ILE JOURNAL OF GOVERNANCE AND POLICY REVIEW

VOLUME 1 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION

ILE JOURNAL OF GOVERNANCE AND POLICY REVIEW

(Free Publication and Open Access Journal)

Journal's Home Page – https://jgpr.iledu.in/

Journal's Editorial Page - https://jgpr.iledu.in/editorial-board/

Volume 1 and Issue 1 (Access Full Issue on - https://jgpr.iledu.in/category/volume-1-and-issue-1-of-2023/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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ILE JOURNAL OF GOVERNANCE AND POLICY REVIEW

Volume I and Issue I of 2023

ISBN - 978-81-961791-0-6

Published by

Institute of Legal Education

https://iledu.in

JURISDICTION ISSUES IN INTERNET REGULATION

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Best Citation - Gaurika Singh JURISDICTION ISSUES IN INTERNET REGULATION, *ILE JOURNAL OF GOVERNANCE AND POLICY REVIEW*, 1 (1) of 2023, Pg. 51-56, ISBN - 978-81-961791-0-6.

Abstract

The age of internet has completely changed the jurisdictional principle of nations. From territorial jurisdiction, the countries are now following the principle of universal jurisdiction. While this has helped in gaining access to data, it has still not been enough to curb cyber crimes and other misuse of data. The article introduces the concept of jurisdiction, the need for regulating the Internet, compares the jurisdictional policies around the world and finally suggests ways in which the Internet can be governed in a better manner.

Keywords

Internet, Jurisdiction, Internet Regulation, cybercrimes, international law

Introduction

In the age of Metaverse, cryptocurrency and artificial intelligence, it is hard to imagine a task that cannot be accomplished with the help of technology and internet. The world today is more interconnected than ever. A new digital space has been created which transcends the physical world and creates an outreach to all the internet users.

Such a virtual space had not been accounted for when most of the laws were made. In India, the general public started using internet only around the late 90s. It was in 1991 that the world wide web became accessible to people around the world.[65] Therefore, most laws had not contemplated the ramifications of crimes committed on the Internet. It is only later that the jurisprudence around internet jurisdiction evolved and laws were made regarding the same.

Even now, the internet is continuously advancing and evolving. This article seeks to look at all the modern jurisdiction issues around the world and how the countries have dealt with them.

What is Jurisdiction

Jurisdiction is basically the power of a court of any other judicial body to take cognizance of a matter and adjudicate upon it. Conventionally, when disputes only took place in the physical sphere, jurisdiction was decided by the place of residence, business, dispute, etc.[66] However, this fails to work on the internet because a particular business can be based in USA, and sell their services or products in India. It needs to be determined which country would then have the jurisdiction to decide any dispute that arises out of this transaction and to what extent the subject jurisdiction of the court would apply. These are questions over which courts all over the world have dwelled upon in the past few decades.

The Indian statute that deals with cybercrimes and other disputes arising on the internet is the Information Technology Act of 2000. As per Section 1 of the Act, the applicability of IT Act extends outside India also. Therefore, the nationality of a person does not matter. The IT Act has jurisdiction over cybercrimes committed outside India also if they affect any computer, computer system, or network situated in India.[67]

[65] WORLD WIDE WEB, https://webfoundation.org/about/vision/history-of-the-web/ (last accessed Mar. 2, 2023).

[66] The Code of Civil Procedure, 1908, § 21, No. 5, Acts of Parliament, 1908 (India).

[67] The Information Technology Act, 2000, § 1, No. 21, Acts of Parliament, 2000 (India).

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The three main considerations while deciding jurisdiction are-

- Determining the court that has legal authority (procedural jurisdiction)
- Determining the rules that should be used (substantive jurisdiction)
- Determining the method of implementing the court's decision (enforcement jurisdiction).

The principle of universal jurisdiction has given the state the power to take action against crimes, irrespective or where and by whom they have been committed. This principle is used in cases of war crimes, genocide, and piracy.

When more than one state asserts its authority over a particular legal matter, a conflict of jurisdiction can be expected to ensue. In most cases, this occurs when a legal dispute involves an element that transcends jurisdictional boundaries (e.g. involves citizens of different states, or international transactions). One of these three factors—territoriality, nationality, or result of action—is used to determine which legal system has jurisdiction over the situation at hand.

When posting content or communicating with other users on the Internet, it might be difficult to determine whether or not a violation of a national law has occurred. Within this framework, nearly every activity that takes place on the Internet has a global component, which may result in the interaction of multiple legal systems or the "spill-over effect."

Need for Internet Regulation

The current global economy is largely data driven, where the data of the users is used by big tech companies to manipulate us, spread misinformation, and for advertisement and profiling purposes. These companies continue to build their wealth upon our data. Cybercrime, like mentioned before, is another pressing reason for taking legal action against people who misuse the internet.[68]

Since the international laws regarding jurisdiction on the internet are not developed enough, it is difficult for countries to determine the jurisdiction of their courts. A one-size-fits-all approach would not be possible for this because online offences intersect with a lot of different domestic laws. Courts have come up with various landmark judgments to regulate the online activities of individuals and groups.

Issues with Internet Jurisdiction

While a state's jurisdiction is restricted to its territory, the internet has no boundaries. When it comes to criminal law, it is crucial to know the time and place of the crime. However, this becomes very uncertain on the Internet because of its ubiquity. Countries usually use the territoriality principle of international law and restrict their powers to their territory. However, it is not clear where this principle stands in the world of Internet.

As per the Lotus Principle given by the ICJ, states cannot exercise their power in another state's territory unless they do so on grounds specified in international agreements or customs. As a consequence, states have to resort to procedures like **"Letters Rogatory"** or Mutual Legal Assistance. Letters Rogatory are basically formal requests from the court of one country to that of another to do certain tasks which the country cannot do itself. Letter rogatory can be used to access any evidence that may be located extraterritorially.

However, the treaties for mutual legal assistance have procedures that do not suit the volatile nature of digital evidence. This is because MLAs are bureaucratic, slow and are hampered by politics. They often do not have requisite clauses to be considered valid. There might also be a lack of legal agreements that the involved countries have entered and ratified.

However, internet governance and accessing data has recently been happening through two new methods- specific agreements, and Service Provider.

[68] Julia Hornle, *The jurisdictional challenge of internet regulation*, OUP BLOG (Mar. 3, 2023, 6:09 PM), https://blog.oup.com/2021/03/the-jurisdictional-challenge-of-internet-regulation/.

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Specific Agreements

Sometimes, it maybe absolutely difficult to track cybercrimes when techniques to a anonymise the data or conceal the identity and location are used by the perpetrators. The Council of Europe Convention on Cybercrime has made some progress in this regard and has worked on transborder access. Article 32 of this Convention allows extraterritorial access to data without the other party's consent if it is available publicly.[69]

Contacting Service Providers

States can have domestic laws that can allow them to directly order the intermediaries and service providers to give them certain information. Provisions regarding the same exist in the IT Act of 2000 and the IT Rules of 2020 as well. However, they raise concerns about the privacy of the users.

There are other ways also in which the countries can extend their jurisdiction like through Law Enforcement Authorities.

Recent Trends

There is no universally accepted definition of what constitutes criminal conduct or content throughout the world's many governments. Some information and behaviours, such as the abuse of children, are deemed criminal everywhere; however, the legality of other content and behaviours, such as defamation, varies from nation to nation. When content is uploaded on the internet for anybody in the world to view it, the content itself as well as access to it may be subject to a variety of different regulations imposed by a number of different jurisdictions.

The Yahoo! case that began in France in 2001 is one of the first and most widely cited cases that illustrates the issue of various jurisdictions. Even though the Yahoo.com auction website was hosted in the United States, where the display of such materials was legal at the time and still is today, it was a violation of French law. The law in question prohibits the exhibition and sale of Nazi objects.

The legal matter was resolved by employing a technical strategy (geo-location software and access filtering), which was successful in the court of law. Yahoo! was required to identify users who accessed the site from France in order to prevent those individuals from viewing online pages that featured Nazi artefacts.

In a similar vein, the ruling on the "right to be forgotten" in the European Union (**Google v. Mario Costeja Gonzalez**), put upon search engines the need to accept requests from users in Europe to delete certain search results. One of the examples that occurred not too long ago is the decision that the Court of Justice of the European Union (CJEU) made in the case **C-18/18 Eva Glawischnig-Piesczek v. Facebook Ireland Limited**.

Ms. Glawischnig-Piesczek, an Austrian politician, sought that Facebook delete defamatory claims about her as well as statements that are equal to those demands on a global scale through the country's national judicial system. The highest court in Austria has requested that the CJEU decide regarding the interpretation of the Directive on ecommerce. More specifically, the request focuses on the obligation of the host provider to remove or disable access to illegal information as soon as it becomes aware of its existence.

The Court of Justice of the European Union (CJEU) concluded in its decision that a national court has the authority to order Facebook, in its capacity as a host provider, either to remove information globally that is identical or equivalent in content to illegal information or to ensure that such information does not get posted in the first place (through filters). If identical content is removed, the hosting service provider should not conduct an independent evaluation of the content (although the hosting service provider may

[69] *International Cooperation in Cybercrime: The Budapest Convention,* THE CENTRE FOR INTERNET & SOCIETY, (Mar. 3, 2023, 7:21 PM), https://cis-india.org/internet-governance/blog/vipul-kharbanda-april-29-2019-international-cooperation-in-cybercrime-the-budapest-convention.

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employ automated search techniques and technologies).[70]

Comparative Analysis

A. United States

In the past, the Supreme Court's decision in **International Shoe v. Washington** established the precedent that liability would arise if there is minimum contact with a state if there is a reasonable expectation of being sued in that state.[71] However, more recently, the court has reversed this precedent and held that a defendant cannot be held liable for such cross-border issues.

Zippo Manufacturing Co. v. Zippo Dot Com Inc. was the case that established the well-known Zippo Test and appears to have definitively resolved the conflicting legal positions in this area in the United States in recent years. According to the Zippo Test, a determination of jurisdiction would be dependent on the nature of the website and intended to adopt a sliding scale test. It outlined the following two significant points:

- The fact that it is possible to interact with the site, which would be helpful in determining the magnitude of the harm that was inflicted;
- The detrimental consequence that occurred within the borders of the state that was concerned.[72]

Europe

The Brussels Agreement on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ["Brussels Convention"] applies throughout the European Union. Art. 5(3) lays down that act of torts, delict, and quasi-delict, are actionable. In the case of **Shevill & Ors. v. Presse Alliance S.A.**,[73] a libellous article was published in one location but distributed across numerous jurisdictions. In this case, the European Court of Justice developed the mosaic approach and determined that the site where the damage was done comprises the following elements: the location of the publisher's home, the location of the event that gave rise to the defamatory statement, the location of the publication, the location of the distribution, or the location where the content was read and received.

In the **Svensk Handel case**[74], although though the Court didn't come out and reject the Mosaic Method, it did make it clear that "the centre of interest" must be situated and understood in a broad enough way to encompass residence, which is where the majority of the damage is done. On the other hand, the Court established an essential precaution when it stated that any order to remove defamatory content cannot be initiated in all states where the website can be accessed. This is a very significant precaution.

Suggestions

A. Self-regulation

Private self-regulation on the part of the technology businesses themselves has been proposed as one of the legal solutions to the problem. Even though technology companies do have a part to play in the regulation process (for instance, setting standards regarding what people are allowed to post on social media platforms), these companies will not address the more significant risks that are posed by the data economy on their own because it is not in their best interest to do so. The self-interest of large firms in the media and technology industries is standing in the way of democratic and equitable regulation.

International co-operation

The second solution can be found in international law and the cooperation that exists between nations on a global scale. More than anything else, the jurisdictional challenge has emphasised the importance of international cooperation in order to address the issues that are caused by advances in

[70] DIGWATCH, file:///C:/Users/User/Downloads/Main%20trends%20in%20jurisdiction%20online%20in%202022%20_%20DW%20Observatory.pdf (last visited Mar. 3, 2023).
[71] International Shoe v Washington, 326 U.S. 310 (1945).
[72] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119.
[73] Shevill & Ors. v. Presse Alliance S.A., Case C-68/93 [1995] 2 W.L.R. 499.
[74] Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, ECJ.

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technology. This realisation has been the most important takeaway from the challenge. But, states have a propensity to act in ways that are in their own self-interest, and once again, development is very sluggish. In addition, cultural, moral, and legal norms differ greatly throughout states, which makes it inappropriate to attempt to approximate laws from one state to another.

Political citizenship

The third response is that lawyers have little choice but to transfer the blame back to politicians and, to some extent, to computer scientists who are building defensive technologies. These technologies should be able to better enhance and preserve users' privacy. These dangers can only be mitigated by increased political consciousness among users of technologies and engaged citizenship on the part of the general population. This awareness goes much beyond merely having a (passive) literacy in the media and receiving instruction.

Users need to be aware of the potential hazards that can arise from utilising technology in specific ways, and they must alter their behaviour in order to retake control of their lives. Regulation is not simply legal (in the sense of complying with the law), but more importantly, it is about political citizenship and active participation in the political process. The concept of jurisdiction illustrates why the law is not the only solution to the question of how to regulate the data-driven environment of the worldwide internet.

Conclusion

In the same way that the Internet developed, the only way a digital society that is free, open, and welcoming to everyone can arise and be organised is through the concerted effort of all stakeholders, including governmental, corporate, and civil society actors alike. Over the course of the past few decades, an institutional ecosystem has gradually come into existence to enable and maintain the technological interoperability of the Internet's underlying infrastructure. But, more than just a technical challenge, protecting the global and borderless nature of cyberspace is a top priority.

It is necessary to build governance structures that are just as forward-thinking as the network itself in order to address the growing tensions that exist between different jurisdictions online. If this is not done, there will be an increase in the number of national decisions that are not coordinated with one another. These decisions will have unintended and negative effects on everyone, putting at risk the global exercise of human rights as well as innovation, which will result in high social and economic costs.[75]

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