

**REGULATORY ISSUES INVOLVED IN PROTECTION OF PRIVACY AND  
DATA PRIVACY IN e-COMMERCE: INDIAN SCENARIO**

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**Abstract**

*Technology is the creation of intelligent human beings but ironically these technologies are controlling its creator in this internet saga. Due to this chaos in the human society, many regulatory issues have emerged which needs legislative attention as well as judicial cure. The online activities in the form of e-Commerce have facilitated human lives in many facets and have sadly also troubled their privacy and data. The laws in India are not capable enough to deal with the issues of privacy and data protection and thus have left many grey areas. Thus this paper shall examine the two main regulatory issues involved in e-Commerce.*

***Keywords:*** Privacy, Data, e-Commerce, Choice of law, Choice of Jurisdiction, India

## 1. INTRODUCTION

Information is power<sup>1</sup> when one has full control over it without the intrusion of others. With the advance of internet, distribution of individual's data and intrusions into personal space have increased over the years. An easy access to internet empowers anyone anywhere to distribute information true or false to the world with the help of tech-gadgets and violates the privacy and misuse data of an individual.

The mobile nature of the borderless internet and lack of consumer's knowledge has not only questioned the Indian regulatory system but has also threatened faith of consumers in online stage. Our laws to deal with these issues are scattered and are not comprehensive.<sup>2</sup> One best

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<sup>1</sup> Peter B. Maggs et al *Internet and Computer Law* 634 (Printed in the United States of America) (2001).

<sup>2</sup> Like the United States of America our Country (India) too lacks comprehensive laws to deal with cybercrimes and related regulatory issues. But still there can be no comparison between these two Countries. Even though United

example is that of the Information Technology Act 2000. This Act does not specifically provide the manner of forming a contract which takes on an online platform and untraceable jurisdiction<sup>3</sup>. Borderless nature has made it hard to entertain the issues in hand and has invited more vulnerability in contemporary society.

Privacy and data protection issues coupled with issues of choice of law and choice of jurisdiction has been a topic of debate in e-Commerce world. The right to privacy is infringed by many factors<sup>4</sup> and in the absence of even one legal definition of this term, the concern for its protection becomes even more important. Talking about data protection numerous questions are unheard and unaddressed. To list some, it includes questions like; what types of data are to be regulated? What sorts of activities over the internet are regulated? Are Internet Service Providers, Controllers and users of websites classed as data users or computer bureau operators? What are the obligations of registration for internet data users and computer bureau operator's operating in India as well as abroad, when there are no laws on Data Protection? With the internet often lacks security, what are the principles for adequate data security over the internet? How to protect data which travels within India and those data which flows overseas? Technology has affected personal privacy and is repeatedly influencing our understanding of the notion of privacy.<sup>5</sup>

In addition our legal framework on choice of law and jurisdiction were made without bearing in mind the effects of internet as such it is really difficult for regulating the changing

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State lacks a complete law but their laws are well framed to address different contours of cybercrimes. In India we have Information Technology Act, 2000, Information Technology (Amendment) Act 2008, The Indian Penal Code 1860, The Indian Contract Act 1872, The Indian Evidence Act, 1872, Reserve Bank of India Act, 1934 and Banker's Book Evidence Act, 1891. These Acts nor solely neither jointly can race against the mushrooming cybercrimes.

<sup>3</sup> Dr. Rakesh Kumar and Ajay Bhupen Jaiswal *Cyber Laws* 95 (APH Publishing Corporation) (2011).

<sup>4</sup> The right to privacy is infringed by many factors –

- (i) Utilizing private data already collected for a purpose other than that for which it was collected;
- (ii) Sending of unsolicited emails or spamming or spam;
- (iii) Spimming;
- (iv) Adware and Spyware;
- (v) Phishing;
- (vi) Unauthorized reading of emails of others.

<sup>5</sup> Rahul Matthan, *Privacy 3.0 Unlocking our Data-Driven Future* 15 (HarperCollins Publisher) (Printed at Thomas Press (India) Ltd.)(2018).

personality of internet in e-Commerce.<sup>6</sup> Traditional style of choice of law and jurisdiction falls short of its universal application. Parties are struggling to track the location of other users in cyber space and in such turmoil it is not easy to determine the applicable law and choice of jurisdiction is another hurdle to be dealt with.

Jurisdiction is the very basis of every justice delivery system. This very basis has been threatened over the internet. In modern technological society, courts are not as free as they were in traditional society in exercising their jurisdiction over the parties to a suit. Transaction taking place in cyberspace are leaving the courts located in physical space in confusion. It is appearing to be a war between the virtual world and physical world with no comprehensive cyber laws to come in aid.

Internet in e-Commerce transaction acts opposite to the concept of Jurisdiction<sup>7</sup>. Mockery of the Jurisdiction by the internet has questioned the liability of the intermediaries/ internet providers. Each Country has their own legislation to answer this question of liability of the middlemen. Questions pertaining to their liability include, - to what extent the intermediaries can be held.

## 2. DEFINITIONS OF PRIVACY AND DATA PRIVACY

*“No technology has ever been shut down because of the privacy threat it posed to the existing social order”<sup>8</sup>*. The word privacy is not defined by any laws to date. This right was not absolute earlier but today this right is recognised as a right and has formed an integral part of Article 21 of the Indian Constitution. Privacy as a concept differs from person to person and is protected differently in different countries. In India, this right under the Information technology Act is not defined but is infringed on numerous occasions when an individual is engaged in e-

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<sup>6</sup> Tatiana Balaban “Choice of law and Jurisdiction in E-commerce contracts with focus on B2C Agreements, available at file:///C:/Users/hp/Downloads/balaban\_tatiana.pdf (Last visited on September 9, 2019).

<sup>7</sup> Niharika Vij, *Law & Technology*, 40 (Universal Law Publishing Co. Pvt. Ltd.,) (2015).

<sup>8</sup> Rahul Matthan, *Privacy 3.0, Unlocking our Data-Driven Future* 26 (HarperCollins Publishers, India) (2018).

Commerce and other activities online and in other social platforms facilitated by the internet. Due to the technological swift, this basic human right is infringed by many factors. Private data forms part and parcel of privacy and infringement of one may affect the other.

The classical legal definition of privacy is attributed to Judge Cooley (United States judge), who defined privacy as '*the right to be left alone*'<sup>9</sup> almost certainly the best-known definition of privacy so far.

Data Privacy law has long been afflicted by an absence of clarity over its aims and conceptual foundations. Although section 2, sub-section 1 clause (o) of the Information Technology Act defines 'Data' but 'Data Privacy' and 'Personal Data' is not yet defined. Apart from this section, there are section 43 and section 66 of the Information Technology Act 2000, which provides Civil and Criminal liability i.e. penalty and compensation for damage to computer, computer system, etc. and other computer related offences respectively. The question here arises is that of 'what constitutes Personal Sensitive Data? Although India has RBI guidelines that provides additional authentication on a system which are based on information encrypted, the guidelines however are limited to the banking sector only and hardly covers any mandates relating to failure to protect personal data and information in e-Commerce online transaction.

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<sup>9</sup> Ian J. Llyod, *Information Technology Law* 17 (Published by, Oxford University Press 198 Madison Avenue, New York, United States of America) (Printed in, Ashford Colour Press Ltd, Gosport, Hampshire) (7<sup>th</sup> Edition, 2014).

### 3. THE REGULATORY ISSUES INVOLVED IN PRIVACY AND DATA PROTECTION IN E-COMMERCE

- **Issues of choice of law in e-Commerce**

Choice of law and jurisdiction in e-Commerce is one of the toughest questions to be decided by the Court. A court can adjudicate upon a case effectively only if it has the jurisdiction. When a matter involves questions like choice of law and jurisdiction in e-Commerce, determination of applicable law is very important. With different countries having different laws, how the question of choice of law and jurisdiction are to be decided. Different countries will have different judgements on the same issue. Court can determine its jurisdiction and apply law only on physical location but how can it apply its jurisdiction in cyberspace. Internet users are everywhere belonging to different countries having their own laws and such laws are based on their national interest. Disputes in e-Commerce involve persons of different countries therefore determination of one applicable law is very difficult. 'Choice of law' is a crucial question in this digital era with no answer. Many scholars over the years have debated this issue and have suggested for having a separate law on cyberspace i.e. *lex cyberalty*. Uniformity in cyber law can prove to be a win-win in resolving 'choice of law' particularly in disputes relating to e-Commerce.<sup>10</sup>

Data protection is related with the concept of privacy and violation of one may obviously affect the other.<sup>11</sup> Litigation is a weapon for deciding upon a conflict. This weapon of the Court has been threatened with the issue of 'choice of law' and 'jurisdiction'. Internet is the reason in these modern eras, which have questioned the traditional method of proceedings across the globe.<sup>12</sup>

In the event of legal problem in e-Commerce 'choice of law' by the parties to contract is one of the most annoying one. In a borderless cyberspace lawyers are often struggling with choosing

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<sup>10</sup> Yun Zhao, *Dispute Resolution in Electronic Commerce*, 124-127 (Martinus Nijhoff Publishers).

<sup>11</sup> Jayanti Ghosh and Uday Shankar "Privacy and Data Protection Laws in India: A Right-Based Analysis" *Bharati Law Review* 58 (2016).

<sup>12</sup> Supra Note at 9.

the correct law. Choosing a proper clause in choice of law plays a very crucial role in a contract between two parties of different nations.<sup>13</sup>

- **Issues of Choice of Forum in e-Commerce**

Choosing a forum is easy, when parties involved in a traditional transaction are from different jurisdictions and are also easy to be governed by the laws of the country. The party to disputes, only need to decide upon which law of the country shall govern the transactions so performed. The theory of functional equivalence applies to treat this form of transactions. The issue of choice of forum is difficult in e-Commerce as the theory of functional equivalence is difficult to apply as that of in land. The traditional law of jurisdiction fails when transactions are carried out over the internet. The activities which may be lawful in one country may oppose the law of another country. Indian Courts can grant injunction to only those party in an appropriate case, where it can exercise its personal jurisdiction. Jurisdiction *in personam* can only be exercised to the people upon whom the court has jurisdiction and should not interfere with the jurisdiction of another court.<sup>14</sup> The issues in e-Commerce, is parties in online activities do not know with whom they are doing business, and where do they reside. In the event of any fraud or wrong, parties are clueless as to which forum to choose and against whom.

- **Issues of choice of Jurisdiction in e-Commerce**

Unlike physical world, cyber world lacks boundaries and borders. As such it is an admitted fact that it is really a difficult task to frame laws for governing the cyberspace. Till date no single State has been successful in framing law to exercise control over the internet. Due to lack of physical boundaries the consequences arising are more threatening as compared to in the physical world. The difficulty is also in deciding about which State will have jurisdiction to frame cyber law and which State shall adjudicate a cross border dispute. This is a question which every Nation is facing at this moment. Some of the eminent scholars like Johnson and

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<sup>13</sup> The Choice of law clause in contracts between parties of developing and developed Nations, *available at* <https://pdfs.semanticscholar.org/7a9e/271fdd141c9daaeb72ed985e97668ab8c88.pdf> (Last visited on September 9, 2019).

<sup>14</sup> Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* 64 (APH Publishing Corporation, New Delhi) (2011).

Post have made a remark on the decreasing significance of one's physical stand in cyberspace in the following words:

*“Cyberspace radically undermines the relationship between legally significant (online) phenomenon and physical location. The rise of the global computer network is destroying the link between geographical locations and (1) the power of the local government to assert, control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of the efforts of a local sovereign to enforce rules applicable to global phenomenon; (4) the ability of physical location to give notice of which sets of rules apply”.*<sup>15</sup>

Jurisdiction divides the power of one country with that of the other, whereas on the other hand Internet knows no boundaries. As e-Users engage themselves in online activities there is an involvement of at least three jurisdictions<sup>16</sup>. The issue here is the absence of uniform and internationally recognized laws having a universal application. Problems related to cyber are invited when medium of internet do not understand the limit and sovereignty<sup>17</sup>.

The issue of 'Jurisdiction' has not secured India. The I.T. Act, 2000 has been debated and questioned numerous times over jurisdictional issues. One of the questions is regarding the involvement of parties of different jurisdictions, where person/(s) of one jurisdiction wants to sue another. The confusion is of two areas viz; the defendants residence and the place where cause of action arises<sup>18</sup>.

The positive aspect of this Act is, it extends to the whole of India and also punishes people of other national's if offence is committed by using computer based in the India Territory.

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<sup>15</sup> Karnika Seth, Computers, Internet and New Technology Laws, A Comprehensive reference work with a special focus on development in India (LexisNexis) (2013).

<sup>16</sup> It involves the laws of a State/Nation of such users, the laws of the State/Nation where the transaction takes place and third the law which applies to the person or business with whom the transaction takes place.

Prashant Mali, *Cyber Law & Cyber Crimes, Information Technology Act, 2000 with new IT Rules, 2011*, 3 (Snow White Publication Mumbai, 1<sup>st</sup> Edn.) (2012).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The negative aspect is theoretically it is possible but practical implementation of the law is not viable. The logical question is even if the wrong doer is summoned, how far our laws will be binding on them.

Yahoo<sup>19</sup> is a well-known case in the genre of jurisdictional conflict. The fact of these case states that Court directed Yahoo! to remove links and all materials from its websites pertaining to Neo Nazism and despite of the order being challenged on the ground that it violated the U.S. Constitution's first amendment, Yahoo, had to remove all the contents as directed by the order. This case is one of the most important cases in the history of jurisdiction because it was for the first time that a foreign court had exercised its preliminary jurisdiction to decide a case not located within its physical boundaries<sup>20</sup>.

Indian Courts have also interpreted Section 75 of the I.T. (Amendment) Act and Section 20 of the C.P.C. in number of cases<sup>21</sup> on issues of extraterrestrial jurisdiction. For instance in *Banyan Tree* case<sup>22</sup>, the question before the single judge was regarding its jurisdiction to entertain the case. After careful analysis of the facts of the case, the Delhi High Court also highlighted on intention of the wrong doer in "purposefully availing"<sup>23</sup> of the jurisdiction of the U.S. Court in other cases<sup>24</sup> on jurisdictional matters and further it was averred by the Court that mere accessing of a website does not mean that Court has power to exercise the jurisdiction<sup>25</sup>.

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<sup>19</sup> 2001 Us Dist. LEXIS 18378 (N.D. Cal. 2001) & 145 F. Supp.2d 1168 (N.D. Cal. 2001)

<sup>20</sup> Dr. Amita Verma, *Cyber Crimes and Law*, 318,323 (Central Law Publications) (2009).

<sup>21</sup> *Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd.* 2003 Del, *India TV v. India Broadcast Live*, 2007 Delhi HC, *IPRS v. Sanjay Dalia*, 2008 Delhi HC.

<sup>22</sup> (2009) SCC OnLine Del 3780

<sup>23</sup> *International Shoe Co. v. Washington* 326 U.S. 340 (1945), available at <https://www.sconline.com/Members/SearchResult.aspx> (Last visited on November 26, 2019).

<sup>24</sup> *Burger King Corp v Rudzewicz* 471 U.S. 462 (1985), *Asahi Metal Industries v Superior Court* 480 U.S. 102 (1987), *Calder v Jones*, 465, U.S. 783 (1984), available at <https://www.sconline.com/Members/SearchResult.aspx> (Last visited on November 26, 2019)

<sup>25</sup> Prashant Mali, *Cyber Law & Cyber Crimes, Information Technology Act, 2000 with New IT Rules, 2011*, 243 (Snow White Publications Pvt. Ltd.)(2012).

#### 4. ADDITIONAL ISSUES

The legal issue of privacy rights in e-Commerce have dwindled the users faith in electronic mode of transactions. Customers are occupied in e-Commerce yet reluctant for complete involvement owing to the concern for confidentiality of their data and security issues involved.<sup>26</sup>

#### 5. CONCLUSION

Trending e-Commerce is a danger to the protection of data and privacy of consumers. There is a need for right based approach for safeguarding data privacy of an individual's over the internet. Privacy and data privacy protection of individual in India is no where guaranteed by any law. Though right to privacy in India is developed by the judiciary on case by case basis, comprehensive law is still in need at the earliest to make all the cyber crime good. Efficient and result oriented legal and regulatory framework is needed to cure the issues of choice of law, jurisdiction and grey areas of our existing legal framework supra. With the growing e-Commerce our old traditional style of dealing with these issues are quite outdated. With trending e-Commerce concerns for e-consumers have also evolved. E-contracts plays a vital role in choice of law among the parties involved in e-Commerce as duties and obligations of the parties will be decided at first hand and the application of applicable laws shall also be easy to determine. But it is not an easy case as at least three parties from different jurisdiction is involved who are governed by three different legal systems. To conclude on which law to apply is of a huge concern. In the absence of comprehensive globally accepted cyber laws these issues will continue in circle. Choice of law and jurisdiction is trampled in e-Commerce. There is no segregation of boundaries, regions and borders. Choice of law is especially important in e-Commerce as that clause shall be binding the whole E-contract.

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<sup>26</sup> Talat Fatima, "Cyber Crimes" 274-275 (EBC Publishing) (2016).

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