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COMMENT

A HAVEN FOR INTERNATIONAL CHILD ABDUCTION: WILL THE HAGUE CONVENTION SHAPE JAPANESE FAMILY LAW?

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I. INTRODUCTION

Picture a little girl in San Diego, California, who is a dual citizen of the United States (“U.S.”) and Japan. She cannot travel to Japan or any other foreign country until she turns eighteen. She cannot visit her birthplace to see her grandparents, great-grandparents, cousins, nor her “favorite auntie.” This is because during her parents’ divorce proceedings, her mother was falsely accused of attempting to abduct her to Japan.

The mother, an immigrant from Japan, was a domestic violence¹ victim with no family in the U.S. Unfortunately, she perfectly matched the profile of a typical “international child abductor.”² During the parents’ divorce proceedings, the father repeatedly cautioned the court that because Japan is not a party to the Hague Convention there would be no remedy if the child was abducted to Japan. The mother in this case is me, the author of this Comment.

Until April 2014, Japan was the only major industrialized country that had not ratified the Hague Convention on the Civil Aspects of International Child Abduction of 1980 (“Convention” or “Hague

1. “Domestic violence” is “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.” THE U.S. DEP’T OF JUSTICE, DOMESTIC VIOLENCE (2015), <http://www.justice.gov/ovw/domestic-violence> (last visited Nov. 12, 2015).

2. U.S. Dept. of Justice, *Early Identification of Risk Factors for Parental Abduction*, Mar. 2001, <https://www.ncjrs.gov/pdffiles1/ojdp/185026.pdf> at 2-3. The typical child abductor profile consists of: (1) previously abducted or threatened to abduct; (2) makes claims of abuse and has no social support; (3) paranoid and delusional; (4) severely sociopathic; (5) foreign and ending a mixed marriage; (6) feels alienated from the judicial system and has social support in other communities. *Id.*

Convention”).³ The Convention is a multilateral treaty to ensure the prompt return of children who have been abducted from their country of habitual residence⁴ or wrongfully retained in a contracting state.⁵ For almost thirty-five years, Japan refused to ratify the Hague Convention for two reasons. First, the Japanese family law directly conflicts with the Convention’s underlying principle: joint custody⁶ and children’s right for having both parents.⁷ There is no concept of joint custody or visitation rights in Japan.⁸ Second, the Japanese government believed ratifying the Treaty might hinder its ability to shield Japanese families fleeing from abusive spouses.⁹ Since 1994, reportedly over 400 children have been abducted to Japan from the U.S.¹⁰ As a result of Japan’s firm opposition to the Convention, some Japanese women have successfully fled to Japan and protected their children from abusive fathers. On the contrary, there have also been cases in which non-Japanese fathers, whose children had been abducted to Japan, were left behind without a remedy to reunite with

3. Charlie Reed, *Parents Hope Japan’s New Leaders OK Abduction Treaty*, STARS AND STRIPES, Sept. 23, 2009, <http://www.stripes.com/article.asp?section=104&article=64950> (last visited Nov. 12, 2015).

4. The convention does not define “habitual residence” as the term is meant to be fluid.” Courts are split on the definition. In the U.S., “habitual residence” is interpreted as the State where the child lived. 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, 558 (1994).

5. Hague Convention on the Civil Aspects of International Child Abduction art. 31, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

6. Joint custody includes joint physical custody and joint legal custody. Joint physical custody means each parent has significant periods of physical custody. Joint legal custody means both parents share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child. *In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 214-15 (1989).

7. See Megan J. Reynolds, *It can be Done: On Japan Becoming a Successful Signatory to the Hague Convention on Civil Aspects of International Child Abduction*, 44 GEO. WASH. INT’L L. REV. 367, 398 (2012).

8. *Id.*

9. Robin S. Lee, *Note: Bringing Our Kids Home: International Parental Child Abduction & Japan’s Refusal to Return Our Children*, 17 CARDOZO J.L. & GENDER 109, 109 (2010).

10. BRING ABDUCTED CHILDREN HOME, <http://bachome.org> (last visited Nov. 13, 2015).

their children.¹¹ Eventually, other countries began calling Japan “a haven for child abductions.”¹² Because of this inaccurate characterization, many Japanese mothers were falsely accused of attempting to abduct their children to Japan.¹³ Because Japan was not a party to the Convention, non-Japanese courts often prohibited Japanese mothers from traveling to Japan with their children.¹⁴

In Japan, 23,657 international couples¹⁵ married and 16,288 international couples divorced in 2012.¹⁶ With this increasing number of international marriages and divorces, Japan finally ratified the Convention on April 1, 2014.¹⁷ As of October 2014, ninety-three countries are parties to the Convention.¹⁸

The purpose of this Comment is to explain how Japan’s recent ratification of the Convention has affected international custody disputes and why the current Japanese domestic legal system is inadequate to implement the provisions of the Convention. To accomplish this purpose, Section II of this Comment explains provisions of the Hague Convention. Section III addresses the reasons why Japan avoided ratifying the Convention until 2014, and Section IV discusses the issues confronting Japan before ratifying the

11. ACCJ Journal Article: Tokyo Handles First Cases Under Hague Convention, CHILDREN’S RIGHTS COUNCIL OF JAPAN, Feb. 2, 2015, <https://crcjapan.wordpress.com/2015/02/02/accj-journal-article-tokyo-handles-first-cases-under-hague-convention> [hereinafter ACCJ Journal].

12. Lucy Birmingham, *How Did Japan Become a Haven for Child Abductions?*, TIME, Mar. 7, 2011, <http://content.time.com/time/world/article/0,8599,2056454,00.html>.

13. *Joining the Child-Abduction Treaty*, THE JAPAN TIMES: OPINION, Feb. 20, 2014, <http://www.japantimes.co.jp/opinion/2014/02/20/editorials/joining-the-child-abduction-treaty/#.VOQrsarTnIU> [hereinafter *Joining Abduction Treaty*].

14. *Id.*

15. For the purpose of this Comment, “international couple” refers to a couple that consists of a Japanese spouse and a non-Japanese spouse.

16. JAPANESE MINISTRY OF HEALTH, LABOUR AND WELFARE OF JAPAN, HANDBOOK OF HEALTH AND WELFARE STATISTICS 2013 CONTENTS, Table 1-37, 1-42 (2013) <http://www.mhlw.go.jp/english/database/db-hh/1-2.html> (last visited Nov. 12, 2015).

17. *Joining Abduction Treaty*, *supra* note 13.

18. Hague Convention Status Table: 28: Convention of 25 Oct. 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Hague Convention Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Nov. 12, 2015).

Convention. Section V analyzes how Japan's recent ratification has affected international custody disputes. Section VI concludes the current Japanese legal system, which does not recognize the joint custody or the visitation rights for non-custodial parents, is inadequate to implement the provisions of the Convention and Hague cases properly. Finally, Section VII proposes possible solutions to resolve this issue.

II. WHAT IS THE HAGUE CONVENTION?

The Hague Convention of Civil Aspects of International Child Abduction was enacted on October 25, 1980 for two purposes: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State;" and (2) "to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States."¹⁹ When one parent unilaterally abducts a child, the other parent may file a claim under the Convention, which requires the contracting state to return the child to his or her country of habitual residence immediately.²⁰ If a child is abducted to Japan, the child's parent can apply for help through either the Japanese Ministry of Foreign Affairs or the State Department in the country of the child's habitual residence.²¹ Japan will then attempt to locate the child and respond appropriately to return the child.²²

The Convention does not seek to resolve disputes about custody or visitation rights.²³ The court where a Hague Convention action is filed should not consider the merits of any child custody dispute, but should only determine which country should hear the child custody issues.²⁴ This prevents the abducting parent from utilizing advantages of the legal system in the country where the child was taken.²⁵ The

19. Hague Convention, *supra* note 5, at art. 1.

20. *Id.* at art. 8.

21. Overview of the Hague Convention and Related Japanese Legal Systems, THE MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Apr. 10, 2015), http://www.mofa.go.jp/fp/hr_ha/page22e_000250.html.

22. Hague Convention, *supra* note 5, at art. 10.

23. *See* Hague Convention, *supra* note 5, at art 19.

24. *Id.*

25. *Id.*

Convention discourages a mother from abducting a child to a country in order to take advantage of a legal system that typically awards custody to mothers. Instead, it will be heard in the country from which the child was taken.

III. WHY DID JAPAN REFUSE TO RATIFY THE CONVENTION?

Despite overwhelming pressure from other countries, Japan strongly stood by its decision to oppose ratification of the Convention for over thirty-four years.²⁶ Japan was the last G8²⁷ country to join the Convention.²⁸ Japan's hesitation was due to two main reasons: first, the Japanese legal system concerning divorce and custody directly conflicts with the Convention; and second, the Japanese government desired to protect Japanese women and children from difficult living situations, such as domestic violence.

A. *The Japanese Legal System Concerning Divorce and Custody*

The central reason for Japan's long refusal to adopt the Convention is deeply rooted in Japanese culture and its legal system. The Japanese domestic legal system directly conflicts with the Convention's underlying principles: joint custody²⁹ and children's rights for having both parents.³⁰ In Japan, the concept of "joint custody" does not exist. In the vast majority of cases, one parent, usually the father, will be excluded from the child's life after divorce. Therefore, the child's right for maintaining relationships with both

26. *Joining Abduction Treaty*, *supra* note 13.

27. "The Group of Eight (G8)" is a governmental forum of leading advanced economies in the world. Members of G8 are Canada, the Russian Federation, France, Germany, Japan, Italy, the United Kingdom, and the United States, together with the European Union. G8 Summit 2009, http://www.g8italia2009.it/G8/Home/G8-G8_Layout_locale-199882116809_Summit.htm (last visited Nov. 13, 2015).

28. Reed, *supra* note 3.

29. Joint custody includes joint physical custody and joint legal custody. Joint physical custody means each parent has significant periods of physical custody. Joint legal custody means both parents share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child. *In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 215 (1989).

30. See Reynolds, *supra* note 7 at 398.

parents is denied. This subsection outlines the Japanese legal system concerning divorce and custody.

1. Divorces in Japan

More than 90% of divorces in Japan are done through “*kyogi-rikon*,”³¹ where parties can decide all terms of divorce and custody without any judicial interference.³² The process of *kyogi-rikon* is very simple; parties simply need to submit a one-page document stating which parent is going have custody of the children.³³ There is no column to state visitations or property divisions.³⁴ Unlike in the United States, judicial divorce proceedings are not required in Japan. This means the Japanese family courts have no authority or supervision over the vast majority of the custody arrangements.³⁵ In the very few cases where Japanese courts get involved, they award sole custody to the mother about 80-90% of the time.³⁶ The U.S. embassy in Tokyo says, “the general practice is to award custody to the mother unless there is an overriding reason to award custody to the father.”³⁷ Parties can negotiate visitation arrangements, but enforcement could be difficult because the Japanese law enforcement is not involved in domestic disputes.³⁸

In 2012, the divorce rates were 1.77 in Japan³⁹ and 3.6 in the U.S.⁴⁰ Compared to other industrialized countries, Japan’s divorce rate

31. JAPANESE MINISTRY OF HEALTH, LABOUR AND WELFARE OF JAPAN, JINKO TOKEI (2008).

32. MINPŌ [CIV. C] art. 763, 766 (Japan) [hereinafter MINPŌ].

33. Each municipality has its own form but the contents are the same in all municipalities. See, e.g., Shinjuku City, *Rikon Todoke*, http://www.city.shinjuku.lg.jp/todokede/koseki02_000008.html.

34. *Id.*

35. Colin P.A. Jones, *Hague Convention on child abduction may shape Japan's family law- or vice versa*, THE JAPAN TIMES (June 11, 2013) <http://www.japantimes.co.jp/community/2013/06/11/issues/hague-convention-on-child-abduction-may-shape-japans-family-law-or-vice-versa/>.

36. Reynolds, *supra* note 7, at 382.

37. *Divorce in Japan*, Embassy of the U.S., Tokyo Japan, <http://japan.usembassy.gov/eacs/tacs-7117-content.html> (last visited Nov. 13, 2015).

38. *Id.*; Birmingham, *supra* note 12.

39. In this Comment, the “crude divorce rate” is used. The crude divorce rate is “the number of divorces occurring among the population of a given geographical

is still significantly low, yet it is currently twice the rate as in the 1970s, and four times the rate as in the 1950s.⁴¹ As the numbers suggest, the Japanese family courts began handling divorce cases only fairly recently. Therefore, the Japanese family law is not nearly as developed as it is in the U.S. In fact, the Japanese family law currently addresses the parent-child relationship only within the framework of marriage.⁴²

2. *No Joint Custody*

In Japan, there is no concept of “joint custody.”⁴³ To comprehend this problem fully, one must understand these two important Japanese legal concepts: “*koseki*,” a family registry system and “*shinken*,” parental power.

Japanese family law is based on *koseki*, a family registry system.⁴⁴ Under the *koseki* system, everybody belongs to one family unit, which typically consists of a father, a mother, children, and sometimes grandparents.⁴⁵ Upon marriage, a couple obtains their own *koseki* to register themselves as a new family unit.⁴⁶ Any children born in the marriage belong to that family unit.⁴⁷ However, when the parents divorce, children of the marriage are assigned exclusively to one side of the family, either the mother or father’s.⁴⁸ Under the *koseki* system,

area during a given year, per 1,000 mid-year total population of the given geographical area during the same year.” JAPANESE MINISTRY OF HEALTH, LABOUR AND WELFARE, JINKO TOKEI SOURAN, HEISEI 26 (2014) [hereinafter JINKO TOKEI (2014)]; *Crude Divorce Rate*, OECD Glossary of Statistic Terms, <http://stats.oecd.org/glossary/detail.asp?ID=492> (last updated Apr. 18, 2013).

40. *FastStats: Marriage and Divorce*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last visited May 15, 2015).

41. JINKO TOKEI (2014), *supra* note 39.

42. MINPŌ, *supra* note 32 art. 766, 818.

43. *See generally* MINPŌ, *supra* note 32.

44. Chandra Zdenek, Comment, *The United States versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance*, 16 S.D. INT’L L.J. 209, 224-45 (2014).

45. *See generally* Zdenek, *supra* note 44.

46. *See generally* KOSEKIHO art.74-75 (Japan).

47. *Id.*

48. KOSEKIHO, *supra* note 46, art. 76-77.

there is no mechanism to share children between two families.⁴⁹ In other words, Japan does not legally recognize joint custody.⁵⁰

Additionally, in Japan, legal custody and physical custody are awarded simultaneously.⁵¹ “*Shinken*,” often translated as “parental power,” includes all of the rights and responsibilities in raising children, including legal and physical custody.⁵² During a marriage, *shinken* is vested in both parents.⁵³ However, upon divorce, *shinken* of the couple’s child is recorded in only one of the parents’ *koseki*.⁵⁴ Because all the parental rights and responsibilities are included in *shinken*, obtaining *shinken* means obtaining sole legal and physical custody of the child. Without *shinken*, a non-custodial parent has absolutely no parental rights. A new spouse of the custodial parent can adopt the child without the non-custodial parent’s consent.⁵⁵ Moreover, once *shinken* has been determined, it cannot be modified without extraordinary reasons, such as death of the custodial parent.⁵⁶ This inevitably excludes the non-custodial parent from the child’s life.

There are two other notable problems with *shinken* and *koseki*. First, when an unmarried couple has a child, the child is automatically recorded in the mother’s *koseki*.⁵⁷ This means the mother gets *shinken*: sole legal and physical custody of the child. Second, *koseki* is available only to Japanese nationals; thus, non-Japanese nationals cannot obtain their own *koseki*.⁵⁸ When a Japanese national marries a non-Japanese national, the non-Japanese spouse’s name will be noted as a spouse in the Japanese spouse’s *koseki*, but will not be added to

49. Zednek, *supra* note 44.

50. Reynolds, *supra* note 7, at 382.

51. Zdenek, *supra* note 44, at 225; MINPŌ, *supra* note 32 art. 818.

52. MINPŌ, *supra* note 32, art. 818, 820.

53. *Id.* at art. 818, no. 3.

54. *Id.* at art. 819.

55. 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 (2007) [hereinafter *Best Interests of the Court*].

56. *Id.* at art. 834-37.

57. KOSEKIHO, *supra* note 46, art. 52.

58. Colin P.A. Jones, *Will The Child Abduction Treaty Become More “Asian”? A First Look at the Efforts of Singapore and Japan to Implement the Hague Convention*, 42 DENV. INT’L L. & POL’Y 287, 292 (2014) [hereinafter *First look*].

the *koseki* as a member of the family unit.⁵⁹ Upon divorce, the non-Japanese spouse's name will be simply deleted from the Japanese spouse's *koseki*.⁶⁰ Because non-Japanese nationals cannot obtain their own *koseki*, any children from international couples will automatically be recorded to the Japanese national's *koseki*.⁶¹ Thus, under this system, non-Japanese parents cannot obtain any parental rights without the Japanese spouse's consent or through judicial proceedings.⁶²

3. No Visitation Rights

Another problem with the Japanese family law is that it is mostly procedural and there is no statute or guiding principle "to determine the best interests of children."⁶³ At this moment, Japan does not have any substantive law regarding non-custodial parents' visitation rights.⁶⁴

One of the most important principles of the Hague Convention is "children's rights in cases of parental separation."⁶⁵ It recognizes "the right to know and be cared for by his or her parents."⁶⁶ Parties to the Convention must provide assistance when a child's rights to "family relation" are unlawfully interfered with.⁶⁷ Parties are also required to ensure children will not be separated from their parents against their will and to "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis," except when it is not in the child's best interests.⁶⁸ However, Japan does not have any substantive law to protect such rights; therefore, non-custodial parents' visitation rights are not legally protected.⁶⁹

59. KOSEKIHO *supra* note 46, art.6.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See First Look, supra* note 58.

64. *Best Interest of Court, supra* note 55, at 197.

65. *Id.* at 197-98.

66. *Id.* at 198; Hague Convention, *supra* note 5.

67. Hague Convention, *supra* note 5.

68. *Id.*

69. *See generally Best Interest of Court, supra* note 55, at 229-30.

No statutory provision clearly governs visitation rights in the Japanese family law; the Japanese courts only recently held that visitation orders are within the scope of the family court's authority.⁷⁰ In Japan, more than 90% of divorces are processed without any court interference.⁷¹ When the Japanese courts do determine visitation rights, the frequency and length of visitation is usually much less than it is in the U.S.⁷² In 2009, the Japanese family court handled 6,349 cases and only 14.1% of them involved overnight stays.⁷³ 51.2% involved the frequency of visitation of once a month or greater, 16.2% was once every two to three months, and 5.7% was once every four to six months.⁷⁴ Furthermore, in many of these cases, these orders are not enforced due to lack of joint custody concept and police involvement.⁷⁵

Unfortunately, non-custodial parents rarely receive much visitation rights. Visitation rights are not legally recognized nor practiced in Japan; it is a foreign concept to many Japanese people. In Japan, being with the mother is generally considered to be in the child's best interest.

4. Role of Family Court

The Japanese legal system grants an unfortunately broad scope of authority to the family courts. In addition to marriage and child custody disputes, the Japanese family courts also hear juvenile delinquency and probate matters.⁷⁶ Because of the family courts' broad scope, family court judges often do not specialize in "family law."⁷⁷ This is true for mediators as well.⁷⁸ They are required to have

70. *Id.*

71. *See Best Interest of Court, supra* 55, at 205.

72. *Id.* at 234.

73. *Id.*

74. Masayuki, Tanamura, Oyako no menkaikoryu wo jitsugen suru tameno seidotou ni kansuru chousa hokokusho (親子の面会交流を実現するための制度等に関する調査報告書) 89 (2011) <http://www.moj.go.jp/content/000076561.pdf>.

75. *Id.* at 90.

76. Saibanshohō [law of courts], Law No. 59, 1947, art. 31 no. 3 (Japan).

77. *Best Interest of Court, supra* note 55, at 180.

78. *Id.*

broad and general legal knowledge and are not necessarily specialized in child development or divorce.⁷⁹ Because the Japanese family law is mostly procedural, and lacks substantive guideline or principles,⁸⁰ the Japanese family courts have little experience or guidance to determine the “best interests of children,” especially outside the framework of marriage.

The Japanese government feared that it would be difficult to enforce rules and practices that are completely different from its own legal system.⁸¹ Recognizing this conflict, it is unsurprising Japan remained reluctant to ratify the Hague Convention.

B. Domestic Violence

Japan’s recalcitrance to the Hague Convention was also motivated by wanting to protect Japanese mothers and children fleeing to Japan, away from abusive fathers.⁸² Contrary to what the Hague Convention originally expected, the vast majority of the abductors have been mothers.⁸³ The study by the U.S. State Department shows that 54% of international child abductions involved domestic violence between parents.⁸⁴

Some experts believe “[m]ost international child abductions by Japanese women are a result of spousal abuse.”⁸⁵ Domestic abuse victims without sufficient financial resources may face a complex dilemma: go to a public shelter or stay with their abusive spouse and risk further physical and psychological abuse.⁸⁶ For many women who

79. *Id.*

80. *See supra* Section III.A.3.

81. Lee, *supra* note 9, at 109.

82. Reynolds, *supra* note 7, at 386-87.

83. U.S. Dep’t of State, International Parental Child Abduction (Apr. 2014), <http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf>.

84. *Id.*

85. Lawyer Kensuke Ohnuki, who handles about 200 international divorces a year, stated most international child abductions by Japanese women are a result of spousal abuse. *Quote of the Day*, JAPAN TIMES (Jul. 21, 2009, 4:01 AM), <http://www.japantoday.com/category/quote-of-the-day/view/most-child-abductions-by-japanese-women-are-a-result-of-spousal-violence> (last visited Nov. 13, 2015).

86. Jeanine Lewis, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 Transnat’l Law. 391,397 (2000).

emigrated from Japan, there is also a language barrier.⁸⁷ Lack of local language skills may prevent immigrants from obtaining adequate representation in dealing with domestic violence. Indeed, many victims of domestic violence may have better support systems and employment opportunities in their home country.⁸⁸ Considering these realities, rational minds can conclude that a parent's decision to take his or her child to Japan is a reasonable course of action. Actually, for those abused spouses, international child abduction may be the only way for survival.⁸⁹

Furthermore, Japanese immigrants do not always come forward and ask for help with domestic violence in their adopted country because in Japan it is against cultural norms to seek help regarding domestic disputes. Japanese people firmly believe "what is within a family stays in the family."⁹⁰ A well-known Japanese proverb illustrates this cultural norm: "*fufu genka wa inu mo kuwazu*," which means not even a dog wants to bother with domestic disputes because they are tedious and shameful.⁹¹

Not only do Japanese cultural norms discourage Japanese parents from seeking help, but also many immigrants simply do not know about the legal system and resources that exist in the foreign country they live in.⁹² For example, in the U.S. domestic violence clinics and other community-help organizations offer support to domestic violence victims at no cost.⁹³ However, Japanese immigrants likely do not know of these organizations. As discussed above, many factors may prevent Japanese immigrants from receiving help. First, they do

87. See generally Janet Chiancone et al., U.S. Dep't Just., Off. Juv. Just. & Delinq. Prevention, OJJDP Bull. No. NCJ 190105, *Issues in Resolving Cases of International Child Abduction by Parents* 1, 14-15 (2001), <http://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf>.

88. *Id.*

89. Lewis, *supra* note 86, at 398.

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

91. See generally Roger Pulvers, *Colorful Proverbs Capture a Peculiar Sensibility*, THE JAPAN TIMES (June 26, 2006) http://www.japantimes.co.jp/life/2006/06/27/language/colorful-proverbs-capture-a-peculiar-sensibility/#.VSDA3qm_VI.

92. Kamoto, *supra* note 90.

93. See, e.g., San Diego Family Justice Center Resources, <http://www.justice.gov/ovw/domestic-violence> (last visited Oct.19, 2015).

not know about available resources. Second, it is against cultural norms to ask for help. Third, they cannot ask for help or legal counsel because of the language barrier. These challenges are further convoluted because non-Japanese courts are quick to conclude there was no domestic violence because restraining orders were not requested. Considering the Japanese cultural background, this is not always the case.

The underlying principle of the Convention is to serve “the best interest[s] of children” by returning abducted children to their habitual residence.⁹⁴ However, return of children may not be in the best interest of the children when it means going back to their abusive parent.⁹⁵ Before ratification of the Convention, the Japanese government was aware that Japanese parents might face this exact issue in a foreign country.⁹⁶ Japan believed ratifying the convention might hinder its ability to protect those battered Japanese mothers and their children.⁹⁷ This concern was one of the main reasons Japan did not ratify the Convention for thirty-four years.⁹⁸

IV. BEFORE JAPAN’S RATIFICATION

Although Japan’s reasons for withholding ratification of the Convention seemed reasonable, Japan’s refusal also created several problems: denial of children’s relationship with their left-behind parent and bias toward Japanese mothers.

A. Denial of Children’s Relationship with Left-Behind Parent

Before ratifying the Convention, embassies in Tokyo handled around 400 cases annually where Japanese parents violated the terms of the Convention.⁹⁹ Between the years 1994 and 2013, an estimated 400 children were abducted from the U.S. to Japan.¹⁰⁰ As of 2013, the

94. Hague Convention, *supra* note 5; Lewis, *supra* note 86, at 416.

95. Lewis, *supra* note 86 at 416.

96. See generally *Joining Abduction Treaty*, *supra* note 13.

97. Reynolds, *supra* note 7.

98. *Id.*

99. See ACCJ Journal, *supra* note 11.

100. H. Rep. *Resolving International Parental Child Abductions to Non-Hague Convention Countries: Excerpts of Remarks from Hearing before the*

Japanese court had not granted favorable relief to an American left-behind parent in a single case.¹⁰¹ In every case, Japanese courts granted sole custody of the child to the Japanese mother.¹⁰² In 2009, an estimated 10,000 children were denied a relationship with their non-Japanese parents.¹⁰³ Most of the left-behind parents never saw or spoke to their children after they were abducted to Japan.¹⁰⁴

This problem is illustrated in the case of *Savoie*. In 2009, a U.S. native husband and a Japanese wife divorced in Tennessee.¹⁰⁵ The Tennessee court awarded the mother custody of their two children, but denied her international travel with the children.¹⁰⁶ Shortly after this decision, the Japanese mother fled to Japan with the children, directly against the court order.¹⁰⁷ Due to her unlawful conduct, the Tennessee court reversed its previous order (awarding her custody of the children) and awarded the father sole custody of the children.¹⁰⁸ The court also issued an arrest warrant for the Japanese mother.¹⁰⁹ However, at the time of these events, Japan had not ratified the Convention.¹¹⁰ Therefore, neither the warrant nor the new custody order was legally enforceable in Japan.¹¹¹ In 2009, the father flew to Japan in an attempt to bring the children back to the U.S.¹¹² Ironically, during his visit to Japan, the father was arrested for attempting to

Subcomm. On Africa, Glob. Human Rights, and Int'l Org. of the Comm. on Foreign Affairs, 113th Cong. (2013) (excerpts of Remarks by Chis Smith, H. R. Rep) http://chrissmith.house.gov/uploadedfiles/2013-05_09_chairman_smith_on_resolving_international_parental_child_abductions_to_non-hague_convention_countries_on_letterhead.pdf.

101. *Id.*

102. Zdenek, *supra* note 44, at 223.

103. *Id.*

104. ACCJ Journal, *supra* note 11.

105. Kyung Lah, *Father, Kids in Custody Case Japanese Citizens*, CNN, Sept. 30, 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/09/30/japan.savoie.children/> (last visited May 14, 2015).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Lah, *supra* note 105.

112. *Id.*

abduct his children.¹¹³ After spending nearly three weeks in jail, criminal charges against him were dropped; however, he could not bring the children back to the U.S.¹¹⁴ Ultimately the father will likely never have the opportunity to reunite with his children ever again.¹¹⁵

In cases like *Savoie*, the true victims are the children. Savoie's children were denied any relationship with their father because their mother unilaterally decided to abduct them to Japan. Japan's refusal to ratify the Convention created many left-behind parents and abducted children, both of who are still suffering because of the separation created by one parent.¹¹⁶

B. Bias toward Japanese Mothers

If Japanese mothers were allowed to visit Japan with their children, they might not flee to Japan. In many cases, Japanese mothers were barred from visiting Japan with their children because Japan had not accepted the Convention, and Japanese mother's bad reputation of being "child abductors."¹¹⁷

What follows is a sad example that illustrates the aforementioned problem. A Japanese mother had physical custody of her son for seven years after the divorce.¹¹⁸ The American father did not have any problems with the custody arrangement until he remarried. Both parents resided in San Diego, California. However, shortly after the father remarried, the Japanese mother was falsely accused of attempting to abduct their son to Japan. Thereafter, the court awarded sole legal and physical custody of the child to the father. Not stopping there, the court also issued a restraining order against the mother so she could only see her son during supervised visitations. The court also banned the mother from communicating to her son in Japanese, the language they always used to communicate with one another. The

113. *Id.*

114. *Id.*

115. *Id.*; The provisions of the Convention are not retroactive; therefore, they are not applicable to cases like this, which occurred before Japan ratified the Convention in 2014. The left-behind parent in those situations may apply to Japan for visitation rights. Hague Convention, *supra* note 5 art. 35.

116. ACCJ Journal, *supra* note 11.

117. See generally *Joining Abduction Treaty*, *supra* note 13.

118. O'Berry v. O'Berry, D485413 (S.D. Super. Ct. 2004).

son is a dual citizen of the U.S. and Japan, and had lived in Japan about one third of his life. Unfortunately, the court further barred the mother from traveling to Japan with her son. During this lengthy court battle, both of the child's grandparents in Japan passed away. Sadly, the boy was not allowed to visit Japan to say a last good-bye to his grandparents.¹¹⁹

The Department of Justice provides six characteristics of a typical child abductor: (1) previously abducted or threatened to abduct; (2) makes claims of abuse and has no social support; (3) paranoid and delusional; (4) severely sociopathic; (5) foreign and ending a mixed marriage; (6) feels alienated from the judicial system and has social support in other communities.¹²⁰ Abused Japanese immigrants usually automatically possess half of the characteristics. Many non-Japanese courts considered that was more than just a red flag. In this way, many innocent Japanese mothers were denied international travel with their children. Japan's opposition to the Convention further reinforces this bias toward Japanese mothers.

V. WHAT NOW? AFTER THE RATIFICATION

With an increasing number of international marriages and cases of Japanese parents unilaterally taking a child to Japan, pressure from other countries, especially the U.S., to ratify the Convention, built in Japan.¹²¹ On April 1, 2014, Japan finally became the ninety-first country to join the Convention.¹²² Now, the Japanese government must cooperate in returning abducted children to their country of habitual residence.¹²³ The following section addresses how Japan's recent ratification has affected international custody disputes, highlighting successful return of children, development of a mediation system, and possibility of international travel.

119. *Id.*

120. U.S. Dept. of Justice, *supra* note 2.

121. ACCJ Journal, *supra* note 11; Zednek, *supra* note 44 at 236.

122. Hague Convention, *supra* note 5.

123. ACCJ Journal, *supra* note 11.

A. Successful Return of Children

Since April 2014, there have been several cases where a child was returned to Japan from overseas, and also where a child was returned overseas from Japan.¹²⁴ In July 2014, a British tribunal ordered the return of a Japanese child whose mother abducted him to the United Kingdom from Japan.¹²⁵ In this case, both of the parents were Japanese nationals.¹²⁶ This was the first case where a child returned to Japan in accordance with the Convention.¹²⁷ The father's counsel said, "I think the child's future would have been decided purely on the mother's wishes were it not for the Hague Convention."¹²⁸ The father stated he was glad Japan had finally recognized that raising a child involves both parents.¹²⁹ Before the ratification, non-Japanese parents could not bring their children back from being abducted to Japan, and Japanese parents had no remedy when their child was abducted to another country.¹³⁰

In November 2014, a child who was unilaterally taken to Japan by his Japanese mother reunited with his German father in Germany.¹³¹ This was the first case where a child was returned from Japan to another country in accordance with the Convention.¹³² Since Japan's ratification of the Hague Convention, 117 Hague cases were filed with the Japanese government as of April 16, 2015.¹³³ Among

124. Masaaki Kameda, *Boy Returns to Germany Under Hague Pact, In First for Japan*, The Japan Times, (Nov. 12, 2014) <http://www.japantimes.co.jp/news/2014/11/12/national/crime-legal/boy-returns-germany-hague-pact-first-japan/#.VOl0ParTnIU> [hereinafter *Boy returns to Germany*].

125. *Id.*; *Hague Pact Used to Return Japanese Child for 1st Time*, KYODO NEWS INTERNATIONAL (July 29, 2014) <http://www.globalpost.com/dispatch/news/kyodo-news-international/140729/hague-pact-used-return-japanese-child-1st-time> [hereinafter KYODO].

126. KYODO, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Boy Returns to Germany*, *supra* note 124.

132. *Id.*

133. Masami Ito, *State of Reunion: Evaluation the Hague Pact's Success*, THE JAPAN TIMES (Apr. 18, 2015)

those claims, twenty-seven involved parents seeking the return of children from Japan; nineteen sought return of children from overseas.¹³⁴ As of April 2015, ten cases have been resolved since Japan's ratification, and in five cases, children returned overseas from Japan. In the remaining five cases, children returned to Japan from overseas.¹³⁵

Moreover, the number of child abductions by Japanese nationals dramatically decreased since Japan's ratification.¹³⁶ Before the ratification, embassies in Tokyo were handling approximately 400 cases a year involving a Japanese parent allegedly abducting children.¹³⁷ After the ratification, the number was reduced to 100 a year.¹³⁸ The Japanese Ministry of Foreign Affairs believes the Convention helped prevent abductions to Japan.¹³⁹ So far, Japan's ratification has certainly fulfilled one of the purposes of the Convention: "to secure the prompt return of children wrongfully removed to or retained in any signatory state."¹⁴⁰ It also helped prevent international child abductions.¹⁴¹

B. Development of Mediation System

In November 2014, two children returned to Canada after their Japanese mother abducted them to Japan.¹⁴² In this case, a new

<http://www.japantimes.co.jp/life/2015/04/18/general/state-reunion-evaluating-hague-pacts-success/>.

134. *Id.*

135. *Id.*

136. Masaaki Kameda, *Number of Reported Child Abductions 'Down' Drastically a Year After Hague Convention*, The Japan Times (Mar. 26, 2015) http://www.japantimes.co.jp/news/2015/03/26/national/social-issues/number-reported-child-abductions-drastically-year-hague-convention/?utm_source=rss&utm_medium=rss&utm_campaign=number-reported-child-abductions-drastically-year-hague-convention#.VSDYS6rn_VI [hereinafter *Number of Abductions*].

137. ACCJ Journal Article, *supra* note 11.

138. *Id.*

139. *Number of Abductions*, *supra* note 136.

140. *See supra* Section II.

141. *Number of Abductions*, *supra* note 136.

142. *Second Batch of Children Leaves Japan Under Hague Pact*, The Japan Times (Dec. 6, 2014) <http://www.japantimes.co.jp/news/2014/12/06/national/social->

mediation system was used for the return proceedings: Alternative Dispute Resolution (“ADR”).¹⁴³ To accommodate the changes the Convention brings, The Ministry of Foreign Affairs of Japan (“MOFA”) introduced a mediation method tailored specifically to international child abduction issues.¹⁴⁴ The main goal of ADR is to facilitate communications between the parties and help them reach an amicable resolution in international custody disputes.¹⁴⁵ MOFA also provides a list of institutions that offer ADR to parents involved in these disputes.¹⁴⁶

ADR’s advantages far outweigh its disadvantages. ADR’s disadvantages include its voluntary nature; one cannot force the other parent to participate in ADR.¹⁴⁷ In addition, because ADR is so new, it is still uncertain how other authorities will handle ADR agreements.¹⁴⁸ Despite these disadvantages, ADR has several very important advantages. First, ADR can help avoid unnecessary conflicts between parties. Often, parties who end up in custody disputes have trouble communicating with each other.¹⁴⁹ A trained mediator can facilitate effective communication between these embattled parties and avoid unnecessary conflicts.¹⁵⁰ Second, ADR is much quicker and more flexible compared to formal court proceedings.¹⁵¹ As long as parties agree on lawful measures, any custody arrangement is possible. Moreover, an agreement reached in ADR has the same legal effect as a court order.¹⁵² ADR will likely become more common in resolving international disputes arising under the Hague Convention.

issues/second-batch-of-children-leaves-japan-under-hague-pact/#.VOl_EKrTnIU
[hereinafter ADR case].

143. *Id.*

144. *The Hague Convention (Convention on the Civil Aspects of International Child Abduction)*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (June 19, 2014), http://www.mofa.go.jp/fp/hr_ha/page22e_000344.html.

145. *Id.*

146. *Id.*

147. *Id.* at 2(1)c.

148. *Id.*

149. *Id.* at 2(1)b.

150. *Id.*

151. *Id.* at 2(1)c.

152. *Id.*

Additionally, ADR may play another important role; introducing custody mediations to Japan. Japanese divorce proceedings generally do not include custody mediations.¹⁵³ If ADR in Hague cases can show the effectiveness and benefits of mediations, it can be a starting point to mandated custody mediations in divorce proceedings. This could help bridge the gap between the Japanese legal system and the Convention.

C. Online Visitations

MOFA will also start offering an online parent-child communication software in fall 2015.¹⁵⁴ Japan will be the first member of the Convention to provide such a system.¹⁵⁵ As discussed above, parental visitations are neither recognized nor practiced in Japan.¹⁵⁶ This system is expected to ease financial burdens on parents living far away from their children and facilitate communications.¹⁵⁷ A trained third party will monitor these communications; therefore, the Japanese government hopes it will also be helpful to cases involving domestic violence.¹⁵⁸

D. International Travel Order

The Japanese government also hoped its ratification would dispel other countries' distrust in the Japanese legal system.¹⁵⁹ Japan's non-ratification, combined with the high number of cases of Japanese mothers unilaterally taking their children to Japan, resulted in non-Japanese family courts completely prohibiting Japanese mothers from traveling overseas with their children, even for vacation.¹⁶⁰ Now that

153. See *supra* Section III.A.1.

154. *Japan Government to Support Online Parent-Child Contact Following Divorce*, TODAY, <http://www.todayonline.com/world/asia/japan-government-support-online-parent-child-contact-following-divorce> (last visited June 26, 2015) [hereinafter *Online Parent-Child Contact*].

155. *Id.*

156. See *supra* Section III.A.3.

157. *Online Parent-Child Contact*, *supra* note 154.

158. *Id.*

159. *Joining Abduction Treaty*, *supra* note 13.

160. *Id.*

Japan has ratified the Convention, non-Japanese courts have fewer reasons to grant a “no international travel” order. To date, Japan has been promptly handling the Hague cases in both scenarios: returning a child to another country and bringing back a child from another country.¹⁶¹ Japanese mothers, who were previously denied international travel, have renewed hope to soon be able to visit their families in Japan with their children.

VI. ISSUES AFTER JAPAN’S RATIFICATION

While the Convention has brought many positive outcomes, drawbacks still exist. Japan opposed the Convention for many years because of two major problems: conflicts between the Convention and the Japanese legal system; and concerns for Japanese victims of domestic violence.¹⁶² Even after the ratification, these two problems remain unsolved. This section focuses on the difficulty in complying with the Convention under the current Japanese legal system.

A. *Difficulty in Implementation*

1. *Ambiguous Article 13(b) “Grave Risk” Exception*

The Convention’s goals and procedures seem straightforward; however, the exception provided in Article 13(b) has caused confusion.¹⁶³ Under Article 13(b), a party is not required to return the abducted child if “there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”¹⁶⁴ Because the Convention does not provide clear guidelines for this provision, the interpretation varies from country to country.¹⁶⁵ In the U.S., the applicability of this exception is interpreted narrowly. The U.S. Court of Appeal held the Article 13(b) exception can only be applied in two situations: (1) where the child is at risk of imminent danger if returned; or (2) where serious neglect, abuse, or extreme emotional dependence of the child is implicated if

161. *See supra* Section V.A.

162. *See supra* Section III.A.1.

163. Lee, *supra* note 9, at 113.

164. *Id.*

165. *Id.* at 128.

returned. Under the U.S. version of interpretation, this exception is not likely to be applied to a case involving unsubstantiated domestic violence.¹⁶⁶ Japan opposed the Convention to protect abused Japanese families that could not obtain proper legal protection in their country of residence.¹⁶⁷ This exception seems to provide a loophole in these cases. With its long tradition of awarding mothers sole custody and its bias favoring Japanese nationals over non-Japanese individuals,¹⁶⁸ Japanese family courts will likely interpret the “grave risk” provision broadly and rule in favor of Japanese mothers. Even though Japan has not taken a position on the interpretation of this provision, many countries still fear Japan may not return abducted children interpreting this exception too broadly.¹⁶⁹

2. *Inadequacy of Japanese Legal System*

In accordance with the provisions of the Convention, Japan now must protect children’s rights to maintain relations with both parents. As addressed earlier, there is no concept of joint custody or visitation rights in Japan.¹⁷⁰ One parent, usually a mother, obtains full legal and physical custody of the child, leaving the other parent with no parental rights.¹⁷¹ Japanese law enforcement is not involved in domestic disputes, including custody and visitation issues.¹⁷² Unfortunately, many parents in Japan have been denied physical custody and visitation by the other parent.¹⁷³ Because children’s rights are not legally recognized nor practiced in Japan, Japanese judges will likely struggle to comprehend this concept.

Furthermore, Japan has no statute or guiding principle to determine the best interests of children.¹⁷⁴ Additionally, most of Japanese family law is procedural and does not require any

166. See *Freidrich v. Freidrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).

167. See *supra* Section III.A.

168. See *supra* Section III.A.

169. See generally Lee, *supra* note 9.

170. See *supra* Section III.A.

171. *Id.*

172. *Id.*

173. See generally Lee, *supra* note 9, at 128.

174. *Best Interest of Court*, *supra* note 55, at 197.

interpretation of substantive legal terms.¹⁷⁵ Therefore, unfortunately, the Japanese family courts do not have the experience, or the knowledge to determine the “best interest of the child,” which is a necessary process to decide whether to return the children.

A U.S. congressman, Christopher Smith states Japan is “breathhtakingly unresponsive” to the international abduction issues.¹⁷⁶ At this point, Japan has not changed its domestic legal system to comply with the Convention. Without any modification, the current Japanese legal system is not adequate to handle the Hague cases.

Additionally, the Hague Convention has exposed Japanese parents to a new concept, joint custody. Currently, Japanese courts recognize joint custody and fathers’ rights in the Hague cases, but they do not recognize those rights in domestic custody disputes. Now, those non-custodial parents who were denied parental rights may start asking the Japanese government to change its domestic law so they can reunite with their children, just like other Hague cases.

VII. HOW CAN JAPAN OVERCOME THESE PROBLEMS?

As discussed above, the current legal system in Japan cannot properly implement the provisions of the Convention. Also, there is still a strong concern for abused Japanese families being trapped in foreign countries. This section discusses what kinds of changes are needed to overcome these two problems.

Before acceding to the Convention in April 2010,¹⁷⁷ Morocco faced the same issues as Japan: Morocco had no substantive family law and no joint custody.¹⁷⁸ In joining the Convention, the Moroccan government made significant changes to its domestic legal system, specifically, the development of substantive family law and recognition of joint custody.¹⁷⁹ Even though Japan did enact

175. See *supra* Section III.A.

176. Erik Slavin, *Congressman: Japan ‘breathhtakingly irresponsible’ on US child abduction*, Stars and Stripes (Mar. 27, 2015) <http://www.stripes.com/news/congressman-japan-breathhtakingly-unresponsive-on-us-child-abduction-1.336910>.

177. Hague Status Table, *supra* note 18.

178. Michelle Boykin, *A Comparison of Japanese and Moroccan Approaches in Adopting the Hague Convention on the Civil Aspects of International Child Abduction*, 46 FAM. L.Q. 451, 462 (2012).

179. *Id.*

implementing legislation before ratifying the Convention,¹⁸⁰ unlike Morocco, the act did not significantly change Japan's domestic family law.¹⁸¹ For Japan to overcome its difficulty in implementation, Japan should also recognize joint custody and develop substantive family law. At the same time, the Hague Convention should provide universal guidelines as to interpretations of important provisions, such as the "grave risk" exception and what is the "best interest of children."

A. Recognition of Joint Custody and Development of Substantive Family Law

First and most importantly, as a party to the Convention, Japan must recognize joint custody. The current Japanese family registry system does not provide a mechanism for joint custody.¹⁸² This system should be modified "so that the child's name will remain under both parents' registries, regardless of the marital status of the parents,"¹⁸³ and both parents can share the rights and responsibilities of raising their child.

Second, the concept of legal custody and physical custody should be considered separately because they are different concepts. For example, equal share of physical custody may not be in the best interests of a very young child who needs stability, yet sharing joint legal custody may be in the best interest of the child. "Morocco had a very similar system that valued one parent, usually the mother," but in ratifying the Convention, Morocco modified its domestic legal system to allow joint responsibilities among parents.¹⁸⁴ One parent gets

180. The Implementation Act: Promulgated on June 19, 2013 (Act No.48 of 2013). "It appoints the Minister for Foreign Affairs as Central Authority and prescribes its authority, and it prescribes court procedures (Procedure of Return of the Child) required to decide whether the child should be returned to the state where he or she held habitual residence before he or she was removed. While the Hague Convention consists of 45 articles, Implementation Act consists of 153 articles." Overview of the Hague Convention and Related Japanese Legal Systems, THE MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Apr. 10, 2015), http://www.mofa.go.jp/fp/hr_ha/page22e_000250.html.

181. *Id.*; see generally Slavin, *supra* note 176.

182. Boykin, *supra* note 178, at 467.

183. *Id.*

184. Boykin, *supra* note 178, at 467.

“*hadena*” (care), and the other parent gets “*wilaya*” (supervision).¹⁸⁵ Similarly, Japan should separate physical custody from legal custody to allow both parents to share responsibility in raising their child.

Third, Japan needs to establish substantive family laws to guide custody determinations. Japan needs clear guidance in determining the best interests of children in Hague cases. If joint custody and visitation rights were to be more common, such guidance would certainly be needed. One of the most important changes Morocco has made is to establish non-custodial parents’ visitation rights.¹⁸⁶ Having frequent contact with both parents is very important to children’s developmental needs.¹⁸⁷ Learning from Morocco, Japan needs to establish substantive family law, especially regarding non-custodial parents’ visitation rights.

Finally, Japanese law enforcement needs to be involved in domestic disputes. Morocco also “implement[ed] law enforcement mechanisms to find abducted children and return the children safely.”¹⁸⁸ Japan will need law enforcement to help courts ensure the safe return of abducted children. Police involvement will be especially important in enforcing visitation orders.

B. Guidelines for Interpretations

The Hague cases inevitably involve two or more countries and the countries views on family and custody often differ. For example, joint custody is generally preferred in the U.S.¹⁸⁹ In contrast, Japan does not even legally recognize joint custody, and being with a mother is generally considered to be in the best interests of children.¹⁹⁰ The U.S. and Japan often interpret some of the Convention’s provisions quite differently. The Convention includes several ambiguous, yet very important terms, such as “best interest of children,” “grave risk,”

185. *Id.*

186. *Id.*

187. See generally Stephen Lilienthal, *Benefits of Having a Mom and Dad*, HUMAN EVENTS (Jan. 9, (2007), <http://humanevents.com/2007/01/09/the-benefits-of-having-a-mom-and-dad/>).

188. Boykin, *supra* note 178, at 467-78.

189. Birmingham, *supra* note 12.

190. *Best Interest of Court*, *supra* note 55 at 220-21.

and “country of residence.” Interpretation of these terms is crucial when determining whether to return a child.

However, the Convention does not provide universal guidelines on purpose because interpretation of these terms requires consideration of many different social factors.¹⁹¹ As a result, each court considers different factors and interprets these terms independently. For example, when determining “habitual residence,” the U.S. courts have considered the following factors: parental employment, purchase of home, moving of belongings, location of bank accounts, obtaining driver’s license and professional licenses, marital instability, citizenship, school enrollment, social activities, length of stay in the country, and age.¹⁹² Courts must also consider each party’s cultural backgrounds and the child’s personal traits.

This ambiguity causes difficulties in implementing the provisions around the world.¹⁹³ Laws are developed over time based on each country’s societal norms, religious beliefs, history and so on. Accordingly, different countries might have completely different law on the same issue. Because each country’s domestic legal system is dependent on its cultural and social background, implementing one universal rule in multiple countries can be very difficult. This is why the Convention does not wish to make universal guidelines.

There are two possible solutions to this problem. First, the Convention should provide a list of factors countries should consider when interpreting these terms. Some countries, like Japan, have no capacity or experience in interpreting these crucial terms. Universal factors would not only help guide countries, it would also lead to more uniform results around the world.

Second, if the Convention is not willing to provide universal factors, it should establish an approving committee that either approves or rejects each countries list of factors. This way, each

191. *In re Bates*, No. CA 122.89, 1989 WL 1683783 (High Court of Justice, Family Division Court, Royal Court of Justice 1989) (UK).

192. *See generally* *Feder v. Evans-Feder*, 63 F.3d 217, 218-19, 224 (3d Cir. 1995); *Papakosmas v. Papakosmas*, 483 F.3d 617, 627 (9th Cir. 2007); *Maxwell v. Maxwell*, 588 F.3d 245, 253 (4th Cir. 2009); *Ruiz v. Tenorio*, 392 F.3d 1247, 1255 (11th Cir. 2004); *Silvestri*, 403 F. Supp. 2d at 381; *Gitter v. Gitter*, 396 F.3d 124, 128-29, 135 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067, 1082 (9th Cir. 2001); *Holder v. Holder*, 392 F.3d 1009, 1019 (9th Cir. 2004).

193. *Holder*, 392 F.3d at 1015.

country has some guidance in interpretation and the Convention can still maintain uniformity to some extent. Still, formalistic unfair determination can be avoided. For example, Japan has tried to codify circumstances that may fall within the 13(b) grave risk exception with no success.¹⁹⁴ For Japan to overcome its difficulty in implementation, it needs guidelines that allow some flexibility depending on cultural backgrounds.

C. Establish a Safety Net for Abused Japanese Immigrants

The 13(b) exception can be applicable to cases that involve domestic violence. However, this exception is not applicable if there is not sufficient evidence of abuse.¹⁹⁵ Even if the court finds abuse occurred, the court may find the abuse does not pose a “grave risk.” The applicability of this exception varies from country to country.¹⁹⁶

While working on the interpretation of this provision, Japan should establish a safety net for Japanese domestic violence victims in foreign countries. Japan could provide legal counsels and interpreters to Japanese domestic violence victims. In addition, the Japanese government should vigorously inform Japanese immigrants of local resources. Through these measures, the Japanese government can protect Japanese families without being a “haven for child abduction” and Japanese parents can protect their children without being an “international child abductor.”

VIII. CONCLUSION

This Comment was written a year after Japan ratified the Convention in April 2014. The number of international abductions involving Japanese parents has drastically decreased since Japan’s ratification.¹⁹⁷ Several children have been returned to their country of residence and several children have been returned to Japan from other countries.¹⁹⁸ To accommodate the needs of the Convention, MOFA

194. Ito, *supra* note 133.

195. *See supra* Section IV.B.

196. *See supra* Section IV.B.

197. *Number of Abductions, supra* note 136.

198. *Boy Returns to Germany, supra* note 124; KYODO, *supra* note 125.

created a specialized mediation system, ADR.¹⁹⁹ ADR has already been utilized in several cases and enabled the prompt returns of children.²⁰⁰

At the same time, discrepancies between the Japanese domestic legal system and the Convention have become apparent. The Japanese legal system does not recognize underlying principles of the Hague Convention, such as joint custody and children's right to have a relationship with both parents.²⁰¹ At this time, the Japanese government approaches domestic custody disputes and international custody disputes differently. The Japanese domestic legal system has no choice but to change in accordance with the majority of countries participating in the Convention. First, Japan needs to recognize joint custody and visitation rights. Second, Japan needs to develop substantive law in custody and visitation. Because the Japanese legal system is deeply rooted in Japanese cultural traditions,²⁰² making these changes will not be easy. However, without these changes, Japanese courts cannot properly determine the "best interests of children."

Interpretations of these important provisions vary from country to country. Because most countries' legal systems are based on social factors specific to them, it is difficult to implement a universal rule all over the world. The Convention must balance consistency and flexibility.

At the same time, Japan should also provide more resources to abused Japanese immigrants, by providing attorneys and translators to them. There are many ways Japan can better protect Japanese families.

To this day, much controversy still surrounds the Hague Convention: some criticize the Japanese government for not protecting battered Japanese mothers; some have become aware of Japanese fathers who have been denied a relationship with their children. However, I, both as the author of this Comment and a victim of the negative effects of the Convention, strongly believe Japan's

199. Ministry of Foreign Affairs of Japan *The Hague Convention (Convention on the Civil Aspects of International Child Abduction)*, June 19, 2014, http://www.mofa.go.jp/fp/hr_ha/page22e_000344.html.

200. ADR case, *supra* note 142.

201. *See supra* Section III.A.

202. *See supra* Section III.A.

ratification was a positive step for Japanese families, especially Japanese immigrant mothers. For one, it gives them a chance to get rid of their bad reputation as “child abductors.” It also gives them a better chance to visit their families in Japan with their children. Moreover, the Hague Convention may prompt Japan to recognize joint custody, and hopefully those parents who were unilaterally denied their parental rights will reunite with their children and rebuild their relationships. Japan’s journey with the Convention has just started.

*Yoko Konno**

* Juris Doctorate Candidate at California Western School of Law, December 2016. I would like to thank my family and friends, especially my daughter Smile for being my inspiration. Also, I would like to thank my professors and peer law review members for continuous support.

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