
Kluwer Mediation Blog

Mining the cultural conversation - more lessons from our students

Rosemary Howell (University of New South Wales) · Tuesday, September 22nd, 2020

I say regularly that students make the best teachers.

My students continue to prove me right.

In my recent ADR program I confessed to my undergraduate students that having a conversation about culture was something that made me very anxious. I feel poorly prepared and I fear, with the best intentions, causing offence and appearing disrespectful.

Australia likes to boast that it is the most multi-cultural country in the world and my class certainly represents remarkable cultural diversity. I asked my students for guidance about how to engage in the conversation I find so unsafe. They were generous and the conversation was rich and deep.

An unexpected outcome was that some students were perplexed and disappointed that modern ADR seems to pay so little attention to the dispute resolution tools and practices of many cultures that have existed for centuries. I encouraged students who wanted to pursue this to consider making this the focus of their substantial research essay.

My wonderful student, Zaynab Gul, saw the opportunity to reflect on what modern ADR could learn from Islam and in the process introduced me to long-established, successful practices that foreshadowed present usage. Here is the blogpost she has crafted from her research paper.

Islamic Med-Arb: Time for a Change



By: Zaynab Gul

When ADR was introduced in the Western world in the 1960's, it was commended for its ability to offer quick, cheap and efficient methods of dispute resolution. It didn't take long for ADR to become an integral service offered by the legal framework and work its way into university legal education. But, it's important to remember that ADR wasn't "invented" in the 1960's, it was simply discovered by the West at that time. As I studied ADR at university, I couldn't help but think of how strikingly similar it was to ADR in Islamic law, which has existed for over 1,400 years.

Dispute resolution in Islam is based on three key factors:

1. The maintenance of good relations amongst people and avoiding animosity;
2. The use of informal and flexible solutions to solve the issue at hand; and
3. The encouragement for most disputes to be settled either amicably by the parties themselves, or through the assistance of a neutral third party, to only go through the court system if absolutely necessary.



Don't these values ring a bell when it comes to western ADR practices?

Islamic law not only facilitates but also encourages processes that can be said to be

equivalent of western mediation and arbitration. Although I recognise that this isn't an arbitration blog, it is interesting to note that over a thousand years before the first version of the UNCITRAL model Arbitration Rules came into existence, Islam had already mapped out the process of arbitration and has been put to use by Muslims.

My point here is not to simply draw out the similarities between Islamic and Western ADR. Instead, for me, the real question is: *What can the West learn from Islamic ADR practices that have been tried and tested for centuries?*

An interesting aspect of Islamic ADR is "**Med-Arb**" which is basically a hybrid system that combines the features of both mediation and arbitration. The uniqueness of Med-Arb lies in the role of the arbitrator. At first, the arbitrator is expected to put on their "mediator" hat, meaning that they are to act as an agent for the parties to try and negotiate an amicable settlement. It is only when the parties cannot reach a compromise that the arbitrator is expected to put on their "arbitrator" hat and make an award for the resolution of the dispute.

To me, this gets to the essence of what ADR stands for - that is, a flexible approach to dispute resolution. Med-Arb as a process means that parties aren't locked into the box of either mediation or arbitration, rather dispute resolution becomes a fluid process that is guided by the parties' approach to settlement. It makes no sense to me that western ADR, a flexible process at its core, offers limited flexibility for participants to efficiently jump from one method to another in a single setting.

Part of ADR is being able to deal well with differences, and use those differences as a springboard for advancement rather than leaving it as a restrictive barrier. Given that western ADR is only 60 years old and still in its formative years, now is a good time to peer into the ways that it's used by others around the world. Rather than segregating our practices, it is important for us all to be respectful and learn from each other so that ADR can be shaped into its best form. Med-Arb is just one example of a process that is so close to the heart of ADR's values yet is more or less foreign to the western world.

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