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A STUDY ON TRIAL OF ONLINE CRIMES, IN PERSPECTIVE OF JURISDICTIONAL CHALLENGE

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ABSTRACT

Cybercrimes are boundary less crimes. It may be good to say that these are computer related as well as computer generated crimes. Cybercrime is also known as digital crime, computer crime or online crime. Internet plays a very important role in spreading cybercrimes. It establishes a medium through which thousands of computers are inter connected to each other and make a source of universal jurisdiction. Therefore jurisdictional issue is a big issue or even problem to curb or mitigate online crimes.

1. Introduction

The internet is a collection of many interconnected computer systems via network, allows theirs to share digital information, search for data and communication electronically with one other. Now computer system or internet has become integral part of the fast developing society. Internet or cyber space has no physical to body but working as a real body or model. Cyber space is a virtual (nonphysical) model or space created by computer systems and shared virtual or metaphorical environment. The cyber space or internet inhabitant s shares a data that is visualized, heard and touched by surfing Internet. In other terms it is an artificial virtual or conceptually created mental environment but its working mechanism is real and visualized.

The term “Cyber space” was coined by the science fiction writer named William Gibson in his short stories and novels to denote the separate space created by internet. The William Gibson scribed the term cyber space in his book “Burning chrow” in 1982 but he got popularization from his Hugo award winning Novel ‘Neuromancer’ in 1984 and his work acknowledged by John Perry Barlow in his book crime and puzzlement published in 1990.

Working mechanism in Cyber space

Cyber all the elements of a state like territory means space inhabitants (citizens) and sovereignty. Hence the route of journey in cyber space in 3D based. It means contains textual, audio and video, three types of electronic signals that move freely. Cyber model is characterized by the use of electronics and more and more by its electromagnetic spectrum to store process modify and exchange data through network system in virtual sphere and get directly associated with physical infrastructure.

In cyberspace the small entity is sole computer, when it interconnected with computers systems through internet it maps huge model. In nineteenth century a professor of Cambridge University named Charles Babbage had considered the future of Modern digital computer system he is known as father of modern computer. He is known as father of

modern computer. Computer is an electronic device it can store, preserve, process and reproduce data on demand in desired form. It is a complex instrument with more complex component.

Federal Networking Council (FNC) collectively passed a resolution on 24 October 1955 in which they define the term ‘Internet’. This definition was developed by the collective opinion of members of the Internet and intellectual property rights communities. According to FNC ‘Internet’ is universal information sharing virtual system, it¹⁻

- (i) Establish connection for communication through Internet Protocols (IP) and its variant extensions.
- (ii) Able to support and share digital information like texts, videos and sounds, making an advance globally spread communication medium.
- (iii) Making a strong communication system with weaker and fragile evidences,
- (iv) Provides, uses or makes accessible either publicly or privately high level services layered on the communications and related infrastructure described herein.

The term ‘cyber space’ came into the arena of law to interpret the comparison between breaches of law in cyber space to the breach of law in real space, the case of **Renov. American civil Liberties union**, the American supreme court in this case interpret the term cyber space and define the comparison between the breach of law in cyber space to the breach of law in real space and applied the laws of real world to the cyber space.

Jurisdictional questions on online crimes

The internet today maps a biggest scoff of the law. Not even the modern law. Not even the modern law but also the traditional law. The very basic of every justice delivery system is the jurisdiction. The term jurisdiction refers to the authority of a court to hear a case to resolve the dispute. Simple courts have power to issue a process and decide a case or issue a decree is called the court possess jurisdiction. Crimes are also

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in want of proper and affective justice delivery system of court. Jurisdiction gives to a court power to hear a case like wise internet crimes are also in want to proper and effective justice delivery system of court.

The complete synonym of the term of jurisdiction is power. The power of the court to preside over a case, heard a case completely said a court has jurisdiction.

In the context of a state, a court exercise jurisdiction over any matter up to the extent given to it by constitution or law or legislation on of sovereignty of state while the other context includes exercise of authority or powers of a national court or judicial authority to exercise imply and execute national penal and procedural laws with competency in order to investigate and decide a case or dispute on the basic of existing principles legislation or law and precedents or jurisprudence of concerning area of law.

It is well known that the internet is borderless and it has no geographical boundaries. Internet jurisdiction has been one of the most controversial areas of internet governance because there are different approaches for different states. Internet jurisdiction intercross different areas of law and a number of national courts around the world have issued several landmarks judgments jurisprudence and precedent in order to resolve the legal issues related to the functioning and other activities of the companies, corporation and individuals belongs to different nationals and territories. Some jurist suggests that law of real or physical world may be applying to the cyber space. However the other is of the view that territorial or nationality based traditional and laws may not be applicable to cyber space or internet.

Since the legal environment of e-commerce has no geography boundaries, cyber jurisdiction extends to all communications to anyone who has access to website. The law of cyber jurisdiction includes consideration of few relevant questions which are whether a particularly activity in cyberspace is determined by the laws of that state where website is accessed or retrieved and by laws of state where internet services provides IPS (Internet service provider) is situated or located or by the laws of the State where users accessed or located or by all these laws?

Enterprises Inc. V. Chuckleberry Inc² is the first published international case. This are involved the multijurisdictional issues on cyberspace. The defendant published an obscene pornography on a website and operated it in Italy. Some of its users of USA download such web site to see it. In this case court held that distribution of obscene material in US was banned and violates the Trademark right. Since it could not stop the distribution on the global internet market but stop or prohibit access to the computer sites in United States, Therefore the defendant was prohibited from offering his sexy magazine to customers residing in United States. The court further held it is against the laws of USA and banned the website from falling under U.S. Jurisdiction only.

In another case **United States V. Thomas³**, the defendant had published pornographic materials and makes it available to the subscriber after filling a form. On filling a form the defendant giving him password to

download it and see it. The appellate court held that the effect of the defendant's criminal conduct reached the Western District Tennessee and that district was suitable for accurate fact finding and they were amenable to the jurisdiction of Tennessee of court, the court has the jurisdiction their appeal therefore dismissed and conviction upheld by the appellate court.

US approach on jurisdiction

The US constitution contains lineal principles of jurisdiction, which are personal jurisdiction, provincial (local) state laws and due process law, have been used to resolve online crimes or disputes.

A. Personal jurisdiction

Capacity of court to decide disputes on the point of person on physical presence of a person is covered under personal jurisdiction. Personal jurisdiction is of two types

1. General Jurisdiction
2. Specific jurisdiction

1. General jurisdiction

If the defendant has sufficiently 'Continuous or systematic contacts with the forum state it comes under general jurisdiction. Historically close contacts with the state like residency or domicile is also sufficient to come within the ambit of personal jurisdiction.

2. Specific Jurisdiction (minimum contract theory)

If the defendant has minimum contact with the forum state and defendant has/ had purposefully availed the privileges which are/ were directly connected with the defendant's activities. Under the concept of specific jurisdiction there is no need or burden to defendant to establish maximum/more interactivity in the form of contact with the adjudicating state.

- B. Provincial (local) state laws The US State constituted its own provincial state laws to exercise personal jurisdiction over tortuous or other acts of any non-resident or non-domiciliary.

C. Due process of Law

The fifth and fourteenth Amendment of US Constitution limits the power of court and allows them to follow traditional concepts of law of fair play and substantial justice to exercise personal jurisdiction over any nonresident defendants. These provisions also imply both long arm statue and due process of law.

US approach on personal Jurisdiction (Purposeful availment test)

(General personal jurisdiction)

General jurisdiction the U.S. Court has been extended the scope of traditional principles of personal jurisdiction over cyber space or internet. The traditional principles of personal jurisdiction that were applied to the real or physical model are being applied on virtual system of an transaction personal jurisdiction in cyber space are must fulfill the following conditions

- There must be 'purposeful availment' of privileges which has/ had established direct connection with the activities of the defendant in the forum state, cause of action arises from defendant's, activities in the forum state.
- The defendant must has/had minimum contact with the forum state

whether the contacts are/ were sufficient/ insufficient to establish the test of purposeful availment.

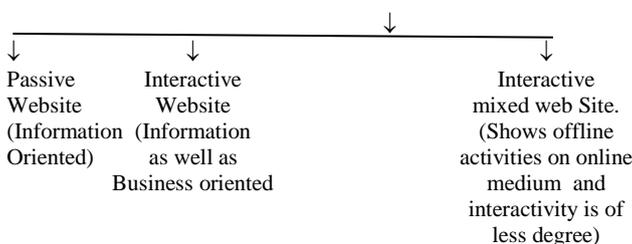
- The use of jurisdiction would be fair and reasonable. There is/was no mala fide intention on the part of defendant.
- There is no need of physical presence in the adjudicating/forum state. **International shoe co. V. State of Washington**⁴

Nature of the website

Jurisdiction is also based on the nature of website. The website includes, either passive or interactive or interactive mixed website.

The passive website merely for information purpose, i.e. information oriented, interactive website includes information as well as facilities purchasing decisions i.e. solicit business while Interactive mixed website is solicit business through online medium the offline activities and also advertise or promote via on line medium on interactive mixed website and showed interactivity of less degree. This can be explained by this below mentioned figure-

(Jurisdiction on the basis of nature of websites)



Sliding Scale Test (Specific personal jurisdiction)

The specific personal jurisdiction evolved the sliding scale theory. The sliding scale theory is also known as Zippo Test. In **Zippo manufacturing company Vs. Zippo Dot Com**⁵, the level of contact to establish specific personal jurisdiction which evolved sliding scale theory is categorized the website on the basis of interactivity there must be a progress in technology and probability that the exercised personal jurisdiction is directly proportional to the nature and commercial activity that a business entity conducts on the internet In thus the website must include commercial purposes.

Exception to Sliding Scale theory⁶

Since 1997 courts did not accept the concept of sliding scale theory for minimum contact and concept of interactivity of website as a sole basis to establish purposeful availment by the defendant to a forum state. **Cyber sell Vs. Cyber Sell**⁷ the court held that only operation of website is not sufficient to constitute personal jurisdiction. Something more is needed to establish purposeful availment something more means something else.

Effect test or theory

This is another test that was evolved on the basis of interaction with the adjudicating state. To establish personal jurisdiction under effect theory, there must be

- An international action against the forum state.
- Expressly against the forum state.
- Causing injury
- The injury which the defendant knows is suffered or likely to be

suffered in the forum state. (**Codler V. Jones**⁸)

Jurisdiction on the basis of Web server

The use of IT Infrastructure of a service provider i.e. web server, by the defendant, to host his website allow the forum state to exercise its jurisdiction over such defendant. [**Jewish Defense organization, Inc. V. Superior Court**].⁹

Indian Approach of Jurisdiction¹⁰

The Indian courts have exercised power to issue injunction or anti suit injunction to a party is said they have personal jurisdiction. When online transaction exists involving, business to business (B 2 B) and business to consumer (B2C) the issue of personal jurisdiction must be looked into from all possible sources.

- Forum of choice
- Civil procedure code, 1908
- Choice of law

These sources are dependent to each other hence they do not establish mutually exclusive categories.

(a) Jurisdiction as forum choice

The parties have been mutually agree to resolve their disputes, they would either approach any existing court having natural jurisdiction or foreign /distant court (as neutral forum), of their own choice, according to the law applicable to that court. On the other hand if one or more courts have the jurisdiction to try any suit the parties are at liberty to choose any one of the two competent courts to decide their disputes.

(b) Jurisdiction as within code of civil procedure

In context of India, the Supreme Court is the apex court of the country and High Court in each state. Such institutions are conferred with original and appellate jurisdiction to adjudicate issues or disputes arising between citizens or citizen between citizens and the state, between state and other states or between a state and the union. The jurisdictional questions are to be determined on the basis of following criteria mentioned in the C.P.C.

- Pecuniary Jurisdictional- jurisdiction is to be decided on the basis monetary limits or the pecuniary value of the dispute. Pecuniary Jurisdictional principles are also applicable in internet system.
- Subject matter jurisdiction- here the jurisdiction is determined on the basis of the nature/ subject matter of the dispute.
- Territorial jurisdiction-jurisdiction on the basis of territory is based on the hierarchy of structure of court of a legal system.
- Cause of action- Signifies as cluster of facts. The plaintiff is required to prove facts, to establish jurisdiction, on the basis of cause of action then he will be entitle to a decision of the court in his favour.

(c) Jurisdiction as choice of law

A court applies the choice of law rules to determine dispute. There are two choices to parties i.e. either to apply –

- The law of the forum, or
- To apply the law of the site of the transaction or occurrence *lax loci* prefer the jurisdiction of the state.

The Indian Approach on jurisdiction in cyberspace

It is well said that Indian case law on cyber jurisdiction of the courts was almost not in existence till the Information Technology Act 2000 was not enacted and it came into force on 17 October 2000. Due to the fastest establishment and development and of Information Technology (IT) Sector in the world has led to certain unforeseen consequences which are concluded in cybercrimes. Faster and quicker mean of communication in cyber world resulting in cybercrimes coming before the courts for adjudication.

The Indian courts not only taking the cognizance of enactments involving on online medium like Information Technology act, 2000, Trade Marks Act, 1999 and Copyright Act, 1957 etc. but also started interpreting the provision of civil procedure code in matters of jurisdiction in cyber space. The Information Technology Act 2000 aimed at effectively providing measures to prevent or curb the potential misuse coming out from online transactions and other human activities using electronic medium infringing the privacy of the people.

This Act also enforced the civil and criminal liabilities for contravention of the provisions of the Act. The enforcement machinery showed their dissatisfaction and found insufficient to meet the challenges of cybercrime, therefore a series of consequential amendments has been made to many Acts and laws including penal and procedures laws of India, like Indian penal code 1860, Indian Evidence Act, 1872, Bankers books Act 1811 and Reserve Bank of India Act, 1934.

Jurisdiction on the basis of territory or subjective under Information Technology Act 2000¹¹

Section (2) of Information Technology Act 2000 – States, that such Act shall extend to the whole of India, applies to ‘any offence or contravention enshrined or mentioned under this Act’ if takes place outside India by any person whether resident or non-resident, Such expression of Act defines ‘territorial jurisdiction’ on the other hand Section 75 (1) of the IT Act states that this Act shall apply for any offence or contravention takes place outside India by any person whether resident or non-resident. Subjective jurisdiction establishes under Sub-Section (1) and (2) of Section 75 of that Act when offence and contravention is related to a computer, computer system or computer network placed in India.

The above expression of the Act explained the existence of territorial as well as subjective use of jurisdiction.

Section 4 and 5 of IT Act provides legal recognition to subjects like electronic records, documents, containing written information, digital signatures etc. subject to the conditions agreements, stipulations specified under the Act.

Personal Jurisdiction in cyberspace

Personal jurisdiction¹²

The internet is complex virtual model running over the cyber space, having no border and not bound by the geographical boundaries of the states or countries. Today the courts are more aware of internet, its complexities and ambiguous feature involved, consequentially bringing foreign services providers i.e. intermediaries under the territorial jurisdiction of Indian courts. Now courts invoked the principle of cause

of action' of civil procedure code of India over the matters related to cyber space.

The intermediaries like Google Inc., Facebook Inc., Myspace Inc., etc. reject the Indian courts contention on jurisdiction, their arguments can be summarized as

- a) They are comprised under the law of the United States.
- b) Web servers are situated outside India.
- c) No operational and management role of Indian auxiliary.
- d) Transmission of files processed outside India.

The Indian judiciary systems are aware of these contentions they decided the issues on merit.

In **K.N. Govindacharya V. Union of India¹³** a double bench headed by acting chief justice of High Court of Delhi has ordered and directed to the intermediary like face book Inc. and Google Inc. to appoint Grievance officer as described in the guidelines. The Facebook Inc. and Google Inc. have obeyed with such directions.

Conclusion

Section 1(2) and Sec 75 of the IT Act 2000 apply to any offence or contravention committed in India as well as outside India. The application of this Act outside India extends scope of jurisdiction and power i.e. Extra territorial jurisdiction of nation. It applies to both residents or non-resident accused. Apart from this there are other relevant legislations like Indian penal code, criminal procedure code that gives the power to Indian courts to adjudicate the matter concerning to cybercrime, but still there is a question that how far this Act would be effective to non-residents of India. Therefore India is needed to be signatory of International treaty and conventions.

Suggestions

India is not the signatory of Budapest convention but again thinking over that issue. If India becomes a part of this convention it will be a great effort on its side and it will definitely aid the country to fall down cybercrime cases and in resolving the jurisdiction issues and controversies.

Endnotes

¹ Saha, T.K., (2009), Journal of Intellectual Property Rights, National Institute of science Communication And Information Resources, CSIR, Vol. 14:489-500

² 939 F. Supp. 1032 (S.D.N.Y. 1996), 1996 WL 396128 (S.D.N.Y. July 12, 1996)

³ (1996) 74 F.3d. 701

⁴ 326 U.S.310(1945)

⁵ 952 F. Supp. 1119 (W.P.)

⁶ Sharma, V., Sharma, S., Information Technology Law and Practice (Law & Emerging Technology Cyber Law & E-Commerce, Universal Law Publishing Co. Pvt. Ltd., 2010:272-417

⁷ 130 F. 3D 414 9th Cir. 1997

⁸ 1456 US 783 (1984)

⁹ 85 Cal Rptr. 2nd 611 (Cal. Ct. App 1999)

¹⁰ Sharma, V., Sharma, S., Information Technology Law and Practice (Law & Emerging Technology Cyber Law & E-Commerce, Universal Law Publishing Co. Pvt. Ltd., 2010:272-417

¹¹ Information Technology Act 2000

¹² Sharma, V., Sharma, S., Information Technology Law and Practice (Law & Emerging Technology Cyber Law & E-Commerce, Universal Law Publishing Co. Pvt. Ltd., 2010:272-417

¹³ CS (OS) 3672 of 202, Order dated August, 23, 2013.