

Divorce Mediation and the Debate on Japanese Litigiousness

Asian Studies 120 EC, specialization in Japanese Studies – Master Thesis



Universiteit Leiden

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Number of words: 15,617 (including bibliography, excluding the appendix)
Date of submission: 24-04-2020

Introduction

In Japan, where the divorce rates have shown an upward trend since the late 1960s (Statistics Bureau 2017), there are three legal ways in which a spouse can get divorced: through negotiation or mutual consent (*kyōgi rikon*), mediation (*chōtei rikon*), and adjudication or litigation (*saiban rikon*). Most of the divorces are granted through mutual consent, namely 90 percent of all divorces in Japan. This is a relatively easy process, as spouses can reach mutual consent privately and afterwards submit a divorce registration form, stamped by the two of them and two witnesses, to a government office. If such an agreement cannot be reached by the parties themselves, or if one of the spouses refuses to divorce, the spouse who wants to divorce has to ask the family court to mediate the dispute. Mediated divorces comprise around nine percent of the total amount of divorces (West 2011, 91; Fuess 2004, 161).

Mediation, which is not limited to cases concerning family relations but for instance also deals with house lease cases, is part of what is usually called ‘alternative dispute resolution’ (ADR). Calling it ‘alternative’ may be misleading however, as this type of dispute resolution is very common in Japan; even more so than the ‘regular’ route of litigation (Feldman 2014, 147). While it has been argued that Japanese are averse to formal litigation and have a cultural preference for informal ways of resolving disputes in order to maintain the social harmony (Idota 1985, 51; Nishikawa 2001, 365), others have attributed the popularity of ADR to institutional and structural factors (Haley 1978, 380-381); being cheaper and quicker than formal litigation. In other words, this ‘preference’ for ADR relates strongly to the debate of Japanese litigiousness; whether the relatively low number of lawsuits (in comparison to the U.S. for example) means that Japanese are ‘non-litigious’ and the various explanations for this phenomenon.

Whether or not it is a correct explanation behind Japan’s low litigation rates, it is interesting to see how patriarchal family values do seem to be embedded in the practice of

ADR, specifically within family conciliation. For all family dispute cases, mediation or conciliation is compulsory in Japan. As mentioned above, the same is true for all contested divorce cases, which first have to be submitted to a family court for mediation before one of the spouses can be sued in court. This is because family matters are considered to be something private, and confrontation (in trial) is seen as undesirable for parties in family problems (Nishikawa 2001, 365). Consensus is considered to be important, in order to preserve relationships between family. Mediators are lay people, representing ‘the common wisdom of society’. They must have high moral standards, experience, integrity and be over forty years of age. They usually are respected people within their local community. As one can imagine however, in a changing society, views on family values or relationships can be very different between generations. The mediators are significantly older than the wives or husbands trying to file for divorce for example. Family mediators therefore, have been criticized for imposing moral values on women and for being negative towards divorce (Murayama 2010, 149). They are nevertheless indispensable to the judiciary, as they reduce the courts’ workload.

As mediation and/or conciliation are practically forced upon Japanese in case of contested family disputes and divorce cases, I want to examine how divorce mediation is actually experienced in Japan and how this relates to the debate on Japanese litigiousness. In other words, in this thesis I will attempt to answer the question: “how do participants in divorce mediation experience this system in Japan?” Do they prefer the way the system is now? Or would they have rather been able to go directly to court? This can furthermore be related to access to justice; “...the ability to receive, mobilize for, and be informed about social practices and procedures that reinforce certain ideals of accountability, fairness, equality, civil liberties, and human rights.” Justice in this case being a concept that “...presumes that there is at least a minimally agreed upon moral and/or legal code that

affords the opportunity to seek redress when individuals or groups have been victimized” (Mains 2009, 6). Looking at Japan’s divorce mediation in this light, i.e. from an access to justice perspective, allows us to question whether or not obliging someone to go through mediation before being able to go to court should be seen as a barrier to accessing ‘justice’, or perhaps the opposite, as this type of ADR could potentially alleviate major issues to access to justice such as cost and delay (Wayne 2014, 12).

I will first go further into the relevance and the methodology of my research, before discussing the historical background of divorce (mediation) in Japan, providing a literature review on the theories concerning Japanese litigiousness as well as on what has already been written on divorce mediation, and discussing the actual views of the various actors in the mediation process. Finally, I will answer my research question in the conclusion and provide a discussion on as to what are some of the limitations of my research.

1. Relevance and Methodology

Relevance: filling the gap

As stated in the introduction, in this thesis I will research how divorce mediation is experienced in Japan and how this relates to the debate on Japanese litigiousness. I have chosen specifically for the translation of *rikon chotei* as divorce mediation, as opposed to divorce conciliation, because I agree with Bryant (1984, 33) who argued that using ‘conciliation’ seems to imply conciliating in order to reconcile, whereas mediation is a more neutral term. While literature on ADR in Japan in general and on divorce mediation does exist, there is not much, as ADR usually takes place behind closed doors (Bryant 1984, 20-21). There has been written especially little on the actual experiences of those who have participated in family or divorce mediation in Japan. For example, although Alexy’s (2008) dissertation is an ethnographic study of experiences of divorce in Japan, she does not address how participants experience divorce *mediation*. In other words, while there has been quantitative research (surveys) on this topic, and qualitative research about how divorce or loss of custody affects women, the participants’ stories about their experiences with divorce mediation have not been researched enough.

A PhD dissertation written in 1984 does touch upon very similar topics to this thesis’ research, but as that was written already 36 years ago, I am able to update some of her results by presenting more recent changes. The writer of that dissertation herself however, could not research the clients’ or participants’ opinions in detail as she was directly involved in the court by observing cases, making it unclear whether what was mentioned to her by clients was in order to get their message through to the mediators or the judge (Bryant 1984, 361-362). Bryant wrote three more articles (in 1984, 1991, and 1995 respectively) about this topic, all with a slightly different focus; about the legal obstacles to marital dissolution in Japan, about the operation of the family registration system in Japan, and about family models/ideals as portrayed by the family court system and laws. Again however, since they all are quite dated

works, my research could still be a relevant contribution to the field as it provides a sense of the current situation.

I furthermore hope to bring a new focus to this particular topic, by not only looking at the family values that are apparent in this type of ADR, but also at what the participants' stories imply for the existing image of Japanese as being reluctant litigants and whether any existing explanation for this holds true. The access-to-justice perspective, could also help with finding out whether Japanese are really reluctant litigants, or whether the barriers to accessing justice (in contested divorce cases) are just too high. Thus, by researching the participants' experiences, I hope to fill the currently existing gap, while also contributing to the larger ongoing debate mentioned above on Japanese litigiousness.

Methodology: taking a qualitative approach

As I spent around two years in Tokyo and was able to do field research, I had the opportunity to do qualitative research and conduct interviews. I believed this to be the best method to acquire the data necessary for my research, especially as I was aiming to find out the actual experiences of people participating in the divorce mediation process. Seeing as 'divorce by mediation' only constitutes nine percent of all divorces in Japan, and as divorce is a sensitive topic, it was difficult to know beforehand who would be willing to talk to me. Access to interviewees indeed turned out to be an obstacle, which is why I decided to use purposive sampling. This way of sampling is common when the target group is very specific and hard to reach, and comes down to using various methods to locate as many people as possible without limiting oneself to a particular age, sex, etcetera (Seidman 2006, 274). Part of this method is trying to reach possible interviewees by contacting social groups which they might be part of or local experts. I contacted divorce lawyers' offices in Tokyo and the NGO FPIC (Family Problems Information Center) for example, and both turned out to be valuable resources. I joined lectures on divorce-related topics, and sometimes acquaintances happened to know

others who had been through the process. Since women are usually the ones who initiate mediated divorce, it is also interesting to be able to compare their views on mediation with the views of the men who were thus made to partake in mediation (West 2011, 95). Interviewing not only the direct participants in the process, but also the ‘indirect’ participants, such as divorce lawyers and mediators furthermore, gave me valuable insights which allow me to provide a more balanced view of Japan’s divorce mediation system. Depending on whether the interviewee was a direct participant in the process, or a lawyer or mediator, I used different presets of questions to start the interviews off, but I mostly tried to let my questions follow from what the participants told me.

In order to analyze the data that I gathered this way, I made use of coding or labeling, which is a way of identifying recurrent patterns and organizing raw data in conceptual categories. In qualitative research, this is a process that already takes place during the collection of the data, but gradually takes a more definite form when reviewing the data on different occasions (Neuman 2009, 479). I managed to interview a total of 11 people, the results and analysis of which I will discuss in my fourth chapter.

The reason why I think qualitative research, in-depth interviews in particular, is an adequate way to go about answering my research question, is because I am interested in people’s stories and experiences. Divorce is after all, a very personal experience, even for those who have been through the exact same legal procedures (Bryant 1984, 2). The purpose of interviewing the participants, mediators and lawyers, is to understand their lived experience, and to understand the meaning they give that experience. I am interested in gaining access to their ‘subjective understanding’; the meaning they themselves give to their own behavior, thereby allowing me to put that behavior into context (Seidman 2006, 9-10). In other words, instead of observing someone’s actions and then assuming the reason behind that

behavior, through interviewing one could find out what meaning that person him or herself gives to their behavior (e.g. to getting a lawyer or not, initiating mediated divorce, etcetera).

In addition to qualitative research, I also conducted literature research to be able to give a literature review of the theories relevant to the debate of Japanese litigiousness for my theoretical framework in the third chapter. I will furthermore look at Japan's laws pertaining to divorce (mediation) as well, as this would be another primary source besides the interviews. Lastly, I will make use of literature research to provide a historical background of how divorce mediation came to exist in its current shape, and to find out how family values, opinions on and the practice of divorce and marriage itself in Japan have changed over time.

2. Historical background of divorce (mediation) in Japan and its current system

From Tokugawa to the American Occupation: continued preference for consensus

During the Tokugawa period (1603-1868) there already existed different types of divorce mediation, such as in the Tokeiji Temple (also known as the Enkiri-dera or Divorce Temple) in Kamakura. This particular type of mediation did not take place between husband and wife however, but rather between the wife's parents and the husband, with the Buddhist temple acting as an intermediary. The Tokeiji was one of just two convents in all of Japan that offered a state-sanctioned way of arranging divorces initiated by women, at a time when the right to initiate a divorce belonged to the husbands alone (Morrell 2006, 115-117). Women then were also not in the position to refuse a request to divorce from their husbands (Fuess 2004, 19). While usually the abbess of the temple tried to convince the reluctant husband to sign a letter of separation, sometimes she would mediate reconciliation (Morrell 2006, 133). The Tokeiji had a so-called temple code outlining its purpose of helping women who wanted to divorce abusive husbands. When a woman got to the temple, they would listen and see if she could be persuaded to return. If not, they reported the matter to her husband and officials, and recommended the husband to produce a letter of divorce. If such a letter would not be produced, the woman could then serve up to 24 months at the temple to get a divorce regardless, before she was released to her parents (Morrell 2006, 87-89).

This method of obtaining a divorce however, would only be worthwhile if the husband was unpersuadable in any other way (not by the go-between who helped arrange the marriage, her relatives, or herself) and occurred quite rarely. A similar way for women to divorce was to return to their family for more than three years, after which a husband's request to recover his wife would be rejected. The Tokugawa shogunate and domain authorities were not really interested in controlling divorce and there were no national laws regulating it, nor were official institutions required to obtain a divorce. According to the shogunate's administrative

guidelines of 1668, a husband could divorce his wife on the condition that he returned her dowry. Spouses and their families usually reached a settlement themselves, without outside interference. In cases of conflict, local communities each handled it according to their own customary practices. Seldom would disputes be brought to the village or town authorities or, more exceptionally, get to the shogunate's magistrates. Even when it did get to the magistrates, their approach was to support private settlement and avoid a judgment. Participants in divorce cases could even be punished for bothering the magistracy with their dispute instead of first negotiating privately (Fuess 2004, 39). Divorce itself was common and did not have the stigma that was prevalent in Christian countries, as during this period around 6 to 40% of marriages were dissolved and one could remarry as soon as the husband issued a divorce notice or letter (Fuess 2004, 18-21, 29).

The inability of women to initiate divorce, whereas the husbands and senior family members of the household could, is often said to be rooted in Confucianism or the Confucian gender ideology which enjoyed official government support (Morrell 2006, 85). Confucianism can be seen as a social model providing 'philosophical underpinnings to support the society', with a great emphasis on filial piety, duty and social harmony (Pardieck 1997, 35; Funken 2003, 6). This way of thinking is also reflected in 'The Greater Learning for Women', a moral instruction written in the Edo period meant for women by a Confucian scholar, which mentions for example 'a woman's disobedience to her father-in-law or mother-in-law' as a reason for divorce to preserve family harmony (Fuess, 19-20).

After the Meiji Restoration in 1868, the new central government introduced universal compulsory education, abolished class restrictions on professions, and allowed marriage between people from different localities or classes. It also legally defined marriage as an act of registration according to the Family Registration Law of 1871 (Ishida 2018, 61; Fuess, 48). The government was trying to implement a modern legal system as soon as possible in order

to abolish extraterritoriality and obtain equal trade treaties; drafting a modern civil code was therefore a priority (Murayama 2010, 144; Bryant 1984, 39). Since the government hoped to convince Western countries of its modernity and legal system, they naturally looked abroad for inspiration. In addition however, commissioners were sent out to explore local customs in 1873. An important change already occurred in 1873, when new Council of State Decrees allowed wives and their families the initiative to sue husbands for divorce in court. This was also the year the newly established Ministry of Justice finished a draft of a Japanese civil code. The important foreign model for Japan was the Napoleonic Code (1804) which originated from France. Unlike other European countries at the time, this particular code allowed divorce and even more befittingly, it offered both consensual divorce and one-sided divorce on specific grounds. This allowed Japan to codify what was custom, while referring to French civil code, regardless of the fact that the French themselves had later on eliminated these divorce laws. The draft of 1873 differed from the Napoleonic Code in an important aspect however, as it permitted consensual divorce by simple registration without a need for judicial involvement (Fuess, 100-106).

The government eventually decided upon a Civil Code in 1898 similar to this draft, which implemented the dual divorce system they found in the Napoleonic Code, but made sure that the role of the courts was restricted only to contested divorce cases. While mutual consent divorces allowed for no-fault divorces, court divorces could only be done on the basis of 10 specific fault grounds. During the drafting process the government had established a code review committee, which examined the provisions' paragraphs in 1896. Some remarks from these examinations are worth mentioning to understand why the government took the approach it did. One of the committee's members, Masaaki Tomii, argued for example that divorce should be allowed, as forcing spouses to remain in a nonfunctional marriage through law would render marriage based on feelings of harmony meaningless. Since divorce had no

religious opposition in Japan furthermore, unlike the Western nations which promoted judicial divorce, he rejected foreign models for Japanese law. Allowing consensual divorce by registration had other advantages as well, he continued, as it does not broadcast the family's indecencies but kept them private. Judicial divorce would not match with the 'distinctively beautiful manners and customs of our country' (Fuess, 110-111).

The family structure was also topic of discussion in drafting the Civil Code: whether it should reflect the Western or the traditional Japanese structure. There was a conflict between those who were in favor of the Western recognition of individual rights and obligations between relatives, with the married couple as the center of the family, and those who wished for the head of the household to retain authority and a male filial line as the family's center. A middle ground was found, which preserved the head's authority as much as possible, while making it look like they adopted European laws (Bryant 1984, 40; Murayama 2010, 145). This patriarchalism could also be seen in some of the grounds now set for a judicial divorce, such as mistreating the other spouse's lineal ascendants (Bryant, 43; Fuess, 147).

The Meiji Civil Code repeated the Family Registration Law of 1871, in defining marriage as an act of registration (art. 775). Divorce also was effective with the act of registration (art. 810), with the consent of both spouses necessary (art. 808). The formalities for registering divorce were the same as for marriage; by giving a notification signed by the spouses and two witnesses (art. 810). Between 1898 and 1940, 99% of the divorces became effective this way. Judicial (contested) divorces in other words, consisted of just 1% in that period (Fuess, 125-128). Foreign criticism of Japan's comparatively high divorce rate, and the wish to let the civil code conform more with Japan's 'virtuous ways and beautiful customs' led to the announcement of Prime Minister Kei Hara to institute an expert committee in 1919. Seeing as the usage of courts had proven to be unpopular, the committee argued that a new institution was necessary to provide mediation for family disputes. This 'family court' could

be private and provide warmth, instead of coldly having to claim one's right in public court. Litigating did not suit Japanese family values, so they recommended establishing 'a special system to solve them [family disputes] amicably with compassion and based on morality (Fuess, 130-131; Haley 1978, 373-374; Pardieck 1997, 31).

These recommended civil code changes were nevertheless blocked in the Diet by politicians, among other reasons because there was simply not enough money available to establish the planned 300 family courts throughout the country. The scheme was partly realized with the enactment of the Family Conciliation Law in 1939, that provided an optional conciliation procedure to assist family procedures (Murayama 2010, 145-146; Haley, 373). Complete legislative reform did not occur until the American Occupation (1945-1952), with the new constitution of May 1947 reordering for example the earlier much-debated family structure. Instead of the importance being on the 'house' or *ie* in structuring family relations, the married couple now became the center of the family, as article 24 stated that marriage is to be based on mutual consent of the sexes and that 'laws shall be enacted... [with regards to] divorce and other matters pertaining to marriage and the family, from the standpoint of individual dignity and the essential equality of the sexes' (Fuess, 146; Murayama 146-147). The New Civil Code that became effective in 1948 also had been revised along these lines and replaced the previous Meiji Civil Code of 1898. The move away from the emphasis on the house, led to the elimination of several grounds for judicial divorce, such as the previously discussed mistreatment of lineal ascendants. Women now became able to divorce husbands on the basis of adultery, which previously only men could (Fuess, 147; Pardieck, 32). Important to realize is the strong continuity of the legal framework concerning divorce, as the New Civil Code maintained the dual-system of consensual and judicial divorce. The formalities for a consensual divorce did not really change either, as it only required informing officials at a local government office of the divorce (in writing or orally). Fear of fraudulent divorce, as

there was no need to attend in person, prompted the government to give spouses the opportunity to let a local office know that they wished to remain married in case a divorce registration was issued (Fuess, 149).

Although the Family Conciliation Law had already instituted an optional conciliation procedure in 1939, the obligatory mediation as a precondition to get a judicial divorce that is still in place today, was established with the enactment of the Law for the Determination of Family Affairs in 1947 (Funken 2003, 7-8). The Family Court, first discussed in 1919, was created in 1949 as the institution specialized in family matters and became the appointed place to accommodate the mediation. All family dispute cases now first had to go through mediation by a committee consisting of two lay commissioners (with one female member) and a judge. Since it concerned resolving family disputes, it was considered to be appropriate that lay mediators were people who were respected in their local communities, and had ‘good morality’ (Murayama 2010, 146-147). This is similar to the fact that go-betweens during the Tokugawa period, who both helped arrange marriages as well as negotiate and settle divorces, were people with recognized social standing (Fuess 2003, 39). All in all, while there were important developments such as in terms of gender equality, it is remarkable to see how much of the divorce procedures have stayed the same over time, especially taking the marginal role of the courts in divorce into account. From the second half of the twentieth century up until now, almost 90% of the divorces were completed through the consensual, or divorce-by-agreement procedure, meaning that there was no judicial institution involved (Fuess, 149; Harada 2019, 77).

A layout of the current system

Now that we have seen how divorce (mediation) took place historically, and that the majority of divorces does not involve any courts, what exactly then are the current procedures regarding contested divorce cases? In 2013, the Domestic Relations Case Procedure Act,

replaced the Law for the Determination of Family Affairs of 1947. Procedures mainly stayed the same, but some revisions were implemented to make the system easier to use for participants, such as the opportunity to conduct proceedings through a telephone conversation or videocall in case one lives in a remote place (article 54; Akitake 2018, 14-15). The new act restated the previous law's 'conciliation first principle' in article 257 (1): "A person who intends to file an action on a case where a conciliation may be possible pursuant to the provision of article 244 must first file a petition for conciliation of domestic relations with a family court". In other words, prior to litigation, mediation is mandatory for family disputes. Contrary to litigation, and even though it also takes place in (family) court, mediation for family disputes takes place in private.

As mentioned above, the mediation committee consists of a judge and two mediators (article 248), one of which female. The judge however, oversees many cases at the same time, and is therefore mostly absent during the proceedings except for the first and last session (Harada 2019, 80). The lay mediators who will work as part-time court officials are appointed by and according to the rules of the Supreme Court (article 249). These rules state that they must be selected from people between 40 and 70 years of age, who have specialized knowledge and skills to resolve family disputes, and/or are knowledgeable of and have rich experience with social situations (who hold a high social standing), and/or hold a qualification of attorney at law. They are appointed to serve for two years, after which it is possible to renew the appointment (The Civil Affairs and Family Affairs Commissioners Rules; Akitake 2018, 23-24). As of 2019, there are a total of 11,587 family court mediators, 67.4% of whom are in their 60s. Since the mediation sessions take place during the day only on weekdays, it comes to no surprise that most (36%) mediators are without active employment, likely being retired or homemakers (Supreme Court of Japan 2019, 23). The remuneration for mediators is quite low, which is why the position could be seen as a kind of volunteer with social prestige.

Once the newly appointed mediators complete a short training period at the family court they serve at, they are assigned to a case. Local mediator associations and the family courts provide training sessions each year, teaching basic knowledge necessary for family dispute resolution, but attendance is not required (Harada 2019, 79-80).

If one wants to apply for divorce mediation, they can do so through mail or in person, by filling out a form. The application for and mediation proceedings themselves cost a mere 1200 yen (about 11 dollars) making it a comparatively cheap endeavor (Akitake 2018, 53-54). Although hiring a lawyer would increase the burden for the applicant, it is not necessary nor the norm, as only 43.9% did so in 2016 (Harada 2019, 79). This means that it is not uncommon for only one of the two participants to have a lawyer. Once a date has been set by the court (usually around a month after the application), the applicant and other party both receive a notice with the time and place of the first session. The spouse who did not apply for the mediation also receives a copy of the applicant's original application (article 67). Although it differs case by case, in general the mediation proceedings take around 5 or 6 sessions (Harada 2019, 80). Considering the fact that sessions have about a month between them, divorce mediation can soon take up at least half a year (Akitake 2018, 58). The participants both have to attend the sessions, but do not have to be in the same room at the same time (Minamikata 2005, 494). Each participant will talk alternately with the mediators, without having to speak to one another directly. This practice is deemed to help participants speak more openly, without having to worry about what the other party would think. Each party gets around 30 minutes with the mediators and then waits again until the other is finished; a process that lasts for a couple of hours until the session is finished (Akitake 2018, 49-53).

During the sessions, the parties try to figure out if they can agree not only on divorce, but also on how to divide their assets, who will get custody if they have children and how and

if there will be visitation, and so forth. When custody needs to be determined, or when the court sees it to be fit, a court investigation officer will be appointed. These officers can investigate by making home visits, observing, and by interviewing both the parties and the children (Harada 2019, 81). In order to determine what amount of alimony or child support is to be paid, mediators make use of a fixed formula. This table or formula is freely accessible to disputants on the website of the Supreme Court of Japan (Supreme Court of Japan 2019). Whether the agreements will be enforced is a different matter however, as there are no enforcement measures or a collection system in place (Harada 2019, 84). The law does not state much with regards to in what way custody or visitation is to be awarded. Article 766 (1) of the Civil Code provides simply that such matters should be discussed by divorcing parents according to the child's interest: 'the child's interests shall be considered with the highest priority' (Akitake 2018, 105). In reality however, both existing literature and jurisprudence show that the most common outcome in contested cases is for custody to be awarded to the mother, while the father pays child support and sees the child at most around once a month without overnight stay (Harada 2019, 85, 96). In 2018 for example, out of the total of 20,061 cases in which custody was determined by mediation or judgment, the mother was awarded custody 18,713 times, which is an overwhelming 93% of the cases. Statistics on visitation arrangements through mediation or judgement are published as well, showing that visitation once a month is the most common outcome with 44% of the cases. Visitation of twice a month or more consists of a mere 7.7% and in 29.6% of the cases the specifics of visitation arrangements are left to be determined later (Supreme Court of Japan 2018).

There are several ways in which the mediation proceedings can end; if both parties agree, if the court concludes that agreement is unlikely, if the applicant decides to withdraw, or if one party dies (Akitake 2018, 68). The applicant is allowed to withdraw at any point, but might not be allowed to litigate unless the court has concluded the proceedings as having

‘failed’ since no agreement was possible. The Domestic Relations Procedure Act states in article 268 that an agreement reached between parties through mediation, provided that a written statement is included, will have the same effect as a final and binding judgment. If there is no likelihood of any agreement to be reached between the parties, the mediation will be deemed ‘unsuccessful’ and closed accordingly (article 272). Usually, both parties attend the last session together, where they confirm the contents of the written statement of their (dis)agreement before the mediators and judge. In order to proceed to litigation in case of disagreement, one needs to have one written statement stating that the mediation proceedings have ended, and another stating that the mediation sessions were unsuccessful as proof (Akitake 2018, 86).

Having explained the divorce mediation system, the laws concerning it, and how it historically came to be in place, we have seen how a majority of people seems to prefer not using the judiciary at all with regards to divorce. Considering how the system does not allow instant litigation, and judicial divorce has to be according to specified grounds (as opposed to a no-fault divorce), the government seems to promote divorcing by consensus. In the following chapter, I will discuss different theories concerning (this lack of) Japanese litigiousness, which all try to answer why this preference take place, as well as describe how existing literature has assessed the divorce mediation system.

3. Literature Review

The debate on Japanese litigiousness

The debate surrounding the question as to why comparatively few choose to litigate in Japan, can hardly be called new (Ginsberg and Hoetker 2006, 31). Throughout the years, both foreign observers and Japanese researchers noticed these trends and have tried to find an answer to this supposed ‘reluctance’ of Japanese people to go to court. In this chapter, I will first explain the different theories that exist which attempt to provide an explanation of (the lack of) Japanese litigiousness, before describing how existing literature has assessed Japan’s divorce mediation system. Among the theories, roughly four groups have been identified: traditionalist (cultural) theory, revisionist theory, rationalist theory and political theory (informalism) (Funken 2003, 4; Port 1994, 662).

Traditionalist Theory

Still proving to be relevant today and perhaps one of the most important contributors to the debate on Japanese litigiousness is Takeyoshi Kawashima. He was one of the first scholars to attempt to formulate an argument concerning the topic in the 1960s, and regardless of whether one agrees with his argument or not, his work has influenced (both foreign and Japanese) socio-legal researchers and students alike (Feldman 2007, 58). The works discussing dispute resolution in Japan that followed, were often either paying homage to Kawashima’s work or consisted of a critical response; proving the ability of his works to incite the debate.

In his article ‘Dispute Resolution in Contemporary Japan’, Kawashima tries to explain the Japanese ‘tendency to settle or propose the use of some extrajudicial, informal procedure instead of litigation’. While he mentions this tendency is likely to be true for other societies as well, he emphasizes that it is particularly true for Japanese society. To first show that Japanese indeed do not litigate as much, Kawashima looks at statistics on disputes regarding land and leases during housing shortages after World War I and II, which show a preference

for mediation over litigating. The small number of lawyers relative to the population in Japan, he suggests moreover, can be seen as a low demand for their services as the Japanese public does not go to the courts as much as Western societies do. From April to September 1960, he conducted a survey on disputes surrounding traffic accidents with taxis and railroads. Here he finds that of the 145 traffic accidents involving a railroad that occurred, not a single one was brought to court (Kawashima 1963, 41-42).

Kawashima offers a variety of explanations of the lack of litigation he finds in his research. He mentions how litigating is costly, both in terms of time and financially, but argues that this is also the case in other countries and therefore cannot explain the Japanese public's specifically strong inclination to avoid it. He brings forth how possible damages awarded by courts (e.g. because of personal injury in traffic accidents) are exceptionally small, perhaps making litigation not worth it. The most decisive factor according to Kawashima however, is to be found in Japan's social-cultural background: Japanese people traditionally prefer extrajudicial means of settling disputes. By litigating one acknowledges the fact that there is a dispute, and the judicial decisions coming out of it will assign someone with (moral) fault, all of which could be avoided by informal settlement. Kawashima goes on to explain that this preference finds its roots in the traditional social groups and the patriarchal hierarchy within them. He characterizes the definition of the social roles with the term 'harmony' and explains that as harmony ought to be maintained, the expectation exists that disputes should not occur. In case it does, it must be solved in a way that the relationship is not endangered, such as by amicable negotiation or mediation. This attitude was reflected in contractual agreements before WWII, which did not assure a solution in case a dispute occurred, as then it would seem as though one expected that to happen (Kawashima, 45-46).

Kawashima sees these attitudes as being reflected in the judicial process itself as well, as even if one has resorted to a lawsuit there are plenty of opportunities to settle nonetheless,

with judges likely to be hesitant or expedite judicial decisions in favor of reconciliation. Judges furthermore seem to attach importance to maintaining the status quo, thereby letting unfair practices continue when it has become a *fait accompli*. Considering all these factors; a profitable outcome being unlikely, lawsuits being expensive, time-consuming, and the likely termination of a harmonious relationship, one must be really ‘pugnacious’ to decide to litigate (Kawashima, 49).

So what would lead the Japanese public to become more litigious? Since Kawashima viewed the hierarchical, harmonious social relationships as the main reason behind the reluctance to generate conflict, it is the weakening of these relationships that would lead litigation to increase. He predicted that modernization and industrialization would disrupt the traditional social structure, and values like deference to authority to change. He describes in his article that during times when these ‘traditional’ values threatened to change, the government sometimes intervened by instituting laws concerning mediation for example, but that in the end change would be inevitable (Feldman 2007, 55; Kawashima 1963, 59). While many who cite Kawashima only tend to bring forth his main, cultural argument, it is important not to ignore the nuances to his argument, since he named several other explanations behind the phenomenon as well.

Revisionist Theory

The pioneer of revisionist theory, John Owen Haley, is a famous critic of Kawashima. In his article ‘The Myth of the Reluctant Litigant’, Haley attempts to answer the question of whether the Japanese actually have an unusual (cultural) aversion of resorting to court, and if not, how one then would explain the relatively low litigation rate. If being litigious would simply refer to the number of suits filed per capita, Japan would be non-litigious compared to the United States, but be fairly litigious when looking at other countries. Haley therefore looks specifically at the issue of whether parties in Japan would settle because of a reluctance to

litigate, even if a more beneficial result might be gained by going to court. An examination of litigation rates from 1890 to 1974, leads Haley to conclude that this is not the case, as he saw a higher frequency before 1937 than in the more recent decades he examined (Haley 1978, 367). He denies Kawashima's claim that modernization would instigate an increase in litigation, as he finds that when the ratio of agricultural employment to the population lowers, litigation actually decreases as well (Haley, 385).

To explain where the lack of litigation originates from instead, he bases his answer mostly on the institutional incapacity of the Japanese judicial system. To that end he first reconsiders dispute resolution's 'paradigm process', in which parties typically move through stages of negotiating directly, through a third party (mediation), before finally turning to litigation. Moving to the next stage only occurs when parties cannot agree on a resolution in the preceding one. It is within this process that several factors behind a relative lack of litigation can be explained according to Haley. For example, if third party intervention is very effective, there would be no need to proceed to the litigation stage. Another factor is court access. If the public is not aware of going to court as being an option, or does not have adequate access to the courts, it does not come as a surprise that one would not think to litigate. An insufficient number of courts, judges, and lawyers furthermore, leading to high costs and delays, would render lawsuits an unrealistic enterprise as well. Yet another factor is the ability of courts in providing adequate relief. This comes down to whether the court is capable of providing remedies that fit the cases and has ways to enforce its judgments as well (Haley, 378-380).

Haley then goes on to assess the Japanese courts' effectiveness in terms of the criteria mentioned above. He finds that information, i.e. the public being aware of their options and possible outcomes, is not a particular problem in Japan. He states that evidence of institutional barriers is plenty however, and that the Japanese courts are strained to capacity. A reason for

this strain is the lack of judges. In 1969 for instance, there was only one judge to 56,391 persons and in 1974 judges each had a caseload of 1,708 cases. Proceedings can quickly take up years because of the delays, decreasing the frequency of litigation. Besides judges, there is a lack of lawyers as well, adding to the problem. The Japanese courts also fall short with regards to providing adequate relief. There is a limited range of available remedies and the reliance on voluntary compliance due to a lack of contempt power means that a court cannot enforce its judgments on its own. Considering these institutional factors, the prevalence of and necessary reliance on informal means to dispute resolution such as conciliation seem self-evident. Haley further mentions in his conclusion that by attributing the lack of litigation in Japan to cultural reasons, one justifies continuing the (unintended) barriers to an effective judicial system (Haley, 385-390).

It is interesting to see that the argument of the lack of lawyers is repeated, but reversed; for Kawashima being proof that there is not really a demand for their services and for Haley being a barrier to a more effective judiciary. Haley is not alone in seeking the answer in institutional constraints. In 2006 for instance, Ginsberg and Hoetker who analyzed litigation in the period between 1986 to 2001, also found that an increase in attorneys and judges per capita leads to an increase in litigation per capita (Ginsberg and Hoetker 2006, 49-52).

Rationalist Theory

Just like how Haley's work was a response to what Kawashima had proposed, Ramseyer's work was very much a response to Haley's. More so than a critique however, Ramseyer tried to add to what Haley had written in the areas which he felt were left unexplained. In his article Ramseyer states that while Haley does discuss the shortage of lawyers, unavailability of adequate remedies, and delays (thereby decreasing the possible payoff from litigating), he still has not explained why Japanese find it profitable to settle so often convincingly enough. Even

in cases such as traffic accidents and contract claims, where through litigation plaintiffs can actually recover a considerable net amount, Japanese rarely bring these types of disputes to trial. Litigation costs alone, seeing as they are markedly high in the United States as well, seem to be an insufficient explanation (Ramseyer 1988, 113-114).

For Ramseyer, the reason why settling is more profitable in Japan than in other countries, lies in the predictability of litigation. The costs and payoffs from litigating he argues, are just as important as the disputants' ability to agree on the likely outcome. To put it very simply, if disputants know the likely outcome and if going to court would exceed settlement costs, they would settle regardless of how high the net gain from litigation may be. Provided that both parties agree on the likelihood of one of them prevailing, avoiding the court (costs) is beneficial. Litigating then, becomes profitable only when they cannot agree on its probable outcome. Ramseyer names three examples of factors that help boost the predictability of outcomes in Japanese courts. According to him, the first and most important one is the fact that there are no juries in Japanese courts, leading to all issues being decided by judges. Juries, similar to the lay mediators discussed in the previous chapter, are legal novices. This is why their decisions tend to vary a great deal. In contrast to the judges whose opinions can be found in previous written statements or judgements, juries' attitudes toward the specific issues at stake are harder for lawyers to find out. The second factor he names, is the way in which Japanese judges try cases. Due to the discontinuous sessions, cases move slowly, allowing judges to suggest the probable outcome to the parties. This of course helps parties agree on the likely verdict, thereby erasing the incentive to stay in court. This is similar to Kawashima's point on how judges provide opportunities to disputants to settle even once they have filed suit. The third factor relates to Japanese judges who attempted to standardize their judgments. In damage cases for instance, they often follow formulae which allow lawyers to predict the outcome more easily (Ramseyer, 114-117).

For rational parties, factors raising the costs of litigation or reducing those of settlement will increase the ratio of disputes where a mutually beneficial settlement can be found. This is how in a case in which parties cannot agree on the likely outcome, a settlement could still be reached. Ramseyer states that in Japan, these factors could very well be the already mentioned costs and delays by Haley. One of the factors decreasing the costs of settlement furthermore, is the fact that mediators (third parties) are readily accessible. Ramseyer then argues that a 'non-litigious ethic' like Kawashima proposes, does not have to be contrary to his 'rational disputant' theory, as such an ethic could be a source of the costs to litigate. A possible sanction of litigating within the aforesaid ethic is reputational loss, thereby jeopardizing relationships with future business partners and reducing the net amount gained from going to court. Because of that, parties can believe that settling instead of suing is both profitable and morally the right choice. More so than because of being expensive or cumbersome however, Ramseyer claims that the Japanese public settles because the system is predictable. And in that sense, he argues, the Japanese system works quite effectively (Ramseyer 118-122).

Political Theory

The last theory I would like to discuss has mostly been the terrain of Takao Tanase. After describing other explanatory models behind Japan's non-litigiousness in his article, Tanase describes what he believes to be the correct explanation with his 'management model'. Like the name of the model implies, he believes that rather than the institutional barriers such as explained by Haley or litigants' attitude as proclaimed by Kawashima, it is management by the Japanese elite that explains why the public rarely resorts to court. This is similar to Upham's work (1986), as he argued that it was the bureaucracy that encouraged informal ways of dispute resolution instead of formal litigation. By controlling the level of litigation, the elite can reduce the risk of their policies being challenged in court and curtail the cost of

dispute management. Tanase tries to demonstrate this through a case study of automobile accident compensation. To measure litigiousness, he looks at the use of lawyers' services, as these are used to get the most favorable outcome in out-of-court negotiations as well as in court. Dispute management aiming to control litigiousness should want to hold down the usage of legal services. Tanase therefore, looks at the amount of lawyer involvement in dispute resolution to consider how the process of dispute management lowers the demand for such services (Tanase 1990, 655-659).

His focus on automobile accident compensation is for two reasons; it being one of the more common disputes where lawyers' services are used, and because it is where scaling down the use of legal services has been managed most successfully. While there had been an upward trend from the 60s, various measures effectively stopped the trend of litigation and reduced it first by two-thirds, before further diminishing it to a mere 1% of cases ending up in court. In Japan injured parties themselves usually take care of compensation disputes without a lawyer's aid, and in his article Tanase tries to test whether this is due to prudent management. He states that it takes three interrelated measures to manage disputes in a way that legal services will not be used: the system should enable victims make their claims on their own, the law should be simple enough so that legal services are not necessary, and alternative forums to settle disputes must be provided. For the first measure free legal consultation is provided by government bodies, insurance companies and/or bar associations, so that lawyers do not need to be retained to obtain information. The information given is consensual in nature furthermore, thereby facilitating a move towards agreement (Tanase, 660-667). The second measure is standardized compensation, which helps simplify resolving such disputes by reducing the legal knowledge normally necessary. The third measure of providing alternative forums is for those claims which nevertheless turn into disputes. Within

court-annexed mediation or the traffic accident resolution center, parties can still settle without a lawyer (Tanase, 668-669, 675-678).

In short, Tanase argues that the reason for Japanese not resorting to the courts is because the elite manages them that way. The compensation system is efficient and the people are consequently content with what they receive, believing that the system is benevolent and thus do not challenge it in court. Since the public is satisfied, Tanase does not see the system change anytime soon, but is concerned that without sufficient input through litigation the law would not evolve and weaken. The success of the elite could be its downfall, as this weakening of the law could ensue the loss of its legitimacy (Tanase, 680-687). Like others have mentioned before me (e.g. see Ginsberg and Hoetker 2006, 35-36), these four groups of theories do not have to be mutually exclusive, as several elements could easily be combined. The reluctance to litigate may very well be because of the existence of institutional barriers, a cultural element, predictability of the outcome, as well as alternative fora to resolve disputes provided by the elite. It is interesting however, to be able to see what the actual experiences of the public reveal with regards to which factor may have a bigger influence than the other.

How does existing literature assess Japan's divorce mediation system?

While there has not been written much on the experiences of those who go through divorce mediation, literature on the system itself (from a variety of angles) fortunately does exist, albeit mostly from some time ago. It is necessary to look at how researchers have assessed the system in the past, in order to see how much and if things have changed in recent years.

One of the authors that first described the Japanese divorce mediation system in English is Taimie Bryant. She wrote her PhD dissertation and a number of articles on the topic in the 80s and 90s. One of her observations from during the sessions was that the mediators, since they are usually in their 60s, have different social values from the disputants who are generally a lot younger. Other than the age difference, mediators are commonly from

the more well-off social strata, thereby differing from the disputants in social status as well. According to Bryant mediators tend to value the traditional family structure and sometimes urge disputants to stay in a marriage in spite of their unhappiness. The observation that mediators seem to be trying to keep families together is echoed by other authors (Mizuno 2014, 260; West 2011, 91), but denied by others who say that this is something that occurred in the past but is in fact changing (Murayama 1999, 53). Bryant also discusses how the way in which mediators restate the disputant's opinion shows their own point of view (Bryant 1984, 13, 26). In a sense similar to political theory, she sees the family courts as being part of a legal system that does not support divorce. Mediators tell disputants that they should settle even if they want to litigate, because they would surely be unsuccessful. Her works can also be said to reflect Haley's work however, since she sees the obligatory divorce mediation system in contested cases as an obstacle for those who wish for a judicial divorce. The fact that 90% of divorces are 'divorce-by-agreement' she argues, shows how hard it is to get a divorce through other procedures. Judges are too busy due to the amount of cases they deal with, so there is no choice but to leave it up to the volunteer mediators to resolve disputes (Bryant 1984, 78-81; Bryant 1995, 9; Murayama 1999, 57; Murayama 2010, 149).

Several authors who addressed the divorce mediation system, did so with regards to how it affects (parents with) children. Child visitation once a month is seen as the most common result of mediation, but one-third do not even come to any agreements on visitation during mediation (Harada 2019, 85; McCauley 2011, 592; Tanase 2011, 265). And while it is said that mediators are supposed to advise parents on the basis of the welfare of children, they often tend to support the 'maternal preference' or 'preserving the status quo' rule, coming down to mothers receiving sole custody (Harada 2019, 86; Minamikata 2005, 497-499). Domestic violence is a sensitive topic, as some have argued that allegations are used by the custodial parent to deny the other parent visitation (Tanase 2011, 588), but others have

mentioned the difficulties that obligatory mediation brings with it in cases of actual domestic violence. A wife might forfeit all of her economic rights just to get an abusive husband to divorce her (Mizuno 2014, 260; Yoshihama 2002, 395).

Yet not all researchers are negative about the mediation system, as it provides a way of dispute resolution that is cheap, informative and amicable (Minamikata 2005, 495). Perhaps a proponent of Kawashima, Nishikawa states that mediation in private is suitable for family matters as in Japanese culture it is considered inappropriate to discuss such disputes in open court. Lay mediators she states, are also better at negotiating than judges. Judges are young and inexperienced when they start out and the lay mediators' life experience can make up for that gap. No lawyers are required, making the process less costly, more accessible and fair (Nishikawa 2001, 365-368). Murayama on the other hand, shows in his article that having a lawyer in fact does make a difference in divorce mediation. He found that wives with lawyers got a better outcome than when both parties did not retain a lawyer, and that when husbands retained lawyers and wives did not, wives had the worst outcome (Murayama 1999, 52).

In the following and final chapter, I will discuss the findings from the interviews I conducted with disputants, lawyers and mediators. We will see if and how divorce mediation has changed over time, and what can be said with regards to the adequateness of the theories described above.

4. Research Findings

Interview results

In this chapter I will describe the results from the interviews I conducted from October 15th to December 20th 2019, to see how and if the actual experiences of the participants in the divorce mediation system are (in)consistent with the literature on a particular theory of Japanese litigiousness and on the system itself. As mentioned in the methodology section, I have conducted a total of 11 interviews¹ with both direct participants (disputants) and indirect participants (lawyers, mediators) of the divorce mediation system in Japan. All but two interviews took place in person in Tokyo at a place of their choosing. This was often a quiet café or, in case the interview was with a mediator or lawyer, at their own office. I found most of my interviewees through purposive sampling. I contacted for example divorce lawyers' offices in Tokyo and the NGO FPIC (Family Problems Information Center). I furthermore joined lectures on divorce-related topics, and sometimes acquaintances happened to know others who had been through the process. I was lucky to live in a big share house with over a hundred people, which allowed me to ask whether housemates knew anyone who would be open to talk about their experiences in an informal setting. In two occasions, this led to an interview via skype as interviewees lived in Kyoto and I was based in Tokyo. In one case, a disputant was able to introduce me to another disputant through a support group they were both part of.

Although I wrote a preset list of questions to get the interview started, I mostly tried to let the conversation and questions follow from what I was told by the interviewees. In one case the indirect participant was a direct one as well, since he had experienced divorce mediation himself but later became a lawyer specialized in divorce cases, providing for an interesting perspective. Only one of the disputants proceeded to litigation after mediation,

¹ For an overview of all interviews conducted and the preset list of questions, please see the appendix

whereas most were able to come to an agreement through mediation. None of the disputants remained married after going through mediation, nor did they feel pressured to stay together. The interviews were conducted in Japanese, recorded and transcribed when they gave permission to do so, and took around an hour to an hour and half in general. Seeing as divorce and especially contested divorce is a sensitive topic, most felt uncomfortable with me recording the interview, in case of which I double-checked my notes with them afterwards to make sure results are still reliable. I was able to record interviews in three instances and confirmed the contents of each interview by sending interviewees an email with a summarized version. In the cases described more in depth below, I changed the names of participants to a single initial, and left out details that otherwise would enable identification. I will discuss the recurrent themes that were identified after analyzing and organizing the raw data into conceptual categories, provide a more detailed account of the experience of two disputants, and describe the indirect participants' perspective—that of lawyers and mediators—as well to see the issues from another angle.

Recurring themes

The interviewed disputants were between 35 and 55 years old. I only managed to interview one female disputant, so the results mostly reflect a male disputant's perspective. Half of the disputants retained a lawyer. On average the disputants took around six sessions to conclude the divorce mediation proceedings, the fastest being in four sessions and the longest being in twenty sessions. Seeing as twenty sessions is quite rare however, this number was left out of the average. Since there is at least a month or a month and half between every session, and the first session usually takes longer to plan, timewise the fastest it took was around half a year. The interviewee who participated in twenty sessions proceeded to litigation afterwards, taking a total of two and a half years before the divorce was finalized.

So what were some of the common themes or issues that were brought up during interviews? What reasons were given as to why they did or did not proceed to litigation? Did they feel able to get ‘access to justice’ through the mandatory process? A common feature between the interviews was how disputants felt that certain standards had formed in practice that were not to be deviated from. This was especially so with regards to custody, visitation rights and alimony or child support. All interviewees were parents and thus had to deal with those kinds of issues upon divorce. There existed a common awareness of the fact that the mother usually receives custody and the father is expected to pay. One interviewee said, ‘shared custody does not exist, and the image of what a man and what a woman is supposed to do is still very strong’ (Mr. O, Dec. 11, 2019). This principle of ‘maternal preference’ coincides with existing literature (Harada 2019, 86), and custody was in fact awarded to the mother in all cases. With regards to visitation, once a month for a couple of hours seemed to be the standard maximum, much to the dismay of the fathers: ‘I tried to ask for more than one hour a month, but was told [by the mediators] that I ask for too much’ (Mr. I, Dec. 12, 2019), ‘I reluctantly accepted the condition of seeing my son once a month for two hours’ (Mr. A, Nov. 16, 2019), ‘when asked why this is the standard, you get the answer that it’s because they have always done it like that’ (Mr. R, Dec. 16, 2019).

Interestingly however, although not entirely pleased with the outcome of their case, none were adamantly opposed to the divorce mediation process. Disputants were on the contrary, quite content with the system of going through obligatory mediation prior to litigation. Common reasons as to why included the low costs compared to litigation and proceedings not being public. The mental aspect of there being less pressure in a small room with just the mediators to have to talk to seemed to be the biggest factor: ‘it’s better to have mediation before going to court...I would have been very nervous if I had gone to court straight away...if I had to see my ex-husband in person we would just have shouted at each

other' (Ms. M, Dec. 9, 2019), 'during mediation you can have a conversation, while in court it becomes a fight' (Mr. I, Dec. 12, 2019), 'if it had become a lawsuit straight away, the psychological burden would have become very heavy...even during mediation I struggled mentally with preparing the documents, so I think that mediation first is a good step' (Mr. A, Nov. 16, 2019). Many mentioned the shuttle system in mediation as an advantage, since not seeing one another helped with remaining calm and agreeing to compromise. While the literature suggests that the age gap between the mediators and disputants could cause friction, several interviewees said that they would actually be less likely to listen if that gap was smaller, 'young people don't listen as well, and if the mediators were younger I would not be convinced or accept what they had to say' (Mr. Y, Dec. 20, 2019), 'if someone younger told me what to do I'd just think shut up already' (Mr. R, Dec. 16, 2019). Only one interviewee said he would prefer younger mediators, since he expected them to better understand modern family life instead of proclaiming traditional standards. Opinions also varied on the fact that mediators are lay persons. Some stated it was fine because mediators prepared the answers to the questions they did not know for the next session, or that the lack of knowledge does not matter as long as one hires a lawyer, but others said that due to this lack of knowledge mediators tended to follow the lawyers' opinions whenever they were involved, thereby defeating their purpose.

The interviews nevertheless revealed aspects that were disliked about the proceedings, such as having to take off from work and the relative long time the process took in total. Having to take off time sometimes negated the private aspect of the proceedings as one is often required to state the reason for their absence at work. As stated before, mediation sessions can only take place during working hours on weekdays. Other interviewees complained that mediation does not have a clear ending, '...at some point I just wanted it [the sessions] to stop, so I accepted her conditions' (Mr. R, Dec. 16, 2019). Another disputant

experiencing up to twenty sessions reflects this; there is no maximum of sessions after which the case automatically proceeds to litigation. The one interviewee that did go to court decided to do so when the judge intervened after eight sessions of divorce mediation, assessing further mediation to be counterproductive. So why did all the other interviewed disputants decide against resorting to court?

Disputants Ms. M & Mr. A

In order to better understand the process that disputants go through in divorce mediation and why they chose not to resort to court, I will describe two cases more in depth. I will first discuss the story of Ms. M who was not granted a divorce in the process after applying for divorce mediation, but nevertheless decided not to pursue litigation. Secondly, I will discuss Mr. A's story who, despite of being very displeased with the outcome, still decided not to sue.

I was able to meet Ms. M through a friend of mine and she was very informal and open towards me. The interview took an hour and half and was conducted on December 9, 2019. Ms. M initiated divorce mediation proceedings in 2015 and ended up having five sessions, taking up half a year. She worked as a part-timer and was in her 40s at the time. She and her former spouse already lived separately for a while, but he nevertheless was surprised by the news of her wanting a divorce, and refused. After seeking legal advice from a lawyer who provided three free consults, she decided to file for mediation. Both Ms. M and her ex-husband did not retain a lawyer. At first she was worried that they might run into one another during the proceedings, but the mediators were careful not to let this happen. She had an overall positive impression of the system, since it barely cost her anything and the mediators were kind, but she did not like having to take time off from work. Since her former partner kept refusing to divorce, it was mostly financial issues that were discussed, '...the mediators told me that in 20% of the cases former partners don't pay in spite of agreements...they advised me to put my children's name on the bank account instead of my own because it

might be easier to accept'. In the end, he admitted that he was at fault and agreed to provide for their children until university.

The divorce however, turned out to be a different matter altogether as he still did not agree to it. The mediators thought further sessions would not help, so told her that litigation was a possibility but probably unnecessary, 'when I could not get him to agree to a divorce they [the mediators] told me that they had never witnessed a case like mine where the spouses were not able to divorce...They told me to be patient and wait-and-see'. After proceedings ended, she took matters into her own hands, 'I went to his house with my parents and begged him to sign the papers, but he ripped them apart...The second time I went over there, I put on dirty clothes and made my hair messy [laughs] ...he finally agreed and signed the papers'. She secretly recorded their conversation, to make sure he could not go back on his word. Getting further into the interview, she reflected on whether she was really happy with how events transpired, 'I was comfortable talking to the mediators...I don't remember being discontent but if I say it strongly-worded, although I initiated divorce mediation he agreed to everything but the divorce...When the sessions seemed to take too long because of this, I felt that the mediators politely tried to end them with their advice. I couldn't help but feel coaxed into agreeing to stop. I did get a divorce half a year later though, so I accepted it...I have to admit I was a bit disconcerted afterwards, but I used all sorts of measures and tried my best on my own'. She explained that while she was strong enough to do so, she worried for others who without the mediators' help may never get a divorce. Ms. M did not think she could have achieved the same result financially speaking without mediation, so she was pleased she applied for it in that regard. When asked why she decided not to litigate even though they reached an impasse, she said, 'we already lived apart so the situation wasn't that pressing that I wanted to spend the money to go to court, and I believed in the words of the mediators... in

the end it became a divorce-by-agreement instead of a divorce-by-mediation...I actually only realize that now’.

A remark similar to the one Ms. M was given by the mediators that ‘litigation would probably be unnecessary’ did not come up in other interviews. As there are many registered mediators but there is no uniform education in place (see chapter two), this could be because different mediators each have their own style of mediation. Another possibility is that since I interviewed mainly male disputants, similar stories to Ms. M’s could have come up if I had been able to interview more female disputants.

I was introduced to Mr. A by another interviewee, who had asked around whether someone else in his support group would not mind being interviewed. The interview was around an hour long and took place on November 16, 2019. Mr. A, a 46-year-old company employee, had been married for twelve years when he received a divorce notice from his wife’s lawyer end of March 2017. Three days before, she had gone to her parents’ house with their six-year-old son unannounced. In the divorce notice was stated that his wife wanted to divorce, any contact would go through her lawyer, and divorce mediation procedures would be initiated. Mr. A had no clue that his wife wanted to divorce him until he received the notice. The day before she left, the three of them had spent a day off together like they usually did. Since she had hired a lawyer, he consulted with a lawyer he was friends with and retained one as well. About one and a half months later, the first session started. In the next session another month later, they agreed on the divorce, but could not come to an agreement on visitation. The sessions concerning visitation did not start until September and were concluded in January the next year, taking around 10 months combined with the divorce-related sessions. During a ‘trial’ visitation as part of the mediation, Mr. A was finally able to see his son again after 8 months. He grudgingly accepted the condition of seeing his son once a month for two hours, with his ex-wife being present during visitation as well. When asked

about what he thought of the process itself he mentioned, ‘I was not able to say what I wanted to say because of the worry of never seeing my son again... The notice came so suddenly that I could not sort out my feelings’. Like others, he talked about the feeling that certain standards were fixed, ‘...while they were listening to my story, I felt that things were going according to Japanese standards: changing a child’s environment should be prevented, the mother gets custody, and visitation of a couple of hours a month is the norm’. He considered his ex-wife’s actions to be kidnapping, and was frustrated others did not see it this way, ‘I accept the divorce, since I can see now that we have grown apart, but I don’t understand why kidnapping is tolerated’. So why did Mr. A not resort to court? ‘I finally was able to see my son again, and I was afraid that if I went to court I would not be able to see him at all... Although the time I can see him now is very limited, it’s better than nothing... I think the result is absurd, but this was how I felt then.’ He nevertheless was happy with having mediation before possibly litigating, since financially everything was properly arranged and it was less of a mental burden than litigation would have been.

Mr. A’s story and reasoning was comparable with that of other disputants in the sense that they felt sure that going to court would not allow for a better outcome, ‘...I think I would have lost in court, going through mediation was best in order to still see my child [after the divorce]’ (Mr. R, Dec. 16, 2019). The common knowledge that visitation of once a month is the unwritten standard, led many to believe they would be best off accepting such an arrangement and not go through court to futilely ask for more. Or worse still, being stripped of their right to see their child entirely. As shown in chapter two, the annual statistics published by the Japanese Supreme Court (which are freely accessible to anyone through their website) show that chances of a different outcome are rather slim. Several of the male disputants I interviewed furthermore, knew they were the spouse ‘at fault’ (e.g. due to adultery on their part) and assessed that gaining a better result in court was unlikely. Ms. M’s

story resonated with other interviewees as well, in the regard that they did not have the money or wanted to spend the money to go to court, ‘...well I didn’t have money at the time because I was unemployed, so I was happy everything could be resolved through mediation’ (Mr. O, Dec. 11, 2019). None of the interviewed disputants said they would prefer to be able to go to court straight away.

Indirect participants’ perspectives: lawyers and mediators

The interviews with the indirect participants to the divorce mediation system provided an interesting perspective, as their opinions both coincided and differed from the disputants’ stories in several aspects. The majority of lawyers interviewed, thought that mediation should be optional and not mandatory prior to litigation, ‘...mediation still takes a lot of time anyway, and the goal is often unclear. We recently had a case where mediation concerning the division of assets went on for a year and half... A court case is at least clear’ (Mr. R, Dec. 16, 2019). One interviewee said, ‘...isn’t [mandatory] mediation there because the courts are too busy otherwise?’ (Ms. K, Dec. 16, 2019). Most do appreciate how mediation is easy to apply for by oneself and the fact that it is less adversarial. As opposed to the disputants, all interviewed lawyers found the lay mediators’ lack of knowledge to be problematic, ‘the mediators don’t know a lot about law and when lawyers are not present they might not give good advice or provide correct information... [when an agreement is made] the judge will think the disputants agree with the outcome, regardless of whether that person was informed about his other options, or whether he agreed to something disadvantageous to him’ (Mr. S, Dec. 13, 2019), ‘judges and mediators like to handle cases quickly, so they would not ask if the disputants are sure they are okay with it...hiring lawyers could solve this [lack of knowledge], but then it will cost the disputant significantly more’ (Ms. K, Dec. 16, 2019). The interviewed lawyers shared the opinion that mediators should receive more and uniform education, since right now further education is left up to each court. Some wondered whether

it should be made into a profession rather than a volunteer-type position. This way, a generational or a gap in wealth between mediators and disputants can be avoided. It was mentioned that the people who are mediators are usually those who can afford to be one, ‘...you know mediators can be mediators because they are well-off...sometimes in sessions this is noticeable when mediators tell clients: you can easily pay this right?’ (Mr. R, Dec. 16, 2019).

While the interviewed mediators were more positive about mediation in general, they acknowledged that flaws included the time it took and mediation being only possible on weekdays. Because of the month between each session, they noticed that progress made was often reversed by the time they met again. Interviewees mentioned the lack of staff, mediators and mediation rooms as the reason behind the process being so lengthy. Mediators found the accessibility of the process, mediation being closed, cheap and flexible to be some of the merits of mediation, ‘...in court the process is formal and fixed, but when people first get to mediation they often don’t even know what getting a divorce truly means’ (Ms. N, Dec. 12, 2019).

Although the majority of lawyers thought mediation was mainly instituted to reduce the judges’ workload, and some were convinced judges refuse to write decisions because of the work that comes with it and therefore try to close cases through mediation as much as possible, not all lawyers thought this way, ‘...obligatory mediation or not, judges still have to be involved and are busy regardless’ (Ms. T, Oct. 15, 2019). An interesting observation was how one lawyer, who also had experience as a disputant, changed his statement with regards to what he thought of mediation prior to court depending on his role in the process. As a lawyer, he was quite critical and thought people should be able to go straight to court. As a disputant however, he said that he would have hated a lawsuit and was happy that it could be

resolved through closed mediation. He was surprised himself, but the contradictory opinions show how lawyers and disputants each have different stakes in the divorce mediation process.

Connecting findings and theory

So what do the findings reveal with regards to the theories on Japanese litigiousness? As stated before, the theories presented in the previous chapter do not have to be mutually exclusive, and my findings show exactly that. All interviewed disputants were relatively pleased with having mediation prior to litigation and most chose not to litigate afterwards for a number of reasons. Even without taking the participants' experiences into account, it can be said that divorce mediation in Japan is accessible and cheap, but Ms. M's and other disputants' stories corroborate this as being a reason to decide against litigation. As Haley proposed, if mediation is readily available and an effective way to resolve one's dispute, one would of course choose that over a costly and lengthy litigation process. For others like Mr. A, predictability is the factor that largely accounts for not resorting to court. Since he and other fathers knew the likely outcome and the likelihood of them not being granted custody, they decided to settle instead of risking more costs and the same (or a more negative) result. This unwritten standard and there being for example a fixed formula to decide on the amount of child support (Harada 2019, 84), help boost the predictability of the outcome. This is similar to how Ramseyer mentions the standardization of judgments as being a factor to do so (Ramseyer, 114-117). Cultural reasoning cannot be ruled out entirely, as disputants' preference for discussing matters privately, in a conversational manner as opposed to an adversarial battle in court, seems to be a factor behind resolving disputes through mediation as well. At the same time however, the experiences of the interviewees suggest that it is mostly because of the lesser mental burden that private mediation entails, not because they want to maintain the 'social harmony'. Kawashima's theory therefore; cultural values according to which one wants to avoid the termination of relationships and thereby is reluctant to litigate,

does not seem to hold up. While the Japanese government tried to lessen the relatively high divorce rates when they were criticized because of it internationally, this is no longer the case. The Japanese elite thus does not have as much incentive to be involved in divorces cases, but there are still some elements of Tanase's management model that played a role in the interviewees' stories. The availability of free legal consultation and the way in which mediation attempts to facilitate consensus are two examples of this. Looking back at Ms. M's story specifically, she did not have to retain a lawyer because of the free-of-charge consultations provided and her belief in the words of the mediators was largely why she refrained from litigation.

The interviews with the indirect participants mainly pointed to Haley's theory, as most lawyers stated that mediation was implemented to cope with the lack of judges and to not overstrain the courts' capacity. Similarly, interviewed mediators mentioned how lawsuits were much more expensive and could take up years; leading mediation to be the preferred way of resolving disputes. The interviews conducted therefore seem to suggest that not an inherent reluctance to sue, but rather the accessibility of mediation, increased costs and delays of litigation due to a lack of capacity, and the predictability of the outcome are part of the factors in deciding (not) to proceed to litigation. I would further like to stress the importance of mediation's informal character in helping disputants feel comfortable and thereby preferring it to litigation. Finally, we have to consider however, that disputants might be content with the proceedings (as they are now) because they simply do not know better. This could be the case when no lawyers are involved and, due to their lack of legal knowledge, mediators do not inform disputants sufficiently or correctly. Judges are usually involved during the final mediation sessions, but would not question the outcome that was agreed upon because of their heavy workload. This workload furthermore, adds to the pressure of

processing cases quickly, which in cases like Ms. M's could risk disputants not having 'access to justice' through the current judicial system.

Conclusion

This thesis has sought to fill the gap in existing literature concerning the Japanese divorce mediation system as well as contribute to the debate on Japanese litigiousness by attempting to answer the question: “how do participants in divorce mediation experience this system in Japan?” To this end, I conducted both qualitative and literature research and interviewed a total of 11 people. By answering my research question and analyzing people’s experiences, I hoped to find out whether participants preferred the way the system is now or whether they would have rather been able to go directly to court. In turn, this could provide a clue as to what, if any, theory holds true with regards to (the lack of) Japanese litigiousness. By taking a closer look at participants’ experiences furthermore, we could see whether the current system in which mediation is obligatory prior to litigation should be considered as a barrier to one’s ‘access to justice’ or not.

Historically speaking, there had already been a preference for resolving disputes related to divorce outside of the judiciary from the Tokugawa period. Unlike Western countries, where divorce was frowned upon at the time, divorce in Japan was both accepted and prevalent. While the Civil Code of 1898 introduced a one-sided judicial divorce, it still allowed for a consensual divorce through a simple act of registration, which was the preferred route for most. It was not until foreign criticism emerged that Japan’s government wanted to do something about their comparatively high divorce rate. This was one of the reasons behind the introduction of family courts and the first optional, later mandatory mediation system in contested divorce cases. Consensual divorces through registration, have remained roughly 90% of the cases from the second half of the twentieth century until now. I have laid out how the current system works and shown that divorce mediation is very cheap and easy to apply for by oneself, as having a lawyer is not required. Since there is a month between each session however, getting a divorce this way usually takes up at least half a year.

In my third chapter, I discussed the four main groups of theories that have been identified with regards to explaining the lack of Japanese litigiousness. Representative of traditionalist theory, Kawashima proposed that the main reason why Japanese are averse to litigation lies in their socio-cultural background: preferring to maintain the social harmony. For Haley, or in revisionist theory, it is institutional incapacity of the Japanese judicial system that leads Japanese to opt for dispute resolution outside of court. Ramseyer's rationalist theory does not deny Haley's claim, but adds to it and suggests that predictability of the outcome is in fact the biggest factor. Political theory or Tanase's management model, proposes that the political elite has a hand in holding down litigation rates and does so by careful management.

The results of my interviews, participants' experiences of going through the divorce mediation system, have revealed that some aspects of the different theories indeed played a part in deciding against litigation, while others have not. For fathers, the predictability of the outcome was key in deciding not to pursue litigation in court. For other disputants the accessibility of mediation, both in the sense of costs and one being able to apply for it easily by oneself, played a big part. A common factor among all of the disputants however, was how they mentioned that it was mediation's informal character that made it preferable to resorting to court, or at least preferable to going to court straight away. This was not because they wanted to avoid destroying the 'social harmony' by litigating publicly, as Kawashima might suggest, but because of the lesser mental burden it entailed. Interviewing lawyers and mediators provided a different perspective, and added to Haley's proposition in the regard that they agreed that Japanese courts are simply overstrained.

To conclude, while most interviewed disputants were content with the system and able to come to an agreement through mediation, meaning that for them it works as a way of getting access to justice outside of the courts, this comes with a few remarks. Mediation does make dispute resolution more accessible, but as the interviewed lawyers worried, mediators'

lack of legal knowledge could jeopardize disputants getting fair and equal proceedings. They might be content with the way things are now, simply because they do not know any better. Judges getting more involved or the retainment of a lawyer may solve this, but would create more costs for disputants and add strain to the already overburdened courts. In my view therefore, making sure that mediators' legal knowledge is up to par through uniform education or by making it an actual profession, is the only way to ensure mediation remains a good alternative to resorting to court in Japan.

Research limitations

There are of course a few limitations to my research. I do not pretend to be able to make generalized statements representative of all of Japan, since I only interviewed a limited amount of people who furthermore all live in big cities, mostly in Tokyo. As mentioned in chapter four, I was not able to record all of my interviews due to the topic being quite sensitive. While I tried to note down as much as I could, it is natural that some details would get lost that way. Japanese is not my mother tongue, so I might have missed a few nuances here and there or translated differently than others would. To compensate, I made sure that the data I used in my findings was double-checked with participants. The interviewed disputants were mostly male, which was coincidentally the group to whom my access proved easier. In further research it would be good however, provided access allows it, to interview more female disputants for a balanced perspective. Although I had hoped to speak to a formerly married couple to have two sides of the same story, this did not work out. Once I interviewed a disputant's ex-wife, he did not want to do the interview anymore because he was convinced that I must have gotten a distorted view about him already. Lawyers logically could not give me their clients' contact information, but did help me with finding other lawyers specialized in divorce. Lastly, other than issues related to access, one has to consider that it is always possible that other interviewers could have told a different story.

Appendix

Preset list of questions for disputants

1. Can you introduce yourself?
2. How did you come to participate in divorce mediation? How long ago was it?
3. How many sessions did you have / how long did the total process take?
4. Did you hire a lawyer? Why?
5. What do you remember about the mediators? How did you feel about them?
6. What do you think about the mediators being 'lay people'?
7. Were you able to speak freely and say everything that you wanted to say?
8. How did you feel about the proceedings themselves? What did you think of the result?
9. Would you have preferred to go straight to court if that was possible? Why?
10. Why did or didn't you decide to litigate after the mediation proceedings?

Preset list of questions for lawyers & mediators

1. Can you introduce yourself?
2. How long have you been working in this field?
3. What kind of / Are there any trends that you see occurring?
4. How do you think that your clients evaluate or experience divorce mediation?
5. Are you proud of the work that you do? If so, how come?
6. What do you think about / Why do you think mediation prior to litigation is obligatory?
7. Do you think mediation is useful? How come?
8. What do you think about the fact that there is no joint custody in Japan?
9. What do you think about mediators being 'lay people'? Do you think the current training they receive is sufficient?
10. Should the divorce mediation system be improved? If yes, how?

Overview of interviews conducted by date

	Initial	Date	Location
1.	Ms. T <i>lawyer</i>	Oct. 15, 2019	Lawyer's own office, Tokyo
2.	Mr. A <i>disputant</i>	Nov. 16, 2019	Café in Tokyo
3.	Ms. M <i>disputant</i>	Dec. 9, 2019	Café in Tokyo
4.	Mr. O <i>disputant</i>	Dec. 11, 2019	Via skype
5.	Mr. I <i>disputant</i>	Dec. 12, 2019	Café in Tokyo
6.	Ms. N <i>mediator</i>	Dec. 12, 2019	NGO FPIC, Tokyo
7.	Mr. T <i>mediator</i>	Dec. 12, 2019	NGO FPIC, Tokyo
8.	Mr. S <i>lawyer</i>	Dec. 13, 2019	Via skype
9.	Mr. R <i>lawyer and disputant</i>	Dec. 16, 2019	Lawyer's own office, Tokyo
10.	Ms. K <i>lawyer</i>	Dec. 16, 2019	Lawyer's own office, Tokyo
11.	Mr. Y <i>disputant</i>	Dec. 20, 2019	Restaurant in Tokyo

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