

## **JURISDICTIONAL ISSUES IN CYBER CRIMES**

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### **Abstract:**

Cybercrime is the form of crime which is increasing day by day. A person sitting in any corner of the globe can affect any computer system only with few clicks. The important issue which arises here is the jurisdiction over such act which is committed outside the territorial limits of the state which faced the effect of such act. Here it is important to discuss the aspect of jurisdiction because it deals with the territorial sovereignty of a particular state. The paper tries to discuss some important theories of jurisdiction and also the Budapest Convention on Cyber Crime, 2001 which was the first international treaty which addressed the issue of cybercrime. It tries to focus on the aspect of international cooperation which could be one the way in which cybercrimes can be tackled.

**Keywords:** Cyber Crime, Jurisdiction, Technology, territorial sovereignty, international cooperation.

### **Introduction:**

Information communication and technology plays a very crucial role in day to day life of human beings. From economic activities of an individual to national security of a particular state all these things depends upon the cyber space. Similarly this technology is being misused by offenders to commit crime. There are many annoying things occurring in the cyberspace which may facilitate the offenders to indulge in various types of criminal activities which are called cybercrimes. The term cyber crime is a wide term under which many activities may be included.

Cyber crime in a narrow sense can be defined as, "A computer crime which includes any illegal behaviour directed by means of electronic operations that targets the security of computer

systems and the data processed by them<sup>1</sup>.” Also in broader sense cyber crime can be defined as, “All computer related crimes which consists of any illegal behaviour committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession and offering or distributing information by means of a computer system or network.<sup>2</sup>”

Cyber criminals now a days have the capacity to disrupt any computer or computer network located anywhere in the world with just a few clicks. In order to deal with such attacks there must be proper provisions to enforce jurisdiction that empowers the state to exercise jurisdiction beyond its territorial limits. The jurisdiction of the State is one of the important topics related to international law. Cyberspace is considered as borderless and so territory is irrelevant when it comes to cyber crimes.

The Criminal Codes mostly provides for jurisdiction of the State based on the territory and sometimes outside the territory in some cases. As Indian Penal Code provides that an Indian citizen who commits an offence in any part of the globe can be tried by the Courts in India<sup>3</sup>. The jurisdiction with respect to criminal cases is usually domestic in nature because it mostly deals with the public order within the State. The emergence of cyber crimes has changed the principles of jurisdiction relating to criminal cases. Cyber criminals can attack from outside the border of one country and so it is always said that there are no boundaries for cyber crimes. Accessing the internet is a common thing now a day; however there are many uncertain issues with respect to jurisdiction over the accused person.

### **Essentials of Jurisdiction under International Law:**

Jurisdiction basically means the limit or power of a particular State to exercise its control. Jurisdiction is based on the concept of the principle of state sovereignty. Jurisdiction deals with three elements namely jurisdiction to prescribe that is the ability of a State to make its law applicable to persons, conduct, relations, or interests. The next one is the jurisdiction to adjudicate which includes the State’s ability to subject persons or things to the process of its

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<sup>1</sup> Tenth U.N. Congress on Prevention of Crime & Treatment of Offenders held in Vienna on 10<sup>th</sup> -17<sup>th</sup> April, 2000

<sup>2</sup> *Ibid*

<sup>3</sup> Section 4, Indian Penal Code, 1860

courts or administrative tribunals. And the last one is the jurisdiction to enforce which means the State's right to enforce the legislation by using its machinery i.e. police or prosecutors.

### **Theories of Jurisdiction:**

In order to exercise jurisdiction, the state must find some connection with the accused person or the alleged act. There are different theories which are evolved by the States to determine jurisdiction.

#### **1. Subjective Territoriality Theory:**

This theory states that if an act or conduct is committed within the boundaries of the state then such state shall be entitled to lay down law that would govern such an act or conduct. The important object of this theory is to uphold the sovereignty and integrity of the nation. The second goal is to obligate the states by inviting them to enter into treaties to participate in the security of international society against modern organized crimes in which the criminal conduct breaks down into many portions, each one of them taking place in different territories. Therefore, according to the subjective territoriality principle a state has the legal capacity in reliance on its sovereignty and international law to assert jurisdiction over crime when the incriminating action starts within its territory, regardless of the criminal consequence's place. Even though the principles of sovereignty and equality are recognized and accepted by the states, voluntarily complementary application of them by the states is rare due to the special nature of the international society. All the states have an important right to exercise sovereignty over its territories. Considering this right the theory of subjective territoriality have been recognised and accepted by all the states.

#### **2. Objective Territoriality Theory:**

This theory is also known as effects theory of jurisdiction. It is applicable where the alleged act is committed in some other country and its effects are felt in different country. According to this theory, the state has right to take action against a crime when the effects of such crime are felt in its territory even if the accused accomplished the act in different state. Section 4 of Indian Penal Code, 1860 which was amended in 2009 gives reference to this theory. It states that IPC is applicable to offence committed by any person in any place without and beyond India committing offence targeting a computer resource located in

India. This section gives the idea of applicability of the objective territoriality theory in India.

The effect test was discussed in *United States v. Thomas*<sup>4</sup>. The defendants residing in California supervised and managed a computer bulletin board system. The defendant published indecent pornographic content on the system and charged a membership fees from its subscribers who were assigned a password. The subscriber were also asked to fill an application form that contained the applicants contact details and personal information. When a person downloaded this objectionable material in Memphis, Tennessee criminal violations were alleged against the defendants. The court held that “the effect of defendant’s criminal conduct reached the western district of Tennessee, and that district was suitable for accurate fact finding”. Therefore, the court concluded that it had the jurisdiction to decide the case. In this case due knowledge and intention can be inferred from the facts as the defendant knew the jurisdiction to which the subscriber belongs<sup>5</sup>.

### 3. **Nationality Theory:**

This theory deals with the nationality of the person who committed the offence. All the States have wide controls over their nationals. Wherever the crime is committed, the State has the power to punish its nationals. Section 4 of Indian Penal Code, 1860 covers this aspect by stating that IPC is applicable any citizen of India in any place without and beyond India. The words ‘without and beyond India’ used in section 4 of IPC clearly signify that if a person commits any act outside the territory of India than also he can be subjected to the laws in India because of its nationality.

### 4. **Passive Nationality Theory:**

The Passive nationality theory deals with the nationality of the victim. It is based on similar principles of unlimited control over country’s national but this theory looks from the other end. So according to this theory the state to which the victim belongs has the jurisdiction to take cognizance of a particular crime. It is justifiable considering the point that it is the State which has wide control over its nationals if they commit any act abroad. Similarly it is the liability of the State to protect its nationals when he is harmed overseas. This theory is rejected by many states on the ground that it violates the international law by interfering

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<sup>4</sup> 74 F.3d 701 (6th Cir. 1996)

<sup>5</sup> *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), available at [http://www.internetlibrary.com/cases/lib\\_case252.cfm](http://www.internetlibrary.com/cases/lib_case252.cfm), last seen on 29/04/2019

within the territorial sovereignty of other state. Also it is considered as interfering within the national affairs of other states.

**5. Protective Theory:**

This theory gives jurisdiction to a State to see its national or international interest in jeopardy because of an offensive act. Nearly all states assume jurisdiction over aliens for acts done abroad which affect the security of the state. These offenses must be generally recognized as crime by the international community. The possibility of committing crimes across borders has been increased. Criminals perform their incriminating projects in different territories in order to take advantage of the legal gap that could occur from the strict application of the territoriality and the nationality principle. States identified this risk and the necessity for more protection. The State must always consult the international community in order to ensure safe and peaceful application of protective principle.

**6. Universality Theory:**

This theory allows every State the claim of jurisdiction over offences, even if those offences have no direct effect on the asserting State, therefore demanding no nexus between the State assuming jurisdiction and the offence itself. Two requirements are necessary for assuming jurisdiction: the State assuming jurisdiction must have the defendant in custody; and the crime must be especially offensive to the international community. War crimes, crimes against humanity, certain terrorist acts, hijacking and sabotage of planes, apartheid, torture and other violations of human rights progressively became subject to universal jurisdiction. According to the universal principle, a state has the capacity, as a representative of international society, to prosecute crimes committed by foreigners outside its territory. According to the universal theory, the state is not obligated by international law to prove any relationship between the offence and its territory or nationals. This theory can be used to excuse the application of national or international laws over foreigners committing offenses in ungoverned areas.

**Jurisdiction according to Budapest Convention on Cyber crime:**

Budapest Convention on Cyber Crime is the first international treaty seeking to address cyber crimes by bringing consistency in State laws and seeking cooperation among member States. Its main objective is to have uniformity of laws in order to tackle the issue of cyber crimes by enacting relevant laws and providing a platform for international cooperation. Article 22 of the

Convention deals with the aspect of jurisdiction relating to cyber crimes which states that parties shall adopt laws to establish jurisdiction over the offence when it is committed in its territory; or on board a ship flying the flag of that Party; or on board an aircraft registered under the laws of that Party; or by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State<sup>6</sup>. The Convention relies exclusively on the territoriality and nationality theories to empower parties to establish jurisdiction. It also recognises the principle of principle *aut dedere aut judicare* which means the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. The underlying idea is the need to ensure that no offence goes unpunished. It provides for an obligation on the state regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator and victim may be of alien nationality. It states that the alleged offender be found in the territory of one Party State, an extradition be required by the offended State, and if the Party in which territory the alleged offender is constrained by domestic law not to extradite, the requested Party has the duty to prosecute, as well as the legal ability to undertake investigations and proceedings domestically.

### **Conclusion:**

Jurisdiction, or the lack of it, seems to be the most problematic issue in the fight against cybercrime. The fact that cyber attacks can come from anywhere in the world makes investigation, producing evidence and taking the offenders to court an immense task that can only be achieved through international cooperation. The most immediate and effective legal approach to prosecute such attackers would be to add extraterritorial reach to domestic criminal statutes pertaining to cyber crimes.

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<sup>6</sup> Budapest Convention on Cyber Crime, 2001, Article 22, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561>, last seen on 29/04/2019