ICT Strategy of India: An ODR Perspective

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The aim of this article is to stress upon the importance of Information and Communication Technology (ICT) for resolving contemporary electronic commerce (e-commerce) and other disputes. The best example of the same is the use of Online Dispute Resolution (ODR) for resolving these disputes and misunderstandings. The Online Dispute Resolution Mechanism (ODRM) is gaining popularity among all the countries of the World, including India. There are, however, certain prerequisites that must be satisfied before ODRM can be effectively established and used in India.

I. Introduction

In the present globalised and decentralised world, India cannot afford to keep its economy closed and secluded. Thus, an interaction between Indian economy and world's economy is inevitable. That is not a big problem. The real problem is to make Indian economy an efficient and competitive economy. Though there are many indicators for measuring the strengths and weaknesses of an economy, but the ICT strategy of a nation is very crucial to put it on a global map. It is very important that the ICT strategy and policies of a nation must not only be suitable but should also believe in a "holistic application and implementation". The ICT strategy and policy of a nation cannot afford to keep the different components of ICT [1] separate. Their amalgamation and supplementation must be done at a priority basis otherwise the ICT strategy and policy will not bring the desired results.[2] The present ICT strategy and policies of India are deficient and defective.[3] It must be appreciated that the ICT is directly related to International Trade, more particularly e-commerce. Thus, when the Indian economy will be integrated with the Global economy certain disputes are bound to be there. We cannot use the traditional litigation methods to resolve those disputes. That will only put more pressure on the already overburdened courts. The fact is that the increasing backlog of cases is posing a big threat to our judicial system. The same was even more in the early 90 but due to the computerisation process in the Supreme Court and other courts that was reduced to a great extent. However, the backlog is still alarming.[4] This is because mere

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[1] These are e-governance, e-commerce, security of ICT infrastructure, cyber forensics, computerisation of various governmental departments, etc.
[2] http://cyberlawindia.blogspot.com/2006/07/ict-strategy-in-india-need-of.html
[3] Praveen Dalal, "Techno-legal compliance in India: An essential requirement", http://www.crime-research.org/articles/2130/
[4] http://www.supremecourtofindia.nic.in/new_s/pendingstat.htm

computerisation of Courts or other Constitutional offices will not make much difference. What we need is a will and desire to use the same for speedy disposal of various assignments. There is a lack of training among Judges regarding use of Information Technology (IT). We need a sound training of Judges first before we wish to capatilise the benefits of IT. A good initiative has already been taken by the Supreme Court.[5] However, the same appears to be dormant for the time being. Thus, we need a public initiative as well.[6] Besides, the use of ICT for ODR purposes is also inevitable due to the mandates of the "right to speedy trial" that is provided by the Constitution of India.

II. The Constitutional mandates

Article 21 of the Constitution of India declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure established by law. The words "life and liberty" are not to be read narrowly in the sense drearily dictated by dictionaries; they are organic terms to be construed meaningfully. Further, the procedure mentioned in the Article is not some semblance of a procedure but it should be "reasonable, fair and just".[7] Thus, the right to speedy trial has been rightly held to be a part of right to life or personal liberty by the Supreme Court of India.[8] The Supreme Court has allowed Article 21 to stretch its arms as wide as it legitimately can.[9] The reason is very simple. This liberal interpretation of Article 21 is to redress that mental agony, expense and strain which a person proceeded against in criminal law[10] has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court has held the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. A speedy trial encompasses within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. In other words, everything commencing with an accusation and expiring with the final verdict falls within its ambit.[11]

The constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. The failures of prosecuting agencies and executive[12] to act and to secure expeditious and speedy trial have persuaded the Supreme Court in devising solutions which go to the extent of almost enacting by judicial verdict bars of limitation beyond which the trial

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[5] http://www.indianjudiciary.in/

[6] I am trying the same and it is available at http://indian-judiciary.blogspot.com/ . This resource is based on the ground reality that mere computerisation will not serve the purpose. The resource titled "Electronic Courts in India" is making a database of different situations that the Courts may face while discharging the judicial functions.

[7] *Maneka Gandhi v. U.O.I, AIR 1978 SC 597.*

[8] *Hussainara Khatoon (1) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.*

[9] Article 21 is a Fundamental Right that can be directly enforced in the Supreme Court under Article 32 of the Constitution of India. Fundamental Rights, as incorporated in Part III of the Constitution, are different from Constitutional Rights that cannot be directly enforced U/A 32. All Fundamental Rights are Constitutional Rights but not vice-versa.

[10] This agony is equally present in civil cases where the proceedings are dragged to numerous years before their completion.

[11] http://www.odr.info/THE%20CULTURE%20OF%20ADR%20IN%20INDIA.doc

[12] The Executive wing of the Indian Constitution.

shall not proceed and the arm of law shall lose its hold.[13] The validity or justness of those decisions is not the matter to be decided but the seriousness of delay in the conclusion of criminal and civil matters must be appreciated at the earliest. This seriousness was appreciated and accepted by many[14], including the Constitutional Courts[15], long before. The same has got recognition from the "legislature" as well in the form of introduction of "Alternative Dispute Resolution" (ADR) Mechanism (ADRM) through various statutes. There is a growing awareness among the masses as well regarding ADR/ODR and people are increasingly using the same for getting their disputes settled outside the court.[16] Thus, to make that choice a ground reality the ICT strategy of India must consider and accommodate these concerns as well.

III. Online dispute resolution in India

Internet is a communication tool, which facilitates free information dissemination. The growth of Internet has created various new problems as well. New forms of business practices like e-commerce, franchising, service agreements etc. are being used in international and national trade. With the explosive globalization of trade and investment, there has been a corresponding increase in commercial disputes between the parties across national boundaries. It has become difficult to resolve these disputes by applying the traditional judicial settlement mechanisms because of conflict in laws of various countries. In order to overcome this problem a suitable ODRM is required that is compatible with online matters and is netizens centric. The use of ODRM to resolve such e-commerce and web site contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment. The ODRM is not part and parcel of the traditional dispute resolution machinery popularly known as "judiciary" but is an alternative and efficacious institution known as ADRM. Thus, ODRM can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, and industrial disputes. These techniques have been shown to work across the full range of business disputes like banking, contract performance, construction contracts, intellectual property rights, insurance, joint ventures, partnership differences etc. ODRM offers the best solution in respect of commercial disputes. However, ODRM is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only offers alternatives to litigation. There are a large number of areas like constitutional law and criminal law where neither ADR nor ODR can substitute courts. In those situations one has to take recourse of the existing traditional modes of dispute resolution.

The ADR mechanism can be effectively used to settle online disputes by modifying it as per the need. It is time effective and cost efficient. It can also overcome the geographical hurdles. However, there are certain issues revolving around ODRM like need for

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[13] P.Ramachandra. Rao v. State of Karnataka, (2002)4 SCC 578.
[14] Justice Malimath Committee in 1990 stressed the importance of ADRM to supplement the legal forum with a view to decrease the burden of traditional courts.
[15] The Supreme Court and the High Courts.
[16] http://praveendalal.blogspot.com/2005/12/culture-of-adr-in-india.html

personnel with knowledge of IT, ADR and law; technical concerns; legal sanctity of proceedings; industry support etc. But these hurdles are just a passing phase. The use of ADR mechanisms for resolving online disputes is increasing day by day. This will be in great demand in the future since the 1996 Act has given paramount importance to "party autonomy" by accepting the intention of parties as a platform for dispute resolution. Thus, what law will be applicable will depend on the intention of parties. If the parties have adopted the mechanism of ODRM then it will definitely apply with necessary minor modifications. The language used in various sections of the Arbitration and Conciliation Act, 1996 give options to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator.[17] It is high time that we must build a base for not only offline ADRM but equally ODRM in India. It must be noted that every new project needs time to mature and become successful. Thus, the success of ADRM and ODRM depends upon a timely and early base building.

IV. The roads ahead

The provisions of the Information Technology Act, 2000 (IT Act, 2000) must be used for establishing an ICT base that may be conducive for the development of ODRM in India. . The following provisions of the IT Act, 2000 reflect India's commitment to use e-governance for various purposes including ODRM:
(a) Legal recognition of electronic records (section 4),
(b) Legal recognition of digital signature (section 5),
(c) Use of electronic records and digital signature in governmental dealings (section 6),
(d) Retention of electronic record for certain period (section 7),
(e) Establishment of electronic gazette (section 8), etc.

These provisions will go a long way in building a conducive base for ODRM in India. However, these provisions provide only a non-absolute right to claim a sound e-governance base (section 9). This is the reason why till now no such ODRM has been established by the Government. Though, a grant of Rs 23,000 has been sanctioned by the Government out of the public money for e-governance purposes yet the need to establish a sound and effective ODRM has not found favour with the Government. This is another drawback of the e-governance plan of India. The Governement must appreciate the need of ODRM for resolving disputes originating due to the liberalisation of its economy. It is also important to remember that the foreign countries are vary particular about getting their disputes resolved through ADR/ODR methods and India may find itself in an embarrasing situation if its ICT startegies are not modified accordingly. Equally important is the security and maintenance of these ODRMs that also seems to be missing in the present e-governance plan. For a successful ODR project technology plays only 15% role, while rest 85% role is being taken care of by project management. Human resource development of the existing workforce in order to inculcate appropriate skills and attitudes is a critical factor. The establishment and set up of the basic infrastructure, which is conducive to the efficient functioning of the ODRM, is the need of the hour. A sound communication infrastructure is essential for easy access. It should be innovatively used to ensure that no section of society is deprived of the benefits arising therefrom.

[17] http://www.odr.info/ONLINE%20DISPUTE%20RESOLUTION%20IN%20INDIA.doc

Governments have to learn to digitise documents quickly and effectively so that the ICT revolution becomes a reality in India.

Source: http://topics.developmentgateway.org/
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