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## A measure of honor

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## IN DETAIL

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**Mark D. West**, Nippon Life Professor of Law Mark D. West is director of both the Law School's Japanese Legal Studies Program and its Center for International and Comparative Law; he also directs the University of Michigan's Center for Japanese Studies. He has studied and taught at the University of Tokyo and Kyoto University, and has been a Fulbright Research Scholar, an Abe Fellow, and a fellow of the Japan Society for the Promotion of Science. Fluent in Japanese, he clerked for the Hon. Eugene H. Nickerson of the U.S. District Court for the Eastern District of New York and practiced with the New York-based international law firm Paul, Weiss, Rifkind, Warton & Garrison LLP. He is the author of *Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules* (2004), *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes* (2005), and *Secrets, Sex, and Spectacle: The Rules of Scandal in Japan and the United States*, from which this excerpt is taken. West also is an editor of *The Japanese Legal System: Cases, Codes, and Commentary* (2006). He earned his B.A., *magna cum laude* and Phi Beta Kappa, from Rhodes College, and his J.D. with multiple honors from Columbia University School of Law, where he was notes and comments editor for the *Columbia Law Review*.

## 91 On amending Executive Order 12866: Good governance or regulatory usurpation?

**Sally Katzen Dyk**, '67, a Public Interest/Public Service Fellow at Michigan Law, served as administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the deputy assistant to the president for economic policy and deputy director of the National Economic Council, and then as the deputy director for management of OMB. She has taught administrative law and related subjects at Michigan Law as well as George Mason University Law School and the University of Pennsylvania Law School. She also has taught undergraduate seminars in American government at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program.

## A measure of honor

by Mark D. West

*The following excerpt from Secrets, Sex, and Spectacles: The Rules of Scandal in Japan and the United States (University of Chicago Press, 2006) appears here with permission of the author and publisher. The selection is from the chapter “Privacy and Honor,” in which the author finds that Japan has more than twice as many defamation cases per capita than America, “despite the fact that America has about 50 times more lawyers.”*

People in Japan sue despite low damages—and win—over some things that sound rather silly. Actress Reiko Ōhara sued a publisher of women’s weekly *Josei Jishin* over an article that claimed she was causing trouble in her neighborhood by yelling “Shut up!” at her dog, not cleaning the leaves out of her drainage ditch, and never apologizing to anyone (she won). Architect Kisho Kurokawa—whose work was the inspiration for Japan’s capsule hotels—took a weekly to court because it said that people in Toyota City did not like the skeletal look or the cost of a “10-billion-yen dinosaur bridge” that he designed (he won, too). Dewi Sukarno, a Japanese-born socialist celebrity and former first lady of Indonesia, sued the publisher of the sport paper *Yūkan Fuji* over claims that her English pronunciation is poor (they settled in Tokyo District Court). The rules increase the chances of winning for such people, but even if they had a 100 percent chance of success, shouldn’t they be able to get over it?

Law doesn’t wholly capture this phenomenon. The plaintiffs do not find their claims silly. Nor are courts rolling their eyes and begrudgingly awarding damages; their opinions often sound as outraged as the plaintiffs’ briefs (though when I discuss the cases privately with Japanese judges, they volunteer the word “silly”). Not all plaintiffs are seeking publicity: how much publicity could be gained by the small-time haiku poets and traditional storytellers who bring suit?

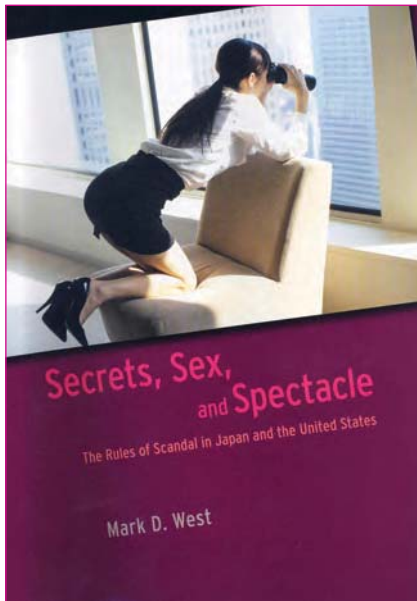
One reason these cases are not publicly treated as silly is that the stories actually *do* damage reputations. In Reiko Ōhara’s case, for instance, the court noted that she would lose considerable income from a resultant inability to appear in television commercials. If a well-known actress can lose significant income because a tabloid says she yells at her dog, Japanese reputation seems awfully fragile. I’ve already suggested one possible reason for the fragility: the defamer, in this case, sensational television shows and tabloids, might be particularly credible. Or maybe some defamed people are simply more susceptible to harm; the organization of the plaintiff’s industry or her social group might make her particularly vulnerable. More broadly, maybe Japan’s



relative homogeneity and social density lead to a stronger consensus on what behavior is acceptable or, as in seventeenth-century American communities, increase a court’s ability to restore a plaintiff’s honor.

Or maybe the difference lies in litigation strategy, since some suits seem to have little to do with defamation. In 2002 a group of 131 Tokyo women sued Tokyo governor Ishihara for defamation because he referred in a *Shūkan Josei* interview to women—not the plaintiffs in particular, just women—as old hags (*babaa*) (they lost). Three years later, the governor had new foes: a group of French and Japanese teachers of French, demanding \$100,000 and an apology for his remark that French is “disqualified as an international language” because it “cannot count numbers.” In 2002 superstar kyogen actor Motoya Izumi claimed that the Japan Noh Association defamed him when it kicked him out for his tardiness, double booking, and unauthorized use of the “headmaster” title (he lost and became a pro wrestler). In a 1998 case, Kabuki actor Ennosuke Ichikawa sued an overexuberant fan who claimed one too many times that she was engaged to marry him (he won). Or how about this one from 1988: a senior citizen sued the chairman of a senior citizens’ club for the damage that he claimed to have incurred when he was kicked out for playing his accordion too long and generally annoying everybody (he lost).

The plaintiffs seem to be using defamation law to get at something else; perhaps it serves as a means of expressing anger, as a means for gaining official approval or public recognition of a position, or as a substitute for other remedies that are difficult to obtain in Japan. The Tokyo women were making a statement about sexism and inappropriate language; one of the lead plaintiffs effectively admitted as much when she said, “I know I’m an old hag, but Mr. Ishihara is not entitled to call me



that.” The *kyōgen* actor seems to have simply tacked on a defamation claim to an invalid vote suit, and the Kabuki actor apparently needed to rid himself of a pseudo-stalker. The senior citizens and the French speakers

probably had hurt feelings, and they were angry.

These cases suggest that defamation cases in Japan and America differ not only quantitatively but qualitatively as well; we don’t see many cases of this sort in the United States. A notable exception is the defamation suit brought by gangstarap antagonist Delores Tucker against rapper Tupac Shakur. Shakur called Tucker a “muthafucka” in the lyrics of a popular song. Tucker sued. She lost: the court found the word to be a mere “vigorous epithet” that is “unpleasant at best and vulgar at worst.” Tucker’s injury is somewhat similar to that of the Tokyo “old hag” plaintiffs (except that Tupac’s epithet was explicitly directed at Tucker and not at a large group). Did Tucker, a civil rights activist who marched alongside Martin Luther King Jr., really think that her social standing was lowered when a deceased rapper who called many people muthafuckas labeled her one? I suspect that her injury, though perhaps very real to her, was of a different sort.

Compared with Japanese suits, cases like Delores Tucker’s are rare in America. The difference in frequency lies in differing conceptions of honor. In the United States, some suits are about economic harm, some are about damage to reputation, and a very few are about intrinsic notions of honor. But in Japan, it’s honor that matters: one of the 131 women who objected to the Tokyo Governor’s “old hag” line explained that “the honor of older and childless women was hurt,” but that injury surely was to the pride and personal integrity components of honor, not to external perceptions of any of the women by others.

Note, however, that the popular Japanese concept differs from the official view. The Japanese Supreme Court has made clear that the required injury to “honor” in the Japanese statutes “refers to *social* honor [*shakaiteki meiyō*], which does not include a person’s subjective evaluation of his own self-worth as an

individual, namely, what might be interpreted as pride [*meiyō kanjō*, literally, personal ‘feelings of honor’].” That formulation sounds much closer to the American concept of defamation as reputational harm.

But what ordinary plaintiff in Japan is going to read Supreme Court opinions? People just know that *meiyō kison* (defamation) must be about damage to *meiyō* (honor), for why else would it be called that?

What’s more, even the courts seem confused at times. The Tokyo District Court has found defamation when a person is called “ugly” (*busu*) and a “run” (*chibi*). Those comments are insulting, but it’s hard to see how they would lower a person’s social standing. In a handful of cases, courts have explicitly held defendants liable for insult-like injuries—but those courts don’t call the injury “defamation” (*meiyō kison*); they call it “injury to pride” (*meiyō kanjō no shingai*). When a person is called “frog face,” or when a photograph of a nuclear power plant protestor fishing in a nearby lake is used as public relations material by the power plant, or when a person tries to have his neighbor legally committed to a psychiatric institution with no basis other than hate, there’s no ground for defamation because the plaintiff’s social standing isn’t lowered, but the defendant can still be liable under a “pride” theory. Compare that to U.S. courts, where the leading statement on torts says that “a certain amount of name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more.” So Delores Tucker loses against Tupac in the United States, but she might win in Japan.

All of which suggests that when we compare the frequency and bases for defamation actions in Japan and America, it’s not at all clear that we’re comparing the same things. Japan seems to place more emphasis on honor, constructing “defamation” as a deeper, broader, or more common injury for which more people might seek redress in a courtroom.

It’s no accident or mere happenstance of interest-group politics that leads to this result. Such a high-profile area of the law as defamation law would not be the way it is if it did not serve social interests. The same activist judges who harmonized criminal and civil defamation in Japan could have revised the system to award higher damages and require actual malice like the American model. Instead, they have stuck to the system that supports norms of honor, deliberately avoiding other paths when the option has been presented. ■