Interference with Spousal Rights

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I. INTRODUCTION

The aim of this paper is to discuss divorce in Japan and, more specifically, the consequences of interference with spousal relationships. In particular, we examine the types of claims recognized by the Japanese courts. According to official statistics, there were 208,496 divorces during the year 2019.[1] Breakdown of a marriage is perhaps one of the most emotional types of litigation, as it is not rare for spouses to consider that every betrayal, either real or perceived, must be remedied. Most legal systems include a type of economic remedy between spouses in the event of a divorce, be it a periodical payment in the form of alimony or be it a lump-sum payment.

Japanese law allows for four types of divorce proceedings: by mutual agreement (*kyōgi rikon)*, by means of litigation (*saiban rikon)*, via conciliation (*chōtei rikon*), or via the judicial decision of a family court (*shinpan rikon*). In general, most divorces in Japan use the mutual agreement method. Furthermore, the Japanese Civil Code, or *Minpō* (hereinafter: CivC),[2] appears to follow the "clean break" principle, under which the spouses do not owe each other any obligations after divorce, as there is no provision that

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1 PORTAL OF GOVERNMENT STATISTICS, *Jinkō dōtai chōsa rikon no shurui betsu ni mita nenji betsu rikon kensū oyobi hyakubun ritsu* [Demographic Survey, Annual Number of Divorce Cases and Percentages by Type of Divorce], at *https://www.e-stat.go.jp/stat-search/file-download?statInfId=000031981603&fileKind=1*.

2 *Minpō*, Law No. 89/1896. Unless indicated otherwise, English translations of laws and ordinances are taken from *http://www.japaneselawtranslation.go.jp/?re=02*.

would grant one of the spouses financial support in the form of alimony. However, in practice, Japanese courts usually also grant compensation for non-economic losses in connection with divorce, so-called *rikon ni tomonau isha-ryō* (usually abbreviated as *rikon isha-ryō*), in cases where one spouse is considered to be at fault.[3]

This remedy is not based on family law provisions but rather was developed under the rules of delictual liability as established under Art. 709 CivC. Hence, it is a type of inter-spousal delictual liability. These types of damages are granted to the slighted spouse for the emotional distress caused by the divorce itself and are independent of any other claim under delictual liability.[4] Furthermore, while in principle the suit can only be brought against the culpable spouse, a recent Supreme Court case appears to have expanded the liability to third parties.[5]

Rikon isha-ryō are not the only remedy available to slighted spouses in the event of an infringement of their marital rights. In 1979, the Japanese Supreme Court recognized a claim for damages brought against the lover of a spouse on the basis that the plaintiff-spouse's rights had been infringed upon by the defendant, without consideration of any actual feeling of love between the spouses.[6] These types of damages are called *futei kōi isha-ryō* (usually abbreviated *futei isha-ryō*) both by commentators and in the case law and have become a staple of Japanese delictual liability to the point that *isha-ryō* is one of the few technical legal terms most Japanese people understand. The term *futei kōi* can be translated as an adulterous act and is recognized as grounds for divorce under Art. 770 CivC. Nevetherless, case law has established that not every type of adulterous act gives rise to a claim for damages. In contrast to *rikon isha-ryō, futei isha-ryō* do not require the dissolution of the marriage. The mere existence of the extramarital affair is enough to give the slighted spouse a claim for damages.

This puts Japan in the very limited club of jurisdictions that recognize a claim against a third party for interference with marital relations. Common law countries such as the U.S. and England used to punish interference in marital relations under claims for alienation of affection and criminal con-

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3 *Isha-ryō,* or apology money, is a type of monetary award granted by Japanese courts to compensate for non-economic losses (pain and suffering, emotional distress, etc.). The controlling legal provisions are Art. 710 and Art. 711 CivC. For a more detailed explanation in English on the concept and modern issues regarding *isha-ryō,* see: R. RODRIGUEZ SAMUDIO, Non-economic losses under Japanese law from a comparative law perspective (2017). R. RODRIGUEZ SAMUDIO, Foreigners under Japanese delictual liability law, ZJapanR / J.Japan.L. 48 (2019) 205.

4 Supreme Court, 23 July 1971, Minshū 23, 805 (1971WLJPCA07230001).

5 See below sub IV.

6 Supreme Court, 30 March 1979, Minshū 33, 303 (1979WLJPCA03300003).

versation. The roots of these claims can be traced to the idea that a husband owned his wife and thus was entitled to compensation for a lost property interest in her sexual fidelity, which later evolved into the view that the husband held an exclusive right to her services.[7] Presently, the rights of actions have been abolished in most states within the U.S. By contrast, countries that follow the civil law model do not traditionally allow for a spouse to claim damages against the lover of a spouse, and the few which did (e.g. Argentina) have amended their laws to eliminate this remedy.[8]

Regardless of comparative law trends, since the Japanese CivC provides for a general clause, and since the remedy is based on delictual liability rather than any particular family law provision, Japanese courts have developed a robust body of case law detailing the requirements, defenses, and consequences of these claims. Recently, there was a 2019 Supreme Court ruling which set out the rules for expanding the liability of third parties for infringement of marital rights of spouses, thus cementing the pillars for future developments as regards the topic.

II. Divorce in Japan

1. *General Aspects*

From a comparative law perspective, the number of western states that have switched to a no-fault model of divorce has been increasing since the early 1970s. In a true no-fault divorce, the spouses' intent is sufficient to complete the divorce, and the fault of one or both spouses is only relevant to the extent it might affect the decision on child custody or property division issues.[9] The Japanese system allows for both no-fault and fault-based divorces. In contrast to other countries, in particular those that require fault as grounds for

7 H. BRUTON, The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-affection and Criminal-conversation Torts, Duke Law Journal 65 (2016) 761–762.

8 RODRIGUEZ SAMUDIO, Non-economic losses, *supra* note 3, 197–198. The tradition of not holding third parties responsible for marriage breakdown can be observed in the Gleeden affair in France. Gleeden is an app that serves as a platform that allows users already in a relationship to find and meet partners. In 2015, Gleeden was sued in France by the Association of Catholic Families (Les Associations Familiales Catholiques, AFC), under the argument that adultery was illegal under French law. In 2017, a Paris court rejected the AFC's argument, pointing out that infidelity is not an *ipso facto* ground for divorce, as a couple might choose to allow it (TGI Paris, 5e ch. 2e sect., 9 February 2017, n° 15/07813).

9 B. VERSCHRAEGEN, Divorce, in: Zweigert et al. (eds.), International Encyclopedia of Comparative Law, Volume IV – Persons and Family (2004) 137.

divorce, the Japanese system has been described as treating divorce as an absolutely private matter.[10]

Japanese law recognizes four types of divorces. The first type is divorce by agreement, or *kyōgi rikon*, which can be completed by both spouses filling a form at the municipal office where the couple resides. Divorce by agreement is a no-fault divorce under Art. 763 CivC.[11] If the relationship between the spouses has deteriorated to such a degree that it does not allow for communication, they can apply for conciliation via a panel, which is composed by a family court judge and two conciliatory commissioners appointed by the family court. The aim of conciliation is not necessarily to facilitate a divorce, but both parties may agree to end their marital relationship during the conciliation proceedings. This is known as a divorce by conciliation, or *chōtei rikon*, and it can be considered as another form of divorce by mutual consent in so far as the parties might agree on the divorce and its consequences during the conciliation process.[12]

If the conciliation fails, the court might grant the divorce after taking into account all the circumstances of the case.[13] Such *shinpan rikon*, or divorce via adjudication, also occurs where the parties agree on their intent of divorcing but disagree on the consequences of the divorce, e.g. custody rights or the division of property.[14] In theory, *shinpan rikon* decisions are issued when the couple is not able to find a middle ground after the conciliation process, other than their intent to divorce, thus leaving the judge with the duty of adjudicating those issues for which amicable conciliation was not possible. In exceptional cases, the judge can decide to adjudicate the matter

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10 VERSCHRAEGEN, *supra* note 9, 3.

11 Art. 763 CivC: A husband and wife may divorce by agreement.
See also Art. 766 CivC:

> If parents divorce by agreement, the agreement will also determine the matters of who will have custody over a child, visitation and other contacts between the father or mother and the child, the sharing of expenses required for custody of the child, and any other necessary matters regarding custody over the child. In this case, the child's interests are to be considered with the highest priority.
>
> If the agreement set forth in the preceding paragraph has not been made, or cannot be made, the matters set forth in the preceding paragraph are to be determined by the family court.
>
> The family court may change the agreement or determination under the provisions of the preceding two paragraphs and order any other proper disposition regarding custody over the child, if it finds this necessary.
>
> The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding three paragraphs.

12 VERSCHRAEGEN *supra* note 9, 150.

13 A. KUBOTA, *Kazoku-hō* [The Law of Family and Successions] (3rd ed., 2017) 90–91.

14 Art. 766 CivC, *supra* note 11.

ex officio, i.e. without the need of a conciliatory step. In practice, however, this type of divorce is almost never used as both the conciliation panel and the parties will try their utmost to iron out any differences during conciliation and as either of the parties can object to the result within two weeks if the case was heard *ex officio*, thus rendering the process moot.

The number of ways which a couple might complete a divorce without formal requirements – other than their intent – has led some scholars to argue that Japan is the only country that can be considered to have a true divorce by mutual consent, in the sense that divorce, just like marriage, is construed as a private contract between the parties (spouses) with no formal requirement other than registration and the indication of which parent will be the custodian of the couple's children.[15]

The fourth type of divorce is judicial divorce. Art. 770 CivC establishes five grounds for judicial divorce: adultery, abandonment, where one spouse suffers severe mental illness with no prospect of recovery, where one of the spouses has disappeared for no less than three years, or any other grave cause that would make a continuation of marriage difficult. However, courts might decide not to terminate the marriage if they find it reasonable, even if one of the aforementioned criteria is met.[16] The courts also retain authority to decide matters regarding the distribution of property or child custody, as provided by Art. 771 CivC.[17]

Statistics show that divorce by mutual agreement is the preferred type of divorce in Japan. Of the 208,496 divorces registered in 2019, there were 183,673 cases of divorce by mutual agreement, 18,431 *chōtei rikon*, 1,344 *shinpan rikon,* and 2,017 judicial divorces.[18] Also included are 3,025 cases of divorce via settlement (*wakai rikon*) and six cases of divorce via acceptance (*shodaku rikon*). *Wakai rikon* takes place if the parties reach a settlement during the judicial process of divorce. *Shodaku rikon* is similar to *wakai rikon* in the sense that it must materialize after a suit for judicial divorce has been brought forth, but before the ruling is handed down. However, in the

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15 VERSCHRAEGEN *supra* note 9, 150.

16 Art. 770:

(1) […]

(2) A court may dismiss a suit for divorce if it finds continuing the marriage reasonable taking into account all circumstances, even in the case where there is a cause listed in items (i) to (iv) inclusive of the preceding paragraph.

17 Art. 771: The provisions of Articles 766 to 769 inclusive shall apply mutatis mutandis to the case of judicial divorce.

18 PORTAL OF GOVERNMENT STATISTICS, *Jinkō dōtai chōsa rikon no shurui betsu ni mita nenji betsu rikon kensū oyobi hyakubun ritsu* [Demographic Survey, Annual Number of Divorce Cases and Percentages by Type of Divorce], at *https://www.e-stat.go.jp/stat-search/file-download?statInfId=000031981603&fileKind=1*.

case of *shodaku rikon*, one party, usually the defendant-spouse, will agree to all the claims submitted by the other party.

2. *Rikon isha-ryō*

Spouses owe each other a duty of support based on Art. 752 CivC;[19] there is no provision that would grant ex-spouses a right for continued financial support after divorce has been finalized, meaning that there is no right to sue for alimony. However, Art. 877 CivC[20] establishes a parental obligation of child support. Hence, in practice, the parent who retains guardianship is only entitled to receive support from his or her former spouse in the form of child support.

Supreme Court case law established that *rikon isha-ryō* are granted when the conduct of one of the spouses caused the marriage to breakdown and end in divorce. Therefore, such compensation is independent of any division of community property due to divorce proceedings.[21] In the case of divorce by mutual agreement, the former spouses will decide upon all aspects of divorce by themselves, ranging from which parent retains custody and parental rights over children to any division of communal property. Thus, issues regarding *isha-ryō,* if they exist, are usually resolved by the intent of the spouses. By contrast, in cases of judicial divorce, the judge will decide at the request of one of the parties if they are to receive any compensation in the form of *isha-ryō* as well as the amount.

Therefore, claims for *rikon isha-ryō* survive even after the end of the divorce proceedings and any division of property.[22] In addition, as a general principle, *rikon isha-ryō* are considered to be a claim between spouses, with lower courts not granting any remedy when brought against third parties (e.g. in-laws).[23] However, a 2019 Supreme Court ruling has expanded the liability of third parties in regard to the infringement of marital rights.

Since spouses have ample rights to decide matters regarding the divorce before and during the proceedings, regardless of the type of divorce, they can decide on the amount to pay as *rikon isha-ryō* in the event of a divorce. This agreement is legally binding, and courts have ruled that since it is nothing

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19 Art. 752: A husband and wife shall live together and provide mutual cooperation and assistance.

20 Art. 877(1): Lineal relatives by blood and siblings have a duty to support each other. See also, Art. 766 para. 1, *supra* note 11.

21 Supreme Court, 2 February 1956, Minshū 10, 124 (1956WLJPCA02210002).

22 Supreme Court, 23 July 1971, Minshū 23, 805 (1971WLJPCA07230001).

23 Fukuoka District Court, 19 June 1970, Hanrei Taimusu 254 (1971) 270 (1970WLJPCA06190003). Nagoya District Court, 29 January 1968, Hanrei Jihō 515 (1968) 74 (1968WLJPCA01290002).

more than a mere promise to pay an amount already owed, it cannot be considered as a new obligation created with the intent of defrauding a creditor under Art. 424 CivC.[24] However, if the amount promised as *rikon isha-ryō* is excessive, courts might construe any amount over what is considered adequate as a donation or a fraudulent act against the interests of a creditor.[25]

Scholars tend to make a distinction between *rikon isha-ryō* based on the emotional distress caused by the culpable spouse (*rikon gen'in isha-ryō* or *yūseki isha-ryō*) and *rikon isha-ryō* based solely on the divorce itself (*rikon jitai isha-ryō*). Nevertheless, the courts have not adopted this distinction.[26] In addition, some commentators posit that since requesting a divorce is neither a breach of contract (Art. 415 CivC[27]) nor a delictual act (Art. 709 CivC), *rikon jitai isha-ryō* should not be recognized as a form of damages.[28] Proponents of the theory that divorce itself is enough to cause a legal injury argue that *rikon jitai isha-ryō* is not a claim for damages based on Art. 415 or Art. 709, but rather a claim for an adjustment (*chōri seikyū-ken)*.

Nevertheless, under current Japanese case law, claims for *isha-ryō* are based on the principle of delictual liability. Therefore, any claims should follow the principle of negligence commonly found in general clause systems such as the Japanese Civil Code. However, since the early 1990s, scholars have pointed out that in practice there is a shift to a form of strict liability, or at the very least a relaxation of the general rules of negligence.[29] Another criticism is that *isha-ryō* are used by a spouse as a condition for the divorce. This is particularly true in cases dealing with divorce by agreement,

24 Supreme Court, 10 September 2000, Minshū 54, 1013 (2000WLJPCA03090005). Article 424 reads:

(1) An obligee may demand the court to rescind any juristic act which an obligor commits knowing that it will prejudice the obligee; provided, however, that, this shall not apply to the cases where any person who benefits from such act, or any person who succeeds to such benefit, did not know, at the time of such act or succession, the fact that the obligee is to be prejudiced.

(2) The provision of the preceding paragraph shall not apply to a juristic act with a subject other than property rights.

25 Supreme Court, 10 September 2000, Minshū 54, 1013 (2000WLJPCA03090005).

26 CHIBA BAR ASSOCIATION (ed.), *Isha-ryō santei no jijitsu* [The Practice of Calculating *Isha-ryō*] (2nd ed., 2015) 7.

27 Article 415: If an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in cases where it has become impossible to perform due to reasons attributable to the obligor.

28 M. TANAKA, *Rikon futei kankei-tō* [Divorce and Adulterous Relations, etc.], in: Osamu (ed.), *Isha-ryō santei no riron* [Theory on Calculating *Isha-ryō*] (2013) 197.

29 J. NAKAGAWA, *Kazoku-hō no gendaiteki kadai* [Modern Issues in Family Law] (1992) 165.

where one spouse will refuse to sign the divorce form until granted a suitable amount. Critics posit that this type of *isha-ryō* cannot be considered as fulfilling their original purpose any longer,[30] as they are nothing more than a price tag on the divorce. Critics argue that this type of *isha-ryō* runs afoul of the principle of public policy set by Art. 90 of the CivC[31], thus making them null and void.[32]

An analysis of current case law reveals three criteria that must be met in order for a court to grant a remedy in the form of *rikon isha-ryō*. First, there must be culpable conduct by one of the spouses, or in its absence an agreement to pay *isha-ryō*. Second, in the case of culpable conduct by a spouse, the other spouse must have suffered some sort of emotional distress. Third, the divorce must be finalized. The last requirement is also important for the purposes of the statute of limitations.

Common examples of culpable conduct include extramarital affairs and emotional or physical violence. The culpable conduct must be grave enough as to be considered the main reason for the divorce; therefore, merely unwelcome personality traits of the spouse would not in themselves constitute culpable conduct and do not support a claim for *isha-ryō,* even if they do cause emotional distress to the victim-spouse.[33] Furthermore, courts will also take into account conduct before marriage in determining the emotional distress suffered by the victim-spouse.[34] Cohabitation or the lack thereof does not affect the existence of a claim; the victim-spouse is entitled to receive *isha-ryō* even if the couple had lived separately for years.[35]

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30 As in many other countries that recognize a claim for non-economic losses, Japanese scholarship considers that *isha-ryō* have two main functions. The first view posits that *isha-ryō* are a tool to compensate victims for their emotional distress and other types of non-economic losses. The second view puts emphasis on *isha-ryō* as means to punish the aggressor. S. OSAMU, *Sōron* [General Principles], in: Osamu (ed.), *supra* note 28*,* 5 et seq.

31 Article 90: A juristic act with any purpose which is against public policy is void.

32 S. TAKAO, *Gendai kazoku-hō I* [Modern Family Law I] (1992) 180.

33 Tōkyō High Court, 25 November 1982, Hanrei Taimusu 490 (1983) 146 (1982WLJPCA11250004).

34 Tōkyō District Court, 25 December 2003 (2003WLJPCA12256009).

35 Tōkyō District Court, 28 March 2003 (2003WLJPCA03280011). Tōkyō Family Court, 19 January 2011 (2011WLJPCA01196003). Japanese work culture includes the concept of *tanshin funin* (unaccompanied job transfer; solo assignment without spouse), under which a spouse, usually the husband, is assigned to work at a different location from his family. Some companies will even include additional compensation for workers under this situation. The decision on whether to move as a family or use the *tanshin funin* system is usually up to the family. However, in particular in those cases where the transfer is for a fixed period, or if the new location is not an urban center or is not well equipped for the raising of a child, the couple will chose to live

Since these types of claims are based on the intentional or negligent behavior of one of the spouses, if both spouses contributed to the breakdown of the marriage, neither is entitled to receive compensation.[36] In addition, since divorce can only be completed through the intent of the spouses or via judicial decision, as a general rule, spouses cannot sue third parties for *isha-ryō.* In particular, lower courts have denied claims against the parents of one spouse, even if their conduct contributed to the dissolution of the marriage.[37]

International divorces are not exempt from these rules. If the divorce is finalized under Japanese law, the victim-spouse has the right to ask for compensation, even if both spouses are foreigners.[38] This is the case even if one spouse lives abroad.[39] Even if the spouses complete a divorce by mutual agreement under a jurisdiction that does not recognize *rikon isha-ryō* (e.g. South Korea), the victim-spouse is still entitled to claim *isha-ryō* under Japanese law according to the argument that not doing so would violate Japanese public policy.[40] Furthermore, while Japanese law does allow for the *exequatur* of a foreign judicial decision on divorce, Japanese courts retain jurisdiction on the matter of *isha-ryō*.[41]

De facto marriages, also known as common-law marriages, are also subject to these rules. In 1957, the Supreme Court ruled that, even though *de facto marriages* lacked the formalities of an ordinary marriage, in those cases where the couple shared responsibilities and the administration of the household, the relationship should be granted the same protection as a legal marriage. Thus, the legal right, as required by Art. 709 CivC, should not be construed in a limited manner.[42] Furthermore, in contrast to legal marriage,

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separately. Thus, in Japanese culture, separation does not necessarily equate to a breakdown of the marriage.

36 Tōkyō District Court, 29 August 2003 (2003WLJPCA08290005). Tōkyō District Court, 28 August 2003, (2003WLJPCA08270004).

37 Fukuoka District Court, 19 June 1970, Hanrei Taimusu 254 (1971) 270 (1970WLJPCA06190003).

38 Kōbe District Court, 19 June 1990, Hanrei Jihō 1383 (1991) 154 (1990WLJPCA06190004).

39 Tōkyō District Court, 30 January 2004, Hanrei Jihō 1854 (2004) 51 (2004WLJPCA01300003).

40 Kōbe District Court, 19 June 1990, Hanrei Jihō 1383 (1991) 154 (1990WLJPCA06190004).

41 Nagoya District Court, 24 November 1999, Hanrei Jihō 1728 (2001) 28 (1999WLJPCA11240009).

42 Supreme Court, 11 April 1958, Minshū 12, 789 (1958WLJPCA04110002). There is, however, not a single standard under which a judge can conclude whether a relation can be considered a *de facto* marriage. For example, in one case the Fukuoka District Court held that even if the couple lived separately, when taking into account their routine visits to each other, their jobs and their positions, their relationship could be

isha-ryō in the case of *de facto* unions are only recognized when there is not a justifiable reason for ending the relationship.

In recent years, discussions regarding the rights of same-sex couples have increased. Some municipalities, such as Yokohama, have begun to recognize civil partnerships for same-sex couples.[43] There are also many suits requesting that the ban on same-sex marriage be declared unconstitutional.[44] A 2019 case from Utsunomiya recognized the right of same-sex partners to request damages for adultery.[45] In that case, a female couple had legally married under the laws of the State of New York in 2014. After returning to Japan, the couple then contacted defendant B (male) to serve as a sperm donor. However, defendant A and defendant B began a romantic relation which led to the divorce of the plaintiff and defendant A in 2018. The defendants married in August 2018; however, defendant B subsequently underwent a sex change operation and legally changed gender to female; the defendants divorced a month later in September.

In finding for the plaintiff, the court considered that the constitutional provision under which marriage is based on the consent of "both sexes" was nothing more than a reflection of the social values of the period when the constitution was written, and thus did not prevent the rights of same-sex couples from being recognized. In particular, the court held that same-sex unions were to be granted the same protections as *de facto* marriage, i.e. barring rights regarding succession, they were to be considered the same as legal marriages. The fact that Japanese courts are willing to grant a certain level of protection to same-sex marriage might be an indication of a societal change.

III. *FUTEI KŌI ISHA-RYŌ*

Isha-ryō are also granted in the case of extramarital affairs. Known as *futei kōi isha-ryō or futei isha-ryō*, they were first recognized by the Supreme Court in 1979.[46] In that case, the Supreme Court ruled that a third party who had adulterous sexual encounters infringed upon the rights of the victim-spouse and thus was liable for the emotional distress caused by the

considered a *de facto* marriage. Fukuoka District Court, 26 August 1969, Hanrei Jihō 577 (1969) 90 (1969WLJPCA08260001).

43 "Yokohama Recognizes Partnerships for LGBT Couples", Mainichi Shinbun, 2 December 2019, at *https://mainichi.jp/english/articles/20191202/p2g/00m/0dm/054000c*.

44 "Same-sex Couple Sues Japanese Gov't Claiming Inability to Marry is Unconstitutional", Mainichi Shinbun, 5 September 2019, at *https://mainichi.jp/english/articles/20190905/p2a/00m/0na/023000c*.

45 Utsunomiya District Court, 18 September 2019 (2019WLJPCA09189006).

46 Supreme Court, 30 March 1979, Minshū 33, 303 (1979WLJPCA03300003).

disruption of a healthy marriage (*kenkōteki na kekkon seikatsu*) of the victim. By contrast, children of the marriage are barred from bringing such claims, as the courts have ruled that the affair does not affect the feeling of love a parent has towards his or her child.[47] Some commentators oppose the courts granting damages in the case of adultery both in general and against third parties. Arguments against claims for *futei isha-ryō* consider that relationships between spouses should not extend to complete control over conduct, that the adulterous spouse is the one who should shoulder the burden, and that the relationship between spouses is a private matter, one into which the law should not intrude.[48]

The idea that spouses have a right over the fidelity of their partner is not widely accepted in comparative law. Common law countries used to have claims for alienation of affection and criminal conversation.[49] Generally speaking, in jurisdictions that still admit a claim for alienation of affection, a plaintiff must prove (1) That the defendant's conduct affected the marriage; (2) A loss of affection or love resulted; (3) The defendant's conduct was culpable or negligent. By contrast, criminal conversation claims usually require the existence of a marriage and sexual intercourse between the defendant and one of the spouses.[50] Civil law countries are even less open to admitting a claim against the lover of a spouse. For example, courts in Spain,[51] Chile,[52] and Colombia[53] reject claims for infidelity against a third party. In most cases, civil law courts will approach the matter as an issue between spouses which affects the consequences of the marriage.

Nevertheless, under Japanese law, a spouse is entitled to damages if he or she can prove the third party (i.e., the lover) necessarily acted either with intent or negligence. In other words, the lover must have known, or be in a position in which he or she should have known, that his or her partner was married and pursued the affair regardless.[54] Courts will not grant damages if the victim-spouse contributed to the affair in any manner, either by clearly

47 Supreme Court, 30 March 1979, Saiban Shumin 126, 423 (1979WLJPCA03300005).

48 TANAKA, *supra* note 28, 206.

49 In the U.S., these claims have been abolished in most states at the time of this writing. Alienation of affection is recognized in only five states: Mississippi, Hawaii, North Carolina, South Dakota, and Utah. Criminal conversation is recognized in only four states: Hawaii, Kansas, Maine, North Carolina. See: BRUTON, *supra* note 7, 759–760.

50 Ibid.

51 P. MENDOZA ALONZO, Daños Morales por Infidelidad Matrimonial. Un Acercamiento al Derecho Español, Revista Chilena de Derecho Y Ciencia Política 2 (2) (2011) 41.

52 Supreme Court, 13 June 2012, No. 263/2010.

53 Supreme Court, 30 December 2014, No. 10622/2014.

54 Tōkyō District Court, 30 November 2017 (2017WLJPCA11308039).

granting permission or by giving the impression that he or she was not opposed.[55] Furthermore, lower courts have said that the lover has no obligation to confirm the marital status of his or her partner or determine whether the culpable spouse has more than one lover.[56]

In contrast to *rikon isha-ryō*, courts have developed a defense against *futei isha-ryō*. Since the victim's request for compensation is based on the infringement of a healthy marriage, courts will not grant a remedy in the event the marriage was already strained before the affair began, as there is no legal injury to compensate.[57] Therefore, determining whether spouses had a healthy relationship will be the deciding factor in establishing liability. Violence between spouses is usually considered to be a sign that the marriage had broken down.[58] Any indication that the spouses intended to divorce is also considered evidence that the marriage had broken down.[59] Nevertheless, if the spouses reconcile after the affair has begun, the lover can be found liable for *isha-ryō*.[60]

Any period of separation is also an important factor, with longer periods usually considered as evidence of the marriage breakdown. However, this is not an absolute rule. For example, in the case of a young wife who reneged on taking care of her aging husband, a one-year separation period was enough to bar the claim for damages.[61] In contrast, in the case of a couple married for 20 years, a one-year period of living separated because of the husband's job was not enough to prove a strained marriage.[62]

Futei kōi isha-ryō also raises the question of how to approach the liability of sexual workers for their services. While prostitution is illegal in Japan if done by an individual, a business can obtain a license to provide "similar" services.[63] Courts have established a defense for individuals providing sexual services as employees of an authorized businesses under the argument

55 Supreme Court, 19 June 1996, Kagetsu 48, 39 (1996WLJPCA06180005).
56 Tōkyō District Court, 12 October 2017 (2017WLJPCA10128004).
57 Supreme Court, 26 March 1996, Minshū 50, 993 (1996WLJPCA03260001).
58 Supreme Court, 19 June 1996, Kagetsu 48, 39 (1996WLJPCA06180005).
59 Tōkyō High Court, 22 June 2005, Hanrei Taimusu 1202 (2006) 280 (2005WLJPCA06220008).
60 Tōkyō District Court, 18 January 2013 (2013WLJPCA01188024).
61 Ōsaka High Court, 26 May 2009, Kagetsu 62, 85 (2009WLJPCA05266003).
62 Tōkyō District Court, 26 February 2018 (2018WLJPCA02268015).
63 Examining the status of prostitution in Japan is beyond the scope of this paper. However, while direct prostitution is prohibited, business are still allowed to provide services that "facilitate" the meeting of customers and sex workers. For more see: J. HONGO, Law bends over backward to allow 'fuzoku', Japan Times, 27 May 2008, at *https://www.japantimes.co.jp/news/2008/05/27/news/law-bends-over-backward-to-allow-fuzoku/#.XiJ6uMgzbD5*.

that, even if the spouse of the client might not agree, the service itself cannot be considered anything but a service for sexual release, thus not meeting the criteria of delictual liability.[64]

Lower courts, however, are divided on whether this defense can be used by professionals who provide similar services. In particular, the disagreement focuses on the so-called pillow business, or *makura eigyō*, a term used to describe the practice of certain professionals, such as those working in hostess clubs, of engaging in sexual relations with some of their best clients as a means to maintain their patronage. Some courts consider that *makura eigyō* is covered by the protection granted to sex workers[65] while others consider these individuals as infringing upon the peace of the household (*kon'in kyōdo seikatsu no heiwa*).[66] This exception does not extend to *rikon isha-ryō* as the victim-spouse can still sue for damages provided the criteria are met. Courts, however, will allow the defendant spouse to argue that the marriage had already broken down, thus barring the claim for damages.[67]

The liability of spouses has also been the subject of controversy. The Supreme Court has ruled that since adultery is a consensual act the adulterous spouse is jointly liable under Art. 719 para. 1 CivC[68] and should also shoulder a part of the burden.[69] Nevertheless, the victim-spouse can decide to sue only the lover and still recover damages.[70] Nevertheless, the courts will consider any amount paid as *kōi isha-ryō* when determining damages in the case of a divorce.[71] However, since there are very few limits to the amount a judge can grant as *isha-ryō*, some lower courts will consider damages paid by the culpable spouse when determining the amount for *futei isha-ryō*.[72]

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64 Tōkyō District Court, 14 April 2014, Hanrei Taimusu 1411 (2015) 312 (2014WL JPCA04147001).

65 Tōkyō District Court, 14 April 2014, Hanrei Taimusu 1411 (2015) 312 (2014WL JPCA04147001).

66 Tōkyō District Court, 31 January 2018 (2018WLJPCA01318032).

67 Tōkyō District Court, 28 March 2016 (2016WLJPCA03288018).

68 Article 719:

(1) If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.

(2) The provisions of the preceding paragraph shall apply to any person who incited or was an accessory to the perpetrator, by deeming him/her to be one of the joint tortfeasors.

69 Supreme Court, 30 March 1979, Minshū 33, 303 (1979WLJPCA03300003).

70 Tōkyō District Court, 25 July 2007 (2007WLJPCA07258028). Tōkyō District Court, 8 February 2007 (2007WLJPCA02088006).

71 Tōkyō District Court, 21 February 2007 (2007WLJPCA02218016).

72 Tōkyō District Court, 28 October 2016 (2016WLJPCA10288023).

An innocent lover might have recourse against the culpable spouse. In a 1940 case in which the spouses were living separately and preparing for divorce while seeing other people, the Imperial Court ruled that the husband's new partner was barred from pursuing damages against him because she was aware that he was married.[73] However, in a 1969 case, the Supreme Court found for the plaintiff since she had been deceived into initiating the affair by her lover, who lied to her and led her into thinking that he was single, thus justifying her claim.[74] In practice, however, these types of cases are rare, as the lover would rather see the affair end quietly than expose himself/herself to a lawsuit from the victim-spouse.

IV. Liability of Third Parties for the Divorce

Claims for *rikon isha-ryō* and *futei isha-ryō* share certain commonalities. Firstly, both aim to compensate a victim-spouse for the emotional distress caused by the disturbance of his or her marriage. Furthermore, both claims utilize the rules of delictual liability to achieve this end. By contrast, the main difference between the two claims lies in who is liable. While *rikon isha-ryō* can only be brought against a spouse, *futei isha-ryō* can be brought against both the spouse and the lover. Furthermore, the statute of limitations for the action, or rather the point from which the time begins to run, is not the same. While both claims will extinguish after three years, the period begins from the day the divorce was finalized for *rikon isha-ryō.* By contrast, in the case of *futei isha-ryō,* the period will begin to run the moment the victim-spouse knew or should have known of the affair.[75] Considering that consenting to the affair is a defense against *futei isha-ryō,* a three-year period seems reasonable, as it can be inferred that the spouse assented to the affair if they did not oppose it during that time.

However, since the differences are rather technical, there is room to argue that these are not actually two claims, but one claim used in two cases. In particular, since the courts already consider that the culpable spouse and lover are jointly liable in the *futei isha-ryō,* one could argue that the same principle can be applied to cases of *rikon isha-ryō.* In 2019, the Supreme Court made a ruling that cemented the difference between these two claims but which also raises some questions for the future.[76]

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73 Imperial Court, 6 July 1940, Dai-minshū 19, 1142 (1940WLJPCA07066002).

74 Supreme Court, 26 September 1969, Case No. sho 42 (o) 790, Minshū 23-9-1727 (1969WLJPCA09260001).

75 Supreme Court, 20 January 1994, Minshū 171, 1 (1994WLJPCA01200001).

76 Supreme Court, 19 February 2019, Minshū 73, 187 (2019WLJPCA02199001).

The details of the case are as follows: The plaintiff (husband) and his spouse were married in 1994; however, their relation grew cold as a result of the plaintiff's work. In 2008, the plaintiff's wife began working at the same company as the defendant and shortly after began an affair, which continued until 2009 when the plaintiff confronted his wife about it. After living separated for close to a year with over 6 months of no communication, the couple finalized their divorce in 2015. The plaintiff then proceeded to sue the former lover under the argument that the affair was the main cause his marriage had ended.

In finding for the plaintiff, both the trial court and the appellate court ruled that the defendant was liable for having disrupted the relationship between spouses, which in turn led to the divorce. The defendant then petitioned to the Supreme Court for review of the appellate court's decision. In particular, the defendant asked the Supreme Court to answer two questions of law: first, whether a third party could be held liable for the divorce; and second, in the event the defendant could be held liable for the divorce of the plaintiff, at which point the statute of limitation begins to run.

The Supreme Court decided the issue in early 2019. In a very succinct decision, the Court found for the petitioner, pointing out that under the facts of the case, the affair could not be considered as the main reason for the divorce. The Court upheld the previous case law that spouses have a claim against each other for the emotional distress caused by the divorce. However, it also noted that a divorce is a legal act that materializes through the will of the parties; thus a third party could not be held liable for the divorce based on the mere fact that his or her conduct could have contributed to the breakdown of the marriage. Since the defendant was found not liable, the Court did not address the second question regarding the statute of limitations. However, the Court did not reject the idea that a third party could be held liable if his or her actions led to a divorce. Rather, the Court appears to have created a new right of action. Specifically, the court said that a third party could be held liable if his or her main intention was to cause the couple to divorce and if the third party took unjustifiable actions towards achieving this goal.

While the ruling itself is not very long, and the facts of the case not that important in the grand scheme of Japanese delictual liability law, this decision is important for two reasons. First, it is the first decision that makes a clear distinction between *rikon isha-ryō* and *futei isha-ryō*. Since in some cases the divorce was preceded by an affair, there was some confusion as to whether a defendant was found liable for the affair or the divorce itself. The facts of these cases allowed the Court to establish a clear boundary.

Second, and in our opinion, the most important part of the ruling is the fact that the Court seems to have created a new claim. Under this decision, victim-spouses can sue a third party if the following three criteria are met:

(1) An intent to cause the divorce; (2) Unjustifiable intervention; (3) The divorce is completed.

The first criterion, intent to cause the divorce, appears to contradict the wording of the ruling. As the Court recognized, divorce can be completed only through the will of the spouses and thus cannot be performed by a third party alone. Therefore, regardless of how much a third party might want the couple to divorce, he or she would require the cooperation of at least one of the spouses. Furthermore, while the facts of the case centered around an adulterous affair, the Court did not expressly limit the claims to sexual encounters. Hence, any third party whose conduct meets the standard set by the Court is, in theory at least, liable for the divorce. For example, under the wording of the ruling, parents who opposed the marriage could be held liable for the divorce if their action met all three criteria. In addition, there is also the question as to whether any attenuating circumstances should be considered. There are certain cases in which a third party might, justifiably, contribute to the divorce, such as in domestic violence cases, particularly those in which the victim is unable to recognize his or her situation or ask for help.

Even though the Supreme Court decision is very recent, the new standard introduced by the Court has already been put to the test. In the aforementioned case regarding the rights of same-sex couples,[77] the lower court rejected the claim brought against the lover under the argument that the defendant, knowing that the plaintiff and the co-defendant were a lesbian couple, and concluding that same-sex marriage is not recognized under Japanese law, was not aware of any duties they might have against the other. Therefore, the court continued, defendant B's conduct did not meet the standard to be considered intentional. The standard for intent is also not defined.

While the wording of the ruling requires that the defendant's conduct must be intentional, it is not clear whether gross negligence is also included. For example, performing extreme overtime work is a recognized phenomenon in Japan, to the point that the term *karōshi* was coined to define it. Would superiors, or even companies, be liable for "requesting" that a worker work overtime to the degree it affects his or her marriage? While the superior's intention might not be to end the employee's marriage, it can also be argued that in some cases the breakdown of the marriage is foreseeable.

At this point in time, the second criterion, unjustifiable intervention, can be considered the deciding factor in determining liability. Nevertheless, the Court did not establish a standard under which an action can be judged unjustifiable. Barring extreme cases, one-time acts will quite probably also not be enough to establish liability in most cases. Moreover, it seems appropriate to conclude that words alone would not meet the standard, what-

77 Utsunomiya District Court, 18 September 2019 (2019WLJPCA09189006).

ever it might end up being, so as to be considered unjustifiable. Examples abound of in-laws or friends commenting on the behavior of a spouse; however, it would seem extreme to consider such words as the main reason for a divorce, even if they were to be true.

There is also the issue of proving that the defendant's conduct was the cause of the divorce. As in the case of *futei isha-ryō,* any indication that the marriage was already strained will most likely bar the claim. However, it is not clear whether the third party would be liable if his or her conduct served as a mere catalyst which led to further complications, though the Supreme Court reasoning seems to prevent this. In addition, it is not clear if the spouses have any obligation to try to mend their differences. For example, a couple might decide to separate after an affair, only for the adulterous spouse and the lover to break up afterward. Even if the lover had the initial intention to break up the marriage, would he or she still be liable if the spouses never made up and lived separately for a long period?

Moreover, would the rules of joint liability still apply in these cases? It can be argued that in cases in which one spouse is also liable for the same conduct (e.g., adultery), the same rules should apply. However, since the Court did not limit the claim to sexual encounters, it is not evident how these rules would apply to conduct that might cause a divorce in which there is no culpable spouse, such as the overtime work scenario discussed above.

Finally, and perhaps more importantly, there is the issue of the statute of limitations. Unfortunately, the Court declined to rule on this matter since the defendant was found not liable. However, while *rikon isha-ryō* and *futei isha-ryō* both have the same three-year period before the claim is barred, the point from which time begins to run is different. Since actual divorce is required for the third party to be held liable, it seems appropriate to conclude that the statute of limitations should commence the day the divorce was finalized, in the same manner as with *rikon isha-ryō*. Nevertheless, as the Supreme Court ruling shows, while the actions of a third party might influence the relationship between spouses, or in some cases worsen it, divorce is by no means the direct result of the unlawful interference. Indeed, as case law on *futei isha-ryō* shows, spouses might overcome their differences and recover from an affair. If the courts were to allow the prescription to run from the day of the divorce, it could theoretically lead to defendants being held liable for acts that might have ended years before the divorce was finalized.

V. CONCLUSION

Claims for *rikon isha-ryō* and *futei isha-ryō* are a central part of Japanese law, both at the technical level and in daily life. Their importance is evidenced by the fact that these rights have been created and developed via case

law, to the extent that some lawyers specialize only in these cases. Indeed, while legal professionals in other jurisdictions might claim to be divorce specialists, Japanese law firms are as likely to boast about their ability to secure awards for *isha-ryō*.

Isha-ryō also reflect a set of social norms and expectations that go beyond the letter of the law. The 2019 Supreme Court case appears to represent a new development for these idiosyncrasies, one that goes against modern trends in comparative law and asserts the "Japanese spirit". Indeed, the fact that lower courts were testing the new standard less than seven months after it was introduced shows just how much influence and importance *isha-ryō* hold in the Japanese mind.

SUMMARY

Divorce is one of the most emotional types of litigation, and it is not rare for spouses to pursue every available remedy. Most jurisdictions recognize some economic remedy in the event one spouse is responsible for the marriage's breakdown. Japan allows for a type of compensation known as "rikon isha-ryō", which is not based on family law provisions but rather was developed under the rules of delictual liability as established under article Art. 709 CivC.

In addition, Japan is unique within civil law jurisdictions as it will also recognize a claim against third parties if their conduct resulted in the deterioration of the marriage, usually in a case of adultery. Known as "futei kōi isha-ryō" or "futei isha-ryō", the Supreme Court first recognized such claims in 1979. Since then, the courts have developed standards that range from extenuating circumstances to liquidation of damages.

Traditionally, the main difference between "rikon isha-ryō" and "futei isha-ryō" is that the former is a claim against a spouse, while the latter can be brought against both the spouse or a lover. The period for the statute of limitations also differs between these two claims.

In 2019, the Supreme Court made a ruling that cemented the difference between these two claims but which raises some questions about who can be found liable for "rikon isha-ryō".

ZUSAMMENFASSUNG

Scheidungen zählen zu den emotionalsten Arten von Gerichtsverfahren und die Ehegatten greifen oft zu jedem nur möglichen Rechtsmittel. Die meisten Rechtsordnungen kennen eine wirtschaftliche Kompensation, wenn einer der Ehegatten für das Scheitern der Ehe verantwortlich ist. In Japan ist für diese

Fälle ein als „rikon isha-ryō" bezeichnete vermögensrechtlicher Ausgleich anerkannt, der sich allerdings nicht aus familienrechtlichen Vorschriften ableitet, sondern als deliktsrechte Schadensersatzpflicht gemäß Art. 709 ZG entwickelt wurde.

Eine weitere japanische Besonderheit ist, dass ein solcher Anspruch auch gegenüber Dritten gewährt werden kann, wenn deren Verhalten, meist im Zusammenhang mit einem Ehebruch, zum Scheitern der Ehe geführt hat. Dies dürfte im Bereich des Civil Law einmalig sein. Unter der Bezeichnung „futei kōi isha-ryō" oder „futei isha-ryō" hat der Oberste Gerichtshof erstmals im Jahr 1979 einen solchen Schadensersatzanspruch gegen einen Dritten anerkannt. Nachfolgend haben die Instanzgerichte dessen Voraussetzung und Umfang spezifiziert.

Der wesentliche Unterschied zwischen „rikon isha-ryō" und „futei isha-ryō" liegt nach bisheriger Ansicht darin, dass ersterer ein Anspruch gegen den schuldhaften Ehegatten ist, während der zweite sich sowohl gegen den betreffenden Ehegatten als auch gegen den beteiligte Dritten richten kann. Beide Ansprüche unterliegen ferner unterschiedlichen Verjährungsfristen.

Im Jahr 2019 hat der Oberste Gerichtshof den grundlegenden Unterschied zwischen diesen beiden Arten des Schadensersatzanspruches bestätigt, aber zugleich die Frage aufgeworfen, wer eigentlich für das Scheitern der Ehe im Rahmen eines „rikon isha-ryō" als Verantwortlicher anzusehen sei.

(Die Redaktion)