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## **THE IMPACT OF THE PROBLEMS OF DETERMINING JURISDICTION IN THE VIRTUAL SPACE ON THE PROVISION OF HUMAN RIGHTS AND FREEDOMS**

*In many cases, the existing legal regulations are not adequate to solve the legal problems created by the Internet. Solving the legal problems created by the Internet with existing positive regulations is a situation specific to the special field of law. In cases where the existing normative documents are insufficient, it is considered appropriate to add new provisions that complement each other, and if this is not possible, to make independent legal regulations. The fact that such arrangements are based on doctrine rather than spontaneity can ultimately lead to successful practice. Therefore, the interpretation of the human rights aspect of issues related to virtual space is one of the most important topics today.*

*The most important issue related to the protection of human rights violated in the virtual space is the resolution of the issue of jurisdiction. Issues related to the Internet have also been reflected in all international declarations adopted in the field of information society construction, including the provision of information rights. At the regional level, the Declaration "On Freedom of Communication on the Internet" adopted by the Committee of Ministers of the Council of Europe in 2003, the Recommendations of the Committee of Ministers of the Council of Europe on the Human Rights Guide for Internet Users to Member States, etc. such documents are of special importance for the regulation of Internet legal relations. However, no international norm fully covers the issue of jurisdiction in virtual space.*

*In the presented article, as a result of the research, it was concluded that it is necessary to create unified substantive and procedural legal norms that are mandatory for all in order to solve jurisdictional problems in the virtual space. Acceleration of integration and globalization processes in the world increases the interest of states in the unification of their legal norms. Because the countries of the world, which often protect their citizens from violations of their rights on the Internet, as well as from more dangerous information wars and psychological attacks, need the existence of a unified legal regulation. For this purpose, the creation and unification of legal norms that resolve jurisdictional issues in the virtual space should be implemented at different levels: bilateral, regional and universal levels.*

**Keywords:** *virtual space, internet, jurisdiction, mosaic principle, targeting test, unicast-multicast rule.*

**Theoretical approach.** Before talking about the problem of jurisdiction in the virtual space, it would be appropriate to talk about the concept of both general

jurisdiction and international jurisdiction. The concept of jurisdiction means which court will hear the case after the dispute. While international, that is, foreign jurisdiction determines which state's courts will hear the case, domestic jurisdiction determines which court within the state will hear the case. The rules to be applied regarding international jurisdiction are determined by each state's own legislature. On the other hand, there is confusion in practice because there is no uniform rule of jurisdiction other than international treaties on determining the rules of international jurisdiction.

For each legal dispute, there may be more than one state court with international jurisdiction. This situation arises from the fact that the concept of international jurisdiction of courts is completely national and is implemented within the framework of the country's sovereignty. No State may regulate the rules relating to the international jurisdiction of the court of another State or delegate jurisdiction to the court of another State<sup>1</sup>. For this reason, it is quite natural that the international jurisdiction system of the courts of each state is different.

On the other hand, the concept of international jurisdiction is related to domestic law. Thus, the word "international" here means the event or relationship that is the subject of the dispute. When regulating the rules on the international jurisdiction of courts, there must be a sufficient and real connection between the operation or relationship containing the foreign element (component) and the state that will have international jurisdiction. In other words, as a rule, it would not be appropriate for a country that does not have sufficient and reasonable ties to the dispute in question to have international jurisdiction.

In cases of violation of rights in the virtual space, the main feature is the foreign element. Situations such as the fact that the headquarters of most virtual platforms are companies located in foreign countries and the servers providing internet services are located abroad are the factors determining the foreign element. This has led to a disagreement about whether the virtual space is a separate, independent area from the real world. According to the approach that evaluates cyberspace and virtual space as an independent field separate from the real world, the mentioned spaces are an environment that is not limited by existing legal rules, and a new independent legal framework - regulation is needed to determine the law that will be applied to the violations of law that occur in this environment<sup>2</sup>.

Current legal regulations are inadequate and slow to develop in the face of evolving technological developments. This inadequacy is the reason why the problems related to the cross-border violation of rights, especially the determination of the law to be applied to the legal disputes arising in the virtual space, have not been resolved even today. As John Perry Barlow has argued, instead of regulating the borderless cyberspace with local legal rules, there is a need to create *sui generis* legal rules according to the nature of cyberspace.

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<sup>1</sup> Ekshi, Nuray: International Authority of Turkish Courts, Beta Press, Istanbul, 1996. P. 19. (in Turkish)

<sup>2</sup> Ozel, Sibel. Legal issue to be applied in violation of men's rights via the Internet. *Public and Private International Law Bulletins*. 2011. P. 612.

Another point to consider here is that the new legal rules are borderless<sup>1</sup>. However, this approach proposed in the 90s was not implemented in practice. Only social media platforms set their own internal rules, especially regarding freedom of expression. These rules allow users to report, complain and block messages that violate the rules. Thanks to these rules, for example, a post containing hate speech can be removed much faster, even within seconds, compared to court orders.

Proponents of this approach apply the general regime. This means that if both parties use the same service provider, the law of the state in which the common service provider is located will also apply in cyberspace. If the parties use service providers located in different countries, the law of the plaintiff's place of residence or the defendant's domicile is also a possibility as *lex fori*.

According to another opinion, to consider the virtual space as a field completely independent from the real world means to ignore the real consequences of violations that occur in this environment. In this regard, the existing legal regulations should be updated and applied to the Internet environment in the face of developing new technologies, and the existing mandatory regulations should be used to determine the law that will be applied to legal violations occurring on the Internet<sup>2</sup>.

We must note that cyber fraud affects the victim's interests in the real world. In other words, even if the attack takes place in cyberspace, the effects of the attack are directed against people and occur in the real world. Therefore, the violation of law committed on the Internet does not remain in cyberspace, but also has its effect in the real world. According to this opinion, which claims that cyberspace is not an independent world, it is possible to resolve legal violations disputes in the virtual environment by traditional norms<sup>3</sup>.

The presence of an element of foreignness raises the issue of the application of the law of which state. Although the law of the place where the infringement took place is the basis, since the place of action and the place of damage (result) will occur in two different countries, one of them should be preferred and applied to specific cases. Because when it comes to the Internet environment, harm can occur in more than one country, and the place of action and harm can be in different countries. As a rule, in such situations, the law of the place of residence - *lex loci delicti* - is applied. However, the application of this rule in the case of violation of rights and freedoms in the virtual space is not always successful. Because in some cases, especially in the cases of violations that occur through mass media, the rule of residence is not considered a suitable condition for determining the law to be applied, an alternative rule is needed that will allow the determination of the law that is more closely related to the legal relationship.

Traditionally, in cases where there is an element of foreignness, the rule of

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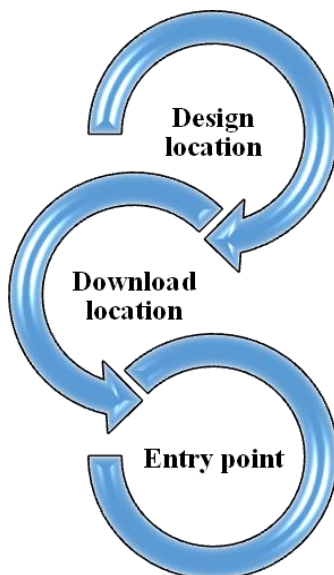
<sup>1</sup> John Perry Barlow. A Declaration of the Independence of Cyberspace. URL: <https://www.eff.org/tr/cyberspace-independence>.

<sup>2</sup> Atik I. C. The law to be applied to violations of manhood rights in the social media environment / Doctoral thesis ; MEF, 2023. P. 85 (in Turkish).

<sup>3</sup> Atik I. C. The law to be applied to violations of manhood rights in the social media environment / Doctoral thesis ; MEF, 2023. P. 87 (in Turkish).

law of the place where the offense occurred (*lex loci delicti comissi*) applies, which is one of the oldest binding rules of private international law. The location of the violation in virtual space is not geographically limited. Furthermore, the ubiquity of the Internet can make it quite difficult to localize both the act and the harm. Since any web page can be accessed from anywhere in the world, just because the computer hosting the web page is located in a certain location does not necessarily mean that the criminal is located in the same location. The above confirms that the application of the law in which the violation occurred is not always effective. For example, if the conflict between the right to privacy and freedom of expression is adopted by the law of the state where the violation occurred, any balance that should be maintained between the parties is disturbed to the detriment of the victim. In other words, in the conflict between the right to privacy and freedom of expression, the right to privacy takes a back seat while disproportionate protection is provided in favor of freedom of expression. Because the damage, which is an indispensable element of the violation of this right, is somehow ignored. Therefore, in such situations, states effectively choose between the right to freedom of expression or the right to privacy and establish binding rules according to which right they provide superior protection.

**The spatial element in determining jurisdiction.** Due to the unique unrestricted structure of the virtual space and features such as anonymity and encryption provided by technical developments, problems can arise in determining the location of the breach, which sometimes makes it impossible to detect the real user. In this regard, three additional spaces should be distinguished in determining the place where the violation occurred<sup>1</sup>:



The place where the infringing content is made is considered the design

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<sup>1</sup> Atik I. C. The law to be applied to violations of manhood rights in the social media environment / Doctoral thesis ; MEF, 2023. P. 94 (in Turkish).

location and cannot be considered the place of commission of the infringement unless that content is disclosed. The upload location is where the content is sent to be delivered to the target audience. In principle, for infringements committed in virtual space, the place of upload should be applied as the place of commission of the infringement. But in many cases, the upload location can be a completely random location. The access location refers to the place where the damage is done. The point is that since the infringer has no way to influence the internet users' access to the content after the upload process, it is wrong to consider every place where the access exists as the place of infringement. Here, attention should be paid to the damage inflicted. Because any content can be designed (prepared) and uploaded to the system in a virtual space with no boundaries. It is practically impossible to detect such operations and to impose liability if no one is harmed. Therefore, the law of the place where the damage occurred is generally preferred. This situation is related to the fact that the law of the place where the damage was inflicted is easier to detect than the law of the place where the violation occurred, and the place where the damage was caused is more closely related to the victim. In our opinion, such an application should not always be accepted unambiguously. For example, the spread of false information about a person who is famous in the world forms a negative attitude towards him not only within a country, but among the entire population of the world. In this case, the value of the moral damage will of course change. Therefore, if the victim proves that he has been harmed in more than one legal system, it may be possible to apply more than one legal rule.

Regarding this issue, an alternative system originating from German law can be mentioned. In this system, a flexible approach (Ubiquity principle) is preferred. The victim or the court is given the right to choose between the law of the place of commission or the law of the place where the damage occurred.

Although the ubiquity system is considered practical in terms of applying a single legal system to a dispute, it has been criticized for giving unilateral choice to the victim or the court. There is no legal certainty as to the law to be applied in this system when assessed from the perspective of the infringer. Therefore, a fair balance between the parties will not be achieved<sup>1</sup>.

In many cases, there may be more than one location of action or damage. Sometimes an action can cause damage in more than one place, while sometimes an action can happen in more than one place and the damage can happen in one place. It is a matter of debate which local law will apply in such cases. There are several rules regarding this:

**Unicast-Multicast Rule.** According to the Unicast-Multicast Rule adopted in the case of *Duke of Brunswick v. Harmer*<sup>2</sup> in England in the 19th century, if the rights of individuals in more than one country have been violated as a result of an article published in the mass media, the problem of how to apply the laws of the country where the damage occurred in resolving the dispute is solved differently depending on whether or not it has the appropriate legal force: Each sale,

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<sup>1</sup> Atik I. C. The law to be applied to violations of manhood rights in the social media environment / Doctoral thesis ; MEF, 2023. P. 99 (in Turkish).

<sup>2</sup> *Duke of Brunswick v Harmer* [1849]. URL: <https://vlex.co.uk/vid/brunswick-duke-of-v-804967245>.

distribution and sharing of infringing content creates a separate liability and therefore a separate cause of action. That is, in dynamic streams or multiple streams where the stream is repeated, each share will create a separate claim.

It should be noted that this rule may not be practical in case of violation of rights occurring in the virtual space. Such a rule was more effective for traditional media, because television, radio broadcasting contained the commission of any violation in a single action. If this rule is adopted in a virtual environment, a chain of litigation can be formed, which will bring high costs to both parties, and each access to the infringing content on the website will be considered a separate publication and create a separate lawsuit. This is an unacceptable solution. Therefore, the multicast rule should be limited within the framework suitable for the Internet environment. US courts also defend this position. For example, as early as 2002 in *Firth v. State of New York*, the plaintiff claimed that his business reputation had been permanently damaged due to unfair content available on the Internet. However, the court treated the publication date of the uploaded content as the date it was placed on the Internet, likened it to a book first made available to the public, and accepted that there would be no new infringement<sup>1</sup>.

**Mosaic principle.** If damage occurs in more than one country, the relevant provisions of each country in which the damage occurred may be applied separately only to the damage occurring in its territory. The mosaic principle, based on the 1995 case of *Fiona Shevill and Others*<sup>2</sup>, is both subject to various criticisms and is increasingly applied in modern legal systems. At the same time, in Europe, the mosaic approach used in Article 7(2) of the Brussels Ibis Regulation is valid in 28 national jurisdictions<sup>3</sup>.

According to the mosaic principle, an injured party can sue for damages in the court of the country where the publisher is headquartered, which has full jurisdiction over the injured party's damages in other countries. In a lawsuit filed at the publisher's headquarters, the judge will apply the law of his country in terms of the damage caused in his country, but will apply the law of each country separately in terms of other places where the damage occurred. On the other hand, the victim may also choose to file a separate lawsuit where the harmful content is distributed. However, in this case, the victim will have to prove that he was harmed wherever the content was distributed, and the judge in the court will decide the dispute according to the rules of that place, i.e. *lex fori*.

When applying the mosaic principle to broadcasts in virtual space, of course, different restrictions are required. Because content on the Internet can be viewed simultaneously from anywhere with Internet access. In this regard, first of all, when determining the place of damage, not only the place of access should be

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<sup>1</sup> *Firth v. New York*, 775 N.E.2d 463. URL: <https://law.justia.com/cases/new-york/court-of-appeals/2002/98-n-y-2d-365-1.html>.

<sup>2</sup> Judgment of the Court of 7 March 1995. *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*. Reference for a preliminary ruling: House of Lords. United Kingdom. URL: <https://curia.europa.eu/juris/liste.jsf?num=C-68/93>.

<sup>3</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 26.02.2015. URL: <https://eur-lex.europa.eu/eli/reg/2012/1215/oj>.



accepted as a criterion, but also the victim should be recognized at the place of access of the content. The mosaic principle is criticized because the same offense may lead to different consequences when different legal systems are applied in different countries due to the conflict of substantive law provisions, and this will not create uniformity in application.

In addition, it is very difficult in practice to determine the amount of damage that occurred in the relevant jurisdiction of the competent court when the information is online. Due to the delocalized nature of damages, courts may only judge a portion of damages, thereby depriving the court of an overall view of damages, which may prevent a global assessment of the context of the case. The mosaic principle leads to the fragmentation of claims within all possible forums. Each court will have jurisdiction to decide on damages limited to the relevant national territory<sup>1</sup>.

Target test or targeting criterion. This rule, like the mosaic principle, took its origin from a specific court case. Although the 2002 *Dow Jones & Company Inc. v. Gutnick* decision [4] is essentially a decision based on jurisdiction, it has significant implications for infringement by Internet broadcasts because of its focus on determining the place of publication. The plaintiff in the said case, Joseph Gutnick, is a well-known businessman living in the state of Victoria. An article about his tax evasion is published in a New York-based magazine and on his online website, along with his photos. Gutnik filed another suit in Victoria, alleging that his honor and dignity had been violated. The defendant claims that the relevant content is transferred to a server in New Jersey and that no harm will occur in Victoria. Because the defendant could place the server in a convenient location and thus find an opportunity to avoid liability, the court refused to use the location of the content uploaded to the Internet as a criterion in Internet broadcasting, and instead investigated the area to which the access was directed. At that time, the sites were classified by the Court into two groups, depending on whether access to the content was targeted in a particular jurisdiction: open and closed websites. Open websites are websites where any user in the world can access the content anonymously. However, closed sites include websites that are subject to surveillance, closed or restricted access, and where users are fully identified by the cyberspace operator. The defendant's website in the current case is a closed website operated by a subscription system (In Victoria, website access by subscription is possible) and management and control of the target audience is centralized in the defendant's hands. Therefore, the Court decided that the claimant's right to privacy was violated. Additionally, the Court stated that for a publisher to be liable, the plaintiff's reputation must first be damaged, the infringing content must have reached third parties, and each new access would give rise to a new cause of action. More specifically, under the targeting test, a publisher is solely responsible for its broadcasts serving the purposes it pursues and their results within that region. Therefore, in online publications, the claimant

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<sup>1</sup> Tereza Kyselovská. Critical Analysis of the „Mosaic Principle” Under Art. 7 Para 2 Brussels Ibis Regulation for Disputes Arising out of Non-Contractual Obligations on the Internet. *PME*. 2019. № 1. P. 43.

and the victim suffer moral damages where both parties are recognized, regardless of whether the content is transmitted to the server.

The target criterion is criticized because the definition of the country of the perpetrator's target is difficult to define and far from legal certainty. This theory, which is mostly supported in French law, is not considered objective because it is based on the assessment of the intention of the person causing the damage<sup>1</sup>.

**Conclusion.** At a time when technology is widely and effectively used in the globalized world, court disputes involving foreign elements are also increasing rapidly. At this point, we should especially note that the mere use of one or more social media sites does not mean that there is an element of foreignness. In a specific case, there must be an element of foreignness in terms of factors such as the place of residence of the parties, the place where the damage occurred, and the place where the damage was inflicted.

During the research, a comment was made on the traditional rules of the application of which jurisdiction with reference to international legal bases. However, from the point of view of virtual space, the traditional rules and conditions do not meet the demand of the time. Therefore, several court cases on the mosaic, targeting tests in modern practice were referred to, and the advantages and disadvantages of the existing rules were determined.

We believe that there is a need for a new regulation that is specific to the virtual space, meets the technical specifications, and ensures the proportionality between the interests of the plaintiff and the defendant. Such new regulation may be based on classical binding rules. At this point, the rule of place of infliction of damage, not damage, may apply. Since the location of the action can be random in cases of cyberspace violations, the location of the damage should be the main criterion to consider.

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<sup>1</sup> Atik I. C. The law to be applied to violations of manhood rights in the social media environment / Doctoral thesis ; MEF, 2023. P. 111 (in Turkish).



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## **ВПЛИВ ПРОБЛЕМ ВИЗНАЧЕННЯ ПІДСУДНОСТІ У ВІРТУАЛЬНОМУ ПРОСТОРИ НА ЗАБЕЗПЕЧЕННЯ ПРАВ І СВОБОД ЛЮДИНИ**

У багатьох випадках існуюче правове регулювання не є адекватним для вирішення правових проблем, створених Інтернетом. Необхідним є удосконалення існуючого правового регулювання сфери відносин, пов'язаної із віртуальним простором. Найважливішим питанням щодо захисту прав людини, які порушуються у віртуальному просторі, є вирішення питання юрисдикції. Питання, пов'язані з Інтернетом, також знайшли своє відображення у всіх міжнародних деклараціях, прийнятих у сфері інформаційного суспільства, включно із забезпеченням прав на інформацію. Втім наразі жодна норма міжнародного права не регулює у

достатній мірі питання юрисдикції у віртуальному просторі.

У представленій статті, в результаті проведеного дослідження зроблено висновок про необхідність створення уніфікованих норм матеріального та процесуального права, обов'язкових до виконання, застосування для вирішення юрисдикційних проблем у віртуальному просторі. Прискорення інтеграційних і глобалізаційних процесів у світі підвищує зацікавленість держав в уніфікації своїх правових норм.

**Ключові слова:** *віртуальний простір, Інтернет, юрисдикція, принцип мозаїки, тест націлювання, правило unicast-multicast.*