

REZENSIONEN / REVIEWS

MARK D WEST,

Lovesick Japan: Sex, Marriage, Romance, Law

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This is the third book with “sex” in the title that has been written since 2005 by the Nippon Life Professor of Law at the University of Michigan Law School. Although it is beautifully written in a conversational style, opens up some intriguing insights, and reflects very extensive research, this work is probably the least successful of the three. This reviewer, at least, hopes that Mark West will now divert his formidable talents to examining other areas of Japanese law and society, including further research in the field that initially established his career – namely, “Economic Organizations and Corporate Governance in Japan” (Oxford University, 2004, co-edited with Curtis Milhaupt).

West’s book on “Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes” (University of Chicago Press, 2005) actually did not focus much on sex. But it showed convincingly how law has played important roles in the development of the “love hotel” industry, as in many other areas of everyday life in Japan. His book on “Secrets, Sex and Spectacle: The Rules of Scandal in Japan and the United States” (University of Chicago Press, 2007) contained more sex. But this arose as part of detailed analysis of important differences – and some similarities – in the two countries’ societies and legal systems relevant to scandals, including corporate fraud, baseball cheaters and political corruption. By contrast, West’s latest book on “Lovesick Japan” is full of sex – *caveat emptor* (buyer beware)!

In this book West pursues the argument that “law matters” in Japan, but in unusual as well as more mundane life situations. Indeed, he argues that “Japanese judges, who have significant discretion, play a surprisingly direct role of arbiters of emotions in intimate relationships” (p 9). Further, unlike his earlier works, West focuses predominantly on how Japanese judges write and reason about sex, marriage and “love” more generally, in their publically-available judgments covering a broad array of legal and social topics. He argues that a “state-endorsed judicial view” (p 9) emerges not just from the way the legally relevant facts (and sometimes seemingly irrelevant facts) are presented, but also

from the legal analysis – with the combination often suggesting broad problems: a “lovesick Japan”. Specifically (p 8):

Love, for instance, is highly valued in Japan, but in judges’ opinions, it usually appears as a tragic, overwhelming emotion associated with jealousy, suffering, heartache, and death. Other less debilitating emotions and conditions, including “feelings”, “earnestness” and “mutual affection” appear in unexpected areas of the law such as cases of underage sex and adultery. Sex in the opinions presents a choice among (a) private “normal” sex, which is male-dominated, conservative, dispassionate, or nonexistent; (b) commercial sex, which caters to every fetish but is said to lead to rape, murder, and general social depravity; and (c) a hybrid of the two in which courts commodify private sexual relationships. Marriage usually has neither love nor sex; judges raise the ideal of love in marriage and proclaim its importance, but virtually no one in the cases achieves it. Instead, married life is best conceptualized as the fulfillment of a contract.

Chapter 1 on “Judging” sets the stage quite effectively for this argument by creating a hypothetical and typical – but still perhaps rather stereotypical – “Judge Tanaka”. Contrasting briefly the American judiciary, West argues that Japan’s civil-law tradition “career judge” system fosters “top-down conformity”; includes many younger judges with (necessarily) fewer intimate experiences; generates “a homogenous and insular world in which judges are often separated from their families in commuter marriages and live life with few acquaintances outside the judiciary”; and limits important professional interactions (pp 21-22). He suggests here and occasionally throughout the book that these institutional outcomes may influence the judicial views reflected in their decisions.

Chapter 2 begins with a helpful brief introduction to some linguistic usages and perceptions of “love” generally in Japanese society, revealed for example through some literature and surveys. West then examines “love in the law” uncovered in judicial decisions related to “love suicides”, more straightforward cases of murder, and the Anti-Stalking Law enacted in 2000. The latter is the only Japanese statute to refer expressly to “love” as a legally-relevant criterion: limiting prosecutions to proscribed activities to satisfy “feelings of love or other feelings of affection for a specific person or for the purpose of satisfying feelings of revenge when one’s love is unrequited” (pp 62-3). In love suicide cases, if the Japanese court finds the deceased to be “in love” then the surviving lover is usually only found guilty of improperly assisting suicide – whereas an American court is more likely to focus on the survivor’s intent, and to turn to formal psychiatric evidence (p 43). In other cases of alleged murder, including euthanasia situations, Japanese judges also read “love” (or otherwise) into the Penal Code provisions to help determine guilt or sentencing.

Chapter 3 on “Coupling” turns to how “people in Japan reach the tragic state of love”, through “matching” (pp 68-9) and sometimes marriage. West outlines the growing variety of match-making services that have emerged as “love marriages” have largely displaced “arranged marriages” since World War II. For example, he criticises a 1996

judgment that awarded one woman damages in tort against a two-timing man using a marriage introduction company. The court decision uses language for which there is “no legal need”, engaging in “superfluous piling on” to frame the adverse outcome by pointing out the man’s “class arrogance, self-centredness and immaturity” (p 80). West also objects to perceived judicial assumptions about sex, namely that the woman could not have been as aggressive in her love-making as the man had asserted in defence. Exercising discretion implicit in the broadly-worded tort provision of the Civil Code, he argues, “in effect the court seems simply to be saying that [the woman] deserved compensation because [the man], the jerk, violated the rules of relationships” (p 82).

West is also critical of criteria applied by the courts to decide whether or not couples have entered into a formal marriage (or “common law marriage” equivalent) under the Code. They seem to be applied inconsistently. And one criterion is that society must view the relationship as marital (an objective test), whereas most US states look to whether a common law marriage involves the couple presenting themselves as married (focusing on their intent: p 91). Love per se is not even a prerequisite – indeed, these cases reveal a vision “in which closeness and mutual affection in long-term relationships are desired but unattainable” (p 104).

Chapter 4 investigates whether “a more less tragic [sic], more realizable emotional intimacy is connected with the physical intimacy” of “private sex” (pp 104-5). West discusses judicial views on “normal sex” (p 108), as contrasted for example with rape cases (where the Penal Code focuses on the accused’s “violence or intimidation” rather than the victim’s lack of consent per se, as in the US), as well as “underage girls and other appropriate [sic] sexual partners” (p 129). He also examines the use of “serial abortions (for the men): courts “find themselves closely policing social norms of abortions. A little coercion by the man is allowed, but too much, creates liability” in tort (p 141). In sum (pp 143-4):

A few broad themes, none of them terribly symbolic of endearment or necessarily even passion, run through the judge-told stories. Male-dominated sex is the norm. Aggressive women are a bit perplexing. Sex in relationships is an act for procreation, not pleasure or love. Sex should stay within normal bounds, and courts determine when acts exceed those bounds. Abortion, a widely used method of birth control, is often decided by the man.

In Chapter 5 we learn instead about how judges rule on “commodified sex”. A major focus is Japan’s extensive (mainly licenced) prostitution industry and pornography (with courts explicitly linking adult videos to harms of rape and other deviant sexual behaviour: p 158). But West also suggests that marriage is in effect “commodified” because Japanese law (unlike US law) allows one spouse to sue his or her adulterous spouse’s lover (and that spouse). Compensation tends to be payable only if the adulterous sexual relationship is based on genuine feelings of affection (p 165). Nonetheless, West again concludes that judicial conceptions of sex do not seem “particularly conducive to compassionate interpersonal relationships” (p 174).

Chapter 6 deals with Japanese judicial responses to divorce. Ninety percent are concluded simply by filing spousal agreement, nine percent go to mandatory Family Court mediation (which resolves half of the cases, mostly by agreeing on divorce), but the rest must be adjudicated. The Civil Code then allows divorce only if the spouse proves adultery, abandonment, disappearance, irremediable mental illness or a “grave reason that makes continuing the marriage difficult” (p 180).

West argues that the amorphous “grave reason” ground is not applied as a purely objective test. In addition, in 1952 the Supreme Court read in a limitation particularly regarding the “adultery” ground: “the at-fault party responsible for the decline of the marriage ... cannot receive a judicial divorce without the consent of the spouse”. He notes that as well as providing a “moral lesson, the no-at-fault-divorce rule might have been intended to protect women from financial abandonment”, but prefers the view that “judges were distributing money between spouses so that spouses could bargain for divorce privately rather than sue in court” (p 197). Lower court judgments began to create exceptions – belying the image of the “top-down” homogenous judiciary presented in chapter 1 – and in 1987 the Supreme Court restated the law allowing more scope for divorce. Yet the new test is based primarily on objective factors, such as the ratio of years married to years of spousal separation, resulting in many couples having to remain in seemingly loveless marriages. Unlike the American story about marriage, therefore: “Marriage is not for the fulfillment of individual spouses. It is a publically recognized contract in which the desire of one spouse is sufficient to maintain it” (p 207).

Overall, therefore, this is a rich and ambitious work. But that is part of the challenge for the reader. It covers so much ground, with so many twists and turns across so many areas, that it is hard to assess the author’s generalizations about a “lovesick Japan” being reflected and perhaps refracted through reported judicial opinions. It probably would have been more effective to focus on fewer areas, delving more deeply, as in the study by Catherine Burns (“Sexual Violence and the Law in Japan”, RoutledgeCurzon, 2004; cited by West only in passing).

Regarding the case law, for example, it would be helpful at least to know specifically what judgments West is referring to when stating that the judgments described in the book are representative (or otherwise), but also more details about temporal and regional variations, or whether differences emerge when female judges make or are involved in rulings. Anyway, only a comparatively small proportion of cases are reported through the publically-available commercial databases that West searched by keyword to end up reading a (phenomenal) 2700 judgments.

To address such possible sample bias, one strategy would have been to add extensive interviews of lawyers and litigants (as alluded briefly at p 218). The views on these topics held by prosecutors seem particularly important, given Japan’s very high conviction rate (related to caution in filing criminal proceedings). But so too are probably the views held by the police (partners in dealing with crime) – not to mention the Family Court mediators or counselors, and others associated with the legal process, including

legislators and policy makers. Are all their opinions and roles significantly different from those expressed by the judges, and what might be the implications? The book occasionally alludes to such matters, but very much in passing.

A related methodological problem with this book is the author's normative stance. West seems to be particularly worried that: (a) Japanese judges use narrative techniques – even if not strictly necessary – to bolster their fact-finding, legal analysis and conclusions; (b) their judgments may not reflect contemporary social realities, or are based on hunches rather than objective evidence; and (c) either the judges should be trying to promote a less “lovesick” vision for Japan – one where love is more central, joyous and compassionate – or (in other areas of law) the judges should not intrude in “private” affairs. Yet each of these propositions needs further analysis.

The last-mentioned “intrusion” objection implies a (philosophically) liberal or even libertarian approach to judging and law itself, whereas encouraging judges to take a different view of love in law would promote *more* “judicial activism” (cf p 23) – even if widespread agreement that (say) the more individualistic American vision of sex and love is universally more appropriate. Incidentally, West mentions Japan's rising divorce rate (pp 9, 197, 219); but in fact it declined over 2002-8¹ and remains low compared to official rates in the US and Australia² – where, moreover, there is a growing tendency for couples never to marry, so their separation is not officially recorded as divorce.

West's concern (b) runs up against indications throughout the book that in fact Japanese judges' intuitions or views seem largely to accord with evidence of social practices and norms (although the “no-at-fault-divorce rule” even now seems out of sync with recent survey evidence: p 206). It also assumes that court proceedings would benefit significantly from including more “expert evidence”, although this brings its own problems. His concern (a) runs up against the reality that all judges must use words to express their judgments, so narrative effects will always be present.³

We need additional reference points to highlight and examine all such issues. One possibility is to identify whether the author's legal theory is rooted in legalism and/or liberalism, or contemporary communitarianism. The latter is expounded recently by one of Japan's leading legal sociologists, including a chapter on post-divorce child visitation rights in Japan compared to the US: Takao Tanase, *Community and the Law: A Critical*

1 http://www.stat.go.jp/english/data/handbook/c02cont.htm#cha2_4

2 http://www.census.gov/compendia/statab/cats/international_statistics.html

3 The Japanese judge whose typically-automatic promotion to full Judge after 10 years was rejected, because he wanted to write judgments minimizing all attempts at narrative, would therefore have probably been seen as unsuitable for judicial office in many legal systems. Cf. KAORU INOUE, *Shihô no shaberisugi* [Blabbermouth Judiciary] (2005), reviewed by COLIN JONES, *Kaoru Inoue's Shihô no Shaberisugi* (Blabbermouth Judiciary): Moral Relief, Legal Reasoning and Judicial Activism in Japan, in: 19 *Emory Int'l L. Rev.* 1563 (2005); subsequent writing by Inoue is also reviewed by Jones at http://sydney.edu.au/law/anjel/documents/ZJapanR/ZJapanR25/ZJapanR25_23_Jones_Rez_Inoue.pdf.

Reassessment of Japanese Modernity and American Liberalism (Elgar, 2010). A more subtle approach is developed in a fictional dialogue between a young Japanese judge and his Australian English-language teacher: Trevor Ryan, *Dear Judge Ichiro* (Zeus, 2007).⁴

Another strategy is to compare more countries, more deeply, whereas West really only compares (quite briefly) the US. These broader vantage points would have allowed readers to reach a more informed assessment of what an author purports to uncover, as well as of the author's express or (in this case, mostly) implicit normative views.

Otherwise, there is a real risk that the sort of analysis attempted in this book will be (mis-)read, especially by those less familiar with the legal world or what happens in several countries, as simply showing that both Japanese law and society are not just unusually "lovesick", but just "sick".⁵ Especially if the casual reader is primarily titillated by all the sex promised in the title!

Luke Nottage

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- 4 Reviewed by myself at
http://sydney.edu.au/law/anjel/documents/Trevor_Ryan_Book_Review_Nottage.pdf
and by Prof Kozuka at
http://sydney.edu.au/law/anjel/documents/ZJapanR/ZJapanR25/ZJapanR25_20_Kozuka_Rev_Ryan.pdf
- 5 Already in this vein, see the review by JEFF KINGSTON, "Holding Court on Warped Ideas of Sex and Love" *The Japan Times* (8 January 2012),
<http://www.japantimes.co.jp/text/fb20120108a2.html>.