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FREE SPEECH AND JURISDICTIONAL ISSUES

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Abstract

This study examines the evolving relationship between free speech and jurisdictional challenges in cyberspace, with particular reference to India and the United States. The Internet, as a borderless medium, has transformed communication by enabling the global exchange of ideas, information, political discourse, and commercial transactions. At the same time, its openness has raised significant concerns regarding regulation of online speech, hate speech, obscenity, and harmful content, thereby creating tensions between freedom of expression and state regulation. The paper explores the concept and historical development of free speech, tracing its constitutional and philosophical foundations under Article 19(1)(a) of the Constitution of India and the First Amendment to the United States Constitution, while also examining reasonable restrictions imposed under Article 19(2), international human rights instruments such as the UDHR and ICCPR, and judicial approaches in both jurisdictions.

The study further analyzes how the borderless nature of cyberspace challenges traditional notions of territorial sovereignty and jurisdiction. It examines the complexities of regulating online content originating beyond national borders and the difficulties courts face in asserting personal and subject-matter jurisdiction in cyberspace disputes. Through doctrinal analysis and judicial precedents such as *Casio India v. Ashita Tele Systems*, *Banyan Tree*, *International Shoe Co. v. Washington*, and *Bensusan Restaurant Corp. v. King*, the paper explores principles such as minimum contacts, purposeful availment, and distinctions between passive and interactive websites in determining jurisdiction.

The research argues that while India and the United States adopt different constitutional approaches toward free speech, both face common challenges in balancing expression with regulation in the digital age. It concludes that traditional legal frameworks are often inadequate to address jurisdictional conflicts in cyberspace and that harmonized international standards

are essential to regulate harmful online content while preserving freedom of speech. The study highlights the need for a nuanced legal framework that reconciles constitutional liberties, technological realities, and cross-border enforcement in an increasingly interconnected digital world.

Keywords:

Free Speech; Freedom of Expression; Cyberspace Jurisdiction; Internet Regulation; Article 19; First Amendment; Extra-territorial Jurisdiction; Cyber Law; Interactive Websites; International Standards.

Introduction

The Internet, the borderless medium, has provided the unprecedented opportunity to the users for communications across the globe, providing scope to exchange emails, post information's, join chats,¹ purchase products, invest monies, providing access to political, cultural and scientific data. The one thing that distinguishes internet from other mediums is its openness. With the increase in the number of people using cyberspace and the ways with which they use it has given rise to number of issues, one of which is whether there should be laws to restrict internet freedom of speech.² It is pertinent to say that there is no danger flowing from speeches unless the incidence of evil is apprehended.

With opportunities comes threat. Internet has become threat to public safety. Though in order to curb this threat nation have enacted legislation to combat hate speech and pornography. This paper will focus on the development of free speech along with different approaches adopted by India and United States in dealing with issues of free speech. It is noticed that the main obstacle that nations encounter when they try to regulate internet content is that of the extra-territorial jurisdiction. It is important to mention that nation has the right to control the conduct and content of website within the territory but there is uncertainty whether nation can regulate internet content originating from outside its borders. The second obstacle is article 19 of Universal Declaration of Human Rights (UDHR) and article 19 of The International Covenant on Civil and Political rights (ICCPR) which guarantees right of opinion and

¹ Walter C. Jr. Dauterman, "Internet Regulation: Foreign Actors and Local Harms- at the Crossroads of Pornography, Hate Speech, and Freedom of Expression", *N.C.J. Int'l L. & Com*, Vol. 28, 2002, pp. 177.

² Doris Bozin, "Casualty of Cyberspace- Free Speech", *J. L. & Inf. Sci.*, Vol. 11, No. 1, 2000, pp.112-123.

expression without any interference and to provide ideas and information through any media and regardless of any frontiers. After analysing the right provided under article 19, it becomes pertinent to see whether any restriction is imposed on such right.

Meaning of Free Speech

Right to freedom of speech and expression is an invaluable fundamental right of human being and it occupies the first position in the fundamental rights. Freedom of speech means to express one's own opinions freely in writings, printings, pictures or whatever mode without any restrictions by the government on such freedom. Free speech is the essence of free society and hence in order to establish a free society the foremost criteria of free flow of speech should be allowed. It is recognised as a natural right, which is inherent in the status of a citizen of a free country. Yet there cannot be any freedom which is not restricted or limited. Had there not been restrictions there would have been complete disorder. Thus reasonable restrictions are imposed on such rights.

Freedom of speech in India is guaranteed under Article 19(1) (a) of the Constitution and also by various conventions which expressly talk about freedom of speech, such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights etc. However, it is important to note that such freedom is not absolute; certain reasonable restrictions are imposed on such rights. The right of one man should not offend the right of other.

The protection of free speech in India is quite similar to that of United States and Bhagwati J., in Express Newspaper Pvt. Ltd. v. Union of India³ observed that fundamental right enshrined in Article 19(1) (a) of our Constitution is based on the First amendment of the Constitution of the United States and so we should refer to those decisions of United States Supreme Court to appreciate the true nature, scope and extent to the right under our Constitution. It is pertinent to mention that internet was first introduced by United States and hence they have the very first right to determine legal issues. It is indeed beneficial for India to take a leaf out of United States experience. In addition to above it is also relevant to mention that United States First Amendment to its Constitution gives an absolute right to a citizen, but Courts have invented

³ (1959) SCR 12

*'Police Power of the State' to prevent misuse of the First Amendment, whereas Indian Constitution does not confer absolute rights. It only confers qualified rights. It is subject to certain restrictions which are conferred under clause (2) of Article 19.*⁴

Objectives of the Study

The present has been carried out with the following objective:-

- i. To understand the meaning of Free Speech;
- ii. To probe into the historical development of Free Speech;
- iii. To understand the concept of Jurisdiction;
- iv. To understand the various Jurisdictional problems in regulating the Internet.

Statement of Problem

The Internet, the borderless medium, has provided the unprecedented opportunity to the users for communications across the globe, providing scope to exchange emails, post information's, join chats,⁵ purchase products, invest monies, providing access to political, cultural and scientific data. *With the increase in the number of people using cyberspace and the ways with which they use it has given rise to number of issues, one being whether there should be laws to restrict internet freedom of speech and second jurisdictional issues.*

Research Methodology

The methodology adopted in this research is Doctrinal. The study is based on the collection of data from secondary sources such as books and internet. The study also involves the collection of data from primary sources such as statutes.

Historical Development of Free Speech- India

Under the colonial era, the liberties of the Indians were at a complete stake because the British Empire has taken strict steps to curb all the liberties that Indians had including right to speech and expression. Seditious laws to Section 295A of the Hate speech law, the Britishers and the British Government has taken all possible steps to curb opinion making or freedom to express, just to achieve their motive i.e. to suppress the revolutionary sentiments prevailing in the

⁴ Durga Das Basu, *Shorter Constitution of India*, Lexis Nexis, Haryana, 2015.

⁵ Walter C. Jr. Dauterman, "Internet Regulation: Foreign Actors and Local Harms- at the Crossroads of Pornography, Hate Speech, and Freedom of Expression", *N.C.J. Int'l L. & Com*, Vol. 28, 2002, pp. 177.

masses to have independence, to have an Independent Bharat. The framers of the Constitution of India have borrowed the idea of freedom of speech from the American Constitution.

Thus the current law what stands today has its root in the Hate Speech Law section 295 (A) enacted by the British Administration in India. The importance of freedom of speech and expression can easily be understood by looking at the preamble. The preamble *inter alia* ensures to all citizens liberty of thought, expression, belief, faith and worship. The Constitutional significance of the freedom of speech can be seen in Article 19 of the Constitution. Supreme Court has said that the words "freedom of speech and expression" included in the Constitution must include the freedom to circulate one's views by words of mouth or in writing or through audiovisual instrumentalities. Article 19 confers fundamental rights on citizens, and these rights cannot be conferred on persons who are not citizens or cannot be citizen of India. Clause (1) of Article 19 confers right of freedom of speech and expression, but this right is not absolute. Clause (2) of Article 19 imposes restrictions on such right on the basis of following⁶:

- Sovereignty and integrity of India,
- Security of state,
- Friendly relations with foreign state,
- Public order,
- Decency or morality,
- Contempt of Court,
- Defamation,
- Incitement to an offence.

Freedom of expression has contributed to the development and well being of a society. This has triggered allot of issues. One of which includes to protect the society from the harm that may flow from the obscene material. In India it is necessary that publication must be judged as a whole and impugned publication should be separately judged to see whether it is grossly obscene. The act of judging should be of an ordinary man with common sense. The definition of obscenity differs from culture to culture. Supreme Court in India held *Lady Chatterley's Lover* to be obscene while in England, the same was not considered obscene. This test has become outdated in context of internet age, which has actually broken down all the barriers and

⁶ *Supra Note 4.*

made publications accessible across the globe with just a click of a mouse. Freedom of Expression is an extension of freedom of speech. Here the very medium to express or get information is the internet. Freedom of information also includes right to access one's website i.e. ability to access Web content without censorship or restrictions.

Thus we see how freedom of speech has developed in India and how it is still developing. With the dynamic growth of internet, the right to exercise freedom of speech and expression is also increasing along with increasing jurisdictional problems.

Historical Development of Free Speech- United States

According to The First Amendment to the United States Constitution Congress shall make no law which abridges freedom of speech, or of the press, of association, of assembly and petition. Initially this set of guarantee was not there but soon realizing the importance of freedom of speech, the American Constitution was amended in order to pave way for protection of this right. is provided by the first amendment of United States. This means as a general rule, first amendment protects all types of communication. However complete protection cannot be given. The United States Supreme Court has specifically demarcated speech based on content of communication and held that First Amendment will not protect fraud, criminal speech, fighting words, child pornography, commercial speech that is misleading or concerned with illegal activity, defamation and obscenity speech.⁷ This means that U.S. Supreme Court has laid down some exceptions to the general rule.

The General rule speaks about the rights protected by the First Amendment. These rights include political speech, scientific, literary, artistic communications, movies, music, dancing, right of the media to gather news etc. This list is not exhaustive The exceptions to the general rule talks about the rights which are not protected by the First Amendment, these rights include criminal speech, fighting words, obscenity, child pornography, commercial speech that is misleading or concerned with illegal activity.⁸

Obscene communications are not protected by the first amendment. Obscene matter can include

⁷ *Supra Note 2.*

⁸ Russell W. Galloway, "Basic Free Speech Analysis", *Santa Clara Law Review*, Vol. 31, No. 4, January, 1991, pp. 891-897.

profanity or even shocking violence but the legal definition provided deals with materials relating to sex. In *Miller v. California*⁹, the definition of ‘obscene speech’ was established. Material is obscene if it satisfies the three criteria’s. First, it appeals to the average person’s prurient interest in sex. Secondly, it describes sexual acts. Thirdly, it does not have literary, artistic, political or scientific value.¹⁰ Child Pornography also falls under the exceptions to which first amendment right does not extend. In child pornography three main points are to be considered. First, if an act depicts a child engaged in sexual activity, it is child pornography. Second, Prohibited conduct should be adequately defined i.e. possession or distribution of child pornography may not be banned until and unless it is specifically banned by law. Such law should specifically mention the age of the child and also other conducts which can be penalised. Third, Scier, which means that government, has to prove that claimant actually knew that the material included pictures of child sex, mere possession or distribution of child pornography is not punishable.¹¹

In *Chaplinsky v New Hampshire*¹² U.S Supreme Court allowed criminalization of speech if it actually caused unrest in the community. This is called ‘fighting words’ doctrine, but now along with the above criteria if the content of the speech has the purpose of inciting unrest in community than protection under first amendment cannot be availed.

In United States the First Amendment shows reluctance is imposing restrictions on speech. Thus United States Constitution usually protects all types of speeches and if restrictions have to be imposed, such restrictions have to be justified on the basis of State interest.

Understanding the Concept of Jurisdiction

Jurisdiction of a court means power to hear a case and resolve a dispute involving person, property and subject matter. These principles of jurisdiction are enshrined in the Constitution itself. State actually possess jurisdiction over all persons and things within its territorial limits. Cyberspace is borderless i.e. it does not have physical boundaries. It is an ever growing space and any website is easily accessible at just a ‘click of mouse’. It is pertinent to note that even in case of cyberspace principles of domestic and international law are applicable. This adoption

⁹ (US) 413, 15 (1973)

¹⁰ *Supra Note 2.*

¹¹ *Supra Note 6.*

¹² *Chaplinsky v New Hampshire*, (US) 315, 568

of both laws would maintain continuity of established law and practice even in the realm of online activities

Every websites come with 'terms of service' agreements, privacy norms and disclaimers and thus such agreement will bind the person doing transactions with any of the websites and in case of a dispute, one may have recourse to the private international law. The very first question in a cross-border dispute is whether or not court has jurisdiction to hear the dispute and it is important to know the very nature of the dispute in order to identify the jurisdiction. In order to know the nature of the dispute it is important to know what has happened, where did it happen and why did it happen. A court must have both subject-matter jurisdiction and personal jurisdiction. The Courts are borrowing the principle of personam jurisdiction, which were first applied to physical establishment and now the courts are applying the said principle to the cyberspace i.e. on online activities.¹³

A website represents a virtual world. It is pertinent to note that in order to fix the place of jurisdiction, one must look into the nature of the website model i.e. whether it is 'business oriented' or 'information oriented'.

Thus after understanding the concept of jurisdiction we now look into various jurisdictional problems in regulating the internet.

Borderless Cyberspace- Jurisdictional Problems in Regulating The Internet

Cyberspace is a place which is borderless i.e. which cannot be tied into any geographical boundaries. The only borders in cyberspace are defined by passwords, firewalls which are regulated by corporations and government. People can interact with each other by accessing and exchanging information online all over the world. This exchange of information has given rise to many issues. Hence, the Government attempt to regulate certain forms of free speech via internet because they may be offensive to the national well being of the society. If this happens than legal paradigm which says that Government protects its citizens is brought into question. How can the Indian Government prevent an American citizen from accessing, participating and providing information to others that is obscene?

¹³ Dan Svantesson, "An Introduction to Jurisdictional Issues in Cyberspace", *J.L. & Inf. Sci.*, Vol. 15, 2004, pp. 50-74

India

With the increase in online commerce, it is important that the issue of personal jurisdiction should be looked into from all sources. Parties may themselves agree beforehand that in case of any dispute parties may approach either the courts of natural jurisdiction or foreign courts of their choice. If one or more court has jurisdiction to try a case than it is open to the parties to choose a court of their choice. If the parties specifically agree by prior agreement as to the court in which dispute shall be tried than it should be tried in that court only. Thus forum to which dispute shall lie is discretionary and at the instance of parties. In *Hakam Singh v. Gammon (India) Ltd*¹⁴ the Supreme Court held that where two or more courts under Code of Civil Procedure have jurisdiction to try a suit or proceeding and an agreement between the parties to which court the dispute shall lie, is not contrary to public policy.

The following are basis of jurisdiction under CPC:-

- Pecuniary
- Subject Matter
- Territory
- Cause of Action

In *Casio India Co. Ltd v. Ashita Tele System Pvt Ltd*¹⁵ the defendant has registered the domain name as www.casioindia.com which has registered office in Mumbai. The plaintiff who was aggrieved by such registration filed a suit for trademark infringement in Delhi High Court along with interim injunction application and defendant contented that it carried on the business in Mumbai only and so no cause of action arose in Delhi. The Plaintiff however averred that the website could be accessed from delhi also. Hence ‘the fact that the website was accessible from Delhi is sufficient to invoke the territorial jurisdiction of this court’.

In *India TV Independent News Service Pvt. Limited v. India Broadcast Live Llc & Ors*¹⁶ different approach was taken by the Court. The plaintiff was the owner of “INDIA TV” that was launched in March 2004. The plaintiff was also the owner of the domain name ‘indiatv.com’ which was registered on 18.11.2003. Defendant hosted a website ‘www.indiatvlive.com’ which plaintiff came across in January 2007. The passing off action

¹⁴ *Hakam Singh v. Gammon (India) Ltd.* (1971) 1SCC 286

¹⁵ *Casio India Co. Ltd v. Ashita Tele System Pvt Ltd* (2003) 70DRJ 74

¹⁶ 2007 (35) P.T.C. 177 (Del.) (India).

initiated by the plaintiff to injunct the defendants from using domain name, wherein the defendants were neither residing nor carrying on business in the territorial jurisdiction of the court. It was found that the website could not only be accessed from but also subscribed to from Delhi and thus was contended that the defendant was carrying on business with deliberate effort for profit or gain from India and thereby hampering the economic interest of the plaintiff. Thus the Court held that the defendant in this case has directed his activity toward the forum state i.e. Delhi and thus liable for passing off.

In *Banyan Tree case*, it was held that creating a site, was like placing a product online, which is accessible to the nationwide or even worldwide public, but it was not an act which was purposefully directed towards the forum state. Purposeful Availment means the act has to be intentional. Courts held that even if neither the plaintiff, nor the defendant were within the local jurisdiction of the Court where the case was instituted, but it was proved that the domains of the defendant were accessible by the people belonging to the plaintiff's market thinking defendant to be the plaintiff, because of similar trademarks or domain names, then cause of action will be deemed to have arisen in that market and the case could be instituted there.

United States

The United States have already dealt with many jurisdictional issues. The internet being a global instrument and so it is impossible to specifically determine the jurisdiction as to the cyber-law. The problem of jurisdiction arises when the person is non-resident. In case of resident he is subject to domestic laws but in case of non-resident the question of applicability of laws is uncertain, whether the domestic law of the state where he is residing will be applicable or the laws of the state whose laws he has transgressed will be applicable.

In United States each state has separate laws that govern the activities of its citizens. When internet-based disputes involve citizens of two separate jurisdictions, the United States use conflict of law rules to determine what law should govern. Only a few decisions on internet related disputes have actually discussed the law relating to jurisprudence on the internet. Normally two principles govern the court's assertion of personal jurisdiction, one being long-arm statutes and the Due Process Clause of the Constitution.¹⁷

¹⁷ Farzad Damania, "The Internet Equalizer of Freedom of Speech- A Discussion on Freedom of Speech on the internet in the United States and India", *Ind. Int'l & Comp. L. Rev.*, Vol. 12, 2002, pp. 243-246.

The Supreme Court has set the standard for constitutional exercise of jurisdiction in *International Shoe Co. v. Washington*. Pursuant to the Due Process Clause, a non resident defendant may not be sued in a forum unless it is established that sufficient "minimum contacts with the forum" and in addition the non resident's conduct and connection with the forum must be there.

In *Minnesota v. Granite Gate Resorts*¹⁸, Nevada Corporation that was running a gambling service over the Internet, to which users could register, pay fee and deposit money into an account and place bets through service provided by the defendant. The state court was of the view that it had personal jurisdiction over the defendant. While in *Playboy Enterprises, Inc v Chuckleberry*¹⁹ the defendant has established a website in Italy by the name 'Playmen' featuring sexual photographs of women. In order to access it, payment of fees along with registration was required. It was held that the defendant was in breach of copyright, passing-off and trademark as it asked the customers to register and receive password. It was decided by the Court that either the Italian site must shut down or prevent US users from accessing such site. But in *Bensusan Restaurant Corp. v. King*,²⁰ Court came out with a different view. The defendant had a night club named 'Blue Note', Columbia, Missouri. He was sued for infringement by the owner of jazz club in New York, named 'Blue Note'. The Court held that it did not have personal jurisdiction over the defendant because the alleged act happened to be in Missouri. The reasoning behind this conclusion was that the website did not require registration or did not ask for deposit of money. It was just a simple website providing information.²¹

Thus it can be said that United States have attempted to solve some of the jurisdictional issues arising out of Internet. In the light of the above judgements it can be inferred that Court had personal jurisdiction over the defendant where the website is active or interactive i.e. where the website requires something more than the information. However if the website only provides information i.e. website is passive website, then the Court will not have personal jurisdiction.

¹⁸ *Minnesota v. Granite Gate Resorts, Inc*, 568, N W 2d, 715

¹⁹ *Playboy Enterprises, Inc v Chuckleberry*, 939 F Supp 1032, 1996

²⁰ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (SDNY, 1996)

²¹ *Supra Note 2*.

Conclusion

The explosive growth of internet usage has led people to communication, access, participate and providing information for other users all over the world. Cyberspace is a place which is borderless i.e. which cannot be tied into any geographical boundaries. Hence this explosive growth has led to different issues, one being the jurisdictional issues. This study has already seen how both countries i.e. United States and India attempt to restrict the freedom of speech which inter alia includes freedom of information with different level of effectiveness.

The First Amendment does not restrict any kind of speech. Thus United States Supreme Court has meant that there is a reluctance to regulate any speech. It is pertinent to note that American legislature attempts to regulate the Internet to provide protection to children accessing online pornography, even then the importance of the First Amendment is paramount.²²

The only way to restrict certain types of free speech is to develop international standards. The obscene content which is pornographic and available to children is something that nations can reach an agreement on.

As the Internet is growing and providing many people with access to a new world cyberspace. Whether there should be restrictions on this new world of cyberspace, in particular, right to information which is a part of right to freedom of speech will need to be determined on an international level by National Governments.

²² *Supra Note 2.*