

An Analysis into Jurisdictional Issue of Law of Internet in Modern Global World: In Special Reference to the LICRA v. Yahoo! Case

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Historically, the matter regarding the jurisdiction was plainly based on the territorial principles. The place of jurisdiction was based on the physical existence of the subject matter. Like in case of dispute in relation to land or immovable properties, the place where the land or such property is situated, In case of movables, where such movable is and where the cause of action arose or according to the physical existence of the person claiming under the case.

But with the advent of Internet the principle of physical existence has totally changed and the transactions cannot be based on the basis of geographical location of the parties. The inbounds of jurisdictional issue has totally changed.

Due to the presence of Internet all over the world, people from one part of world can enter into contract with some other person sitting at some distant place/places in some other corner of the world. Which is really a big problem as if both the parties to contract are in same country, there will be no dispute in regard to controversy of the jurisdiction. But the matter will totally change if both the parties are having different jurisdictions and entering into a contract. There is a question of jurisdiction in the matter that which of the court is having jurisdiction in regard to that matter. In this case generally the law of both the countries is applicable and it is a major concern to decide which law is applicable in such a case i.e. the parties are having the Choice of Law and Choice of Forum.

Same matter was forced by the court in decision of French Court. The court order Yahoo Inc! to put filtering system in its US website so as to prevent access by French residents to portion of Yahoo! Inc auction website where the persons were offered sale of world war II memorabilia containing Nazi symbol³.

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³ Ordonne du 20 November 2000 VEJF and LICRA V. Yahoo! Inc and Yahoo France (Tribunal de Grand Instance de paris)

The dispute in regard to the jurisdictional issues is one of the major concerns to be decided to promote the growth of International Trade and Commerce carrying out through the means of Internet and the present scenario to overcome these jurisdictional disputes where both the parties are having a choice to select the forum. The law must be made for all the countries by their joint treaties, by which the residents of all the countries using internet and entering into transaction with the others will be brought within the net of Law.

Basic notions of jurisdiction and enforcement are turned on their head, as “content on the Internet does not exist in one particular place; rather, it exists in several places at once”⁴

I. Fundamental Jurisdictional Principles of Jurisdiction under International Law

I.I. Jurisdiction to Prescribe:

It means that the substantive laws of the forum countries are applicable only to the persons who are subject of that country. It basically deals with the territorial jurisdictional matter i.e. in what circumstances a law will be applicable to a particular person.

The law of country may prescribe jurisdiction:

- In respect of *conduct of persons, which is within the territorial jurisdiction of the country?*
- In respect of the *subject matter in form of thing, which is present within the territorial jurisdiction?*
- In respect of *conduct of any person outside the territorial limits of the country, having its effect within the territorial limits of the country.*
- In respect of *all interest and activities of its subjects within or outside the territorial jurisdiction of the country.*
- In respect of *conduct of persons, who are not otherwise subject of country but is directed against the security of the country.*

I.II. Jurisdiction to Adjudicate:

As per Wikipedia

⁴ Julie L. Henn, Note, Targeting Transnational Internet Content Regulation, 21 B.U. INT’L L.J. 157, 158 (2003)

Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.⁵

The jurisdiction to adjudicate may be effective for resolving the disputes of following categories:

- Disputes between the private parties, such as individuals.
- Disputes between private parties and public bodies and public authorities.
- Disputes between public bodies or public officials.

As defined in Legal Dictionary of Farlex Jurisdiction to Adjudicate includes:

"The legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. The equivalent of a determination. It indicates that the claims of all the parties thereto have been considered and set at rest."⁶

I.III. Jurisdiction to Enforce:

Jurisdiction to enforce means the jurisdiction to enforce any law. It is the narrowest of all the three forms of Jurisdictions. Jurisdiction to enforce is last to be determined, once the criteria for prescriptive and adjudicative jurisdiction is fulfilled only then the jurisdiction to enforce can come in scene.

II. Jurisdictional Matter in Cyber Law

In context of Internet, the principle of jurisdiction according to the traditional view is not feasible for proper implementation. Internet is such a mechanism by which a person sitting at one place can interact with some other person who is sitting at some other distant place which may be within the same country or some other country.

Likewise, a website can be viewed from any corner of world provided the Internet connection must be present there. So, the concept of

⁵ <http://en.wikipedia.org/wiki/Adjudication> visited on 25.04.2014

⁶ <http://legal-dictionary.thefreedictionary.com/adjudication> visited on 23.04.2014

geographical location has reduced its significance. The circumference of the internet had widened the circumference of its use which ultimately resulted into International contacts and the territorial jurisdictional issues.

The actual location of computers among which information is routed along the Internet is of no consequence to either the providers or recipients of information; hence there is no necessary connection between an Internet address and physical address and physical jurisdiction.⁷

The growth and pace of change in the communication industry are unlikely anything since inception. This change had ultimately led to the expansion of the business houses which had widened the scope of the Law of Internet. The existing jurisdictional rules applicable to commercial transactions reflect presumed power imbalance between buyers and sellers. The sellers are in strong position and hence in most of the cases the jurisdiction is too determined by the seller. The power in context of commercial relationship depends upon knowledge and choice. The buyer is in weakest position.

Electronic commerce in the world wide market place is represented by the Internet inherently expands the consumer choice, because it opens up every market to every buyer regardless of where the seller is located. On the one hand the Internet empowers the consumers and on the other hand it limits or reduces the power of seller. Now, every website is worldwide so the consumers are having wide choice. But whenever the consumer is purchasing any product online the online trading companies generally ask for checking the box providing, "*I agree the terms and conditions*". By this way the companies are limiting the jurisdiction to their own place and the consumer is at the mercy of such company.

III. The Licra v. Yahoo case and the Regulation of Online Content in the World Market

Yahoo is a Santa Clara, California based commerce and media company. The Yahoo hosts more than 25 websites all over the world. The French site (Yahoo France) is located at universe resource locator (URL) <http://fr.yahoo.com>. Yahoo's regional sites target local users but there was option that the users from other parts of the world can also view the same through the link offered on yahoo pages. These links were provided on local sites in regional language of the host countries. The regional sites generally observe the laws of those countries for contents under their control. All the members whether of U.S. site or from regional sites can reach the website

⁷ D. Johnson and D. Post, Law and Borders – The Rise of Law in cyberspace, 48 STAN. L. REV. 1367, 1371 (1996)

and can access all the applications including the chat rooms, auction pages, e-mail services etc.

Anyone over eighteen years of age may select an item for sale. Yahoo records the posting and sends an email to the seller detailing the highest bid and the buyer's contact information. The parties, i.e. the seller advertising on Yahoo and the buyer selecting the product on Yahoo, complete their transactions themselves without any interference from Yahoo.

Even though Yahoo was not regulating the sales terms for the transaction on its auction sites, even then Yahoo was monitoring the U.S. auction sites for compliance with the U.S. laws. Yahoo's auction site was for compliance with the U.S. copyright laws and warned auction sellers not to sell any goods or services violating U.S. laws. Yahoo also advised buyers not to offer items to buyers in jurisdictions which prohibit sales of such items. Yahoo's policy was only in regard to copyright law and it placed the burden of complying with local regional laws on the sellers. This provision shifts the burden of determining the nature of the content to the members who post it. Through its Terms of Service, Yahoo restricts what members can post or upload onto its services overall (including the auction site). Restrictions include prohibitions against defamatory statements and material that breaches fiduciary duties or anything which violates intellectual property law.

France, Germany, the Netherlands and other countries have made laws that make it a crime to exhibit for sale objects relating to Nazism and the Third Reich. Judge Jean-Jacques Gomez, the judge who explained the rationale behind the French statute:

Whereas the exhibition of Nazi objects for the purpose of sale constitutes the violation of French Law (Section R.645-2 of Criminal Code) and even more an affront to the collective memory of a country profoundly traumatized by the atrocities committed by and in the name of the Criminal Nazi regime against its citizens and above all against all its citizens of Jewish Faith.....There has been no challenge presented in any proceedings claiming that France, Germany, the Netherlands, or any other countries with similar hate crime laws lack either the political or moral right to enact those statutes."

However, the unique nature of the Internet, which is totally different from traditional modes, has given rise to controversy in regard to the matter of jurisdiction. The question is, "What is the responsibility of national legal systems when online content is posted in one country where it is legal but can be viewed in another country where the same is illegal?"

It was held by the French court in the present case that the matter was covered under the French Law as the things were visible in France and

causing harm in France. So, the French court is right in deciding the matter. After losing its case in French court Yahoo responded by filing an action for declaratory relief in U.S. district court in California. It was held by the District court that the order of Paris court directing Yahoo to install geo – location filtering software in its California based servers violated Yahoo’s First Amendment Rights and was therefore unenforceable.

This practice of reviewing a foreign judicial act using U.S. constitutional standards by Yahoo is nothing new in the realm of foreign judgment recognition.

The question raised by this judgment was that whether the filing of a judgment obtained in one country by a plaintiff, without subsequent enforcement efforts, be a sufficient contact with the forum of the defendant’s country to confer jurisdiction over that plaintiff in a declaratory relief action filed in defendant’s country?

Secondly, whether the geo-location filtering a flawed technical measure offering no substantive assistance to countries seeking to enforce their laws over the borderless Internet, or can it afford a means for those countries to maintain their cultural values without seeking to impose them on the rest of the world?

Thirdly, whether litigation in multiple forums all over the world is the best way to resolve the international disputes which are resulting from the clash between the local laws of the countries and the web content?

The judgment of the French court ordering the yahoo website to put filtering on its U.S. based server was not seems to be genuine from one side but if we see the other side the decision of the French judge was correct as the things which were restricted for sale in France were visible on French website which was really the violation of French Law. The French Law was prohibiting the exhibition in form of the Nazi memorabilia. It means that the France whose subjects were viewers of the website of U.S. based company by going to that page of Yahoo are thereby doing something which was otherwise not allowed in France. It was rightly explained in kentlaw:

“a Web page placed on an Internet server is as visible elsewhere in the world as it is in the sovereign in which the server physically is located. While it is true that a particular sovereign may have legitimate interests in regulating what its citizens see and do with respect to that Web page, because it is visible and accessible to its own citizens, that same interest exists in all of the nearly 300 sovereigns throughout the world. Interest analysis thus says that everyone has prescriptive jurisdiction and thus as good a

claim to have its own substantive law applied to that Web page as any other sovereign.”⁸

IV. Indian Law

In India, the legislation governing the control over cyber crimes and other activities related with the information technology which is governed by the *Information Technology Act, 2000* and there are specific forums in the Act which have the sole jurisdiction to deal with the cyber crimes.

Position in India

Under the *Information Technology Act, 2000*, India claims that it is having the jurisdiction even over the foreign parties committing criminal acts outside India which have an effect on a computer information system located within India. Section 75 of the *Information Technology Act, 2000* deals with extra – territorial application of the Indian law, the section provides that the provisions of Act will apply to:

“Any person irrespective of nationality and an offence or contravention committed outside India”

The Act has therefore adopted the principal of universal jurisdiction and covers both the cyber contraventions and cyber offences.

V. Legal Dilemma

The main legal dilemma is *whether we can solve these jurisdictional disputes in regard to Internet by applying the currently existing principles of Law*. This doctrine of interaction between the Internet and traditional jurisdiction modes whether national or international is a major concern to be decided in the present context. In the context of *Licra v. Yahoo!* Case this position has emerged where both the court i.e. French and U.S. had given contradictory judgments. Now, as the modes of trade are becoming complex the law must be changed in accordance with the present scenario. The present time requires a co-operation from all the countries for the free flow of the new era of Internet. The trade is changing its shape and if, the law will not be adjusted for free flow of the business then again there will be no promotion of the trade by this modern means i.e. Internet. All countries irrespective of any other personal dispute must come to a single platform and the laws must be drafted in such a manner that Justice will be with every person because the purpose of Law is to make such rules that will regulate the free flow in the society. But initially if rights of any person are violated he had remedy to lodge case and for *main question arises where the person*

⁸ <http://www.kentlaw.edu/perritt/montreal.rev.htm> visited on 20.04.2014

will lodge the case. The simple answer to this question is “The place where cause to action takes place”. We had to determine the place where cause of action has arisen. It will be the only place where the case can be lodged. The matter was decided in regard to the jurisdiction of the courts in several matters but there is no single conclusive determination of the matter in regard to the jurisdiction.

Now, the question comes that *if the court assumes that it is having power and thereby pronounces the judgment what will be its enforceability* if the judgment is in regard to extra territorial jurisdiction of the court. Again the dispute arises that some acts are offences at one place of the world, but they are legal in some other part of the world.

Let’s suppose publishing pornographic material is illegal and an offence in India but is lawful in U.S.A. A person will be held liable for uploading and selling any obscene matter on any website (even if the server of website is located in U.S.A.), if that person is using computer, computer system or computer network in India.

The Information Technology Act, 2000 provides in Section 75(2), that:

“For the purpose of Sub-section (1), this act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”

So, in accordance with this section the act was committed by using computer, computer system and even computer network located in India.

In the celebrated case of *Shoe v. Washington*⁹ the hon’ble Supreme Court of United States had laid the tests to determine the jurisdictional matter in, these are:

1. Whether the defendant had sufficient “minimum contacts” with the forum state to justify the exercise of jurisdiction?; and
2. Whether allowing the defendant to be sued in the forum state would offend “traditional notions of fair play and substantial justice”?

Both parts of the test must be satisfied before a court can proceed.

So, the first point the court has to go with is “*Minimum Contract*”, i.e. whether the defendant has initiated contracts and expects protection by the given forum’s law for defendant’s commercial and personal benefit. Once the minimum contract is established, the court next proceeds towards *reasonableness for proceeding against the foreign national*. While

⁹ 326 U.S. 310 (1945)

determining the reasonableness, the court shall take into account the interest of state in protection of rights granted to its citizens and the quantum of burden on the plaintiff and simultaneously the burden of defendant in relation to the foreign jurisdiction. If one is claiming inconvenience same must be severe. Mere coming to court involves time and expenditure is not a factor counting for inconvenience. It must be something which seems to be court to be genuine.

If the website operated from any part of the world is only informative it would not be justified to take action against that website from any part of the world if any offence is not committed especially in relation to the residents and/ citizens of that country. This type of website can be said to be Passive. But on the other hand, if the website requires a high degree of interaction between the site host and visitors, the visitor who becomes plaintiff would be able to assert the jurisdiction against the host of the website. In this case the host may have its registered and operating office in any part of the world. This second category of website to be called as Active. Whenever the court has to determine about the matter of jurisdiction the "passive versus active test" is applied.

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁰ the test Active versus Passive was made, In this case Plaintiff corporation brought suit alleging trademark infringement and unfair competition against defendant corporation in connection with the manufacture of wind proof cigarette lighters. Zippo Dot Com's contacts with Pennsylvania occur almost exclusively over the Internet. Defendant's offices, employees and servers are all located in California. Advertising in Pennsylvania consists of posting information about its service on its Web page, accessible to any Pennsylvania resident via the Internet. Among the 140,000 paying subscribers worldwide, Pennsylvania residents carve out only two percent (3000 subscribers) of customers. Manufacturing bases its trademark claims on Dot Com's use of the word "Zippo" in many locations in its Web site and in the headings of Internet newsgroup messages that have been posted by Dot Corn subscribers. When a subscriber views or downloads a message, the word "Zippo" appears in various sections of the heading. Zippo.com had no physical presence in the state. In determining the jurisdiction the court determined three types of web presence and also found that the degree of interactivity on a given website would determine reasonability to impose jurisdiction.

Under the traditional personal jurisdiction framework, a court's constitutional ability to exercise jurisdiction over a non-resident depends upon three factors:

¹⁰ 13 Berkeley Tech. L.J. 289 (1998)

1. the non-resident must have sufficient contacts with the state;
2. the claim against the defendant must arise out of such contacts;
and
3. the exercise of jurisdiction must be reasonable.¹¹

VI. Conclusion and Suggestions

In the present scenario, with the change in the modern techniques and tools in all spheres of life, the world has become a small village. One person sitting in a corner of the world is in position to see, deal and transact with the some other person sitting at another corner of the world by use of the Internet. The main requirement is “Internet”. By the use of Internet, now the means of conducting businesses has also got a radical change. Due to this international trade, commerce, dealings and transactions sometimes the dispute arises between the citizens of different countries, in such a situation it will be really very difficult to determine the place of jurisdiction where the case is to be lodged. The decision of *LICRA v. Yahoo! Inc* as given by Judge Jean-Jacques Gomez seems to be correct as in that case the Nazi related items were offered on Yahoo website and the same was an offence in France. The decision of the court for using filtering to the Yahoo in its California based website seems to be genuine as the items were visible in France and thereby it was feasible for the persons sitting in France to purchase that item and thereby commit the offence. But the response of Yahoo by filing an action for declaratory relief with the forum of his own country and the decision of the U.S. District court, California providing that the decision of the Paris court directing Yahoo to install geo- filtering software in its California based servers as violative to Yahoo’s first amendment right and on this ground declaring it as unenforceable seems not to be genuine.

As with the change in the world, new legislations of the different countries across the world are providing new dimensions for the jurisdictional matter. As Section 75 of the Information Technology Act, 2000 provides that any offence committed outside India by any person can be decided and the person can be prosecuted in India if such act or conduct constituting offence involves a computer, computer system or a computer network located in India.

Therefore, Indian law is also having extra-territorial jurisdiction over the matters if the offence is committed by any person by using a computer, computer system or a computer network located in India. It means that if no

¹¹ See, e.g., *Mellon Bank (East) PSFS, N.A. v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992). Ch. L.J.

computer system or computer network located in India is involved then it will have no application to such offence because Section 75 of Information Technology Act, 2000 creates a bar and the courts in India shall have no jurisdiction in relation to those offences. Moreover, the cause of action has not taken place in India. But, at the same time person can be held liable for any other civil or criminal law of the country if conditions of that law are fulfilled. In end, it can be said that the matter in regard to jurisdiction is to be determined by the court where the offence has been committed taking into account the facts and figures of the case but once the matter is decided in favor or against the matter comes to enforcement. As it was rightly said by Dr. M.P. Singh¹² “Law is a bare document without enforcement.”¹³ To give teeth to law all countries shall come to same footings and action shall be taken collectively against the criminals and law breakers. There is need for a Common International Law, which is itself a big concern as the traditions, customs, living styles, habits of all the countries are different but even then we had to come to some platforms and declare some of the offences as international crimes for which the decision of all the courts shall be binding in the foreign states and to make its enforceability more strict there must be creation of some online international courts. These courts must have simple and cost free procedures so that in case of any such dispute the decision given by the International body will be validly and mandatorily enforceable.

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¹³ In a lecture delivered at G.N.D.U. Regional Campus, Jalandhar in National seminar on an emerging Dimensions on Socio legal justice held on 2nd February, 2014