

# Unit 1: Jurisdictional Aspects of Cyber Law

# 1

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### 1.1 LEARNING OBJECTIVES

After going through this chapter, you should be able to understand:

- Issues of Jurisdiction
- Territorial and Extraterritorial Jurisdiction
- Various tests involved to determine jurisdiction

### 1.2 INTRODUCTION

Jurisdiction is an aspect of state sovereignty and it refers to judicial, legislative and administrative competence. Jurisdiction is the authority of a court to hear a case and resolve a dispute involving person, property and subject matter. The principles of jurisdiction are

enshrined in the Constitution of a State and part of its jurisdictional sovereignty.<sup>1</sup> All sovereign independent States possess jurisdiction over all persons and things within its territorial limits and all causes, civil and criminal, arising within these limits.<sup>2</sup>

### 1.3 ISSUES OF JURISDICTION

The issue of jurisdiction has been looked at from two perspectives.<sup>3</sup> They are:-

- ***Prescriptive Jurisdiction***

It describes a State's ability to define its own laws in respect of any matter it chooses. A State's prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs or the nationality of the persons involved.

- ***Enforcement Jurisdiction***

A State's ability to enforce laws is necessarily dependent on the existence of prescriptive jurisdiction. A State's enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein. The State's legislative enactments primarily reflect its prescriptive jurisdiction.

### 1.4 EXTRATERRITORIAL JURISDICTION

Public International Law reflects the juxtaposition of States (as a legal person) and subjects their jurisdictional sovereignties to certain limitations, i.e., there is 'general prohibition in international law against the extraterritorial application of domestic laws.'<sup>4</sup> The Supreme Court in ***British India Steam Navigation Co. Vs Shanmughavilas Cashew Industries***<sup>5</sup>, while dealing with Private International law, however made general observations as to the extent of

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<sup>1</sup> Apart from judicial activity, a State's administrative, executive and legislative activity is also part of its jurisdictional sovereignty

<sup>2</sup> Lord Macmillan in *Compania Naviera Vascongado v Steamship Cristina*, [1938] AC 485

<sup>3</sup> 'Cyberspace Jurisdiction and Courts in India' by Dr Ravishankar K Mor, Asst Prof Dept of Law, Yeshwant Mahavidyalaya, Wardha

<sup>4</sup> In the absence of municipal laws, international treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights. (*Vishaka v State of Rajasthan*, [1997] 6 SCC 241, *Lakshmi Kant Pandey v Union of India*, AIR [1984] SC 469)

<sup>5</sup> *British India Steam Navigation Co. v Shanmughavilas Cashew Industries* [1990] 48 ELT 481 (SC).

applicability of the statutes enacted by the Indian Parliament and opined: “In general, a statute extends territorially, unless a contrary is stated, throughout the country and will extend to the territorial waters and such places as intention to such places is shown”. It was further observed that “without anything more, Indian statutes are ineffective against foreign property and foreigners outside the jurisdiction”.

The sources of the extraterritorial jurisdiction are:

**a) *Territorial Principle***

A State’s territory for jurisdictional purposes extends to its land and dependent territories, airspace, ships, territorial sea and, for limited purposes to its contiguous zone, continental shelf and Exclusive Economic Zone (EEZ). The said principle as adopted by the national courts has been that all persons within a State’s territory are subject to national law, save only for those granted immunity under international law.

The territorial principle has two variants:

- a) ‘Objective’ territorial principle, where a State exercises its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere; and
- b) ‘Subjective’ territorial principle, where a State asserts its jurisdiction over matters commencing in its territory, even though the final event may have occurred elsewhere.

In *SS Lotus Case (France Vs Turkey)*,<sup>6</sup> it was held by the Permanent Court of International Justice that “the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial i.e., it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.

**b) *Nationality Principle***

It is for each State to determine under its own law who its nationals are. The nationality of a person of a particular State shall be determined in accordance with the law of that State.

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<sup>6</sup> *SS Lotus Case (France v Turkey)* PCIJ Ser A [1927], No 9

Nationality serves above all to determine that the person upon whom it is conferred, enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes upon its nationals.<sup>7</sup>

**c) *Protective Principle***

A State relies upon this principle when its national security or a matter of public interest is in the issue. A State has a right to protect itself from acts of international conspiracies and terrorism, drug trafficking, etc.

In *Attorney-General of the Government of Israel v Eichmann*,<sup>8</sup> the District Court of Jerusalem held:

The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence.

**d) *Passive Personality Principle***

It extends the nationality principle to apply to any crime committed against a national of a State, wherever that national may be. It, in a way, provides that the citizen of one country, while visiting another, takes with him for his "protection" the law of his own country and subjects the operation of that law upon those with whom he comes into contact. The passive personality principle authorizes States to assert jurisdiction over offences committed against their citizens abroad.<sup>9</sup> It recognized that each State has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries. Though the principle may be referred to as a controversial one, as it extends the '*arm of national laws further even in the foreign territories*'. Nevertheless, the principle has been adopted as a basis for asserting jurisdiction over hostage-takers.<sup>10</sup>

**e) *Universality Principle***

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<sup>7</sup> *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase), ICJ Rep [1955] 4

<sup>8</sup> *Attorney-General of the Government of Israel v Eichmann* 36 ILR [1961] 5

<sup>9</sup> *United States v Yunis*, 681 F Supp 896 [1988]

<sup>10</sup> See, International Convention against the taking of hostage, 1979

The canvass of the universality principle is quite vast. A State has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern. It includes acts of terrorism, attacks on or hijacking of aircrafts, genocide, war crimes etc. A State may assert its universal jurisdiction irrespective of who committed the act and where it occurred.

The principles of jurisdiction of international law take cognizance of both State and international laws. If on one hand the objective of the State (or municipal or domestic) law is not only to ascertain the supremacy of its judicial sovereignty domestically but also extra-territorially, then on the other the international law itself imposes general prohibition against the extraterritorial application of domestic laws.

### **1.5 THE EFFECTS DOCTRINE**

It is an extra-territorial application of national laws where an action by a person with no territorial or national connection with a State has an effect on that State. The situation is compounded if the act is legal in the place where it was performed. The ‘Effects Doctrine’ is primarily a doctrine to protect American business interests and is applicable where there are restrictive trade or anti-competitive agreements between corporations. In *Hartford Fire Insurance Co. Vs California*<sup>11</sup>, the question was whether the London Insurance Companies refusing to grant reinsurance to certain US businesses, except on terms agreed amongst themselves are violative of the US anti-trust laws and tried in the United States. The US Supreme Court held that the US Court did have jurisdiction and that there exists no conflict between domestic and foreign law and “where a person subject to regulation by two states can comply with the laws of both”.

### **1.6 PERSONAL JURISDICTION**

Personal Jurisdiction is the competence of a court to determine a case against a particular category of persons (natural as well as juridical). It requires a determination of whether or not the person is subject to the court in which the case is filed. It is classified into:-

- *General Jurisdiction*

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<sup>11</sup> *Hartford Fire Insurance Co. v California* 113 S Ct 2891 [1993]

The General Jurisdiction subjects a person to the power of the applicable court with respect to any cause of action that might be brought. It has historically relied on very close contacts of the person with the state, such as residency or domicile within the state, physical presence in the state at the time of service of process, etc.

- ***Specific Jurisdiction***

The Specific Jurisdiction refers to the power of the applicable court with respect to a particular cause of action based upon some set of ‘minimum contacts’ with the forum state that relate to that cause of action.

<b>1.7 TESTS INVOLVED TO DETERMINE JURISDICTION</b>
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- ***Minimum Contacts Test***

In *International Shoe Co. Vs Washington*<sup>12</sup>, a two-part test for determining the jurisdiction of the forum court over a defendant not residing or carrying on business within its jurisdiction was evolved. It was held that in such an instance, the plaintiff would have to show that the defendant has sufficient ‘minimum contacts’ in the forum state. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise ‘purposefully availed’ of the privilege of conducting activities in the forum state. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notions of fair play and substantial justice. The minimum contacts test in the said case has been understood as to have performed “two related, but distinguishable, functions.”<sup>13</sup> The first was to protect the defendant from the burden of litigating in a distant or inconvenient forum.<sup>14</sup> The second was to ensure that the states do not “reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”<sup>15</sup>

- ***Purposeful Availment Test***

In *Burger King Corp Vs Rudzewicz*<sup>16</sup>, the Supreme Court held that the defendant did not have to be physically present within the jurisdiction of the forum court and that the forum court may exercise jurisdiction over a non-resident where an alleged injury arises out of or

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<sup>12</sup> *International Shoe Co v Washington* 326 U S 340 [1945]

<sup>13</sup> *World-Wide Volkswagen v Woodson*, 444 U.S. 286, 291-92 [1980]

<sup>14</sup> Id

<sup>15</sup> Supra note 12

<sup>16</sup> *Burger King Corp v Rudzewicz* 471 U S 462 [1985]

relates to actions by the defendant himself that are ‘purposefully directed’ towards residents of the forum state. It was held that ‘**purposeful availment**’ would not result from ‘random’ or ‘fortuitous’ contacts by the defendant in the forum state. It requires the plaintiff to show that such contracts resulted from the “actions by the defendant himself that created a substantial connection with the forum state.” He must have engaged in ‘significant activities’ within the forum state or created ‘continuing obligations’ between himself and the residents of the forum state. It was held on facts, the twenty-year relationship that the defendant had with the plaintiff “reinforced his deliberate affiliation with the forum state and the reasonable foreseeability of litigation there.”

In *Ballard v. Savage*<sup>17</sup>, it was explained that the expression ‘purposefully availed’ meant that “the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents.” It was further explained that “it was not required that a defendant be physically present within, or have physical contacts with the forum, provided that his efforts are purposefully directed toward forum residents.”

In *CompuServe, Inc. v. Patterson*<sup>18</sup>, it was found that the defendant had chosen to transmit its products from Texas to CompuServe’s system and that the system provided access to his software to others to whom he had advertised and sold his product. It was held that Patterson had “purposefully availed himself of the privilege of doing business.”

#### - *Sliding Scale Test*

An extension of the purposeful availment test was attempted in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>19</sup> The issue of specific personal jurisdiction arose in the context of trademark dilution, infringement and false designation under the Federal Trademark Act. The court in *Zippo* classified websites as passive, interactive and integral to the defendant’s business. It was held that “At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the

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<sup>17</sup> *Ballard v Savage* 65 F3d 1495 (9th Cir) [1995]

<sup>18</sup> *CompuServe, Inc v Patterson* 89 F 3d 1257 (6th Cir) [1996]

<sup>19</sup> *Zippo Mfg Co v Zippo Dot Com, Inc* 952 F Supp 1119 (W D Pa) [1997]

Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Website, which is accessible to users in foreign jurisdictions. A passive Website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website”.

In *Millennium Enterprises Inc. v. Millennium Music L.P.*<sup>20</sup> the Oregon district court declined to exercise jurisdiction over a South Carolina corporation that sold products both offline and on the web. The court felt that ‘*something more*’ than merely showing that the website was interactive was required. The defendant should be shown to have consummated some transaction within Oregon and to have made ‘deliberate and repeated contacts’ with Oregon through the website so that it could be held that they ought to have anticipated being hauled into an Oregon court.

## 1.8 THE EFFECTS TEST AND INTENTIONAL TARGETING

The difficulty experienced with the application of the *Zippo sliding scale test* has paved the way for the application of the ‘effects’ test. The courts have thus moved from a ‘subjective territoriality’ test<sup>21</sup> to an ‘objective territoriality’ or ‘effects’ test in which the forum court will exercise jurisdiction if it is shown that effects of the defendant’s website are felt in the forum state. In other words, it must have resulted in some harm or injury to the plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given the nature of the internet, courts have adopted a ‘tighter’ version of the ‘effects’ test, which is ‘intentional targeting.’

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<sup>20</sup> *Millennium Enterprises Inc v Millennium Music L P* 33 F Supp 2d 907 (D Or) [1999]

<sup>21</sup> That a court will regulate an activity only if it is shown having originated in its territory – exemplified by the decision in *Louis Feraud Int’l SARL v Viewfinder Inc*, 406 F Supp 2d 274 (S D N Y) [2005]



The ‘effects’ test was first evolved in *Calder v. Jones*.<sup>22</sup> In the said case, the Court held that a California court could assert jurisdiction over a Florida publisher that published an article defaming the plaintiff, in view of the facts that the plaintiff resided in California. The Court reasoned that the defendants had engaged in “intentional, and allegedly tortious, actions that were expressly aimed at California”, and that “they knew that the brunt of the injury would be felt” by the plaintiff in California.

The ‘Effects Test’ is a further extension of the ‘forum state targeting’, as it also takes into consideration the effect that “out-of-state” conduct has in the forum state. Thus, in order to have personal jurisdiction, there must be:-

- Intentional actions
- Expressly aimed at the forum state
- Causing harm, the brunt of which the defendant knows is suffered or likely to be suffered in the forum state.

## **1.9 LET’S SUM UP**

In this chapter, we have studied the issues of jurisdiction along with extraterritorial and personal jurisdiction. We also studied the tests involved in determining jurisdiction. Finally, we ended the discussion with the Effects Test and Intentional targeting.

## **1.10 FURTHER READING**

- Brenner, Susan. (2004). Cybercrime jurisdiction. J. High Tech. L. 1. 10.1007/s10611-007-9063-7.
- Brenner, Susan & Koops, Bert-Jaap. (2005). Approaches to Cybercrime Jurisdiction. Journal of High Technology Law. 4.
- Egyankosh.ac.in (2019), <http://egyankosh.ac.in/bitstream/123456789/7634/1/Unit-10.pdf> (last visited Nov 27, 2019).

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<sup>22</sup> *Calder v Jones* 465 U S 783 [1984]

- Amita Verma, Cyber Crimes and Law, Central Law Publications, Allahabad, 2009, p.318.

### **1.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

#### **1. What are the issues of jurisdiction associated with cyber laws?**

The issues of jurisdiction associated with cyber laws are as follows:

- *Prescriptive Jurisdiction* - It describes a State's ability to define its own laws in respect of any matter it chooses. A State's prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs or the nationality of the persons involved.
- *Enforcement Jurisdiction* – It deals with a State's ability to enforce laws is necessarily dependent on the existence of prescriptive jurisdiction. A State's enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein. The State's legislative enactments primarily reflect its prescriptive jurisdiction.

#### **2. What are the principles associated with extra-territorial jurisdiction vis-à-vis cyber laws?**

The principles associated with extra-territorial jurisdiction vis-à-vis cyber laws are as follows:-

- Territorial principle
- Nationality Principle
- Protective Principle
- Passive Personality Principle
- Universality principle

#### **3. What is meant by the 'Effects Doctrine'?**

The Effects Doctrine is an extra-territorial application of national laws where an action by a person with no territorial or national connection with a State has an effect on that State.

#### **4. What are the tests involved in determining jurisdiction?**

The tests involved in determining jurisdiction in instances involving disputes of cyber laws are as follows:

- Minimum Contacts Test
- Purposeful availment Test
- Sliding Scale Test

#### **5. What is understood by ‘personal jurisdiction’ in context of cyberspace?**

Personal Jurisdiction is the competence of a court to determine a case against a particular category of persons (natural as well as juridical) involving a dispute arisen associating with cyberspace. This can comprise of either general jurisdiction or specific jurisdiction.

#### **1.12 ACTIVITY**

*“The effectiveness of any judicial system rest on the bedrock of jurisdiction itself”.* Explain the jurisdiction issues in Internet-based on US law as well as Indian law. (2000-2500 words)