

Lecture- 08



Jurisdictional Cyber Issues

Theories of Jurisdiction

As far as a cyber law is concerned, the jurisdiction encompasses several discrete concepts, including jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. The prescribing jurisdiction is a sovereign entity's authority to make applicable laws to the activities, relations, or status of persons, or the interests of persons in things by legislation, by administrative rule or by determination of a court, by executive act or order and jurisdiction to adjudicate is a sovereign entity's authority to subject persons or entities to the process of its courts or administrative tribunals to determine whether prescriptive law has been violated.

There are various theories of jurisdiction:

Territoriality Theory: It means that a sovereign state has the authority to judge criminal acts that have been committed in its territory. The place where the crime is committed has to be established for this to apply.

Nationality Theory: Also known as Personality theory, recognizes that a sovereign state can adopt criminal laws that govern the conduct of nationals while outside of its borders. This principle effectively makes it a crime for its nationals to engage in conduct that is not illegal in the place where the conduct is performed. This theory is further dealt with in two ways:

Active Nationality Theory: This theory recognizes that a state may exercise criminal jurisdiction over its nationals based on their active nationality and can prosecute and punish its sovereign nationals for committing a crime outside its territory.

Passive Nationality Theory: This theory provides for a sovereign to adopt criminal laws that apply to foreign nationals committing crimes against the sovereign's nationals while the sovereign's nationals are outside of the sovereign's territory.

Protection Theory: This theory provides for a sovereign to adopt a statute that criminalizes conduct that occurs outside of its borders and when that conduct affects the sovereign itself. The sovereign can make it a crime to engage in an act that obstructs the function of government or threatens its security as a state without heed to where or by whom the act is committed.

Universality Theory: This theory provides for a sovereign to adopt criminal laws applicable to the conduct performed by any person anywhere in the world when such conduct is recognized by nations as being of universal concern.

Derived Jurisdiction Theory: This theory cannot be treated as an independent basis for jurisdiction. If the state that has jurisdiction, so determines or authorizes a state that has no jurisdiction over certain acts according to its national laws or case law and embodied principles then it may assume jurisdiction. This can be carried out in the form of a formal request or based on an international treaty.

Principles of Jurisdiction

Territoriality Principle:

if one of the acts constituting an element of the offense has been committed in the territory then the offense is said to be committed within the territory of a state

if the effects of the offense became manifest there.

The Flag Principle: This principle is considered to be a variant of the territoriality principle and it applies if the cybercrime is committed on a ship or aircraft that is beyond the territory of the Flag party, the state of registry will be the one exercising jurisdiction over the offense.

Nationality Principle: It applies the active nationality principle. It gives an obligation to nationals of a state to comply with the domestic law even when they are outside its territory.

This prevents nationals of a state to travel to a foreign state to commit a cybercrime and return without the risk of being prosecuted.