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## DARWINISM OF MEDIATION

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“It is not the strongest of species that survives, nor the most intelligent, but the most responsive to change.”- Charles Darwin

### Abstract

Living in a conflict-free community is nothing but an impracticable dream. We exist on Earth as humans and having conflict in thoughts and actions is inescapable. However the method of resolution of such conflict between two individuals or two communities in a peaceful manner is the actual challenge. For ages, an attempt has been made to resolve disputes amicably, so that it saves relations between the two parties in the long run. Mediation is the facilitation of conciliation between the two parties at conflict. The traditional method of resolution is moving to the court of law, but due to its shortcomings like delay in justice delivery, defamation of the parties, high expenses, chances of corruption, etc. society always stood in need of the more effective dispute resolution method. Furthermore from here on the practice of mediation practically came into existence, although its use can be traced back to Mahabharata when Lord Krishna acted as a mediator between the Kauravas and the Pandavas. It was later seen in the Middle East, in various Islamic traditions of third party intervention for dispute resolution like Sulh and Musalaha and so on. Mediation has always been in existence and is consistently evolving ever since. Although several methods for such conflict resolution was created yet, very few of them persevered. Mediation was one among them and thence proves the Darwinian Theory of Evolution. Even though English scientist Charles Dickens gave the Darwinian Theory of Evolution in the field of Science, it can be seen to have implemented in various other areas evolving. Besides Mediation is one such area since the theory's principle talks about “survival of

the fittest” which has very well been established as discussed above. Unlike other conflict resolution experiments that ceased to exist, Mediation persevered its way through years. This Alternate Dispute Resolution method is now recognized all over the world, thereby matching up with the traditional walk-in-court methods and at times even turning out to be a better one due to its speedy, cost-effective, cooperative and amicable character. After the advent of Mediation in the current judicial system, few survey results are- Post enactment of Arbitration and Mediation law in India in the year 1996, about 39,969 cases were solved in two months clearing the massive backlog; Japan solved 1/3<sup>rd</sup> of cases through Mediation; in Sweden, about 74% of cases solved by court-annexed Mediation and so on. Thus, Mediation turns out to be a boon when the judicial system is in a desperate situation. Even the UN General Assembly considers it a very helpful tool for effective conflict resolution and takes various steps for its spread. The historical and the current value of Mediation is not as important as much as its future value or future shape. The future of Mediation should be secured by making it legally enforceable and its conclusions equal to that of the judicial courts, to alleviate greater benefits.

**Keywords:** conflict resolution, the Darwinian theory of evolution, Mediation

## 1. Introduction

Years ago, humans were apes and couldn't do more than crawl on his fists. However, with time it learned to move, cover, hunt and feed himself, thus surviving. This was Evolution and from time and on man has continued to evolve every day very evidently. In the same manner, like human evolution, the process of dispute resolution has also continued to evolve without fail. Dispute and differences emerge from man's conduct, but its resolution in the most appropriate manner is nothing less than science itself. No matter what phase of evolution, the settlement of a dispute in a peaceful manner has always been desirable. For the same, various figures in all civilizations have always put efforts to invent customs and practices for the harmonious conflict resolution. Apart from other methods invented for the same purpose, one such method is Mediation. Mediation is the facilitation of negotiation between two parties at conflict. It, by all means, try to keep up the harmony between the concerned parties just as desired. If seen closely, Mediation is

very similar to the Theory of Evolution since one of them talks about the fittest surviving and the other undeniably proves that.

### **1.1 Darwinian Theory and Mediation Compared**

In the 18<sup>th</sup> century, the English scientist Charles Darwin developed the Theory of Biological Evolution. In the layman's language, it is the development through a natural process. The underlying concept of natural selection has a remarkable power of explaining adaptive changes with changing times. The Darwinian Theory talked about the 'Survival of the Fittest' which if looked rationally stems that the strongest people, things, ideas or practices tend to survive whilst the weaker slump or fail without observance. Mediation can be compared to the Darwinian Theory on grounds that it is also a social evolution. It has been in existence since long and unlike any other customs or practices initiated for an amicable conflict resolution that failed miserably, it survived and has now come into attention very successfully thus proving that it is the fittest. Although the Evolution theory was published in the year 1859, it has been in existence since the time man put his foot on land. It was just Darwin establishing the theory and bringing it into the light. Likely the practice of Mediation might have been legalized in the year 1999 in India and in some time in various other countries, but the usage of this method has been traced from the era of Mahabharata and hundreds of years ago in the Middle East and various other instances. The biological evolution theory had various points embodied among which few of them were- competition, adaption, and speciation. According to the theory, the competition was concerning the organism's demand for much-needed environment resources like food, nutrients, etc.; adaption dealt with the inheritance character according to changing dynamics, for instance, adapting to weather changes; and speciation which was forming of the new species. Similarly, Mediation also has these points in common say competition, adaption, and speciation, but has to deal with society at large. Here, competition talks about the demand of an individual for the speedy justice in the most appropriate manner; adaption concerns with being dynamic i.e. a state when one is in vogue with the changes and demands of the society and its individuals; and speciation i.e. branching of initial methods into newer ones like other branches of dispute resolution- mediation, arbitration, conciliation, negotiation, etc. Another point of similarity between the two is their struggle for recognition and subsistence since from the time of

introduction, both were criticized at intervals. Darwin's theory of evolution was called 'fatally flawed' in the book named *What Darwin Got Wrong*<sup>1</sup> and by various other scientists whereas Mediation, at instances has been criticized by various bureaucrats for having loopholes due to its non-binding and informal character. Nevertheless, the two never flunked with despondency and with time succeeded thereby becoming an epitome of perseverance. Hence approved that the Theory of Evolution given by Charles Darwin and the Alternate Dispute Resolution method of Mediation are very closely related.

## 2. Changing Landscape of Mediation

### *2.1 Mediation- The Beginning*

Mediation is a Latin word whose usage has been mostly seen in the Middle Ages. Although the origin of Mediation can be traced back to ancient Greece, where people mainly the older members used this method for cordially settling the village disputes, yet it has been living from the epoch of Mahabharata. 5000 years ago when Lord Krishna acted as a mediator between the very mighty Pandavas and the Kauravas by transcending the boundaries of justice to steer clear of war scenes and settle the conflict in a friendly manner by proposing a request to the Kauravas. Later on, it was seen in the Middle East about 100 years ago<sup>2</sup>. The Islamic and Arabic traditions have steeped in belief of the resolution of a conflict by a non-biased third party and that is what was followed. One of the prominent stories of the Prophet Mohammad was resolving in-tribe differences by acting as a neutral third party as chosen by the nearby tribes. The Middle East had other popular practices or customs of such dispute resolution, namely Sulh and Musalaha which are settlement and reconciliation in common terms respectively. Subsequently, its essence is apparent in the 1830s in the American states when the beginning of ascendance of Mediation was an incontestable blend for the dissatisfactions arising out of the legal systems. When President Martin Van Buren facilitated a settlement of strike done by the shipyard workers, the

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<sup>1</sup> Jerry Fodor, *What Darwin Got Wrong* (2010)

<sup>2</sup> Negin Fatahi, *The History of Mediation in the Middle East and its Prospects for the Future*, Kluwer Mediation Blog (Jan. 23, 2018)

[http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/?doing\\_wp\\_cron=1587391651.8661379814147949218750](http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/?doing_wp_cron=1587391651.8661379814147949218750)

first government mediated labour settlement was publicized in America<sup>3</sup>. Then in older days in India, post-independence, the village heads known as the Panches, who mainly the eminent and the wise figures of the village, used to break disputes by the above-discussed method. That was the period of the Panchayati Raj system. Walk-in courtrooms were not much encouraged. The above are a few instances where the crux of Mediation was witnessed long before it was recognized as a judicial instrument. Similarly, there were various other occurrences where it can be traced back in time.

Although the question arises, “*What was Mediation previously and what caused the need?*”

Previously, like talking about 50- 80 years ago, Mediation had nothing to do with the judicial system but was a substitute for judicial methods. Initially, it was nothing more than a settlement of a dispute in a genial way thereby, saving future relations in a community. The initial definition of Mediation comprised only of this. As mentioned above that disputes and differences emerge from man’s conduct, and for such dispute settlement, one cannot always opt for bigger proceedings. Thus, in search for a surrogate for violence gave birth to the precursors of Mediation and other Alternate Dispute Resolution techniques. It was one of the early ways to solve a disagreement without the use of hammer, fists, arrowheads, and attacks. It was rather peaceful that is much desired. Many a times the request for the third-party intervention was self-initiated when the parties realized they need an outsider help of suggestion. The Early phase of Mediation is, as said earlier comparable to the Darwinian Theory since both were always in existence, but were deprived of recognition, however continued to evolve remarkably in all conditions.

## ***2.2 Mediation- The Current Scenario***

Bringing back in attention to the Darwinian Theory, which talked about “The survival of the fittest”. Mediation has valiantly crushed all criticisms and has successfully made it into the current century. There were various reform trials and experiments done to create newer methods for justice-seeking but most them failed miserably due to various causes like lack of

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<sup>3</sup> Stanley D. Prowse, A Brief History of Mediation, The Law Office of Stanley D. Prowse  
<https://stanprowse.com/history-of-mediation>

understanding the concerned targeted population, unrealistic expectations, unclear research guidance, failed implementations, ineffective documentation or evaluation, lack of desired leadership, low commitment grade towards work, inter-agency differences, etc. A few of them are-

- i. Development of Jury Service by the Japanese System Reform Council whose purpose was to reform the justice system in Japan by increasing transparency and legal accountability. It tried to make the justice system more accessible and competent.
- ii. Theoretical study done by Latin America and the U.S. to reduce public access which will, in turn, bring forth a lesser number of cases in the courts and thus no backlogging and no delay issues. This could also be implemented by increasing the court procedure for filing a lawsuit or by making it overpriced.
- iii. Studies and experiments from the Caribbean and Latin America also disapproved that even by increasing the resources, judicial backlogging and other dissatisfactions will never be done away with.
- iv. French Conseil d'Etat tried to make platforms where the people could sue the government, but that too had many loopholes and thus flunked.

These were the examples of various judicial reforms that were made to increase judicial efficiency but failed and on the same page, Mediation made its way through<sup>4</sup>.

The question again is *“What is Mediation in the current era and what is the prolonging need for it continue?”*

The answer to the same question has changed for now the definition of Mediation is not restricted to particular dealing. Today, Mediation can be defined as “An amicable way to settle a dispute or come to a conclusion mutually with the help of an unprejudiced third party popularly known as the Mediator. It is a structured process to communicate and negotiate.” Here the third party is not a judge and rather an outside person who works to find points of agreement within a conflict. It now involves various important components, which makes Mediation a better option than other modes like litigation, arbitration, conciliation, etc. It includes confidentiality in character since this helps the party save his name from getting defamed. It is rather a quiet procedure. It is cost-effective, saves times unlike in the process of litigation that takes ages to

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<sup>4</sup> Juan Carlos Botero and others, Judicial Reform, World Bank Research Observer, Vol. 18, No.1 (2003)

resolve and has fewer chances of corruption since when it competes with other judicial institutions and has a regular check, it is incapable to churn our bribe from the litigant's pocket. In the current era, Mediation allows both parties to clear misunderstandings and find various methods or areas of agreement and reconciliation which otherwise would have never been possible especially in case of a judicial lawsuit. Another way it benefits the parties is that it looks for the advantage of both sides preventing the loss of either one, thereby maintaining the essence of harmony. The outcome of Mediation is most of the time in control. Also, the relation between the two is retained for the scope of future improvements. Mediation is forward-looking. The above points can also be considered as the reasons why Mediation is the best technique among other Alternative Dispute Resolution methods.

Nevertheless, the reason why Mediation has continued to prevail is the discrepancy in the judicial system. It is perceived that judicial systems are at a crisis. Although there is no set parameter to measure the efficiency of the justice delivery gradient, still the gradient is considered to be a low ranking, which is a bad sign for the development of any regime. Getting justice or resolution of even the most petite problem is tough. The percentage for people worldwide who are judicially sought help that too in time is almost ground level. Sluggish court procedures, high expenses, public traduce, are few reasons that keep up the scope of Mediation. Below are a few survey results that depict the pendency rate of cases worldwide<sup>5</sup>.

- a) In India, 43 lakh cases are pending in the 25 High Courts of the country amongst which 8 lakhs are about a decade old. India has 19 judges per 10 lakh people the survey said. The backlog cases will not be cleared up till the year 2330 if the court continues to work at the current pace.
- b) In China (PCR) more than 200,000 cases were pending in 2012 count.
- c) In Nigeria, about 50 judges in Lagos, with a ratio of 300 cases and more on 1 judge. The average life span of a case is 10-15 years.
- d) About 128,000 cases filed in South Africa between the years 2004-2005 but only 62% of cases were settled.
- e) In the UK, there are complaints of 73% from the disputants against the obsolete nature of the UK judiciary.

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<sup>5</sup>Tang Houzhi, Worldwide Use of Mediation, City University of Hong Kong  
[http://www.cityu.edu.hk/slw/ADR\\_Moot/doc/Worldwide\\_Use\\_of\\_Mediation\\_\(by\\_Prof\\_Tang\\_Houzhi\).pdf](http://www.cityu.edu.hk/slw/ADR_Moot/doc/Worldwide_Use_of_Mediation_(by_Prof_Tang_Houzhi).pdf)

Henceforth, the numerical count for such pending cases worldwide will be crossing the highest numbers ever imagined.

Another reason for Mediation used throughout is the downturn of Litigation and Arbitration. People's dissatisfaction with the current situation of the Judiciary made an outreaching consequence to incline towards Mediation. Now, there is a result of another survey done for cases settled with the help of Mediation<sup>6</sup>.

- (i) Enactment of Arbitration and Mediation laws was done in the year 1996 in India. It has also been mentioned under Section 89 of CPC making mediation mandatory. After such establishment about 39,969 cases have been settled in 2 months through Indian Mediation centres lightening the burden of a huge backlog of 31,280,000 cases in the Indian courts of justice.
- (ii) In Japan, about 1/3<sup>rd</sup> of civil cases have been settled through the use of Mediation services.
- (iii) After the creation of the Mediation centre in Dubai, approximately 1/3<sup>rd</sup> pending cases of the courts have been settled in 1 month.
- (iv) French courts too have settled big numbers of cases with high success rates after legalizing Mediation.
- (v) In 1999, Sweden set up the Mediation institute where today about 74% of the cases are resolved by court-annexed Mediation.

Apart from the above survey results, currently, 80 nations in hand have made Mediation laws and set up Mediation institutions to encourage and enhance the method to resolve disputes. Also, Mediation has a positive impact on people's minds to negotiate for the benefit of both sides and keeping up peace and brotherhood. Various countries, for instance, China (PCR) has enacted People's Mediation Law and made about 70 provisions for its improvement; Sri Lanka having Mediation Boards set up along with Mediation Commissions; Mediation becoming a major part of the Singapore legal system; in the UK, LCIA using Mediation methods along with arbitration for dispute resolution, and many more. The practice of Sulh and Musalaha which are ancient forms of Mediation is still in use among the Palestinians inhabited in Galilee. The Sharia law still shows the reflection of Mediation through its provisions on Al-Wasata where third-party intervention to resolve a dispute is encouraged. Adding another event of the year 2017 was the

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<sup>6</sup>Id. At 5



General Assembly requestion the Secretary-General to submit a report at its 72<sup>nd</sup> session on the UN activities in support of Mediation for the peaceful dispute resolution internationally. The UN extended its utmost efforts to promote Mediation and create an appealing environment for its well- being. Again a landmark event when the UN in the year 2019, signs an international treaty to solve cross- border commercial disputes by way of Mediation. A total count of 46 countries agreed upon the treaty.

Even in the current date, when the world is struck with Coronavirus pandemic from the virus named Covid-19, and all the courts of justice are shut close due to prevailing lockdown orders as a safety measure, numerous cases are at a standstill. This anyway is stagnating the court systems and would be considered nothing more as a tribute to backlogs. Nonetheless here too, Mediation does not fail to impress the world by its charm for several cases are being settled through Online Mediation processes. All of a sudden online Mediation has spiked to heights since it is both well-timed and pocket friendly to the litigants at conflict. Nonetheless, it is successful in providing relief to the courts, the litigants and the public at large, even at this time of disparity. Mediation very well stands qualified on the Darwinian Theory talking about the fittest surviving and is thus, undeniably a Boon at this time of Bane.

### ***2.3 Mediation- The Future Perspective***

After having come across the historic value and the current shape of Mediation it now necessary to determine the future value or the future shape of Mediation in the coming years. To secure the future benefits of Mediation, overcoming a mountain-sized hurdle is mandatory. The mountain-sized hurdle talked about is the unenforceability of Mediation results. Since the fact that Mediation cannot be enforced and is rather non-binding, it brings about loopholes and unending criticisms. To overcome this, the outcome of Mediation should be converted into a consent arbitral award by the judiciary. It should have the same effect as that of judgment from the court of justice. In other words, the process of Mediation must be legalized as a court measure and the concerned mediators must have the same gravity as that of an arbitrator at court. In countries where Mediation does not a unique Code must be looked into instantly without delay. In this way, the essence of Mediation will be retained. For a future perspective, it should no longer be regarded as an 'Alternative' but a court process itself. Only after such improvements, Mediation can flourish soon.

In an article by *Forrest (Woody) Mosten*, few predictions for the Mediation future is penned down as- Mediation turning into a separate profession, Training and supervision will be required to become a professional mediator, construction of Mediation friendly courthouses, Mediation will have technical support and more<sup>7</sup>. The article answer's question of "How should Mediation ideally be?"

### 3. Conclusion

The above context shows the Changing Landscape of Mediation- the Historic value, the Current scenario, and the Future perspectives. How Mediation evolved along with the dynamics of time is very well presented. Adding to it, it is established that The Darwinian Theory and Mediation are very comparable and have a handful of similarities. Mediation has successfully proven to be the fittest per phrase "Survival of the Fittest". The spiking use of Mediation in this era, and particularly in the current scenario of Coronavirus pandemic shows the adaptive character of the ADR tool and also demands further improvement. Its improvement will be the key to judicial prosperity. At last but not the least, few scope of improvements must be put audacity on are-

- i. Legal enforceability of Mediation;
- ii. The outcome of Mediation having the same impact as the litigation in courtroom outcomes;
- iii. Settlement of agreement to be enforced without entertaining any delay and excluding unnecessary conditions; and
- iv. The mediators must have equal or deserving designations like that of court arbitrators.

With the above, there lies a hope that Mediation will be recognized more legally in the coming years, thereby a positive reform in both national and international judicial system of justice delivery. Through this Mediation will be able to do more benefit to humankind ever done through any judicial reform.

The world must proudly Mediate!

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<sup>7</sup> Forrest (Woody) Mosten, The Future of Mediation: Twenty Predictions for Mediation in 2030, Mediate India (Mar. 2015)

<https://www.mediate.com/articles/MostenFutures.cfm>