

## **Impact of Mediation on Health & Social Welfare – Indian Context**

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### **INTRODUCTION**

When we think about mediation, we always look at it as an alternative dispute resolution (ADR) mechanism for ‘resolution of dispute’ or something closely connected with the ‘legal system’ or ‘administration of justice’. But when we analyse the process of mediation where the resolution of a conflict is sought to be made in a consensual mode by addressing the underlying emotions that gave rise to it and sustained it, I am of the view that mediation has a health dimension attached to it more than the legal angle. As we know there is a direct link between diseases and stress or conflict and it is also true that emotions and state of mind have a powerful effect on physical as well as mental health. Similarly stress related diseases or health problems will not be cured just by peripheral medical treatment without diagnosing the root-cause that created it. By an effective mediation process, apart from resolving the problem, the cause of stress or problem also gets cured – resolving the problem and curing the ailment. Unlike the other methods of dispute resolution like litigation or arbitration, where the decision made by a third party (Judge or arbitrator) is imposed on the affected parties, in a process of mediation, the mediator helps the parties to understand each other and their interest and the parties are given the freedom to make an amicable resolution at their own wish. I feel that the process of mediation is closely interconnected in promoting and protecting people’s rights and improving their health and therefore it amounts to a fundamental human right. In this chapter an attempt is made to explore how mediation is linked with advancement of health and welfare and as to why mediation should be treated as a human right and not just another “ADR” method.

### **WHAT IS HEALTH?**

The conventional notion of healthcare has tended to be individual-centric and has focused on aspects such as access to medical treatment, medicines and procedures. It was largely identified with statistical determinants such as life-expectancy, mortality rates and access to modern pharmaceuticals and procedures. It is evident that such a conception does not convey a wholesome picture of all aspects of the protection and promotion of health in society.<sup>1</sup>

Regardless of our age, gender, socio-economic or ethnic background, we consider our health to be our most basic and essential asset. The widely acceptable definition of health is that given by the WHO in the preamble of its constitution, according to World Health Organization, “Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease”.<sup>2</sup>

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<sup>1</sup> National seminar on the ‘*Human right to health*’ organized by the Madhya Pradesh State Human Rights Commission (At Bhopal) - September 14, 2008 - Address by Justice K.G. Balakrishnan, Chief Justice of India

<sup>2</sup> Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19–22 June 1946; signed on 22 July 1947 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100); and entered into force on 7 April 1948

In recent years, this statement has been amplified to include the ability to lead a 'socially and economically productive life'. Through this definition, WHO has helped to move 'health thinking' beyond a limited, biomedical and pathology-based perspective to the more positive domain of "well being". "Health for All" does not mean an end to disease and disability, or that doctors and nurses will care for everyone. It means promoting and protecting people's rights, empowering them and thereby improving their health.

### **PHYSICAL AND MENTAL HEALTH:**

An increasing body of evidence gained over the last few decades has made it increasingly clear that emotions and state of mind have a powerful effect on physical as well as mental health. These effects can be both positive and negative. It is an established fact that your physical health is interconnected and cannot be separated from your mental health. One affects the other.<sup>3</sup>

Keeping physically fit means keeping mentally fit as well. That means finding healthy ways to deal with what psychologists would typically call "negative emotions" – such as anger, aggression, aggravation, fear, etc. – and reinforcing the positive emotions and behaviours in our life. It means finding ways to communicate with the loved ones in our lives, rather than bottling it all up inside and letting it simmer.

### **STRESS AND HEALTH:**

Medical research is seeing a direct link between diseases and stress. Some estimates say 40 - 80% of all visits to doctors may be directly related to stress.

Stress can have and will have a negative effect on your body. So while you feel angry and frustrated, or you fume at your spouse or yell at your neighbour or friend, you are not doing your system any good. With the chemical reactions – like the adrenalin surge – you can easily develop stress related diseases and complaints. There are many conditions attributable to stress, like:

- heart disease
- chronic fatigue
- anxiety attacks
- mood swings
- psychological distress
- depression
- sleep problems
- high blood pressure
- eating disorders
- peptic ulcers
- poor immune function
- migraines
- alcoholism
- smoking-related respiratory ailments

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<sup>3</sup> John M. Grohol, 'The Connection Between Mental & Physical Health'

## **NEGATIVE AND POSITIVE EFFECTS OF “EMOTION” ON HEALTH:**

Depression, anxiety, hostility, chronic stress, and social isolation have all been shown to have damaging effects on health, particularly with regard to problems involving the heart and cardiovascular system, including heart attacks, strokes and high blood pressure. Chronic stress can damage neurons in the brain, interfering with memory and other cognitive functions.

Other factors relating to emotion and state of mind, including social connection, have proved to have protective effects on cardiac health. Expressing emotion, especially emotion about traumatic events, has been shown to strengthen immune function and to lessen the symptoms of asthma and rheumatoid arthritis, which are both immune-related problems.

The effect of emotion is not restricted to the person suffering from it. Recent work in neuroscience has shown that emotions are contagious, that is, they can move between people without them being consciously aware of it. This is made possible by mirror neurons in the brain, which fire up and ‘mirror’ what others, seem to be experiencing. Thus emotional stress of one person could lead to stress of other members also, leading to health related issues.

While it is true that the life span of human beings have improved thanks to the modern medicine with its wonderful pills and incredible technical advances for treatments and operations, which takes care of diseases and health conditions incredibly well, the real question is “Do we have a higher quality of life?” Are we healthier than 100 years ago when the life expectancy was lower or are we just here longer? Each of us can live healthier, if we make a concentrated effort to invest in our health by learning to identify bad stress and choosing healthy strategies to overcome a lot of the negative side effects.

## **SOME OF THE COMMON ISSUES CAUSING VARIED EMOTIONS:**

### **Intimate Partner Violence:**

Intimate partner violence, which describes physical or sexual assault, or both, of a spouse is a common health-care issue. The consequences of such violence include increased health problems such as injury, chronic pain, gastrointestinal and gynaecological problems, depression and post-traumatic stress disorder. Women who are abused are frequently treated within health-care systems, however, the cause for the obvious trauma are not addressed. The injuries, fear and stress associated with intimate partner violence can result in chronic health problems such as chronic pain (eg. headaches, back pain) or recurring central nervous system symptoms including fainting and seizures. Similarly, self-reported cardiac symptoms such as hypertension and chest pain have also been associated with intimate partner violence. 40–60% of murders of women in North America are reported to be done by intimate partners. Mortality associated with domestic violence also includes suicide of women.

### **Relationship Issues:**

Many of the emotional and social factors that can affect health play themselves out in our relationships with other people. Relationship problems are among life's most stressful experiences. It could be husband and wife relationship, parent and child relationship, relationship with friends, relationship with business partners, relationship with neighbours etc.

Researches have shown that fights between spouses, parent-child or friends can cause physiologic as well as emotional turmoil. The consequences of these physiological storms on health are usually minor if they happen infrequently, but chronic fighting sets the stage for cardiac and immune problems.

Similarly children of parents who are going through the process of separation or divorce experience a range of emotions that include but are not limited to anxiety, depression, anger, guilt, resentments and fear.

Depression and post-traumatic stress disorders are the most prevalent mental-health sequel of relationship issues. Alcohol and drug abuse is the other mental health problem most frequently seen, as a tool to calm or cope with the specific groups of symptoms associated with post-traumatic stress disorders.

#### **ANALYZING THE ROOT CAUSE:**

Even though I am not a medical doctor or a neuroscientist, a glance through the fundamental theory of neuroscience would convince anyone that there is a direct link between diseases and stress or conflicts. The intertwined relations of abuse, emotional stress and physical and mental-health outcomes should be of interest not only to health-care practitioners but also to mediation researchers.

Research shows a strong link between “companionship” or “affection” and mental and physical health, but little is known about the mechanisms that underlie these relationships. Everyone has an attachment style, a part of your personality that determines how you behave in interpersonal relationships. Insecure attachment styles include attachment anxiety and attachment avoidance. An avoidant attachment style is characterized by reluctance to trust and rely on others and fear of intimacy. An anxiety attachment style involves reoccupation with the other, a need for reassurance and fear of abandonment. Correlational analyses indicate that attachment anxiety and avoidance are strongly related to the mental health component of functional health. The findings suggest that individuals' abilities to be kind toward themselves and their sense of belonging and being important to others, are pathways through which attachment orientation relates to mental health.

Similarly negative associations, like “loneliness” is found to have a strong link with physical health. A lonely individual is unlikely to feel as though others are aware of, rely on, or care about his or her presence, thus lacking in the core components of collaboration. Researches have shown loneliness to be associated with accelerated physiological aging<sup>4</sup> and cardiovascular health risk in young adulthood, and to predict morbidity and mortality<sup>5</sup>. Studies have also shown strong

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<sup>4</sup> Hawkey & Cacioppo, 2007

<sup>5</sup> Caspi, Harrington, Moffitt, Milne, & Poulton, 2006

links between loneliness and lower levels of physical health<sup>6</sup> and between social isolation and lower levels of self-rated physical health<sup>7</sup>. This finding supports the hypothesis that collaborative relationships might have positive associations with physical health.

As people living with mental illness are at greater risk of experiencing a wide range of physical health problems<sup>8</sup>, the reverse relationship is also true: people living with chronic physical health conditions experience depression and anxiety at twice the rate of the general population<sup>9</sup>. Disease of the modern age, such as cancer, AIDS or psychological conditions caused by the stress and strain of daily life, have complicated symptoms and are progressively more difficult to treat. Consequently, modern medicine has started to look for different methods of treatment to cure such conditions and to help people get their lives back on an even keel again.

### **DIAGNOSIS & TREATMENT:**

The causes and extent of such health-care problems will not be cured just by peripheral medical treatment without diagnosing the root-cause that created such problems. This would be rather obvious if the mental disorder affects your outward emotional well being, affecting the decision making power itself.

When we are enmeshed in conflict, our neuro-wiring changes and we are not always able to behave rationally. Here's what happens. It is the amygdala, an almond-shaped region near the brain stem that regulates immediate responses to conflict and change, especially anger and fear. It helps to regulate levels of data flow between the rational, emotional and reptilian parts of our brain. When the amygdala is functioning well, decision-making occurs with input from the different brain centres, especially the rational and emotional brains. However, sometimes the amygdala gets stuck. This can occur when we are tense, stressed or in a conflictual situation. Just as our muscles may become stiff and tense, restricting blood flow and causing pain and headaches, so our amygdala can become locked in a tense state so that communication between the brain centres is temporarily interrupted. Information enters our brain and goes to the emotional brain as usual, but it is prevented from accessing the rational brain. As a result, we react from these brain centres without rational input. This is referred to as emotional hijacking or emotional flooding. Good thinking is hijacked as emotions flood the brain and trigger flight or fight responses. Flight equates to avoidance of conflict and fight refers to confrontation. Neither is useful. During emotional hijacking the hormone cortisol is released into the brain as a response to stress and increases our blood sugar levels. Neuro-imaging studies show that this can be an extremely rapid and non-conscious process – 33 milliseconds can be all that is needed for our amygdala to respond to emotional stimuli. Unfortunately, while emotional hijacking can occur very quickly, it takes much longer to recover

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<sup>6</sup> Hawley & Cacioppo, 2007

<sup>7</sup> Cornwell & Waite, 2009

<sup>8</sup> Canadian Institute for Health Information, 'A Framework for Health Outcomes Analysis: Diabetes and Depression Case Studies', (Ottawa: CIHI, 2008), [www.cihi.ca](http://www.cihi.ca)

<sup>9</sup> Government of Canada, 'The Human Face of Mental Health and Mental Illness in Canada', Minister of Public Works and Government Services Canada (Catalogue No. HPS-19/2006E, 2006), [www.phac-aspc.gc.ca](http://www.phac-aspc.gc.ca)

from that release of hormones that to come down from the natural highs we experience with the reward and pleasure chemical dopamine – more than 20 minutes according to scientists. Most of the illogical or wrong decisions are made at this time.<sup>10</sup>

While people in conflict commonly refer to facts, behaviours, feelings, personalities, or events, for the most part we ignore the deeper reality that these are processed and regulated by the nervous system, and are therefore initiated, resolved, transformed, and transcended largely within our brains.

All conflicts are perceived by the senses, manifested through body language and kinaesthetic sensations, embodied and given meaning by thoughts and ideas, steeped in intense emotions, made conscious through awareness, and may then be resolved by conversations and experiences, and develop into character, nurture a capacity for openness and trust, and contribute to learning and an ability to change.

A number of recent brain studies have revealed how perceptions and memories are profoundly distorted by emotions and by focused concentration, and how they can be reshaped by suggestion and subsequent events. Thus, areas of the brain that are linked with negative emotions and judging others are switched off, for example, when mothers look at photographs of their babies. This method of controlling the action of brain in making it adaptable to taking right decision could be effectively handed only in a process of mediation.

Similarly, sometimes victims of crime need answers and apologies more than they need to know perpetrators are being punished and sometimes offenders need to find out just who they've hurt to realize what they've done is wrong.

#### **ADVANTAGES OF MEDIATION:**

There is no conflict without emotion. Behind almost every human conflict someone feels dismissed, discounted, disenfranchised or disrespected. Unresolved tensions that may have simmered below the surface can resurface and make situations difficult. Even if angry words are not spoken, an appearance of “peace” may not be truly peaceful at all. Underneath the still waters, there may be a turbulent bed of emotions. Therefore there can be no resolution of a conflict without addressing the underlying emotions that gave rise to it and sustained it. Mediation seeks to help parties find an authentic peace.

When we recognize that conflicts are so intrinsically attached with human mental and physical conditions and behaviour, how can we expect the resolution of a dispute by a legal frame work, finding out ‘who is right’ and ‘who is wrong’ by a third party institution, will cure the underlying human element? Legal issues and legal solutions have not provided the desired relief. Emotions, interests and needs of the people who are in conflict and problems have to be analyzed. The growing mob-violence, family breakdowns and juvenile crime rates can be stopped only by stabilizing relationships and taking care of the emotional expectations. Mediation

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<sup>10</sup> Nadja Alexander, *Confrontation or Conciliation: Does Science have the Answer?*

is a process for individuals to resolve disputes during which they make the decisions consensually, rather than fight it out through litigation.

Obviously the more co-operational process of mediation provides an advantage to the adversarial process of conflict/dispute resolution, like traditional litigation. The cause of stress or problem will not be cured by addressing the problem by the traditional adversarial process of litigation or adjudication. The mediation process does not necessarily eliminate all of the problems associated with a traditional litigation; however it can reduce the tension, thereby reducing the stress level of both parties.

The basic issue to be addressed is whether you want a “settlement of dispute” or a “resolution of dispute”? Settlement – is more akin to using pain killers and band aids to relieve the pain and stop the bleeding. Stop taking the pain killers or remove the band aids and the pain and bleeding may very well resume. The word itself – settlement – implies a less than satisfying notion of accepting less than you hoped for – you settled (for less). Resolution is different. It implies completion; its goal is to resolve the matter. If settlement treats the symptoms and stops the bleeding and pain, the goal of dispute resolution is to find out the underlying causes and seeds of the problem and cure the disease. There is permanence and thoroughness to dispute resolution – cure the ailment; solve the problem. Resolution does not mean that you will never feel negative emotions again. It means that you choose to communicate your feelings in a positive way and move forward.

To better understand the concept of resolution, one should look at the contrast between an arrangement-focused and a realization-focused view of justice, it is useful to invoke an old distinction from the Sanskrit literature on ethics and jurisprudence. Consider two different words – *niti* and *nyaya* – both of which stand for justice in classical Sanskrit. Among the principal uses of the term *niti* are organizational propriety and behavioural correctness. In contrast with *niti*, the term *nyaya* stands for a comprehensive concept of realised justice. The need for an accomplishment-based understanding of justice is linked with the argument that justice cannot be indifferent to the lives of that people can actually live.<sup>11</sup> Perhaps the most far-reaching example of what is essential for an adequate understanding of justice is Rawls’s foundational idea that justice has to be seen in terms of the demands of fairness.<sup>12</sup>

Mediation as a method of settlement of disputes is a form of facilitated negotiation in which an impartial third party attempts to help disputing parties to reach a mutually satisfactory solution to their problems, without the element of compulsion. Rather than analyzing a dispute and dissecting the law to find out the legal right of a party to decide who is right and who is wrong, as is done in traditional litigation, the mediator facilitates dialogue between the parties to shape up a resolution acceptable to both parties ending up in a win-win situation. As per the principles of mediation, experts tell us to ‘separate the people from the problem’ and to treat the people differently from the problem.<sup>13</sup> Techniques are employed in mediation

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<sup>11</sup> Amartya Sen, ‘*The Idea of Justice*’

<sup>12</sup> John Rawls, ‘*A Theory of Justice*’

<sup>13</sup> Roger Fisher and William Ury, ‘*Getting to Yes*’

to handle the emotional issues faced by the parties in subtle ways, which would go about encouraging a shift in the attitudes of disputants toward problem solving and collaboration. It has been found that such assistance with the emotional aspects to be of critical importance to the success of resolving the disputes amicably and this could be done only in Mediation. Mediation focuses on needs, empowerment, restructures perspectives or relationships and seeks to resolve the underlying problem.

Mediation process can help to resolve interpersonal problems that cause us to experience relationships as a source of stress rather than as a source of support. Even when health problems are intractable, such as with chronic illnesses or end of life issues, resolving conflict and improving clarity in important relationships can reduce symptoms, improve the quality of life, and allow a greater sense of peace for both the ill person and those who are close to them. Resolving relationship problems can be mentally and physically beneficial for everyone, regardless of their current state of health.

Mediation also helps in restorative justice through its variety approaches and restoring the offender in community by giving correctional practice thereby giving everyone a second chance.

In a mediation process the goal is not to “win”, but to preserve the “interest” and therefore the agreements reached in mediation are vital to making and maintaining cooperative relationships between the parties. Mediation uses the psychological power of empathy to create mutual understanding between parties to address concerns, promote emotional healing, and preserve ongoing relationships. Thus, mediation not only resolves the disputes but also improves their ability to manage their emotions. Simply put, happier spouses, happier parents, happier children and happier people.

## **MEDIATION – A HUMAN RIGHT OR FUNDAMENTAL RIGHT?**

### **Global & Indian Scenario**

According to Jonathan Mann, “Modern human rights, precisely because they were initially developed entirely outside the health domain and seek to articulate the societal preconditions for human well-being, seem a far more useful framework, vocabulary, and form of guidance for public health efforts to analyze and respond directly to the societal determinants of health than any inherited from the biomedical or public health traditions.”<sup>14</sup>

The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The preamble further states that “the enjoyment of the highest attainable

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<sup>14</sup> Jonathan Mann et al., ‘Health and Human Rights: A Reader’



standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”<sup>15</sup>

The 1948 Universal Declaration of Human Rights (UDHR) also mentioned health as part of the right to an adequate standard of living. Article 25 of UDHR states that “Everyone has the right to a standard of living adequate for the health, and wellbeing of himself and his family”. The right to health was again recognized as a human right in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was presented before the UN General Assembly in 1966 and adopted in 1976. Article 12(1) of the ICESCR referred to the ‘right to health’ in aspirational terms, Article 12(2) mandated specific measures on part of the state parties to the covenant.

The right to health is also recognized in several regional instruments, such as the African Charter on Human and Peoples’ Rights (1981), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988), and the European Social Charter (1961, revised in 1996). The American Convention on Human Rights (1969) and the European Convention for the Promotion of Human Rights and Fundamental Freedoms (1950) contain provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhuman and degrading treatment, and the right to family and private life. Finally, the right to health or the right to health care is recognized in at least 115 constitutions. At least six other constitutions set out duties in relation to health, such as the duty on the State to develop health services or to allocate a specific budget to them.

In recent years, increasing attention has been paid to the right to the highest attainable standard of health, for instance by Human Rights Treaty Monitoring bodies, by WHO and by the Commission on Human Rights (now replaced by the Human Rights Council), which in 2002 created the mandate of Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health. Good health is influenced by several factors, such as an individual’s biological make-up and socio-economic conditions. Rather, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization. This is why it is more accurate to describe it as the right to the *highest attainable standard* of physical and mental health, rather than an unconditional right to be healthy.

The Constitution of India does not provide for the right to health as a fundamental right. But the Constitution directs the State to take measures to improve the condition of health care of the people. The preamble to the Constitution of India, inter alia, seeks to secure for all its citizens justice – social and economic. It provides a framework for the achievement of the objectives laid down in the preamble. The preamble has been amplified and elaborated in the Directive Principles of State Policy (DPSP). The DPSP under the Article 47 considers it the primary duty of the State to improve public health. Article 38 of Indian Constitution impose liability on State that states will secure a social order for the promotion of welfare of the people.

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<sup>15</sup> WHO, ‘The Right to Health’ – Fact Sheet No. 31

States have the primary obligation to protect and promote human rights. Human rights obligations are defined and guaranteed by international customary law<sup>16</sup> and international human rights treaties, creating binding obligations on the States that have ratified them to give effect to these rights. 'Fulfilling' the right to health means that the government is required to take positive action to implement the right to health by adopting policies which allocate public resources to correct deficiencies in health facilities, goods and services.<sup>17</sup>

The DPSP are only directives to the State. No person can claim for non-fulfilling these directives. But the Supreme Court of India has brought the right to health under the preview of Article 21 of the Constitution.<sup>18</sup> The scope of this provision is very wide and it prescribes for the right of life and personal liberty. The concept of personal liberty comprehended many rights, related indirectly to life or liberty of a person. And now a person can claim his right of health. After the famous decision of *Keshawananda Bharti Vs State of Kerala*<sup>19</sup>, the Supreme Court has also allowed individual citizen to approach the court directly for the protection of their Constitutional human rights.<sup>20</sup> In a series of cases dealing with the substantive content of the right to life, the Supreme Court has found that the right to live with human dignity includes the right to good health.<sup>21</sup> The court, while reiterating its stand for providing health facilities, held that a healthy body is the very foundation for all human activities.<sup>22</sup> In a welfare state, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. Thus, the right to health, along with numerous other civil, political and economic rights, is afforded protection under the Indian Constitution as a fundamental right.<sup>23</sup>

The Court widened the scope of the term health to state that it implies more than an absence of sickness and held that health facilities should not only protect against sickness but also ensure stable manpower for economic development, to keep a person physically fit and mentally alert for leading a successful economic, social and cultural life.<sup>24</sup>

Mediation, being closely interconnected in promoting and protecting people's rights, empowering them and thereby improving their health, it could be said that resolution of disputes by way of mediation is also a fundamental human right. In a welfare State, it is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health. Further, the right to health extends further and includes a wide range of factors that can help us lead a healthy life. The Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights<sup>25</sup>,

<sup>16</sup> Customary law is evidence of a general practice of States accepted as law and followed out of a sense of legal obligation

<sup>17</sup> Patricia C. Kuszler, 'Global Health and the Human Rights Imperative', Asian Journal of WTO and International Health Law and Policy, Vol. 2(1), March 2007, p. 99-124, at 111-112

<sup>18</sup> Sheeraj Latif Ahmad Khan, 'Right to Health'. (1995) 2 SCJ 29-34, at 30

<sup>19</sup> (1973) 4 SCC 225

<sup>20</sup> Kumar Avnish, 'Human Right to Health' Satyam Law Pub. 2007 at 171

<sup>21</sup> Bandhua Mukti Morcha, AIR 1984 SC 811

<sup>22</sup> Vincent Vs UOI, AIR 1987 SC 990

<sup>23</sup> CESC Ltd. vs. Subash Chandra Bose, AIR 1992 SC 573,585

<sup>24</sup> Ibid, 23

<sup>25</sup> The Covenant was adopted by the United Nations General Assembly in its resolution 2200A (XXI) of 16 December 1966. It entered into force in 1976 and by 1 December 2007 had been ratified by 157 States

calls these the “underlying determinants of health”. In my view, mediation would definitely come under this underlying determinants of health. Since it is one of the most sacrosanct and valuable right of a citizen, and an equally sacrosanct and sacred obligation of the State, every citizen is entitled to look towards the State to perform this obligation with top priority. This in turn will not only secure the rights of its citizens to their satisfaction, but will benefit the State in achieving its social, political and economic goals.

An integrated approach to advancing ‘public health’ recognises its relationship with policies for economic development and addressing social inequalities. The broader notion of the ‘right to health’ emphasizes its interlinkages with other rights. In this respect, *1993 Vienna Declaration and Programme of Action* had emphasized the fundamental inter-relatedness between civil and political rights on one hand and economic, social and cultural rights on the other hand. All human rights are universal, indivisible and interdependent and interrelated.<sup>26</sup> In India, the theory of the inter-relatedness between rights was famously articulated in the *Maneka Gandhi* decision.<sup>27</sup>

Right to resolve conflicts through amicable methods of mediation, which directly affects the health of the community should attract a priority programming for the State. Notwithstanding resource constraints, some obligations have an immediate effect, such as the undertaking to guarantee the right to health in a non-discriminatory manner, to develop specific legislation and plans of action, or other similar steps towards the full realization of this right, as is the case with any other human right.<sup>28</sup> The other actors in the society, viz., individuals, intergovernmental and non-governmental organizations (NGOs) and businesses, have also got a prime responsibility and interest in protecting and advancing this right.

### **IIAM COMMUNITY MEDIATION SERVICE:**

IIAM Community Mediation Service (IIAM CMS) takes this concept to an institutional level in India by taking the entire dispute resolution process and maintaining control and responsibility for it in the community at large. The motto of the IIAM CMS is; “*Resolving conflicts; promoting harmony*”.<sup>29</sup> The mission is to provide neutral and safe dispute resolution opportunities through which individuals are empowered to work collaboratively to develop creative and mutually agreeable solutions to conflicts. Community mediation means neighbours helping neighbours to solve problems and resolve disputes.

The objective is to seek institutions that promote justice, rather than treating the institutions as themselves manifestations of justice, which would reflect a kind of institutionally fundamentalist view. Even though the arrangement-centred perspective of *niti* is often interpreted in ways that make the presence of appropriate institutions themselves adequate to satisfy the demands of justice, the broader perspective would indicate the necessity of examining what social realizations are actually generated through that institutional base.<sup>30</sup>

<sup>26</sup> *1993 Vienna Declaration and Programme of Action*, U.N. GAOR, World Conference on Human Rights, 78<sup>th</sup> Session, UN Doc. A/CONF 157/23 (1993)

<sup>27</sup> AIR 1978 SC 597

<sup>28</sup> WHO, ‘*The Right to Health*’ – Fact Sheet No. 31

<sup>29</sup> <http://www.communitymediation.in>

<sup>30</sup> Amartya Sen, ‘*The Idea of Justice*’

The IIAM CMS was launched for the first time in India by the Chief Justice of India at New Delhi on 17<sup>th</sup> January 2009. The IIAM CMS is endorsed by the International Mediation Institute (IMI) at the Hague, Netherlands. Mr. Michael McIlwrath, Member, Board of Directors of IMI is deputed as Member of the IIAM Advisory Board, chaired by Mr. Justice M.N. Venkatachaliah, former Chief Justice of India. The operations of the Community Mediation Clinics and its ethical norms are supervised and implemented by the CMS Committee, headed by Mr. Justice K.T. Thomas, former Judge of the Supreme Court of India and includes many public organisations. The IIAM Community Mediation Clinics were launched in the State of Kerala by Chief Justice Manjula Chellur, the Chief Justice of the High Court of Kerala.

The thrust of IIAM CMS is to promote reliance of mediation at the grass root level by way of local capacity building. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community Mediators are selected from a wide variety of backgrounds including retired people, house wives, professionals, youth etc., who have a good reputation in the local area with integrity and sense of fairness in public dealing. They are given training on mediation and high standards of ethics as laid down by the IMI are also implemented.

Steps are taken for connecting the IIAM CMS with Community Policing, so that complaints preferred in the Police stations, relating to family and relationship issues, partner violence, neighbourhood issues, compoundable criminal matters or issues which could result in crimes could be amicably resolved by mediation through the IIAM Community Mediation Clinics. The project has the potential to become a powerful vehicle for creating social and communal harmony and reduction of crimes. It could also become a key project in changing the attitude of the people towards the Police and their activities.

To promote the concept of mediation as a tool to improve the health and welfare of the people of the country, proposals are also mooted with the National Institute of Health and Family Welfare (NIHFW), to provide the IIAM CMS through the Primary Health Centres (PHC's). Over the last several years in India there has been a dramatic change in the national government's approach to health sector. One stated goal was to increase total government health spending from 1% of the gross domestic product (GDP) to a targeted 2-3% of GDP by 2012. Moreover the Supreme Court of India *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*<sup>31</sup> directed all State governments to undertake measures to ensure the provision of minimal primary health facilities and declared that lack of resources could not be cited as an excuse for non-performance of such a constitutionally mandated obligation. This decision is considered by many commentators that by recognizing a governmental obligation to provide medical facilities, the Court has created a justiciable 'right to health'. This direction could be fulfilled by providing IIAM CMS in PHC's.

Even though India has not so far adopted the UNCITRAL Model Law on International Commercial Conciliation 2002, India had adopted the UNCITRAL

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<sup>31</sup> AIR 1996 SC 2426

Conciliation Rules 1980 and the UNCITRAL Model Law on International Commercial Arbitration 1985 in its Arbitration & Conciliation Act, 1996. As per Section 74 of the said Act, the settlement agreement is given the same status of a court decree. Therefore the successful culmination of resolution through mediation gets the legal authority and the same status and finality of a court judgment, even though it is not imposed on the parties.

According to a study conducted by the Ministry of Law, Govt. of India, with a population of 1.22 billion, the case pendency in various courts amount to 38 million, resulting in a civil case lasting for nearly 15 years and giving credence to the adage “justice delayed is justice denied”. It is estimated that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts. The Supreme Court-supported National Court Management System (NCMS) has given their “most conservative estimate” that by 2040, the pendency will be 150 million.<sup>32</sup> Apart from the above, when we account for the many more who does not have the privilege or access to courts due to various reasons, like cost, compulsions, fear etc., the health problems associated with such disputes could be enormous. The attempt of the IIAM CMS is to take a positive step in addressing this issue.

The popularization of the IIAM Community Mediation Clinics will help to bring people together to work creatively on conflict resolution, instead of fighting with each other and making those problems worse. This service helps the community to nip the budding emergence of the conflicts. We feel that this unique project has the potential to become a powerful vehicle for creating social and communal harmony and also enhancing health and family welfare including empowerment of women and the youth. This could develop a new dimension to social welfare and empowerment and thereby create stable families and healthier societies. The program has the potential to shape powerful conflict transformation partnerships. Such approaches often have the power to heal even profound social wounds, so that the system can become a vehicle for creating a loving and caring world with a healthy society.

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*(This paper was presented by the author at the Asia-Pacific Mediation Conference 2012 on 16-17 November 2012 at Hong Kong.)*

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<sup>32</sup> [http://articles.timesofindia.indiatimes.com/2013-01-17/india/36393546\\_1\\_crore-cases-judges-per-million-population-civil-case](http://articles.timesofindia.indiatimes.com/2013-01-17/india/36393546_1_crore-cases-judges-per-million-population-civil-case)