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# The Issue of Jurisdiction on the Internet

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OSHIN NEHRU<sup>1</sup>

## ABSTRACT

*The issue of internet jurisdiction assumes an international character for its intangible presence, irrespective of territorial boundaries and due to such nature, it poses a challenge to the Westphalian philosophy of international relations which relies broadly on maintaining territorial sovereignty. There are several forms of interactions taking place on the world wide web every second, from data transmission to transactions. Courts all over the world have attempted to prescribe certain guidelines and tests to tackle the determination of jurisdiction in cases of contentions arising on the web, but it is challenging to determine a uniform jurisdiction over an area that doesn't occupy any physical space. Hence, even the notion of having a single governing body for the same would be considered to be arbitrary by most of the nation-states. It is therefore necessary to deliberate upon bringing a global consensus on how to formulate some standard of ascertaining jurisdiction that would be acceptable to all.*

## I. INTRODUCTION

The World Conference on International Telecommunications (WCIT-12), held in December 2012, in the recent times, has been a landmark conference pertaining to the issue of Internet governance. The US, along with several allies, walked out when a last moment amendment was made to the International Telecommunication Regulations (ITRs) by including a legally non-binding section related to internet governance, stating that all governments shall have an equal role and responsibility for international governance of internet. U.S emphasised on a multi-stakeholder approach to the Internet, wherein private companies, governments and even independent entities are involved and function independently from any regulatory body.<sup>2</sup>

'Global village' is a term often used to denote the constant fall of cultural and geographical barriers amongst nations as a result of globalisation, most of which is attributable to the advent and growth of the World Wide Web. Internet has made the osmosis of ideas and cultural unquities amongst countries more convenient than ever. The topic of jurisdiction on the internet is an issue under national laws, as well as international law, simultaneously,

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<sup>1</sup> Author is a student at Symbiosis Law School, Pune, India.

<sup>2</sup> WCIT Treaty Talks End in Dubai With Walkout of U.S., Allies | eWEEK, EWEEK (2012), <https://www.eweek.com/cloud/wcit-treaty-talks-end-in-dubai-with-walkout-of-u.s.-allies/>

owing to the cross-border implications of any activity on the internet. The scope for an authoritative or monopolar control is very bleak since Internet functions on the notion of distributed power. The intangibility of its existence makes governance challenging, more specifically ascertainment of jurisdiction while deciding on issues since an act on internet has the potential to have implications anywhere else in the world.

### **The Westphalian Philosophy**

The present-day challenges in the sphere of internet jurisdiction can be annexed to developments from nearly 370 years ago, which might seem perplexing since the age of internet itself hasn't crossed a century yet. But it is the Treaty of Westphalia from 1658, which established the bedrock principles of our current foreign relations and the modern-day nation state, namely **sovereignty, non-interventionism** and **legal equality**.<sup>3</sup> In the simplest of terms, it established definite boundaries amongst territories and in the most informal words, a 'stay out of my house' policy. These features of a nation-state have guided every transnational dealing of every shape and form for centuries, till date. With the advent of internet, came in a new form of territory which did not fall under any of those features. The following three features describe the essential nature of internet in a nutshell:

- (a) No established sovereignty
- (b) Blurring of applicable laws
- (c) Interventionist

The inherent paradox in the interplay of different territorial jurisprudences and the internet, hence, becomes evident. Internet is *sans* boundaries and hence ascertaining one jurisdiction for every issue arising within its arena might just require the popularly theorised 'New World Order' to become a reality. But coming back to reality, Internet is antithetical to the Westphalian philosophy of territorial sovereignty.

### **Overview**

Hence, each country has attempted, over the course of last few decades to ascertain jurisdictional authority it may levy. Dealings on internet can be of any nature, be it commercial, social, cultural, economic and the list goes on. In crux, we're faced with two major challenges when deliberating on the jurisdictional issue of internet, firstly, **preservation of the global element** of cyber space in tandem with national laws and

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<sup>3</sup> Today's Cybersecurity Challenges Started in 1648, THE STATE OF SECURITY (2017), <https://www.tripwire.com/state-of-security/security-data-protection/cyber-security/todays-cybersecurity-challenges-started-1648/> (last visited May 14, 2021).

ensuring one's rights in the cyber arena while **keeping misuses of internet at bay**.

This article shall undertake an area-specific approach to discuss the developments of jurisdictional ascertainment in cases within the cyberspace under the following headings:

- 1. Cross Border Legal Assistance**
- 2. Transactions in the Cyberspace**
- 3. Accessing Information on the World Wide Web**

Further, the article shall present an analysis on the evolving concept on extraterritoriality and provide potential approaches to deal with the new challenges arising regularly, and finally a conclusion and hope for providing a legally and liberally sound environment for internet to exist.

## **II. CROSS BORDER LEGAL ASSISTANCE**

The onset of 21<sup>st</sup> century saw the rapid mushrooming of dependence on a global scale upon digital technology, as a medium of transaction for even the minutest activity of day-to-day life, business, trade and even politics. With the switch made to Internet, businesses and governments, the manner of storage of data has come to be altered. Since data is stored at different nodal points, all of which are in different jurisdictions, it becomes difficult to determine what set of regulations would govern their dealings. With the lack of a jurisdiction, internet might present a borderless arena of activities but it also leaves a vacuum when it comes to determining a proper mechanism to ensure the security of data transferred and stored online.<sup>4</sup>

During pending investigations, sometimes it becomes necessary to compel the presentation of evidence which is not within its territorial bounds. For instance, if the data required was stored in servers located in India, either the police could've compelled a company to disclose it under section 91 of the Code of Criminal Procedure or an order for interception could've been passed under section 69 of the Information Technology Act, 2000.<sup>5</sup> But for obvious reasons, conventional methods won't work in case of a different territorial ground. The issue herein lies in the Westphalian philosophy of territorial sovereignty and non-interference, as discussed above.

Therefore, arises the need for consent-based models for cross border data sharing between

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<sup>4</sup> Bertrand de La Chapelle and Paul Fehlinger, *Jurisdiction On The Internet* (2016), <http://www.jstor.com/stable/resrep05249.10>

<sup>5</sup> Amber Sinha, Elonnai Hickok, Udbhav Tiwari and Arindrajit Basu, *Cross Border Data-Sharing and India*, The Centre for Internet and Society, India (2018)

countries. One of the most effective techniques till date has been a Mutual Legal Assistance Treaty (MLAT). Essentially, it's an agreement between two or more countries for an exchange of information, providing with itself the proper means to obtain such data for criminal investigations and prosecutions.<sup>6</sup> As of today, India has entered into a MLAT with 39 countries. It is important to discuss this in context with internet jurisdiction as mentioned above, the storage of any form of data nowadays is in a digital format. Therefore, when ascertaining exchange of information under a MLAT in today's day and age, one is also inevitably determining the scope of jurisdiction on the net. In *Union of India v. Mubarak*<sup>7</sup>, the court upheld that since NIA in the United States was conducting investigation on the social media and email communication used by the accused, who was in front of the Indian apex court, under the MLAT between the two countries, India was entitled to get the reports on the same from the US. With such treaties become more of an accepted norm, they become helpful in promoting a healthy and resourceful exchange of data between countries. For instance, under the 2018 MoU signed between India and US, India is permitted to access USA's database of 'unclassified biographic information of known and suspected terrorists' on a reciprocal basis and also a give and take of information with the Terrorist Screening Centre in USA.<sup>8</sup>

### **III. TRANSACTIONS IN THE CYBERSPACE**

Maybe a few years ago one would've been saying that internet has marked a presence in the commercial world. But today, it is safe to say that most of the commercial world has now took off to the digital arena. While the benefits and conveniences that it brings in for businesses is substantial, it also becomes crucial to define and protect the statutory rights and responsibilities of parties involved in an online transaction. As anticipated, the first and foremost issue in such matters is determining the jurisdiction. Under the Code of Civil procedure, the plaintiff has a prima facie choice of forum. The trend followed by Indian courts in such cases can be followed through a series of judgements.

In *World Wrestling Entertainment v. M/S Reshma Collection & Ors.*<sup>9</sup>, the court held that in an online commercial transaction, the cause of action shall be attributed to the place where the customer carried out their part of the transaction. But an altered stance was held in

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<sup>6</sup> Understanding Cross Border Legal Assistance, INDIA CORPORATE LAW (2020), <https://corporate.cyrilamarc-handblogs.com/2020/10/understanding-cross-border-legal-assistance/>

<sup>7</sup> *Union of India v. Mubarak*, AIR2019SC2428

<sup>8</sup> Danesh Mehta, THE MUTUAL LEGAL ASSISTANCE TREATY AND ITS IMPACT ON INDIA-US LEGAL RELATIONS MONDAQ.COM (2020), <https://www.mondaq.com/india/terrorism-homeland-security-defence/956062/the-mutual-legal-assistance-treaty-and-its-impact-on-india-us-legal-relations>

<sup>9</sup> *World Wrestling Entertainment v. M/S Reshma Collection & Ors*, 2014 (58) PTC 52 (Del)

Impresario Entertainment and Hospitality Pvt. Ltd. v. S&D Hospitality<sup>10</sup>, wherein the court held that mere accessibility to the defendant's website by plaintiff doesn't accord the former's jurisdiction over the matter. The judgement laid down some parameters to consider while determining jurisdiction, such as:

- i. Nature of the defendant's online activity to be commercial
- ii. The website to necessarily be an interactive one, that is, one where business transactions can be conducted and just a mere advertising one.
- iii. The plaintiff may present reasonable contentions as to defendant avoiding the forum state
- iv. The 'Effects' and 'Zippo' test. The former was evolved in the U.S case of *Calder v. Jones*<sup>11</sup> wherein it was held that a jurisdiction can be established if it's proven that an alleged act in the cyberspace produced damaging effects in the contended forum state. The latter was formulated in *Zippo Manufacturing v. Zippo Dot Com*<sup>12</sup> in which it was held that a forum can be availed if established that the website has substantial commercial activity over the internet in that jurisdiction.

But this stance was challenged by the Delhi High Court in *Millennium & Copthorne International Limited v. Aryans Plaza Services*.<sup>13</sup> He targeted especially on the test of interactive website, by stating that an interactive website would be equally accessible in any part of the country wherever there is internet. As opposed to the Impresario case stance, the court herein held that courts in Delhi would have a jurisdiction owing to the fact that defendants' website was accessible there and made it possible to carry out business in Delhi.

#### **IV. ACCESSING INFORMATION ON THE WORLD WIDE WEB**

In the most conceivable and even unprecedented ways, internet has penetrated our lives. From opinions and informal exchanges to daily news and minute-to-minute updates from around the world, the boundless cyberspace provides it all. When the discussion pertaining to jurisdiction arises on matters related to any information provided by anyone in that space, some specific questions arise. Firstly, to what extent does a person posting information on the World Wide Web have to comply with national laws of each territorial area it can be accessed in, and secondly, whether every state or nation having access to such information has

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<sup>10</sup> Impresario Entertainment and Hospitality Pvt. Ltd. v. S&D Hospitality, 2018 (73) PTC 275(Del)

<sup>11</sup> *Calder v. Jones*, 465 U.S. 783 (1984)

<sup>12</sup> *Zippo Manufacturing v. Zippo Dot Com*, 952 F. Supp. 1119(1997)

<sup>13</sup> *Millennium & Copthorne International Limited v. Aryans Plaza Services*, 2018 (73) PTC 275(Del)

jurisdiction over the creator of such information and the website on which it is uploaded.<sup>14</sup>

The aforementioned 'Effects' test and 'Zippo' test have been formulated in the recent times to ascertain jurisdiction in plenty of cases. In India, the IT Act, 2000 prescribes the courts with a 'long-arm jurisdiction' under section 1(1), to extend its power-making under the act beyond the national boundaries. In a very recent case decided by the Delhi High Court, such prescribed jurisdiction was interpreted in a manner which translated into a very debatable outcome. In *Swami Ramdev v. Facebook*<sup>15</sup>, the plaintiff had filed a suit seeking a 'global injunction' against the publication of a video and related content on a book about the plaintiff, the publication of which was already halted by a previous judgement deeming some parts defamatory until proven true. The said relief was passed against the platforms where such content was uploaded and also extended the relief by directing them to remove such content in future as well, if required. The precedent this case set is a rather risky one, since the court failed to appreciate enough the fact that these platforms provide access to information all around the world and an order passing the takedown of any content on a global basis might be in hindrance of freedom of speech laws in different countries. Another important thing that went undeliberated upon, was the liability of intermediaries. While section 79 of the IT Act puts a responsibility of due diligence on such intermediaries but to what extent can that due diligence be interpreted? It would be rather unreasonable to expect intermediaries to monitor every post and take them down *Suo moto*.

Therefore, content monitoring and takedowns is another emerging issue in the cyber arena, posing a potential threat to free flow of information and freedom to expression on internet. Again, since cyberspace doesn't fall under the Westphalian concept of territorial bounds, there are no set limits to the right to speech but while deciding on such matters, different courts try different permutations to come to a decision. Practically, an ad-hoc basis seems to be a much fairer and efficient option.

## **V. EXTRATERRITORIALITY, THE UPCOMING *REALPOLITIK* OF INTERNET REGULATION- CRITICAL ANALYSIS**

After deliberating upon the various facets of the territorial dilemma on the internet, a subsequent line of thought would be determining what the future of internet regulation holds. The multi-stake holder arrangement has worked till now and most of the countries don't feel that there is any need to change. Attempting to bring internet under a single set of regulations

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<sup>14</sup> Julia Alpert Gladstone, Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" Test? (June 2003), <http://proceedings.informingscience.org/IS2003Proceedings/docs/029Glad.pdf>

<sup>15</sup> *Swami Ramdev and another v. Facebook, Inc. and others*, 2019 SCC OnLine Del 10701

would hinder the democratic essence of activity in that area, as countries might try to regulate the free-flowing information.

But another area of issue which needs to be addressed, is the extent of access a nation-state shall have over private data of people that is digitally stored. This issue of online surveillance was debated enough during the Snowden leaks of 2013, when a former employee of CIA revealed numerous global surveillance programs run by the NSA and the Five Eyes Intelligence Alliance with cooperation of European governments, which initiated a dialogue about individual privacy. In the face of such allegations, governments yield the national security card and their contention remains that the ends justify the means. In fact, it has been estimated that United States' NSA programs are capable of analysing 1.3% of the globe's Internet traffic.<sup>16</sup> It is only natural that ally countries would pool their resources to enter into a multilateral cooperation in order to mitigate risks in their respective country of being infiltrated. Given, that such an arrangement has been instrumental in avoiding plenty of life-endangering atrocities by identifying potential attacks in due time, but civil liberties' activists raise questions as to how much surveillance of such nature in the cyber space is actually ethical. Territorial bounds are crossed from a security point of view but at a given point of time it is difficult to ascertain how exposed is a private individual. Theoretically, in pitting civil liberties against threats to national security at large, governments can find adequate footing to justify the reasonable curbing of the former but the risk being, what a government may deem 'reasonable' in this context.

### **Possible Solutions**

In light of all the issues discussed till now, it is clear that what we need is more legal interoperability in order to bring national laws related to internet usage in harmony with each other. While a set of uniform regulations to govern the internet as a whole, which would be deemed just, fair and free enough to every sect of people, might just be a utopian vision, there are other approaches that can be strengthened to ensure the ascertainment of jurisdiction doesn't pose a problem, such as follows:

- A. Strengthening bilateral and multilateral arrangements:** For instance, the MLATs which were discussed before. Constant dialogue and deliberation are necessary when it comes to decide upon issues of the cyber world. Since the web is boundless, negotiations can help establish reasonable bounds to adjudicate within.

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<sup>16</sup> Michael Petrou, SNOWDEN, THE STATE, AND THE FUTURE OF INTERNET GOVERNANCE - OPEN CANADA OPEN CANADA (2013), <https://opencanada.org/snowden-the-state-and-the-future-of-internet-governance/> (last visited May 14, 2021).

**B. Expanding the existing jurisprudence to determine on an ad-hoc basis:** Certain tests have already been formulated by the courts, such as the Zippo test and Effects' doctrine discussed before. These tests don't work uniformly over all cases facing the jurisdictional issue but provide adequate relief in suitable cases. More such tests and jurisprudence shall expand with every case, providing different frameworks for different scenarios.

## VI. CONCLUSION

It deems appropriate to conclude this article with what Kofi Annan, former UN Secretary-General has said about the advent of Internet: *"In managing, promoting and protecting its presence in our lives, we need to be no less creative than those who invented it. Clearly, there is a need for governance, but that does not necessarily mean that it has to be done in the traditional way, for something that is so very different"*<sup>17</sup>

For centuries the Treaty of Westphalia structured our international systems, based on territorial systems and policy of non-interference. But today, it can't take the burden of complications brought in by the digital reality of today. The existence of Internet poses a challenge to traditional principles and how the latter can turn into obstacles, from being the solution.

Interactions on the World Wide Web is can be multi-faceted in nature, each of them substantially changing the trends of human interactions and exchanges, both formal and informal. While trying to pin point jurisdiction for deciding such cross-border issues on the internet, it needs to be made sure that choosing a forum doesn't unreasonably disadvantage any party involved and the rights of such parties are protected. Only international cooperation and negotiations can maintain the liberal bounty of internet.

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<sup>17</sup> The UN Secretary-General's remarks at the opening session of the Global Forum on Internet Governance on March 24, 2004. [www.un.org/sg/STATEMENTS/index.asp?nid=837](http://www.un.org/sg/STATEMENTS/index.asp?nid=837).