandh.com* case, a complaint was filed by Sony India Private Ltd, which runs a website called [www.sony-sambandh.com](http://www.sony-sambandh.com), targeting Non-Resident Indians. The website enables them to send Sony products to their friends and relatives in India after they pay for it online. In May 2002, someone logged onto the website under the identity of Barbara Campa and ordered certain products, gave her credit card number for payment and requested that the products be delivered to Arif Azim in Noida.

<sup>3</sup> This refers to the situation when an act has been initiated in a territory but consummated abroad.

<sup>4</sup> This refers to the situation when an act has been initiated abroad but consummated within a territory.

<sup>5</sup> (2001) 4 SCAPE 233.

<sup>6</sup> (2002) 6 SCC 16.

<sup>7</sup> Section 67 of the Act.

<sup>8</sup> Suit No. 1279/2001. This case is still pending.

After following the relevant procedures of due diligence and checking, the company delivered the items to Arif Azim. At the time of delivery, the company took digital photographs showing the delivery being accepted by Arif Azim. After one and a half months the credit card agency informed the company that this was an unauthorized transaction as the real owner had denied having made the purchase. The court convicted Arif Azim under section 418, 419 and 420 of the IPC,<sup>9</sup> this being the first time that a cybercrime has been convicted. The effect of the crime was generated in some other country which was actually committed online in India.

### 3. Cyber-jurisdiction: International efforts and U.S. experience

A country may employ enforcement measures against a person located outside its territory on the grounds of reasonable circumstances to press charges, opportunity to be heard, courts having jurisdiction and principle of natural justice. So far no treaty or global organizations have been able to formulate uniform policy acceptable to the global forum.

#### 3.1 International efforts

The Hague Convention on “Jurisdiction and Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters” discussed several pertinent issues regarding the policy formulation. The American Bar Association also initiated a “Cyberspace Project 2000” and formulated a “Model for Jurisdictional Analysis.” This model for jurisdictional analysis was based on traditional principle of jurisdiction that is categorized as legislative, judicial and executive jurisdiction, and subsequently leads to issues of choice of law, choice of forum and enforceability, respectively.

#### 3.2 American laws and practice

The due process clause of the United States Constitution permits jurisdiction by way of the long arm statutes. The defendant has to show continuous

<sup>9</sup> Section 418 deals with cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect; section 419 deals with the punishment for cheating by personation and section 420 deals with cheating and dishonestly inducing delivery of property.

and constant contacts with the state to subject to general jurisdiction. The three-part test to permit jurisdiction requires showing the purposefully direct transaction,<sup>10</sup> claim arising out of, or related to defendant’s forum and exercise of jurisdiction confirming fair play and substantial justice.

The U.S. courts have held<sup>11</sup> that simple creation of website that is available to any user who can find it on internet cannot be considered as an act of purposeful avilment of the benefits. The effect of the website may be felt locally and globally as well, but this is not enough to establish an act that is purposefully directed towards a particular state. However, consumers of online services across the country would find themselves being hailed into court in the state in which the suppliers’ billing office and database happened to be located.<sup>12</sup>

The fundamental rule for categorizing a continuum of websites was laid down in the Zippo case.<sup>13</sup> It was held that the likelihood of personal jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of commercial activity carried over www. The “sliding scale doctrine” or a “continuum,” was laid down by the court for measuring websites, which provided these three categories: (i) where it clearly does business over the www, i.e., integral to the defendant’s business, (ii) a passive website, (iii) situations where the exercise of jurisdiction depends upon the level of interactivity and the commercial nature of the exchange of information or interactive websites.

### 4. Cyber-jurisdiction in click-wrap contracts

A click-wrap contract refers to electronic contracts requiring users to express their consent by clicking on an “I accept” button, or an equivalent,

<sup>10</sup> If the defendant fails to show continuous and constant contacts with the state to subject him to the general jurisdiction, the non-resident defendant must then intentionally direct his activities or consummate some transactions or perform some act by which he avails the privilege of conducting activities in the forum thereby involving the protection of its laws.

<sup>11</sup> *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, S.D.N.Y. 1996.

<sup>12</sup> *Press-Kap, Inc.-System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. App.1994).

<sup>13</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952F. Supp.1119 (W.D.Pa.1997).

even before completing their purchase. Frequently, the users never really read the fine print. In addition to acceptance among courts, the state and federal legislation gives statutory support to these new contract forms.<sup>14</sup>

The court in *Comb v PayPal*,<sup>15</sup> held that the click-wrap agreement was unconscionable because it was a standardized contract, imposed and drafted by the party who had the superior bargaining position. Customers only had the opportunity to accept or reject the agreement, and not for negotiation of any of the terms. The court found a “lack of mutuality” in such agreement terms which provided that it could be changed by Paypal at any time and without prior notice, subject to Paypal posting the revised agreement on the website and also, in the event of dispute, Paypal could restrict accounts and withhold funds until such time as it was proven that the customer was entitled to the funds in dispute. Paypal could not show that “business realities” justified such one-sidedness.

## CONCLUSION

Owing to the absence of consistency in the regulations or legal principles followed to settle disputes of similar nature arising in the cyberspace in different places of the world has caused confusion. Indian laws have so far dealt with two sets of reasoning- cause of action and consequences. Foreign judgments are conclusive in India though not in certain circumstances as enumerated in section 13 of Civil Procedure Code.<sup>16</sup> The www involves within its sphere persons, institutions, and nations engaged in personal and commercial communication, the jurisdictional issues would come more often. The

only way to avoid this is to get more means available to “access” extra-territoriality.

*(Neeraj Dubey)*

<sup>14</sup> By way of Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transaction Act.

<sup>15</sup> Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002).

<sup>16</sup> “13. **When foreign judgment not conclusive.**

*A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except- (a) where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of <sup>1</sup>[India] in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India.”*



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