HARALD FUESS, Divorce in Japan: Family, Gender, and the State, 1600 – 2000

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Harald Fuess' "forgotten history" (chapter 1) of Japanese divorce is a valuable resource for comparative law scholars with an interest in Japanese family law. The ambition of the project – both in terms of its historical reach and its inter-disciplinary range – means that Fuess does not have time to engage directly with how law influences marriage and divorce in Japan. After all, Fuess' scholarly quest is to document the changes to Japanese divorce rates and practices over a 400 year period and identify the social, political and economic forces that have accompanied these changes (p. 8). Law is certainly a relevant factor, but its role is interspersed with other, equally important variables such as gender relations, social status, regional diversity and social customs (p. 9).

Nevertheless, comparative lawyers will gain much from Fuess' account. The key to doing so is to define the socio-legal questions that Fuess hints at, but does not fully articulate, throughout his book but for which his social history of Japanese divorce provides important primary data for new answers. For example, one question that has dominated much socio-legal scholarship on Japanese law is the extent to which the Japanese have a "pre-modern" antipathy to law that will change (or is changing) as Japan modernises. Commonly referred to as the "Kawashima thesis" in recognition of the influence of the late Takeyoshi Kawashima in popularizing this view in a series of high-profile essays, this thesis has been used to explain everything from low litigation rates in Japan to Japan's "stakeholder" model of corporate governance. Although it has been subject to a strong critical reaction, especially among leading US-based experts on Japanese law,[1] it is finding new voice in scholarship highlighting increased reliance on litigation and formal legal processes in Japan as evidence of the "Americanization" of Japanese law.[2] In the context of the divorce, advocates of the modernization or Americanization thesis might point to the increasing Japanese divorce rate in the post-war period as evidence that Japan is following the US with its own "divorce revolution" (p. 1). After all, the divorce rate has more than tripled from 0.73 per 1,000 people in 1963 to 2.30 in 2002.

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1 One of the earliest and still most influential criticisms of the Kawashima thesis is JOHN O. HALEY, "The Myth of the Reluctant Litigant" (1978) 4 *Journal of Japanese Studies* 359.

2 For example, see *R. Daniel Kelemen* & ERIC C. SIBBITT, "The Americanization of Japanese Law" (2002) *University of Pennsylvania Journal of International Economic Law* 269.

But, to Fuess, it is a myth to suggest that a recent surge in the divorce rate is a break from the past. For, as Fuess carefully documents, Japan has always been a high divorcing society. For example, the statistical evidence shows that the national divorce rate was consistently above 2.5 for the last two decades of the nineteenth century, peaking at 3.39 in 1883 (p. 3). Prefecture-level data over the same time period shows that divorce was even more common in the eastern prefectures, averaging over 3.0 per 1,000 people. In the northeast, it soared to as high as 5.41 (pp. 60-61). This rate, Fuess notes, rivals that of the United States in the 1980s (p. 3). Even in the 17th and 18th centuries, divorce was not unusual. The regional rate of marriage dissolution in Tokugawa Japan ranged between 10 to 40 percent (p. 23). Divorce was more likely among commoners and in rural areas, but even among the upper classes, marriages broke down at a rate of seven to nineteen percent (p. 22). Fuess attributes this historical high divorce rate to a view of marriage as spousal testing (rather than a commitment to a lifelong partnership) and to the relatively simple administrative (as opposed to judicial) procedures available to effect a divorce.

Not only does Fuess rebut the Kawashima thesis by observing that divorce in contemporary Japan in the twentieth century has "returned" to past levels. He also shows that the return has not been a consistent climb, thereby undermining the view that modernisation and urbanisation have led to a straightforward increase in the divorce rate. His statistic evidence is compelling. Although at record levels in the late nineteenth century, the divorce rate fell precipitously by as much as 50% between 1897 and 1899 before declining more gradually until the 1940s. By 1947, the divorce rate stood at 1.02 divorces per 1,000 people, dropping gently to 0.73 by 1963, before jumping to 1.51 by 1983. After backsliding to 1.26 during the next five years until 1988, it rose again even more sharply during the 1990s to reach 2.30 in 2002 (p. 145).

This historical analysis by Fuess reinforces two critical methodological points for comparative lawyers. The first is the importance of explaining recent socio-legal phenomena in historical context. For sure, the divorce rate has more than doubled in the post-war period. But, with the benefit of Fuess' 400 year overview of divorce trends in Japan, this rate seems neither high nor unusual. The second is the danger of using the United States as a yardstick for evaluating trends in Japan. As Fuess explains in chapter 7, divorce in Japan since the 1960s resembles that of most Western European countries. The rate of divorce in Japan stands above Spain, Italy, Yugoslavia and Greece, but is a step behind France, Germany and the Netherlands. "Compared to the United States …, which currently top[s] the world's divorce tables, Japan can be called a low-divorce society, but," he jokes, "so can most other societies on this planet." (p. 144)

So what role has law played, if any, in sustaining Japan as a high-divorce society? This question is related to the first issue, since the Kawashima thesis predicts that law would play a greater role in regulating Japanese family life as Japan modernises. On this crucial socio-legal question, Fuess' book is also a valuable resource. Although Fuess himself writes that "divorce laws and legal procedures … were less important in Japan

than [elsewhere]" (p. 9), I think this statement of conclusion rests on an overly narrow conception of law as formal legal rules and court-based dispute resolution. The better view of Fuess' collective evidence is that, since the Tokugawa period and beyond the Occupation reforms, Japan has always permitted consensual divorce by registration (pp. 9, 111, 155). That this mode of divorce is administrative rather than judicial does not make it any less "legal"; but its relative informality has certainly allowed a degree of flexibility for partners (or their families) wishing to dissolve a marital union.

At the same time, Fuess is quite right to dismiss the importance of "formal" law in the ebbs and flows in Japanese divorce levels. Certainly, the courts have played a marginal role in divorce. In Edo Japan, magistrates, in their exercise of judicial powers, presided over an "insignificant" number of divorce cases. In Meiji Japan, the lower courts heard approximately 0.002 percent of all divorces (p. 5). And in post-Occupation Japan, the family court system has never handled more than 10% of all divorces (p. 149). Further, major legislative initiatives – notably the introduction of the Civil Code in 1898 and its substantial replacement in 1948 by Occupation reformers – have not had the impact on divorcing behaviour that most assume. Fuess faces a tough task in dismissing the relevance of the Meiji Civil Code, especially since the divorce rate dropped dramatically in the immediate aftermath of its passage. However, in chapter 6, he is convincing in explaining how a re-definition of "marriage" and "divorce" categories in Meiji census collection procedures most likely exaggerated the impact of the Civil Code on the subsequent drop in divorce levels. Similarly, in Chapter 7, he argues that socio-economic factors, such as the weakening of the stigma associated with divorce and the greater importance attached to emotional fulfilment in marriage rather than preservation of the family line, were more important than constitutional and legal reforms for the subsequent climb in the post-war divorce rate.

Finally, Fuess' book sheds light on a third socio-legal question: to what extent does Japanese divorce law and practice reflect unequal gender roles? To date, the Japanese law scholarship on the gendered construction of Japanese family law has elicited three broadly divergent answers. Bryant[3] maintains the post-war Japanese family registration system institutionalises a patriarchical model of the family which is oppressive to women (and other minorities). Bryant argues that the family system does not reflect traditional Japanese values, but is the product of deliberate government policy designed to maintain hierarchy in Japanese society. By contrast, Haley[4] contends that Japanese family law is concerned with maintaining a sense of community. In considering divorce

3 TAIMIE L. BRYANT, "For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan" (1991) 39 *UCLA Law Review* 109; TAIMIE L. BRYANT, "'Responsible' Husbands, 'Recalcitrant' Wives, Retributive Judges: Judicial Management of Contested Divorce in Japan" (1992) 18 *Journal of Japanese Studies* 407.

4 JOHN OWEN HALEY, *The Spirit of Japanese Law* (Athens, Ga: University of Georgia Press, 1998), pp. 123-134

cases, therefore, the judiciary is reluctant to grant petitions for non-consensual divorce, especially where one party (typically the wife) will be adversely affected by the divorce. Finally, Ramseyer[5] contests the view that traditional Japanese family law was exploitative. Despite formal legal powers vested in household heads to control the family unit, men and women were free to leave the stem family and marry at will, since the financial benefits in remaining within the stem family – and the costs in setting up a new family unit – were low. Further, men could not forsake their brides by refusing to register the marriage; women could (and did) sue for breach of marriage contract; and although women could not initiative divorce proceedings, they could sue their philandering husbands for damages in tort. For all these reasons, domestic partnerships were not subject to exploitative legal rules but based on the exercise of free will and kept in check by self-maximising, rational behaviour.

The qualitative evidence Fuess marshalls on this issue – incorporating pre-nineteenth century legal precedents, images of divorce in popular plays and analysis of statutory and judicial law – seems to adopt a position somewhere between that of Bryant and Ramseyer. On the one hand, Fuess does acknowledge the different positions of men and women in the divorce process. In pre-modern century Japan, for example, Confucian ideology constructed the ideal woman as submissive and subservient; they could be unilaterally divorced for lewdness, leprosy, barrenness, disobedience to in-laws, over-talkativeness, jealously and thieving. Until the end of the nineteenth century, only men could initiative divorce. Until Occupation reforms, too, the grounds for judicial divorce varied depending on gender (for example, only men could divorce on the grounds of infidelity). And even in the twenty-first century, women must wait six months before re-marrying whereas men are not subject to any waiting periods.

On the other hand, however, Fuess argues that it is important to not over-state the disadvantage or lack of agency of Japanese women in private relationships. First, the Confucian sanction of unilateral divorce on the part of the husband did not have the grip on Japanese Edo society that many presume. Confucian values were more likely to be consumed by the educated and privileged; yet the empirical data show that divorce rates among the upper classes were lower compared to those for the masses. Second, Fuess refers to survey data, popular culture and divorce notices to illustrate that it was more than a "mere abstract possibility" (p. 97) for Edo wives to demand divorces and exit unsatisfying marriages.

Overall, I have approached this review of Fuess' book in terms of its value to comparative and socio-legal scholars. I readily admit that it is not fair to evaluate a book for a purpose for which it was not written. After all, *Divorce in Japan: Family, Gender, and the State, 1600-2000* is a social history, not a legal analysis. And on this basis, it is a remarkable success. The author must be commended for the sheer bravura of traversing

5 J. MARK RAMSEYER, *Odd Markets in Japanese History: Law and Economic Growth* (Cambridge, Cambridge UP, 1996), ch. 6.

over 400 years of Japanese history. His work is also a study in the value of mixed methods, engaging as he does with both statistical data as well as qualitative analysis. More importantly, he has uncovered a range of rare sources that provides unique insights into divorcing practices and attitudes in Japan. Indeed, the earlier chapters are the more enjoyable in this book, precisely because the author makes creative and indepth use of original materials to provide a sharper picture of pre-nineteenth Japanese history of marital unions and dissolution. If anything, the book flags at the end when the analysis shifts to more straightforward historical description rather than inter-disciplinary analysis. The middle chapter on the codifying divorce in Meiji Japan, too, disrupts the narrative momentum built up in the excellent preceding four chapters, shifting the focus away from the empirical realities of marriage and divorce in Japan to a less engaging intellectual history of Meiji thought on divorce law and policy. Despite these minor drawbacks, however, this book is a treasure trove of quantitative and qualitative data on divorce that makes it invaluable to scholars on Japanese family law. Fuess may not have had socio-legal scholars in mind when he set out on his project. But I recommend it to this community of researchers regardless.

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