MEDIATION APPLIED TO FAMILY LAW IN SINGAPORE

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I. INTRODUCTION

Wong Meng Meng SC, Ex-President of the Law Society of Singapore, asserted that “access to justice...need not be synonymous with access to the courts.”¹ Indeed, it should be the idea that aggrieved citizens should have a chance to seek redress through both formal and informal institutions in an efficient manner, on an equal playing field.²

In Singapore, a staggering number of litigants in the family courts are unrepresented.³ These litigants-in-person are usually unfamiliar with legal procedures and processes. Additionally, a significant proportion are of low education and may not even be fluent in English – the working language of the courts.⁴ In Singapore, Court Friends may assist litigants-in-person, but are unable to represent them in proceedings.⁵ Even with the simplification of court processes brought about by the 2014 Family Justice Act,⁶ this group remains inherently disadvantaged in the adversarial formal litigation process.

Mediation is a promising tool to address this problem. An informal process, mediation is more flexible than litigation and has significantly less procedural formalities to comply with.⁷ This makes it a more accessible tool for litigants-in-person. Additionally, mediation reverts control back to the parties during the process of dispute resolution. Mediation is also much cheaper than formal litigation, making it more accessible for low-income families. The divorce process also becomes more efficient if parties have come to an agreement. Hence, a greater use of mediation would better facilitate access to justice.

³ Ashley Chia, “Justice centre to aid the self-Represented”, Today Newspaper (21 June 2012) 4. “More than 96% of applicants and more than 99% of respondents for maintenance and personal protection orders were unrepresented”. Additionally, defendants in 80% of all divorce cases were unrepresented.
⁶ Family Justice Act 2014 (No. 27 of 2014).
In this paper, the use of mediation — particularly mandatory mediation — in foreign Family Law forms the tertium comparationis. A study of the framework within the People’s Republic of China (China), the United Kingdom (UK) and Australia will be done using deep-level comparative law. Lastly, this paper will discuss the how we might expand our current framework through a legal transplant and the feasibility of doing so before concluding that we should indeed carry out these legal reforms.

I. Comparative Approach

Family Law operates within the personal sphere of families and would hence be strongly shaped by the culture within each jurisdiction. This includes philosophies and values that influence society and the legal institutions. We have hence adopted the deep-level approach chosen of regarding law as embedded in culture proposed by Matthias Siems.8

An analysis of China will provide insight on how an Asian jurisdiction with a similar culture influenced by Confucianism approaches the idea of mediation in Family Law. Coming from the civil law legal family, it could offer a counter balance to the approaches of the other two common law examples.

As for the UK, it is particularly relevant for our consideration as Singapore’s laws largely stemmed from it due to the latter’s earlier status as an English colony. We will be examining, in particular, the failure of its reforms through the Family Law Act 1996 in elevating the status and importance of mediation in divorce proceedings.

Australia was chosen as extensive studies have been done there on the effects and viability of mediation in Family Law. Among common law jurisdictions, it has been widely regarded as the frontrunner in terms of incorporating the use of mediation within their legal framework.9

II. INDIVIDUAL LEGAL FRAMEWORK

A. SINGAPORE – SEPARATED LEGAL REGIMES

Singapore is an extremely heterogenous society. As of 2017, it reported that the ethnic composition stood at: 74.3% Chinese, 13.4% Malays, 9.0% Indians and 3.2% other races.10 Further, it has been reported that about 99.6% of all Muslim Singaporeans and ethnic Malays.11 This is an important

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8 Matthias Siems, Comparative Law (Cambridge University Press, 2014) 98-105.
9 Countries such as Singapore and Hong Kong often refer to Australia when considering reforms in their approach towards mediation. See, eg, Hong Kong Law Reform Committee, The Family Dispute Resolution Process (27 March 2003); Committee for Family Justice, Ministry of Law, Recommendations of the Committee for Family Justice on the framework of the family justice system (4 July 2014) (Helmed by: Indranee Rajah SC, Justice VK Rajah, Justice Andrew Phang).
11 Leong Wai Kum, Elements of Family Law in Singapore (LexisNexis, 2nd Ed, 2013) 705.
statistic, as the legal regime governing marriages and divorces in Singapore is differentiated between Muslim and non-Muslim citizens.

(1) Civil Marriages – Mandatory Court-based Mediation for divorces involving children

Civil marriages and divorces in Singapore are governed under the Women’s Charter. In these cases, mediation can be classified as private or court-based. The former is carried out at specialised mediation centres and is on a voluntary basis. Court-based mediation can be conducted at the Family Resolution Chambers (“FRC”) and Child Focused Resolution Centre (“CFRC”).\(^\text{12}\) Specially trained and appointed Judge-mediators are responsible for the court-based mediation process, sometimes accompanied by a trained counsellor if the case is complex (co-mediation).\(^\text{13}\) Should the case go to trial, the judge-mediator will not hear the case for fairness’ sake.\(^\text{14}\)

The court can refer divorcing parties for mediation pursuant to s 50(2) of the Women’s Charter, but a refusal to attend would not constitute contempt of court.\(^\text{15}\) However, for divorcing couples with children under 21 years old, counselling and mediation at the CFRC becomes mandatory.\(^\text{16}\) The child is involved at the counselling stage only, where his/her interests will be taken into account for the mediation process.\(^\text{17}\) Should parties fail to attend, the court can make further orders, order for a stay of proceedings or make orders as to costs against the uncooperative party.\(^\text{18}\)

(2) Divorces under Muslim Law – move towards mandatory counselling

Divorces under Muslim law is mainly governed under the Administration of Muslim Law Act (AMLA) instead.\(^\text{19}\) Here, there has also been a recent trend towards making less confrontational dispute resolution mechanisms mandatory.

In 2017, amendments to AMLA were passed to allow the Syariah Courts to make it a legal requirement for couples seeking a divorce to first attend its flagship Marriage Counselling Programme (MCP).\(^\text{20}\) This would provide the opportunity for parties to first decide on contentious issues in the presence of a trained counsellor. Other amendments include the right for the Syariah Court to refer parties to further counselling at any other stage of divorce proceedings.\(^\text{21}\) Although

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13 ibid.
14 ibid.
15 Women’s Charter (Cap 353, 2009 Rev Ed) ss 50(2) & 50(3).
16 Women’s Charter (n 15) ss 50(3A), 50(3C); Family Justice Courts of the Republic of Singapore, Practice Directions Amendment No. 3 of 2015.
17 Family Justice Courts (n 12).
18 Women’s Charter (n 15) ss 50(3D), 50(3E).
19 Administration of Muslim Law Act (Cap 3, 2009 Rev Ed) s 35.
20 Administration of Muslim Law (Amendment) Act (No. 33 of 2017), s 9; Singapore Parliamentary Debates, Official Report (1 Aug 2017) Vol 94 (Assoc Prof Dr Yaacob Ibrahim, The Minister for Communications and Information and Minister-in-charge of Muslim Affairs).
21 Administration of Muslim Law (Amendment) Act (n 20) s 7; Singapore Parliamentary Debates (Assoc Prof Dr Yaacob
these provisions have not yet come in force, it is worth noting that the MCP has been made an
administrative requirement since 2004, and has reportedly ‘saved’ the marriages of about 50% of
those counselled. Even if the parties do eventually decide to carry on with the divorce, the
counselling stage would have provided a platform for a professionally directed discussion, thereby
increasing the chances for parties to come to a mutually-agreed arrangements which would lead to
less acrimonious divorces.

Where children are involved, the Court might appoint Child-representatives under these new
changes as well to represent the interests of the child.22

B. THE UK APPROACH — A FAILED REFORM AND WITHDRAWAL FROM
COMPELLARY INFORMATIONAL SESSIONS ON MEDIATION
The UK embarked on an ambitious reform with the Family Law Act 199623 (“UK FLA”), which
provides for a scheme of “no-fault” divorce.24 Under part II of the UK FLA,25 parties must attend
informational sessions on mediation when commencing divorce proceedings.26 Mediation itself
was non-compulsory but greatly encouraged. This framework was initially tried out in phases (the
“Pilot Project”).27

However, the Pilot Project showed that the move was unpopular and ineffective.28 Reasons cited
for dissatisfaction range from the professionalism of the mediators to the opposing party’s conduct
during mediation.29 In 2001, Lord Chancellor Irvine announced that the government would not
proceed with part II of the UK FLA and invited parliament to repeal the relevant sections.30

Currently, section 18 of the Children and Families Act 2014 (“CFA”) repeals most of Part II UK
FLA.31 However, s 18 CFA makes it a general requirement for parties to a divorce case to attend
Mediation Information Assessment Meetings.32 Exceptions to this may be granted in some cases,

Ibrahim) (n 20).
22 Administration of Muslim Law (Amendment) Act (n 20) s 37.
24 British Broadcasting Corporation, “‘No-fault’ divorce to be scrapped” (16 Jan 2001)
25 ibid (n 23) s 3.
26 ibid s 3(1)(b).
27 4000 people were involved in the study carried out. See Jens Scherpe and Bevan Marten, “Mediation in England and Wales” in
Klaus J. Hopt & Felix Steffek, Mediation: Principles and Regulation in Comparative perspective (Oxford University Press, 2012
1st ed) ch 6, 412.
28 ibid 412–413. Only 25% of respondents said they were more likely to take up mediation. Of those who went for mediation,
only 46% were satisfied with the result.
29 ibid.
30 United Kingdom, House of Lords, Parliamentary Debates (16 January 2001), vol 620 at col WA123,
<http://www.publications.parliament.uk/pa/ld200001/ldhansrd/vo010116/text/10116w01.htm#10116w01sbhd7> (accessed 13
October 2016) (Lord Irvine of Lairg).
31 Children and Families Act 2014 (c 6) (UK) s 18.
32 ibid.
for example those that involve domestic violence.33

C. AUSTRALIAN APPROACH — MANDATORY FAMILY DISPUTE RESOLUTION FOR PARENTING ORDERS

For divorce in Australia, mediation is not mandatory. However, the court may still make an order for parties to undergo Family Dispute Resolution (“FDR”) at any stage of the proceedings for these matters pursuant to s 13C(1)(b) of the Family Law Act 1975 (“Australia FLA”).34

Under s60I Australia FLA, a certificate from an accredited FDR practitioner is compulsorily required when applying or varying parenting orders.35 These are orders covering “all aspects of care and welfare arrangements for children”.36 FDR refers to services such as mediation that helps parties in a divorce sort out familial disputes.37 The court can even decline to hear the case if such a certificate is not presented. Parties, however, can seek a waiver under s 60I(9) Australia FLA for exceptional cases, such as when the matter is urgent or there is risk of family violence.38

D. MANDATORY MEDIATION (“调解”) AND THE CONCEPT OF ‘FAMILY MEDIATION’ (“家庭调解”) FOR DIVORCE IN CHINA

In China, participation in mediation must be voluntary. However, there seems to be a different approach in Family Law.

Where a husband or a wife seeks divorce, the party can seek mediation at “the organisation concerned” or appeal directly to commence divorce proceedings in the People’s Court.39 Even if parties choose to directly commence divorce proceedings in court, the courts are obliged to first conduct mediation pursuant to art 32 Marriage Law of the People’s Republic of China (“Marriage Law (China)”) (中华人民共和国婚姻法).40 Here, there is a definitive framework of mandatory mediation for cases of divorce. Articles 32(1) to 32(5) Marriage Law (China) provides for when divorce can be granted should mediation fail.41

33 United Kingdom, House of Commons Library, “No Fault Divorce” Briefing Paper, Number 01409, (29 September 2016) (Catherine Fairbairn).
34 Family Law Act 1975 (Australia) s 13C(1)(b).
35 ibid s 60I.
39 Marriage Law of the People’s Republic of China (中华人民共和国婚姻法) Art. 32.
40 ibid.
41 ibid.
China also offers ‘family mediation’ (家庭调解), where all family members are involved in the mediation process.\textsuperscript{42} This attunes to the concept of not airing one’s ‘dirty laundry’ for all to see, which might make matters worse. Outsiders are however, not precluded from involvement if it is beneficial.\textsuperscript{43}

This mode of conflict resolution has seen significant success. In 2009, 47.8\% of disputes in family law were solved by mediation at first instance; this was up from 43.8\% in 2004.\textsuperscript{44}

III. DEEP-LEVEL COMPARATIVE ANALYSIS

A. Law as embedded in culture

From a broader perspective, we can see that there is a general difference between the Chinese and the western (UK and Australian) approach towards mediation. Singapore, on the other hand, takes a ‘middle-ground’ approach, with features from both. This reflects how Singapore as a fundamentally Asian society, has been westernised, more so than other Asian societies. Despite its heterogenous society, Singapore has even managed to come up with its own set of ‘shared values’ which would be important to note for the following discussion.\textsuperscript{45} In particular, the white paper on shared values notes that “Many Confucianism ideals are relevant to Singapore” – the ethnic Chinese in particular. While the paper goes on to clarify that the government’s intention was not to impose these Confucian values and ethics onto non-Chinese Singaporeans, scholars have come forward to posit that other religions like Islam is not inconsistent with some Confucian values.

Only Singapore and China feature mandatory mediation. However, the two differ in terms of the reach of mandatory mediation, with the latter having a much wider scope of application. This could be explained by the underlying Confucian influences in both countries, which promotes the resolution of conflicts by means other than the law.\textsuperscript{46} Confucianism values harmony and views social relationships as governed by moral duties (礼) instead of hard law (法).\textsuperscript{47} It eschews formal proceedings in favour of informal ones. The concept of losing respectability or ‘face’ (面子) if one does not abide by the result of mediation encourages compliance.\textsuperscript{48} The success of the MCP within the Muslim community might indicate an alignment in these values as well. In particular, the strong sense of community shared among all different ethnic groups in Singapore

\textsuperscript{42} Knut B. Pissler, “Mediation in China: Threat to the Rule of Law?” in Klaus J. Hopt & Felix Steffek, Mediation: Principles and Regulation in Comparative perspective (Oxford University Press, 2012 1\textsuperscript{st} ed) ch 20, 983.
\textsuperscript{43} ibid.
\textsuperscript{44} ibid 993.
\textsuperscript{46} Pissler (n 42) 960.
\textsuperscript{47} ibid.
\textsuperscript{48} ibid 961.
might be a contributing factor to their greater reception of alternative dispute resolution mechanisms like mediation and counselling.

The UK and Australia, with a western perception on the family construct only go so far as to implement compulsory informational sessions on mediation. Even so, such a framework has been met with resistance in the UK and was even deemed ‘unworkable’ after a review of empirical results. In both countries, however, it is still open for judges to refer parties to mediation at any point of divorce proceedings, although it is subject to the voluntary agreement of both parties to a divorce. This is also featured in Singapore’s framework for divorce proceedings not involving children under 21 years old.

The difference in reception of mandatory mediation (or its informational meetings) in Singapore and the UK may be puzzling at first sight, but might also be explainable by the differences in culture. The ideology in the west, including the UK, focuses predominantly on the rights of an individual. This is in stark contrast with the idea of an individual operating within the sphere of his community and family within the Asian legal context. This, coupled with the high respect given to those of high positions of power (such as judge-mediators), may allow Singapore to more effectively navigate the difficulties with trying to implement an expanded scheme of mandatory mediation.

IV. EXPANDING SINGAPORE’S LEGAL FRAMEWORK — MANDATORY MEDIATION FOR DIVORCE

To expand our legal framework, legislation can be amended to make court-based mediation mandatory for all divorce applications. However, in recognising that mediation is not suitable for all cases, parties should be able to apply for a waiver from this requirement in exceptional cases, such as where there is possible violence or abuse. To achieve this, we can transplant the relevant parts of Art 32 of Marriage Law (China) for the mandatory mediation requirement, and ss 60I(9)(b) and 60I(9)(e) of Australia FLA for the waiver requirement. This reform does not impinge on parties’ right to access the court system but serves merely as an additional procedural step in divorce proceedings. Similar opt-out clauses might also be considered for the MCP requirement

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49 Fairbairn (n 33); British Broadcasting Corporation, “‘No-fault’ divorce to be scrapped” (16 January 2001) <http://news.bbc.co.uk/2/hi/uk_news/politics/1120846.stm> (accessed 13 October 2016).
51 Pissler (n 42) 960.
52 Singaporeawsg Mediation (n 7). See also, Jonathan Lock v Jesseline Goh [2008] 2 SLR(R), 455 at [28], where then Chan Sek Keong CJ commented on feedback by litigants in preferring district judges to act as mediators.
53 Marriage Law of the People’s Republic of China (中华人民共和国婚姻法) Art. 32; Family Law Act 1975 ss 60I(9)(b) and 60I(9)(e). The relevant part from the former is “In dealing with a divorce case, the People’s Court shall carry out mediation”.
under AMLA.

However, within civil divorces, Singapore should retain its current framework regarding family involvement during the mediation process. Australia and the UK are moving towards seeing marriage as the union of two individuals while in China, the family is seen as a whole – an entire unit. This should be seen as two ends of a spectrum – Singapore sits in between. However, the signs are that Singapore society is moving towards the more western view. The present framework, where only the child is involved in the mediation process, should remain as the status quo in this aspect.

Within the Muslim law framework, perhaps it might be more beneficial if the court is able to engage with the child directly during proceedings instead of through a third-party child representative.

A. Additional benefits of this reform
This reform shifts the default method of dealing with divorce from litigation to mediation. This would greatly reduce the court’s workload; instead of having to decide which cases should go for mediation from all applications, judges will now only have to deal with applications for waiver (which should arguably be less). As courts work more effectively, applicants have their cases dealt with more speedily, increasing their access to justice. This is in addition to the other benefits listed in part I.

V. VIABILITY OF LEGAL TRANSPLANT
As Chen-Wishart rightly pointed out, we should move on from the “bipolar ‘yes-no’ debate”\(^54\) on whether legal transplants are possible, and focus instead on how the transplant will be received in the recipient society on the “continuum between rejection and smooth reception”.\(^55\) Factors that affect receptivity of legal transplants include:

(a) receptivity to the transplant;
(b) similarity in the formal and informal legal orders; and
(c) nature of the transplanted law.\(^56\)

On these factors, a transplant allowing for a wider application of mandatory mediation should tend towards smooth reception on this continuum.

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\(^{55}\) ibid 2-3.

\(^{56}\) ibid.
A. Transplant receptivity
The idea of mediation has gained traction not just in Singapore, but also in numerous other jurisdictions such as Hong Kong as an effective means of dispute resolution. Empirically, the receptiveness of Singapore has proven receptive to mandatory mediation being introduced. This transplant might be seen as an additional step in the right direction.

B. Similarity of formal and informal legal orders
Singapore and Australia have highly similar formal legal orders. They both belong to the common law family and courts operate using the common language of English. There is also a significant proportion of law students who study in Australia.

Singapore and China have similar informal legal orders. Confucianism features in the cultures of both Singapore and China. It influences not just the workings of law within both countries, it is also seen as the “basis of being Chinese”. This, coupled with respect for judge-mediators who hold positions of authority, prime mandatory Court-based mediation in Singapore for success. Given the congruence in values towards family matters between Muslim and non-Muslim Singaporeans, the suggested transplants would likely fit well under both the civil and Muslim legal regimes in Singapore.

C. Nature of transplant
The recommended legislative transplant offers a sufficiently wide scope for fine-tuning and adjustments for it to suit local needs. For waiver applications, Judges have some flexibility to interpret when parties are unable to effectively participate in mediation. With specific examples (such as cases of family violence or incapacity), the boundaries for waiver still remains clear enough. These characteristics of our proposed transplant would increase the odds of smooth reception.

This paper notes Otto Kahn Freund’s assertion that laws governing procedure are towards the ‘organic’ end of the spectrum and are most resistant to transplantation. However, the suggested legislative changes on mandatory mediation does not seek to allocate power – a main consideration for his assertion.

57 Hong Kong has in 2013 just passed the Mediation Ordinance, Cap 620.
60 Singapore Law Mediation (n 7).
61 Chen-Wishart (n 54) 25.
Considering the discussion above, the proposed legislative reform in part V should be smoothly received in Singapore. As such, they should be implemented, given the increase in accessibility to justice for family law users this would bring.

VI. CONCLUSION
In reviewing our legal framework, we must remember the demographics of the users of our family court system. A significant proportion of those seeking divorce may be of low education. Court systems and procedures, no matter how simplified, coupled with external aid in the understanding of these procedures, may be of limited help still to this group of applicants. Mediation, with its informal and fluid structure, coupled with specially trained mediators, may allow these applicants to have greater accessibility to justice. The comparative study done shows that mandatory mediation can indeed be a workable institution within the confines of family. Hence, legislative changes should be made, using Art 32 Marriage Law (China) and sections 60I(9)(b) and 60I(9)(e) Australia FLA. The potential for such a legal transplant to succeed is promising and this would vastly improve the ability for this group of people to access justice.

However, one must keep in mind the different legal framework governing Muslims in Singapore as well. Although the suggested changes might fit in well with the upcoming changes made to AMLA, it remains difficult to see how it would play out in reality. For instance, Muslim men can divorce his wife in private through the utterance of “Talak”. This can be uttered up to three times in a marriage, with the possibility of reconciliation within the first two times. However, this possibility disappears upon the utterance of “Talak” a third time by the husband. Further research might have to be done as to the usefulness of programmes such as the MCP in helping parties navigate through the subsequent court process given that reconciliation is now impossible.

64 Administration of Muslim Law Act (Cap 3, 2009 Rev Ed), s 97.