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Black Hole in the Rising Sun: Japan and the Hague Convention on Child Abduction

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Black Hole in the Rising Sun: Japan and the Hague Convention on Child Abduction

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Introduction

“It’s a black hole. The children go in, but they don’t come out”¹

-Celizic

In July 2013, Kris Morness’ custody battle with his ex-wife, Chie Kawabata, took a dramatic turn when his 42-year-old former wife, in defiance of a U.S. court order, abducted their son, Max, and took the child to her home country of Japan. The court had ordered her to stay in Kirkland, Washington and allow Morness’ son to visit and Skype regularly with his father. Ms. Kawabata had asked for the court’s permission to take the child to Japan, but the court declined her request, stating: “the detrimental effects of relocation outweighed the benefits.” Only when Max did not show up for his visitation in July 2013, did Morness discover that Kawabata had flown to Japan with their son on a one-way ticket.

Kawabata later admitted to the abduction in an email where she stated that “the torment I have endured in recent years have left me...emotionally ruined and forced my hands to take this step that I wish I did not have to take.”² Subsequently, the King County Superior Court granted full custody of Max to Morness and issued a warrant to apprehend Kawabata for first-degree custodial interference.³ Despite the mandate of the court, Max remains in Japan outside the jurisdictional reach of U.S. courts, leaving Mr. Morness with no legal recourse because Japanese authorities refuse to recognize the U.S. court order.

Tragically, the Kawabata case is not the only instance of a Japanese mother charged in King County for kidnapping. Four other Japanese women living in the U.S. were also recently

¹ Mike Celizic, *Dad: Japan a child custody ‘black hole,’* Today (May 5, 2010), www.today.com/id,36959398/ns/today-parenting_and_family/t/dad-japan-child-custody-black-hole/#.VyObbqgrLIW.

² Levi Pulkkinen, *Kirkland mom accused of fleeing to Japan to thwart parenting plan,* Seattle PI (Sept. 18, 2013), www.seattlepi.com/local/article/Kirkland-mom-accused-of-fleeing-to-Japan-to-4824996.php#photo-5203631.

³ Brian Ashcraft, *Game Developer Says His Son Has Been Kidnapped,* Kotaku (Aug. 31, 2013), www.kotaku.com.au/2013/08/game-developer-says-his-son-has-been-kidnapped/.

prosecuted for custodial interference for kidnapping their children back to Japan. All were indicted on charges of the first-degree custodial interference, but each has failed to respond to the charges against them.⁴ The question is what action Japanese authorities took in response to these flagrant violations of the law. Sadly, prior to this year, the answer was virtually none. Rulings by foreign courts were simply ignored by Japanese courts.⁵ There was, however, a growing call for Japanese compliance with international norms. Prior to April 2014, Japan was the only G8 country that did not adopt the Hague Convention on the Civil Aspects of International Parental Abduction. Further, the number of child abduction cases involving a Japanese parent drew negative attention from around the globe and pressure mounted on Japan, especially from the United States and European nations, to sign the Convention.

Japan ratified the Hague Convention, effective April 1, 2014. Adoption of the Convention means that, upon the request of a foreign parent, the Japanese Foreign Ministry will be obligated to locate the abducted child. With regard to children under the age of 16, the Convention states that parental rights, such as child custody, will be determined by the judicial authority of the country where the family lived in with the child *prior* to their divorce.⁶ Under the sponsorship of the Foreign Ministry, the Diet, Japan's parliament established a Central Authority that is tasked to locate abducted children and to encourage families involved in international parental child abduction to engage in mediation in order to resolve the visitation and custody issues. If this measure is found to be insufficient, family courts either in Tokyo or Osaka will determine the issue.⁷ Many observers, however, are not optimistic about Japan's commitment to honoring its

⁴ Pulkkinen, *supra*.

⁵ Daphne Bramham, *Japan remains an outlier when it comes to parental child abduction*, Vancouver Sun (Nov. 1, 2013), vancouversun.com/staff-blogs/japan-remains-an-outlier-when-it-comes-to-parental-child-abductions.

⁶ *Japan finally signs Hague Convention governing international child custody disputes*, Asahi Shimbun (Jan. 25, 2014), <http://ajw.asahi.com/article/behindnews/socialaffairs/AJ201401250061>.

⁷ *Japan Joins 1980 Hague Child Abduction Convention*, PR URGENT (Jan. 24, 2014), prurgent.com/2014-01-24/pressrelease334537.htm.

obligations under the Convention.⁸

Great obstacles stand in the way of Japanese compliance with the Convention, as the government of Japan is now faced with the predicament of having to navigate between its tradition-based family law and international norms of the Hague Convention. Unlike family law in the West, where courts regularly grant dual custody for couples who filed divorce, in Japan, sole custody is usually given to one parent; in most cases, to the child's mother.⁹ Further, there is a question whether Japanese authorities are truly committed to fulfilling its obligations under the Convention. For example, Masao Ido, a Japanese legislator, has said: "While Westerners call it abduction, it's common among the Japanese that a mother and child return to the mother's parents after divorce."¹⁰ Ido, a member of the judicial affairs committee continued: "If anything, (the Japanese) think it is not a bad thing. It's really a custom."¹¹ As many other Japanese divorcees, Ido, herself, fled with her 3 children subsequent to the termination of her marriage. "Like other parents, I left a note so the other parent knew where the children were and understood that they were in a safe place."¹²

In Japan, 9 out of 10 divorces are settled out of court, simply by the mailing of a notification of termination of marriage to the parties.¹³ This means that only 10% of the couples ending their marriages take the matter before a family court judge.¹⁴ Even if the matter finds its way into court, it would not be wise for fathers to leave their custody disputes in the hands of a judge because

⁸ Julian Ryall, *Dads doubt Tokyo's commitment to abduction treaty*, DW (May 3, 2013), www.dw.com/en/dads-doubt-tokyos-commitment-to-abduction-treaty/a-16647298.

⁹ Kamoto Itsuko, *Behind Japan's Ratification of the Hague Convention*, Nippon.com (June 14, 2013), www.nippon.com/en/currents/d00079/.

¹⁰ Bramham, *supra*.

¹¹ *Id.*

¹² *Id.*

¹³ Kamoto Itsuko, *Behind Japan's Ratification of the Hague Abduction Convention*, Nippon.com (June 14, 2013), <http://www.nippon.com/en/currents/d00079/>.

¹⁴ *Id.*

Japanese family courts give sole custody to mothers in 80% of the cases. Maternal priority in custody matters is a Japanese societal custom dating back to the mid-1960s.¹⁵

Notwithstanding Japan's adoption of the Convention, concern remains that authorities will continue to ignore demands by foreign courts to return abducted children. In preparation for its adoption of the Convention, Japan has, for example, passed a law in June 2013, which provides grounds for refusal to return a child pursuant to the order of a foreign court, if abuse or domestic violence is feared.¹⁶ This creates cause for concern, given that Article 13 of the Convention contains a provision allowing for a State to refuse to return a child only if there is a "grave risk" of physical or psychological harm to the child, with no reference to domestic violence.¹⁷ Parental child abductors often invoke Article 13 when justifying their refusal to allow contact with the non-custodial parent.¹⁸ The Japanese standard is, however, much lower and thus, much easier to meet than the "grave risk" standard of the Convention.

Skepticism about the Japanese will to comply with its Hague Convention obligations is based on precedent. For example, the Convention on the Rights of the Child (CRC), adopted by Japan in 1994, obligates State Parties to take legislative and administrative measures for the implementation of the treaty.¹⁹ However, Japan has failed to pass any legislation or ratify its law upon its adoption of the CRC.²⁰ In addition, nearly 20 years after ratifying the U.N. Convention

¹⁵ *Id.*

¹⁶ *Japan Joins 1980 Hague Child Abduction Convention*, Pr*urgent (Jan. 1, 2014), <http://prurgent.com/2014-01-24/pressrelease334537.htm>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Sept. 2, 1990) [hereinafter CRC].

²⁰ Yasuhiro Okuda, *The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law 87*, available at http://sydney.edu.au/law/anjel/documents/ZJapanR/ZJapanR_15_08_Okuda.pdf.

on Racial Discrimination and almost 30 years since acceding to the U.N. Convention on the Elimination of all Discrimination against Women, Japan has yet to pass legislation prohibiting racial discrimination or a statute guaranteeing workplace gender equality.²¹ Japanese recalcitrance with respect to its international obligations under these treaties casts a shadow over whether Japan is serious about its commitment to end international child abduction.

Part I of this paper analyzes the applicable international laws pertaining international child abduction; namely, the Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Parental Abduction. Part II discusses Japanese family law, including analysis of child custody and visitation, the nominal role Japanese courts play in the administration of justice and how child abduction is treated under Japanese law. This paper concludes with a prognosis of how the Japanese government may deal with the obligations imposed by the Hague Convention.

I. Applicable International Law

Japan is a State Party to two conventions relevant to the issue of international child abduction, the Convention on the Rights of the Child (the “CRC”) and the Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”). Despite its adoption of these treaties, Japan has yet to take the steps necessary to fulfill its legal obligations under these agreements; namely, amend its antiquated family law system.

A. Convention on the Rights of the Child

Adopted by UN General Assembly on November, 1989, the CRC attempts to “protect children from discrimination, neglect and abuse” in terms of their economic, political, civil, social

²¹ Debito Arudou, *Biased pamphlet bodes ill for left-behind foreign parents outside Japan*, The Japan Times, Oct. 8, 2014 at Issues.

and cultural rights.²² This is one of the most broadly ratified international human rights treaties in the world, and the first international treaty mandating legal obligations in protecting children's rights based on universal standards.²³ Claiming one reservation regarding the separation between children and adults deprived of liberty, Japan ratified the CRC on April 22, 1994, becoming a State Party, along with the other 192 State Parties.²⁴

Since its ratification of the CRC, Japan has been accused of failing to fulfill its obligations under the CRC. Not surprisingly, Japan has refuted these claims.²⁵ However, the CRC imposes a number of obligations on member States, which Japan has failed to fulfill. For example, despite the mandate of Article 4 which provides: "states parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention,"²⁶ the Japanese government neither issued new legislation nor reformed its previous laws upon its ratification of the CRC.²⁷

Other relevant provisions of the CRC enshrines the right of children to maintain a relationship with both parents in the event of separation and mandates State Parties to take measures to protect this right and to combat child abduction:

- Article 8(1) states that a children have the right: "to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference"²⁸
- Article 9(1) provides: "State Parties shall ensure that a child shall not be separated

²² Children's Rights Alliance, *The United Nations Convention on the Rights of the Child* (June 2010).

²³ The United Nations, *Cyberschoolbus: Convention on the Rights of the Child*, available at <http://www.un.org/cyberschoolbus/treaties/child.asp>.

²⁴ United Nations Treaty Collection, Chapter IV Human Rights: The Convention on the Rights of the Child, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

²⁵ Okuda, *supra* note 20, at 88.

²⁶ CRC, *supra* note 19, at art. 4.

²⁷ Okuda, *supra* note 20, at 87.

²⁸ CRC, *supra* note 19, at art. 8.

from his or her parents against their will, except when competent authorities subject to judicial review determine...²⁹

- Article 11(1) mandates: “State Parties shall take measures to combat the illicit transfer and non-return of children abroad.”³⁰
- Article 10(2) states: “a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents...”³¹
- Article 18(1) dictates: “State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”³²

Despite the clear mandate of the CRC to allow children to maintain family relations and have direct contact with both parents, in Japan a child’s identity is virtually halved with any connection to the non-custodial parent’s family permanently severed. This is especially difficult for children of cross-cultural marriages. For Kris Morness, with each passing day, his son dissociates more from his American heritage, including the English language.³³

The guiding principle of the CRC, provided by Article 3, is the establishment of the standard to be applied “in all actions concerning children.”³⁴ All State Parties must make “the best interests of the child” the primary consideration by social welfare situations, courts of law, administrative authorities and legislative bodies. It is widely accepted that, in the event of separation or divorce, maintaining a relationship with both parents is crucial for a child’s physical

²⁹ CRC, *supra* note 19, at art. 9.

³⁰ CRC, *supra* note 19, at art. 11.

³¹ CRC, *supra* note 19, at art. 10.

³² CRC, *supra* note 19, at art. 18.

³³ Levi Pulkkinen, *Kirkland mom accused of fleeing to Japan to thwart parenting plan*, Seattle PI (Sept. 18, 2013), www.seattlepi.com/local/article/Kirkland-mom-accused-of-fleeing-to-Japan-to-4824996.php#photo-5203631.

³⁴ CRC, *supra* note 19, at art. 3.

and mental development.³⁵ However, in divorce or separation cases, Japan's family law system fails to secure regular visits for non-custodial parents (Jones C., n.d.). Currently, it is estimated that over 96,247 children in Japan are being denied access to one of their parents as a result of parental abduction. In the U.S. alone there are more than 3,200 parents being denied contact with their children living in Japan.³⁶

B. Hague Convention on the Civil Aspects of International Child Abduction

Japan was long criticized for its refusal to ratify the Hague Convention. In 2010, ambassadors of 8 countries, including the U.S., Britain, France and Australia, called for Japan to adopt the Convention. Japanese resistance was based on its tradition of non-interference by law enforcement and judges in family matters. Former Japanese Foreign Minister Katsuya Okada articulated the Japanese position: “In Japan, basically there is an idea of not letting authorities intervene in family affairs, except for child abuse cases.”³⁷

Critics of Japan’s position were most disturbed by the apparent bias shown by authorities towards Japanese spouses in mixed marriages. Historically, Japanese courts frequently favoured Japanese nationals who returned to Japan with children by foreign spouses, thus leaving the non-custodial parent with virtually no legal recourse if they wished to see their children.³⁸ Consider the case of another American, Christopher Savoie. Mr. Savoie, a father of two Japanese-American minors, was arrested and jailed for 3 weeks after attempting to enter the U.S. Consulate in Fukuoka

³⁵ Yuri Joakimidis, *Back to the Best Interest of the Child* 8 (2d ed. 1993), available at <http://www.fatherhood.org.au/resources/back-to-the-best-interests-of-the-child.pdf>.

³⁶ *Stats – Japanese Divorce, Access Denial, and Abduction Statistics*, IAPCR (Oct. 1, 2010), <http://www.iapcr.org/japan-stats/>.

³⁷ Jeremy D. Morley, *International family law: Japan & international child abduction: an update* (Feb. 24, 2010), <http://www.internationalfamilylawfirm.com/2010/02/japan-international-child-abduction.html>.

³⁸ *Japan joins the Hague Convention on Child Abduction*, Marilyn Stowe Blog (Jan. 27, 2014), available at: <http://www.marilynstowe.co.uk/2014/01/27/japan-joins-the-hague-convention-on-child-abduction/>.

with his formerly abducted children.³⁹ Mr. Savoie's Japanese ex-wife had kidnapped his children because she believed that they were losing their Japanese identity. Although an American court gave Mr. Savoie full custody of both children, after their abduction to Japan, Mr. Savoie was left with no legal recourse option, forcing him to attempt to seize his children back.

Worldwide, approximately 30,000 non-Japanese nationals marry Japanese partners every year.⁴⁰ The birth rate among couples where one parent is non-Japanese is twice as high as the Japanese national average.⁴¹ Further, approximately 25,000 children were born each year between Japanese/non-Japanese couples.⁴² The traditional practice of granting sole physical custody to one parent, *kangoken*, puts all of these children at risk of being completely cut off from one parent in the event of divorce.

As articulated by Article 1, the purpose of the Convention is: "to secure the prompt return of children wrongfully removed to or retained in any contracting state and to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."⁴³ Article 7 specifies the measures that must be taken by State Parties: (1) to safeguard the immediate return of children; (2) to discover whereabouts of a child; (3) to prevent further harm to the child; and (4) to secure the voluntary return of the child or to bring about

³⁹ *Desperate father who tried to 'snatch' children back from runaway Japanese mother awarded \$6.1 million settlement*, Daily Mail (May 10, 2011), available at: <http://www.dailymail.co.uk/news/article-1385401/Desperate-father-Christopher-Savoie-tried-snatch-abducted-children-runaway-Japanese-mother-awarded-6-1-million-settlement.html>.

⁴⁰ Kuchikomi, *Int'l marriages test ability to balance love with tolerance*, Japan Today [Tokyo] (2012, April 19), available at: <http://www.japantoday.com/category/kuchikomi/view/international-marriages-test-ability-to-balance-love-with-tolerance>.

⁴¹ J. Sean Curtin, *GLOCOM Platform - Special Topics - Social Trends*, Japanese Institute of Global Communications, (Nov. 12, 2002), available at: http://www.glocom.org/special_topics/social_trends/20021112_trends_s16/.

⁴² B. A. Yamamoto, *International Marriage in Japan: an Exploration of Intimacy, Family and Parenthood 4* (2010), available at: http://asaa.asn.au/ASAA2010/reviewed_papers/Yamamoto-Beverley.pdf.

⁴³ The Hague Convention on Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [*hereinafter* Child Abduction Convention].

amicable resolution of the issue.⁴⁴ The Convention also emphasizes the importance of conducting prompt proceedings for the return of the abducted children: “if the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings... the Central Authority of the requesting State, shall have the right to request a statement of the reasons for delay....”⁴⁵

With regard to implementation, significant, some would say insurmountable, issues stand in the way of Japanese compliance with the Convention. Japanese attorney, Takao Tanase, acknowledged that there are “serious discrepancies between international and domestic standards.”⁴⁶ Japanese officials echoed this view when they acknowledged “it could take years before Japan signs the treaty because some domestic laws will need to be changed before implementation.”⁴⁷ Moreover, a senior official with the Japanese Supreme Court admitted that there would be only few cases where the courts would have to physically remove the children from a parent residing in Japan.⁴⁸

Some critics assert that if it were not for the intense pressure on Japan, it would not have even considered being a State Party. Most of the pressure came from the U.K., U.S., Australia, Canada and France, as abduction cases involving their citizens quadrupled from 2005 to 2009.⁴⁹ Of great

⁴⁴ Child Abduction Convention, *supra* note 43, at art. 7.

⁴⁵ Child Abduction Convention, *supra* note 43, at art. 11.

⁴⁶ Maya Kaneko, *Care urged for split families when Japan joins Hague pact*, The Japan Times (May 25, 2013), available at: http://www.japantimes.co.jp/news/2013/05/25/national/care-urged-for-split-families-when-japan-joins-hague-pact/#.UxLeH_SSx1N.

⁴⁷ Charlie Reed, *Left-behind fathers urge U.S. to push Japan to sign Hague treaty*, Stars and Stripes (Aug. 23, 2011), available at: http://www.stripes.com/news/left-behind-fathers-urge-u-s-to-push-japan-to-sign-hague-treaty-1_152943.

⁴⁸ *Japan finally signs Hague convention governing international child custody disputes*. Asahi Shimbun (Jan. 25, 2014), available at: http://ajw.asahi.com/article/behind_news/social_affairs/AJ201401250061.

⁴⁹ Jennifer Costa, *If Japan signs the Hague Convention on the Civil Aspects of International Child Abduction: real change or political maneuvering?*, 12 Or. Rev. Int'l L. 369, 380 (2010), available at <https://mylaw.uoregon.edu/org/oril/docs/12-2/Costa.pdf>

concern to child advocates, the Japanese Supreme Court issued a manual for child retrieval.⁵⁰ The manual directs officials to recover the child at the kidnapper's residence, but not to force the child to return if they are crying, and in the case of infants, only remove the child with the custodial parent's consent.⁵¹ Following such protocol would clearly render Japanese compliance nearly impossible.

The Japanese Ministry of Foreign Affairs has also recently issued an informational pamphlet entitled "What is the Hague Convention".⁵² This has come under fire for its biased approach.⁵³ First, consider the visuals. In series of cartoons, a foreign-looking man (never a woman) is physically violent towards his child, who longs to return to Japan and be with their mother.⁵⁴ As for the cartoons depicting children abducted to Japan, they show no dismay. The inference of the pamphlet is clear: "Japan is, on balance, the natural place for the child, regardless of factors such as primary language or time spent living abroad."⁵⁵ Critics assert this is proof that Japan's motivation for adopting the Convention is not "about returning children to their habitual residence (whether it be Japan or overseas); it is about giving Japan greater leverage overseas to bring its children home to Japan. Where they belong."⁵⁶

The justification previously given by officials for Japanese hesitance to adopt the Convention, was a concern for sending Japanese mothers back to abusive ex-husbands.⁵⁷ Further

⁵⁰ Magdalena Osumi, (2013, August 10) *Manual issued for Hague treaty child retrievals*, The Japan Times (Aug. 10, 2013), available at: http://www.japantimes.co.jp/news/2013/08/10/national/supreme-court-manual-lays-out-procedures-for-hague-treaty-child-retrievals/#.UxLjw_SSx1N.

⁵¹ *Id.*

⁵² Debito Arudou, (2014, October 8) *Biased pamphlet bodes ill for left-behind foreign parents outside Japan*, The Japan Times (Oct. 8, 2014), available at: <http://www.japantimes.co.jp/community/2014/10/08/issues/biased-pamphlet-bodes-ill-left-behind-foreign-parents-outside-japan/#.VcgZGJ2qqkr>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ "Running away with one's child": Japan, pushing forward the Hague Convention, JP News (Jan. 10, 2011). (translation by Jeong-Min Lee), available at http://www.jpnews.kr/sub_read.html?uid=8186.

complicating matters, Japan's Act on the Prevention of Spousal Violence and the Protection of Victims defines domestic violence in a very broad manner to include mental harm: "bodily harm by one spouse ... or the words and deeds of one spouse that cause equivalent psychological or physical harm to the other..."⁵⁸ The Japanese definition of "domestic violence" is so exceptionally broad that it not only includes physical violence, but verbal abuse, psychological and even economic "violence."⁵⁹ The international community responded to the Japanese position with disappointment stating that they could "find almost no cases of alleged or actual substantiated claims of violence and ... I think that this allegation is used very loosely and oftentimes inappropriately without any supporting criteria whatsoever...."⁶⁰

Japanese domestic law is in direct conflict with Article 13(b) of the Hague Convention, which provides that a State is not obligated to return a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."⁶¹ Importantly, the article refers only to a grave risk against the child, not the mother, thus, if one parent were to be accused of conducting domestic violence, the relationship between the parent and his or her child should be examined, not between the 2 spouses. Nearly every Japanese mother who abducted her child from overseas alleged to being a victim of domestic violence. Even if this were true, accusations of domestic violence against a spouse are not grounds for refusal to return under the Convention. To the contrary, "grave risk" has been interpreted as those that exist in severely harmful environments such as war zones or places where the child will

⁵⁸ Colin Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, American View (Feb. 1, 2012), available at <http://amview.japan.usembassy.gov/wordpress/divorce-and-child-custody-issues-in-the-japanese-legal-system/>.

⁵⁹ *Id.*

⁶⁰ Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Press Availability on International Parental Child Abduction (Feb. 2, 2010), available at: <http://www.state.gov/p/eap/rls/rm/2010/02/136416.htm>.

⁶¹ Child Abduction Convention, *supra* note 43, at art. 13.

likely suffer from starvation. Moreover, like child custody issues, the determination of the extent of the risk in question should be made by the legal system of the country from which the child was abducted from, not where the child was abducted to.⁶²

Child advocates also believe that “risk” should be defined narrowly and only those situations in which the child would be threatened with sexual or physical abuse should be considered intolerable under Article 13(b).⁶³ In *Friedrich v. Friedrich*, the United States Sixth Circuit Court of Appeals held that a grave risk of harm for the purposes of the Hague Convention can exist in only two situations: (1) if returning the child would put the child in imminent danger prior to the resolution of the custody dispute in the courts of the country of habitual residence, such as a war zone or famine and disease and (2) if there is evidence of serious abuse or neglect of the child, or extraordinary emotional dependence, and if the courts in the country of habitual residence cannot or will not give the child adequate protection.⁶⁴ It is clear that Japan’s justification for not allowing the return of children to foreign nationals for protecting their nationals from “abusive” partners cannot be sustained under Article 13(b).

II. Overview of Japanese Family Law

Japan’s tradition-based family law system is the major hurdle preventing Japan from complying with the CRC and the Convention. Obtaining a divorce under Japanese law is rather easy. The traditional *kyōgi rikon* (“divorce by conference”) system permits couples to negotiate the terms of their divorce, including issues of child custody and visitation, without any judicial

⁶² Joe Jones, *What’s Right and Wrong with Divorce in Japan*, Mutantfrog (Oct. 8, 2009), <http://www.mutantfrog.com/2009/10/08/all-thats-wrong-with-international-divorce-in-japan/>.

⁶³ Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?*, 2 Ind. J. Global Legal Stud. 553, 571 (1995).

⁶⁴ 78 F. 3d 1060 (6th Cir. 1996); Jeremy D. Morely, *The Future of the Grave Risk of Harm Defense in Hague Cases*, http://www.international-divorce.com/grave_risk_harm_defense.htm (last visited Feb. 7, 2014).

oversight or guidance. This system is used by 90% of the couples filing divorce in Japan today.⁶⁵ Japanese family law does not recognize joint custody of a child, requiring that non-custodial parents relinquish their rights to their children upon divorce.⁶⁶ This is contrary to Article 24 of the Japanese Constitution which provides that no bias shall exist in its family law: “With regard to choice of spouse, property rights ... divorce and other matters pertaining to marriage and the family, law shall be enacted from the standpoint of individual dignity and the essential equality of the sexes”.⁶⁷ Despite the constitutional mandate of equality in family matters, in 8 out of 10 divorces involving custody dispute of a minor, mothers were granted sole custody.⁶⁸ Time and again fathers are left with no enforceable legal rights for visitation; non-custodial fathers were able to see their children on average once per month and only upon approval of their former spouses.⁶⁹

A. Child Custody Under Japanese Law

Throughout the 19th century, child custody in Japan was a matter of birth lineage. Since traditionally men were considered to be the progenitors of children, upon divorce, mothers were left with no choice but to leave their children behind with their fathers. Thus, joint custody has never been part of Japanese custom or law.⁷⁰ The 1960s saw a shift towards a preference for maternal care for the children of divorced parents. This was based on the “tender years doctrine,” which provided that, absent special circumstances, mothers should have full custody of children because the Japanese felt that this was best for the child.⁷¹

⁶⁵ Matthew J. McCauley, *Divorce and the Welfare of the Child in Japan*, 20 Pac. Rim. L. & Pol’y J. 589, 591-93 (2011).

⁶⁶ Japan Subculture Research Cent., *As Japan Moves Toward Recognizing Joint Custody, A Father Nourishes Hope for Reunion...*, (Aug. 8, 2013), <http://www.japan-subculture.com/as-japan-moves-toward-recognizing-joint-custody-a-father-nourishes-hope-for-reunion/>.

⁶⁷ Nihonkoku Kenpō [Constitution], art. 24, para. 2 (Japan) (1946).

⁶⁸ Asia Policy Point, *Families and Child Custody in Japan*, (Feb. 1, 2011), <http://newasiapolicypoint.blogspot.kr/2011/02/families-and-child-custody-in-japan.html>.

⁶⁹ Japan Subculture Research Cent., *supra* note 66.

⁷⁰ Asia Policy Point, *supra* note 68.

⁷¹ McCauley, *supra* note 65, at 594.

Child custody or *shinken*, differs depending on whether a person is married or divorced. If one is married, *shinken* is “the ability to conduct legal acts and manage property on behalf of a child.” *Shinken* also includes the rights customarily associated with raising a child including “the right to decide his or her education and place of residence.” However, when the marriage ends, joint-custodial rights end and one parent gets physical custody (“*kangoken*”) of a child.⁷² Although joint custody would be theoretically possible under Japanese law, the Japanese Civil Code does not recognize it. Article 819 of the Code provides that “parental authority” may be decided by agreement between the parties or by verdict of the court:

- (1) If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child.
- (2) In the case of judicial divorce, the court shall determine which parent shall have parental authority (Japanese Law Translation, 1896).

Moreover, having *shinken* rights over one’s children, when one’s former spouse has *kangoken*, often means that the former parent has virtually no day-to-day interactions with their children. For example, a parent holding *shinken* rights, may manage the assets and be responsible for things like filing documents to obtain passports for their children and yet have no clue where the child resides or which school the child attends.⁷³

The separation of parental rights into *shinken* and *kangoken* is a relic of Japanese jurisprudence where mothers were mere caretakers and had no legal rights with regard to their children. Now that the status of women has changed in Japan, women not only serve as the legal guardians of their children, but also are empowered with *kangoken* rights, allowing them to

⁷² Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 Asian-Pac. L. & Pol’y J. 166, 215-16 (2007).

⁷³ *Id.* at 214.

completely cut the father out of the child's life.⁷⁴ This practice is based on the belief that a clean break between parties who are at odds is best for all involved, including the children. The end result is that spouses with economic assets, often the husband, are allowed to protect their property because they are not obligated to pay alimony or to provide child support, which unfortunately often comes at the expense of maintaining a relationship with the children.⁷⁵

The issues created by *shinken* and *kangoken* are exacerbated in the context of an international divorce. Despite the mandate of the Constitution of Japan that “all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁷⁶ Japanese judges have a history of discriminating against non-Japanese parents, with Japanese spouses almost always getting sole custody over their foreign counterpart.⁷⁷ This practice dates back to the 1980s where Japanese family courts showed prejudice against non-Japanese parents in granting child custody, preferring Japanese parents over non-Japanese and refusing to acknowledge the full heritage of a biracial child.⁷⁸ This is due to a societal belief that it is better for the child to be raised in Japan with a Japanese parent than in a foreign place.⁷⁹

B. Visitation Under Japanese Law

There is no right to visitation for a non-custodial parent under Japanese law.⁸⁰ Despite numerous claims by Japanese fathers seeking visitation, Japanese courts rarely grant these

⁷⁴ *Id.* at 216.

⁷⁵ Fabiola Tsugami, *Divorcing a Japanese*, Polonia.JP (14 March 2013 22:42), <http://www.polonia.jp/en/life-in-japan/item/1045-divorcing-a-japanese>.

⁷⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, (Japan).

⁷⁷ Fabiola, *supra* note 75.

⁷⁸ Colin P.A. Jones, *Marbury v. Madison and The Matrix: What Child Custody and Visitation in Japan Show us about the Japanese Court System*, *Sydney L. Rev.* (2005), available at: http://sydney.edu.au/law/anjel/documents/ResearchPublications/Jones_ChildCustody.pdf.

⁷⁹ Jeremy D. Morley, *Japanese Family Law-- Or The Lack Thereof!* (January 25, 2014), <http://www.international-divorce.com/Japanese-Family-Law-Or-The-Lack-Thereof.htm>.

⁸⁰ McCauley, *supra* note 65, at 591.

requests.⁸¹ Several cases illustrate how Japanese courts follow the custom against awarding joint custody. For example, in 1996, in awarding sole custody to a mother, the Yokohama Family Court held that “it is proper to avoid visitation in situations where there is strong antagonism between the parents.” In a 2003 case, in response to a request by a non-custodial parent seeking court approval to see her children after divorce, the Osaka High Court limited visitation to once a month holding: “exposing the child to different lifestyles and methods of discipline can have adverse effects on the feelings and emotional stability of the child.” The Tokyo Family Court used similar reasoning in 2006 when it limited visitation to once every one-and-a-half months finding: “a cooperative and trusting relationship between the parents is necessary to have smooth and stable visitation that truly contributes to the welfare of the child.”⁸²

Article 766 of the Civil Code grants substantial discretion to family law courts: “if the family court finds it necessary for the child’s interests, it may change who will take custody over the child and order any other proper disposition regarding custody.”⁸³ The best interests of the child standard is also emphasized in Article 819 of the Code: “the family court may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the interest of the child.”⁸⁴ Legal scholars have, however, argued that “at the root of Japanese judicial principles of visitation is the fundamental idea that if you do something the custodial parent dislikes, it will result in a negative effect on that parent’s custody of the child, thereby going against the welfare of that child.”⁸⁵ Courts are,

⁸¹ CBS News, *Divorced Fathers In Japan Fight To See Children*, The Associated Press (October 7, 2009, 2:24 PM), <http://www.cbsnews.com/news/divorced-fathers-in-japan-fight-to-see-children/>.

⁸² Takao Tanase, *Divorce and the Best Interest of the Child: Disputes over Visitation and the Japanese Family Courts*, 20 Pac. Rim L. & Pol’y J. 563, 596-71 (2011), <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1028/20PacRimLPolyJ563.pdf?sequence=4&isAllowed=y>.

⁸³ MINPŌ [CIV. C.] 1896, art. 766, (Japan).

⁸⁴ *Id.* at art. 819.

⁸⁵ Tanase, *supra* note 82, at 576.

therefore, following Japanese cultural norms rather than the standard set forth in the Japanese Civil Code (and the standard set forth in the Convention), when making visitation and custody decisions.

The theory that interaction with both parents is in the best interests of the child is generally accepted and supported by a number of studies, which show the importance of the continued interaction of both parents with the child upon divorce. Studies have found that 30% of minors examined had significantly lower academic performance level subsequent to parental separation. Having interaction with the non-custodial parent was also shown to be important for children in order to properly adjust to their new lifestyle. According to noted psychiatrist, Dr. Rebecca L. Drill: “The continued involvement of the non-custodial parent in the child’s life appears crucial in preventing an intense sense of loss in the child” and “the results of this study indicate that arrangements where both parents are equally involved with the child are optimal. When this type of arrangement is not possible, the child’s continued relationship with the non-custodial parent remains essential.”⁸⁶

In January 2010, legal advocate Takao Tanase made a proposal to the Japanese House of Representatives to reform Japanese family law; namely, to establish the right to visitation for the non-custodial parent and a joint custody system. In response to the proposed reforms then Japanese Justice Minister Keiko Chiba expressed reservations, claiming that sole custody may be better for the welfare of the child since it provided stability and that most of the issues surrounding parental alienation could be solved through enhanced visitation rights.⁸⁷ Opponents of Tanase’s proposed reforms assert that in order to create a stable environment for a child of divorce, it is best for the child to have no virtually no relation with the non-custodial parent for fear that divergent lifestyles

⁸⁶ Subramaniam M. Sunthari, *Is Visitation between a Child and Non-Custodial Parent a Right?*, 14 Osaka U. Knowledge Archive 1, 209 (2009), available at: http://ir.library.osaka-u.ac.jp/dspace/bitstream/11094/4368/1/25-14_n.pdf.

⁸⁷ McCauley, *supra* note 65, at 604.

and methods of discipline may have a deleterious effect on the child.⁸⁸ These traditional Japanese beliefs regarding how best to rear a child post divorce is supported by 2009 statistics which show that only 52% of the non-custodial parents have permission for visitation once or more per month.⁸⁹

C. Nominal Role of Japanese Courts in Family Matters

The practice of *kyōgi rikon* (divorce by conference), codified in the Meiji Civil Code (1898), is followed in most divorces in Japan. Furthermore, any divorce or child custody matter (as opposed to *kyōgi rikon*) in which a party is seeking judicial oversight, is mandated to take part in family-court sponsored mediation, which usually continues until the two parties agree on terms. Japanese courts, therefore, on the rare occasion when they get involved in family matters, serve primarily as peacemakers in the arbitration process; the primary purpose being support and encouragement for the participants to reach an agreement as amicably as possible. Courts, then, exercise little in the way of coercive powers in the divorce and custody determination process, doing little more than imposing on non-compliant parties. Moreover, court fines for noncompliance are capped at ¥100,000 (approximately \$830 USD) and the court is not required to levy any fine if there is a finding of “justifiable cause” for noncompliance. And despite the fact that courts have no option other than imposing financial penalties on non-compliant custodial parents for violating its rulings, courts are reluctant to even take this measure out of a fear that it may “impoverish the custodial household.”⁹⁰ The passivity of Japanese courts in domestic matters often leads desperate non-custodial parents little options other than to take the matter into their own hands.⁹¹ One example is the case of Richard Cory, where a family court virtually sanctioned “custody by capture” by allowing Mr.Cory to keep his retrieved daughter while granting his

⁸⁸ Tanase, *supra* note 82, at 569.

⁸⁹ McCauley, *supra* note 65, at 592.

⁹⁰ McCauley, *supra* note 65, at 601.

⁹¹ Joe Jones, *What’s Right and Wrong with Divorce in Japan*, Mutantfrog (Oct. 8, 2009).

Japanese ex-wife physical custody of the two younger boys she had initially abducted.⁹²

D. Child Abduction Under the Japanese Criminal Code

Exacerbating the problem of Japanese compliance with international norms is the Japanese Criminal Code. Article 224 of Japanese Criminal Code defines the felony of child abduction as: “a person who kidnaps a minor by force or enticement shall be punished by imprisonment with work for not less than three months but not more than seven years.”⁹³ Imposing a requirement of “force” or “enticement” would seem to exclude the circumstances of most parental kidnappings. If an abductor were to create a public disorder by grabbing a kid on the street, for instance, they could be charged with a crime, whereas a mother stealing away to her parents’ home with her children would, in all likelihood, not be classified as an abductor. One exception is, of course, that of Christopher Savoie who served 3 weeks in jail for child abduction for seizing his children back from his former Japanese spouse who had kidnapped them to Japan.⁹⁴ Compounding this paradox is the fact that Japanese law enforcement authorities claim that law enforcement protocol prohibits them from getting involved in “civil disputes,” which, though undefined, appears to be code for “matters relating to the family.”⁹⁵

Conclusion

The Japanese government has claimed that adoption of the Convention has been a success, arguing that child abduction is down from 81 reported cases in 2013 to 25 in 2014. Despite this

⁹² Richard Cory, *Behind the Facade of Family Law*, Japan Times (Sept. 28, 2010), <http://www.japantimes.co.jp/community/2010/09/28/issues/behind-the-facade-of-family-law/#.VyTiKTArLIU>.

⁹³ KEIHŌ [KEIHŌ] [PEN. C.] Act No. 45 of 1907, art. 224, (Japan).

⁹⁴ *Desperate father who tried to 'snatch' children back from runaway Japanese mother awarded \$6.1 million settlement*, Daily Mail (May 10, 2011), <http://www.dailymail.co.uk/news/article-1385401/Desperate-father-Christopher-Savoie-tried-snatch-abducted-children-runaway-Japanese-mother-awarded-6-1-million-settlement.html>.

⁹⁵ Colin Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, American View (Feb. 12, 2012), <http://amview.japan.usembassy.gov/en/divorce-law-in-japan/>.

claim, it appears that it is business as usual for the Japanese legal system. For example, a Canadian who has been seeking visitation rights over his 4-year-old son in Japan for 2 years said after court mediation he was offered unreasonably strict conditions for meeting his son; a maximum of 2 or 3 times a year, only in Japan and always under supervision.⁹⁶ This is cause for great concern as the decision to limit visitation in such a way falls outside the spirit of the Convention and its guiding principle of securing the rights of access of the non-custodial parent.

Until Japan takes real steps to dismantle its antiquated family law system, in particular the practice of *kangoken*, granting sole custody to one parent with the near total exclusion of the other and the traditional bias shown by courts to Japanese spouses, Japan will not be in compliance with the mandate of the Hague Convention. Japan is trumpeting its ratification of the Convention as a triumph for the rights of children and left behind parents. Without question, Japan's adoption of the Convention is a first step towards its being in line with the international community. The words, however, of a representative of the Children's Rights Council of Japan are of an ominous timbre: "history does not lend itself to optimism when dealing with Japanese in matters of this nature."⁹⁷

⁹⁶ May Masangkay, *Child Abduction Down in Year Since Hague Pact, but Not All Are Happy*, The Japan Times (Apr. 2, 2015), available at <http://www.japantimes.co.jp/news/2015/04/02/national/child-abductions-year-since-hague-pact-happy/#.VyTocDArLIV>.

⁹⁷ Children's Rights Alliance, *supra* note 22.

