Using Islamic Law for Alternative Dispute Resolution: Is Sharia Sufficient?[1, 2]

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ABSTRACT

The importance of adequate mitigation of disputes between two opposing parties is hugely important in any circumstance, and in particular in business. With more than 1.6 billion followers and a steep history, the Islamic faith has a long-held tradition of resolving disputes without formal court proceedings. The goal of this paper was to explore whether or not the principles of Dispute Resolution advocated by Islam was sufficient when comparing to those found in Western Law.

Comparing the Islamic principles and processes of Dispute Resolution against a baseline from English Common Law, and using a MADM Dominance Analysis, the two legal systems were judged on how they suggest disputes can and should be resolved. It was found that Sharia Law is more than adequate in its instructions on how to resolve a number of disputes. It was clear that Sharia law is not at odds with Western legal principles but can be modernized to further improve.

Keywords: Disputes, Dispute Resolution Methods, Sharia, Alternative Dispute Resolution, Mediation & Arbitration Guidelines, Resolution Benefits

INTRODUCTION

The nature of all businesses is the desire to build capital & gain prosperity, and therefore any such obstacle to achieving this is strongly undesirable. It can be suggested that the key to attaining this success lies in the smooth relationships between all parties. Nonetheless, within any realm of life, especially within the business world, disputes and claims arise, and inevitably

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they result in great losses, both in terms of time and, more importantly, lead to unnecessary costs.

Traditionally the approach to resolving disputes between any parties who are in disagreement has been to proceed to litigation. However, as this formal process itself can unarguably be time-consuming and costly, alternative approaches have been explored and developed.

Alternative Dispute Resolution (ADR) is a broad term referring to any method of resolving disputes outside of litigation. Typically, ADR processes involve mediation, arbitration and conciliation. Its origins, especially the concept of arbitration, goes back to the great Ancient Greek philosophers Plato and Aristotle, and references to arbitration in issues relating to commerce can also be found in biblical passages. Whilst ADR has been used for centuries, it has gained a steadily increasing popularity throughout the 20th century as an alternative to the litigation process and now is often the mandatory pre-cursor to seeking formal action in the courts.

While ADR has observed somewhat of a renaissance as an alternative access to justice, ADR's underlying processes have formed the principals of dispute resolution for many early civilizations' societies, one of which is the Islamic civilization.

Sharia, or Islamic law, is the religious law that forms part of the Islamic faith. Deriving from the main principles of teachings of Islam, particularly the Holy Qur'an and Hadith (sayings and teachings of the Prophet Muhammad), sharia *"produces criminal and civil law, religious mandates and personal codes of conducts"* for which society can be governed.

Step 1 - Problem Definition

In the 1400-year existence of Islam, Muslims have consistently focused on reaching consensus between disputing parties; the overriding premise has been that compromise has always been preferred over confrontation.

With its long history of using ADR-type methods to come to amicable solutions to their differences, this paper will explore whether or not the principles, practices and processes that underpin Dispute Resolution in Sharia match up to those we use in the 21st century. Additionally, considering that the duration these methods have been used, it is vital to explore whether or not anything can be gleaned from them to further improve the ADR processes we implement in the West today.

In a world, where the tide of Islamophobia continues to rise, and one where people are increasingly, and unknowingly, becoming ever more afraid of Sharia and ultimately Islam and Muslims, the intent of this paper is to bridge the gap and see if, and how, we can learn from its principles to improve our very own methods of Dispute Resolution.

METHODOLOGY

Having identified the problem that we aim to solve and answer, we now will plan the scope of this paper and how we will perform our analysis.

In comparing both Western and Islamic legal principles for dispute resolution, for the context of this paper, English Common Law has been selected as the example of secular Western law. The reasoning behind selecting English Common Law for our analysis is two-fold, firstly due to the author's familiarity with the system, and secondly the influential role English Common Law has had on shaping the laws of a vast number of countries. Throughout the duration of the British Empire, England exported both their common and statute laws, which in the majority of cases have survived long after the cessation of British rule. For instance, countries as large and far apart as the United States of America, India, Singapore and Australia base their laws upon English Common Law.

Secondly, the technique we will adopt to assess the several alternatives proposed will be the Multi Attribute Decision Making (MADM) Methodology.

Step 2 – Development of the Feasible Alternatives

As mentioned prior during this paper, we will explore two legal systems in the context of Alternative Dispute Resolution and assess whether or not Islam's Sharia law system provides sufficient guidance in disputes and claims to properly adjudicate them, and without having to entertain the last resort of litigation.

Considering the 'problem definition' we outlined in Step 1, there are several feasible alternatives that we can examine, and possibly find to be correct, however being doing so, we will briefly explore the history and principles of each legal tradition to better understand each of the systems.

The Common Law of England and Wales is one of the most prominent global legal traditions, and can date its origins back to 1066, and William of Normandy's Conquest of England. Prior to this there was no such English Common Law as the world knows today; the law was a *"loose collection of decentralized customs, traditions, and rules"* followed by Anglo-Saxon population. Most of the laws in England at the time were "local laws and enforced by local courts". The situation at the time meant there was no distinguishability between criminal and civil cases, or secular and spiritual disputes, and the guilt and innocence was only determined via "***compurgation*** (obtaining the sworn of oath of 12 people), ***trial by ordeal*** (a superstitious procedure where the accused would be subject to physical torment in the hope of uncovering divine signs of guilt or innocence" and ***trial by battle***. With the Norman Conquest brought many changes to law, such as the introduction of a Royal Court (Curia Regis), who brought together the best and most fair of the local laws from throughout England and established a system of laws common to the entire country.

This system today is the most common legal system in the world, both in terms being applied to the largest percentage of the world's population and being used in 27% of the world's total legal

jurisdictions. English Common Law differs in one key way from the world's other major legal tradition, Civil Law, which traces its history back to Ancient Rome. The difference lies in the main source from where the law is taken from. English Common Law is unique in that is based on the application of legal precedent, and as such the law is not necessarily written down or *codified*, which is the opposite of Civil Law. The precedents that are applied are decided by the judge presiding over each case, and after a decision by a jury of ordinary people, the judge also determines the appropriate punishment based on the verdict. As a result, the role of judges within this system are crucial, as not only do they apply the law, they actively shape it.

On the contrary, countries that apply Civil Law have to continuously up-to-date and complete legal codes which specify all legal matters, the procedures to deal with them, and if necessary suitable punishments for the offense. The role of the judge in cases governed by Civil Law is to establish the facts and then apply the provisions of the code, which applies to it. To summarize, Common Law gives judges a role in developing the rules and regulations; Civil Law is set and based upon its fixed codes and statues.

Similarly, to English Common Law, Islamic Sharia is not codified or written down.

The term Sharia is given to the set of principles that form the Islamic tradition; the Arabic word *sharīʿah* literally means "the clear well-trodden path to water", however within jurisprudence it refers to the laws that have been revealed by Allah (God). Sharia deals with many of the aspects of an individual's public and private life, and from its inception Sharia has been interpreted by independent jurists who base their opinions upon many things including precedent. Sharia laws are derived from four main sources: The Holy Qur'an, the Prophet's *Sunnah* (& *Hadith*), the *Ijma (consensus) of the legal experts and the Sahaba (the Prophet's companions)* and the principle of *Qiyas* (legal reasoning by analogy).

As a result, when we consider the alternatives from our problem definition, we have identified three possibilities:

i. **Following Sharia in situations of ADR is insufficient; English Common Law is a more complete legal system.**
ii. **Sharia is more than sufficient for ADR; in fact, it is a superior legal system.**
iii. **In the context of Alternative Dispute Resolution, both English Common Law and Sharia are equal, and are the same.**

Step 3 – Development of the Feasible Alternatives

To be able to determine which of our aforementioned alternatives from Step 2 is the strongest, it is imperative that we understand the relationship and views each legal system has of one another, as this will give us a better understanding of why one may feel it superior over the other and vice versa. The reason for doing so is that it will provide us a better understanding of any

supposed advantage and disadvantage of each system, and thus will allow us to appropriately select the criteria for the MADM analysis.

At present a solitary but simple opinion exist between the proponents of English Common Law i.e. Western Law and Sharia; that is their legal system prevails over its adversary. The reason for this disagreement stems from the supposed weakness each system sees in the other.

As mentioned earlier, within the Western world presently there is a great scepticism and suspicion around all things Islam, and this is manifested in the view that the West holds regarding Sharia. From politicians, journalists, and media pundits and all the way to the Layman, Sharia is synonymous with barbarism, and that it is something brutal, backward and in dire need of modernization. Critics of Sharia will boldly proclaim that there is nothing fruitful that can be taken from it. Conversely, Sharia advocates will stress the stability and security that it offers, and how this is in contrast to Western laws. For instance, they would argue that as the legal basis on which the English Common Law system is established can constantly change, based on factors such as public mood regarding certain principles of morality and humanity. As a result, they believe that this makes the law fallible, as the human beings at the heart of these changes are themselves fallible. Sharia prides itself on its divine origins, making it not amenable to change and universal in its nature and application.

As a result, it is essential that we comprehensively scrutinize the principles that underline the Alternative Dispute Resolution method within Sharia, so that we are able to evaluate whether they match up to the processes championed in English Common Law. Once we are able to do that, we can essentially deduce whether or not Sharia is a worthy contemporary to English Common Law, and ultimately help decide whether there is a place for it in the globalized, secular 21st century.

Step 4 – Selection of Criteria

MADM Analysis: *Table 1 – Dominance Analysis*

Selection Attribute	**Alternative 1**	**Alternative 2**	**Alternative 3**
Negotiation	Average	Average	Excellent
Mediation	Average	Average	Excellent
Concilliation	Average	Average	Excellent
Abitration	Average	Average	Excellent
Med-Arb	Poor	Good	Excellent
Amicable Expertise	Average	Average	Excellent
Ombudsman	Good	Good	Excellent
Regulators	Excellent	Poor	Average
Equality	Excellent	Very Poor	Poor
Importance Given	Poor	Average	Good
Coverage & Jurisdiction	Average	Average	Good
Codification	Average	Average	Excellent

Influence from Scholars	Average	Average	Excellent

In order to decide which of our three alternatives is to be accepted, we must select appropriate criterion that will help us answer our problem definition.

Following our review of the literature available we have decided that to ascertain whether Sharia is a sufficient source of law for Alternative Dispute Resolution we will compare its core processes, principles and rules, and compare them against our baseline, the Alternative Dispute Resolution methods used in the present-day under English Common Law. In addition to this, to add greater context, we will also explore some criteria that are broader and not only specific to ADR, so as to see if one legal system is 'better' than the other. Our 13 criteria are split into two sections, with each of the two sections receiving differing percentage of importance in this paper; our 2 sections of criteria are specific ADR processes and holistic factors pertaining to each legal system.

The criteria are as follows:

ADR Processes

- **Negotiation** – a method of ADR where both parties with conflicting or rival interests come to a mutual conclusion by either direct or indirect communications. It results in a negotiation agreement that is as binding as a contract to both parties.
- **Mediation** – the most common form of ADR, in this method a neutral third party is hired to act as the facilitator in discussions between disputing parties; the mediator does not make a decision but aids it.
- **Conciliation** – this process is similar in its purpose to mediation, which aims at bringing the parties to a mutual agreement on the resolution of the dispute. However, it differs as the disputing parties do not (or rarely) have face-to-face interactions. Like the mediator, a neutral third party known as the conciliator facilitates the negotiation process between the two parties, with the added responsibility of providing advice or suggestions on solutions for resolving the dispute to benefit both parties. An outside body rather than the parties usually appoints the conciliator.
- **Arbitration** – in this ADR method both parties submit their arguments to a third party who in turn makes an informed decision for the resolution of the dispute. Similar to a court trial without attending court.
- **Med-Arb** – a hybrid process, in which the parties initially submit their dispute to mediation, and if no agreement is reached, they agree to refer the matter to arbitration. The arbitrator is often the same person who is mediating the dispute.
- **Amicable Expertise** – also known as expert determination; a methodology usually in technical disputes where both parties agree to confer the advice of an expert.
- **Ombudsmen** – refers to institutions usually set up by statue, where ordinary citizens can refer their complaint to regarding both public bodies and private firms.

- **Regulators** – refers to a body which has been established following an Act of Parliament, but which acts separately to the government.

Holistic Factors

- **Equality** – this criterion assesses which legal system espouses the most equality between sexes, races, etc.
- **Importance Given** – this criterion assesses which legal system places a greater importance to Alternative Dispute Resolution methods as a means of dispute resolution.
- **Coverage & Jurisdiction** – this criterion looks at which legal system has greater coverage and jurisdiction across the globe.
- **Codification** – this criterion assesses which legal system is superior at arranging its laws into a systematic code.
- **Influence from Scholars** – this criterion assesses to see to which legal system is more adept in keeping up-to-date, by taking on the findings and observations made by legal scholars.

FINDINGS

Step 5 – Analysis and Comparison of the Alternatives

Having selected the criteria that we will use to determine which of our feasible alternatives are to be rejected or accepted, for each selection attribute and the grade they have been given (from very poor to excellent) we will now add a value to each (from 1-5), that will allow us to attain a total score for each alternative. Furthermore, for each criterion we will add a percentage of importance, which will reflect the weighting of each criterion and further help our analysis and answer our problem.

The values and percentage of importance are as follows:

Grade	Score
Very Poor	1
Poor	2
Average	3
Good	4
Excellent	5

Table 2

Attribute	Percentage
Negotiation	10
Mediation	10
Conciliation	10
Arbitration	10
Med-Arb	10
Amicable Expertise	10
Ombudsmen	10
Regulators	10
Equality	4
Importance Give	4
Coverage & Jurisdiction	4
Codification	4
Influence from Scholars	4

Table 3

In light of our aim for the research paper, for our analysis the criterion which relate directly to ADR processes have been given a higher weighting for the percentages of importance, and the holistic factors relating to the two legal systems have been weighted lower accordingly.

Using the scoring in the explained for the grades as mentioned above the MADM table has been modified to provide total scores for each selection attribute. The MADM table is now changed to:

Selection Attribute	**Alternative 1**	**Alternative 2**	**Alternative 3**
Negotiation	3	3	5
Mediation	3	3	5
Concilliation	3	3	5
Abitration	3	3	5
Med-Arb	2	4	5
Amicable Expertise	3	3	5
Ombudsman	4	4	5
Regulators	5	2	3
Equality	4	1	2
Importance Given	2	3	4
Coverage & Jurisdiction	3	3	4
Codification	3	3	5
Influence from Scholars	3	3	5

Table 4

Following on from this, using the formula below, and including the percentage weightings we can obtain total scores for each Alternative. The MADM table is therefore further modified to the following:

Final Score = Original Score (out of 5) X Percentage Weighting

Selection Attribute	**Alternative 1**	**Alternative 2**	**Alternative 3**
Negotiation	0.3	0.3	0.5
Mediation	0.3	0.3	0.5
Concilliation	0.3	0.3	0.5
Abitration	0.3	0.3	0.5
Med-Arb	0.2	0.4	0.5
Amicable Expertise	0.3	0.3	0.5
Ombudsman	0.4	0.4	0.5
Regulators	0.5	0.2	0.3
Equality	0.16	0.04	0.08
Importance Given	0.08	0.12	0.16
Coverage & Jurisdiction	0.12	0.12	0.16
Codification	0.12	0.12	0.2
Influence from Scholars	0.12	0.12	0.2
Total	**3.2**	**3.02**	**4.6**

Table 5

Step 6 – Selection of the Preferred Alternative

According to our MADM analysis, it is apparent Alternative 3 (that in terms of ADR, Sharia Law and English Common Law are equal and the same) would be our preferred alternative. Alternative 3 not only leads in scoring as seen in Table 5, it satisfies the most important selection attributes in an effective way.

Therefore, it is definitive to us that in terms of the 8 main processes used as Alternative Dispute Resolution as advocated by English Common Law, the Sharia also includes and advocates these same processes in its ADR methodology. From our reading we found that in one shape or form Islamic Law propagates the exact same principles of Negotiation, Mediation & Arbitration etc.

For instance, in our readings we found distinct principles and numerous teachings of Islamic ADR which satisfy the processes and procedural requirements set by English Common Law. They are as follows:

- **Nasihah** (Counselling)

- **Sulh** (Negotiation, Mediation/Conciliation & Compromise of Action) – the term *sulh* has the literal meaning of "to end a dispute". The basis of sulh can be found in the Qur'an in the following verse: "*And if two parties among the believers fall into a quarrel, make ye peace (sulh) between them. (Al-Hujarat 49:9/10)".* Further verses of the Qur'an strongly advocate amicable settlements of disputes.

- **Tahkim** (Arbitration) – the notion has been known even in Pre-Islamic Arabia where it was applied to settle both civil and commercial disputes. Subsequently after the arrival of Islam, arbitration was given approval in the Qur'an and mentioned several times. One of the verses states: *"And if you fear dissension between the two, send an arbitrator from his people, send an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted {with all things}. (An-Nisa 4:35).* Furthermore, the Prophet Muhammad (pbuh) recognized arbitration; there is a reported case of him appointing an arbiter and accepting his award, as well as advised a tribe to have their dispute arbitrated.

- **Med-Arb**- is a hybrid process that begins with mediation and ends in arbitration if necessary. As Ayat (verse) 35 of *Surah Al-Nisa* the Qur'an mentions conciliation (sulh) along with arbitration, it is undoubtedly suggested that the arbitrator's duty is try reconciliation before arbitration. This ide

- **Muhtasib** (Ombudsman) – the custom of appointing an ombudsman (or commissioner of public complaints) is as old as Islam itself. In Sharia the *Muhtasib* is the equivalent of ombudsman, and his role involves both dispute avoidance and

dispute resolution. The basis for the Muhtasib is again found in the Qur'an. In *Surah Al-Imran, Ayat 104* one such verse states: *"Let there be arising from you, a band of people enjoining what is right and forbidding what is wrong, and those will be the successful"*. The Prophet Muhammad (pbuh) implemented this and appointed separate *Muhtasib* in both Mecca and Madinah during his lifetime. The roles of the two ombudsmen were separate to the Governor or *Qadi*, and the three types of disputes they looked over involved primarily commercial disputes such as complaints again non-payment of debt or the price of goods purchased and sold. Furthermore, the Sharia advocates for **Informal Justice by the Wali Al Mazalim** who is a mixture of a *Wali* (judge) and *Muhtasib*; this person could intervene in a number of types of disputes such as complaints against individuals and corruption of government; the settlement of disputes was done in a purely informal manner.

- **Fatwa of Mufti** (Expert Determination) – this process directly correlates to the ADR process of Amicable Expertise as outlined by English Common Law. Within Sharia the identical process exists where a *Mufti* (Islamic Legal Scholar or Jurist) provide non-binding evaluative opinions (*Fatwa)* in connection with a dispute. The option of settling disputes with this option continues to allow disputants to settle outside of the courts.

Therefore, we reiterate that we will take Alternative 3 as our preferred alternative, and can confidently say that the Sharia as a legal system is sufficient when applying its Dispute Resolution methods to solving disputes.

Step 7 – Performance Monitoring and Post Evaluation of Result

During our research, whilst we found that the principles of Dispute Resolution in Islamic law match up to, and in certain instances outshine, the principles outlined in English Common Law there are still areas we have identified that will require some rethinking, and improvement.

When implementing Sharia law to resolve disputes in either a commercial or civil case, we must monitor its performance to ensure that we can continue to prove the relevance of this alternative. As such, we can define some Key Performance Indicators (KPI's) to ensure that those using the Islamic legal system as their framework for dispute resolution are receiving the benefits of a fair outcome while also ensuring that no lasting damage occurs in the relationship between the two parties. To assess this, we can monitor the following regarding the Islamic Dispute Resolution methods:

- **Cost**: i.e. to ensure the outlay for implementing the methodology is as low as possible.
- **Timescale**: i.e. to ensure the dispute is resolved in the shortest time possible.
- **Confidentiality:** i.e. to ensure that the privacy offered by ADR is maintained

- **Conclusion**: i.e. to ensure that the methodology advocated by Sharia provides adequate and conclusive final outcomes.

CONCLUSIONS

According to our review of the literature available and the analyses we made above, when answering our question in the problem definition, the use of Islamic Law in resolving disputes is more than sufficient, in comparison to Western legal principles, in particular English Common Law.

During the writing of this paper we found several similarities between Sharia and English Common Law; we found that both sets of law had not been wholly codified, we found that both are heavily influenced by legal scholars and jurists (i.e. the importance of precedent in both systems) and lastly the fact that both systems base their judgment's on reason. In fact it can be argued that Western legal principles themselves have been influenced directly or indirectly by Sharia and Islamic practices that date back to the mid-7th century. From the similarities between London's historic Inns of set up by the Knights Templar, to the clear parallels between Islamic history and English law there is an inarguable association between the two systems.

Therefore, we feel it is fair to say the Islamic Law is synonymous with Alternative Dispute Resolution, and this cannot be demonstrated better by than the quote from the 2nd Caliph (Leader) of the Islamic Empire, Umar bin Khattab. He stated, "Return the disputants till the conciliation is achieved. Verily litigation causes rancour between them". This quote perfectly sums the approach Islam takes to disputes; alternative methods are much preferred over legal action.

FOLLOW ON RESEARCH

How can we improve both Sharia and English Common Law's approach to Dispute Resolution?

Whilst both legal systems are comprehensive and conclusive in how they resolve complaints and disputes, they are both far from perfect, and improvements can be made. Our suggestion would that be that both systems learn from one another in order to improve. For instance we feel that English Common Law should move even further away from their 'litigious nature' and adopt the similar outlook to Islamic law. As we mentioned before in the Sharia, conciliation and arbitration are championed and a greater importance is placed upon social harmony and cohesion over the victory of individuals. Essentially Alternative Dispute Resolution is the de-facto position within Islam, and English Common Law still has a long way to go to reach this. Despite the importance of ADR being recognized by the European Commission, and the UK Government also being keen advocates, the ADR methods we discussed are still not enforceable despite their obvious benefits.

Nonetheless, the Islamic Legal system requires much modernization especially when it comes equality in the eyes of the law. In line with Islamic traditions, much more *Ijtihad*, (*the process of making decision by independent interpretation of the legal sources, the Qur'an and Sunnah)*; in this manner Islam can truly enter modernity

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