

# **Post-Divorce Laws Governing Parent and Child in Japan**

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## Table of Contents

1. Globalization and Japanese Law	p. 3
2. Divorce and Parental Authority	p. 11
3. Legal Theory of Visitation	p. 22
4. Visitation Rights	p. 32
5. Failure of International Marriages	p. 40
Tables 1 to 4	p. 46
Attachments 1 to 2	p. 51

## **1. Globalization and Japanese Law**

### **The Hague Convention and Japan's Laws**

Japan is under international pressure to ratify the Hague Convention on the Civil Aspects of International Child Abduction. The Japanese government has begun to examine the possibility through its Foreign Ministry. It has also been reported that a subcommittee has been formed within the ruling Democratic Party of Japan to address this issue.

Yet within Japan, very few parents of children who have been “abducted” to another country are calling for the adoption of the 1980 treaty, but those who are aggressively pressing for ratification have done so from the perspective that it may lead to revisions in domestic Japanese law. They want the Japanese government and society as a whole to recognize that the provisions embodied in the Hague Convention, that is, “to protect children...from the harmful effects of their wrongful removal...” (Preamble) and “to ensure that the rights of custody and access...are effectively respected...” (Article 1, Chapter 1) are now established standards across the world.

For a while, dissatisfaction has been mounting in Japan about the woefully inadequate “right of contact”, or visitation right, a non-custodial parent has compared with international standards. In 1993, Japan's Supreme Court found no “illegality” in the “wrongful removal of child” by a spouse, an invasion of custodial rights specifically addressed in the Hague Convention. In practice, the “wrongful removal of child” has not been regarded as contravening Japanese law; only on rare instances have criminal charges been filed or damage payments awarded, or the parent with physical custody of the child treated disadvantageously as requested by the spouse with parental authority.

Cases are too numerous to count where a parent leaves the marital home with the child and subsequently denies any access to the left-behind spouse, who, in turn, asks the courts for help, but the bond between the latter and the child becomes severed before any effective remedial action can be taken. Although the courts in recent years seem to have taken a slightly more supportive view on visitation, in general they remain reluctant to grant visitation as long as the parent who has left the marriage with the child adamantly refuses it, on the basis that “visitation is not effective without the cooperation of both parties.”

Parents whose children have been “abducted” are expressing their anger towards Japan's judicial system that will not take a strong stance against the invasion of custodial and visitation rights caused by the wrongful removal of the child. This dissatisfaction is translated into their support for the Hague Convention which is hoped will bring about a realignment of Japanese laws up to world standards.

### **(2) National Characteristics**

To change Japan's existing practices to match current international standards means the globalization of Japanese law. It is part of the process of Japanese-style "modernization" that began in the Meiji Restoration when the government introduced a western-style society after centuries of isolation. Moves to incorporate "advanced" western societal standards into "old-fashioned" and "behind-the-times" Japan have occurred constantly over the past one hundred fifty years whenever the country felt disparity with the rest of the world. Changes would take place either top-down from the government who saw adopting western standards as a way to make Japan stronger or from the grass roots level by citizens discontent with their country who turned to the West for solutions.

It no longer seems appropriate to refer to Japan, an advanced industrialized country, as "a society that is yet to modernize." For this reason, instead of "modernization," the word "globalization" is used whenever steps are taken to bring Japan's standards up to international levels. Both words essentially mean the same thing.

The phrase "external pressure" is used in Japan if a request for change from abroad precedes that originating domestically, as in the case of the ratification of the Hague Convention. The underlying implication is that the Japanese way is unilaterally rejected by the rest of the world and the country is forced to imitate practices of other countries. Yet "external pressure" can become the perfect cover to carry out reform and a means to quell anti-reform sentiments when dissatisfied citizens challenge the status quo. Japanese society tends to be conservative and is cautious towards change. In this environment, pressure from abroad is sometimes considered a welcomed catalyst.

On the other hand, when external pressure is unwanted, Japan tends to assert its "uniqueness" and preference for the Japanese way.

Take the issue of post-divorce parent-child relationship. Many in Japan argue against encouraging visitation and joint child-rearing practices that are accepted in other countries because of the importance Japanese families place on the special relationship between mother and child; aversion towards asserting and proclaiming rights; and sensitivity towards the feelings of women and children, all of which are expressed both explicitly and implicitly.

With respect to the issue of ratifying the 1980 Hague Convention, the notion that Japan is unique connects with anti-foreign sentiments that exist deep within Japanese society and to the question of what is in Japan's national interest.

Family relationships in Japan and the stance taken by the courts on family matters usually emphasize emotional ties rather than legal rights and obligations. The tendency is to come to an agreement by convincing and being convinced instead of by power. The "Japan is unique" theory sometimes causes the Japanese public to stereotype western influence as "bullying." For example, a Japanese woman marrying a Caucasian man is the most common type of international marriage involving a Japanese. The relationship is often interpreted in this way: West = male = violence = take legal actions

(reason and power) versus Japan = female = dependency =not take legal actions (emotion and acquiescence).

Those in Japan who are opposed to ratifying the Hague Convention argue that it would be dangerous for a Japanese woman who has fled back to Japan with her child from her physically abusive foreign husband to be forced back to that country. This line of reasoning is often taken up by the media, the Justice Minister and female advocacy groups. It is believed that Japan's unique theory of foreign pressure that compares Japan to the West form the basis of this argument.

### **(3) Increase in Divorce**

Yet even without external pressure, the Japanese family structure is undergoing a major shift that the current judicial system can no longer handle adequately.

First, the number of divorces has increased dramatically. In the 1960s, the divorce rate was 0.7 out of 1,000. Today, this has trebled to 2.0; one out of 2.9 marriages end in a divorce. This affects just under two hundred fifty thousand children a year. Considering that one point one million children are born each year, one out of 4.5 children experience divorce before they reach adulthood (Table 1).

This trend can no longer be ignored. On one hand, societal norms preventing divorces have been deep-rooted in Japanese society, as reflected in the maxim, "a child is like a clamp that binds a marriage together." A clamp, or iron nail, supports pillars and prevents a house from collapsing. The existence of a child holds the marriage together and parents must suppress any desire to separate in order to keep the family intact.

Although this adage continues to appeal to conservative sentiments held by the Japanese, an increasing number of people are supporting women's movements that emphasize the positive aspect of divorce, that is, as a release from a marriage that has become intolerable. This is not to say divorce no longer has a social stigma attached to it. Couples and children who experience divorce still find it difficult to talk about it openly. Despite the high number of divorces in Japan today, this atmosphere has prevented society as a whole to confront the issue of divorce.

This is one of the main reasons why Japan is far behind the international trend on laws concerning post-divorce parent-child relationships. This is also reflected in the paucity of research in Japan on how children have adjusted psychologically to a divorce, compared to the United States where this subject has been studied extensively.

However, the fact remains that divorce in Japan is in a transition phase. In the past, divorcees kept a low profile as a minority in society (Table 2; in 1970, one out of twenty two children experienced a divorce). Today, divorce is no longer unusual, and people are not afraid to speak out about their problems. Newspapers, for example, carry articles on divorce with increased frequency.

#### **(4) Divorce Means Severance of Ties**

One of the main reasons why Japan's family courts have seen a surge in cases concerning divorce related matters, especially on issue of child custody, is due to an increased number of divorces itself.

In Japan, a couple can divorce by submitting the necessary form to the local ward office as long as both are in agreement. Ninety percent of divorces are based on mutual consent, called *kyogi rikon* (Table 3). If a child is involved, one parent takes parental authority of a child. Because this parent usually also assumes physical custody of the child, separate legal action for custodial rights is not necessary.

However, custodial matters are brought to court when a separation precedes a divorce and a feud over the child develops. Regardless of whether the child leaves with the departing parent or stays behind at the marital home, the parent with physical custody of the child can prevent visitation from the other parent, often leading to a bitter dispute.

Until 1970, child custody cases numbered less than one thousand. Today, over twenty four thousand cases a year are fought in court. The number of petitions for visitation has quadrupled over the past ten years (Table 4).

These trends are a result of many interconnected factors, the main one being the change in attitude towards divorce. In the past, it was customary for one spouse to leave the marital home, thereafter severing all ties with his or her children. Any dispute over custody was settled once it was decided which spouse would leave. Court cases over custody were rare.

Traditionally in Japan, the wife married into the husband's family, and in a divorce, it would be the wife who would leave. The child would remain with the husband and his family; the relationship between mother and child would be severed and they would no longer be related. The child would forever lose all contact with the mother.

Gradually, the nuclear family comprised of the married couple and their children became prevalent. Now, when this marriage fell apart, the husband could leave the family and his wife behind, or the wife could leave with the child. In most cases, the mother was given parental authority over the child. The departing father faced the possibility of never seeing his child, or the mother who left with the child could refuse visitation to the father. Either way, divorce continued to result in the severing of ties, or the permanent loss of contact between one parent and child.

The relationship the parent and child had during the marriage bears significance when considering problems that arise after the divorce. In the past, the husband would go to work and the wife would stay at home, even in a nuclear family setting. Because the parent's role was largely determined by gender, it was assumed that the mother would continue to take care of the child after a divorce. A single mother faced enormous hurdles raising a child single-handedly in the days when divorce was frowned upon and women found employment hard to come by. The hardship mothers faced while bringing up a child under these circumstances and the filial affection shown by the child was romanticized and often talked about.

Thus, in the past, the question of who would raise a child after a divorce was settled by social custom, and the parent who was left without the child resigned to the fact that he or she would most likely never see the child again.

#### **(5) Intensifying Disputes over Child Custody**

This pattern started to change as more fathers, refusing to cut off ties with the child with whom he developed a close relationship within the nuclear family setting, began demanding parental authority of the child, or visitation if the mother had custody. Custodial conflicts also rose when the wife began refusing the demand of the husband's parents or the second wife to leave the child behind. Traditionally, it was the mother's duty to raise a child, but divorce meant the mother would leave the family without the child because the latter belonged to the husband's family. As these traditional family values crumbled, the matter of where the child should live after a divorce became less clear-cut, intensifying disputes.

However, without any new post-divorce family model to replace the traditional setting, conflicts revolving around child custody continued to escalate. Family courts tried to settle disputes through mediation, but these often resulted either in ad hoc resolutions or the courts convincing the parent requesting visitation to give up, citing traditional family values.

In the past, some court officials have even gone so far as to say that "it isn't right for a father to ask to see the child after a divorce." While this may be an extreme example, the view that asking for visitation rights was an egotistic action on the parent dominated family court practices for some time.

In recent years, the courts have shifted their view. They now regard post-divorce visitation as beneficial to the child "as long as it is without conflict." However, disputes do continue. A conflict-free visitation is not possible when the parent with physical custody adamantly refuses visitation by the non-custodial parent. Visitation cannot be realized as long as the court's only recourse is to rely upon the voluntary cooperation of the parents.

In the meantime, an increasing number of divorcing mothers are taking the child with them, rather than leaving the child behind as had been the case in the past. Because the father is still denied any contact with the child, the conflict over post-divorce visitation has taken on the tones of a gender war. Japanese society today feels that victims of domestic violence must be protected; the police and government offices are ready to help. The internet is abuzz with information that may embolden women contemplating divorce, such as "you are not breaking the law by if you take your child with you when you separate," and "the mother is always granted the parental authority after a divorce." Lawyers are willing to take on cases where mothers refuse visitation. These have all served the mother well when it comes to visitation disputes.

In most cases, it is the father who is denied visitation. Many are now voicing their

frustration over the courts' inaction to help them and have formed protest groups whose membership has grown over the past several years.

## **(6) The Japanese Norm**

This paper has so far discussed issues related to Japan's ratification of the 1980 Hague Convention and changes to post-divorce parental contact with child. Today, the courts have taken the position that "post-divorce visitation is beneficial for the healthy psychological development of the child" and are trying to make visitation a reality in as many cases as possible.

However, when disputes occur, the courts are often of the opinion that forcible visitation would "be a burden for the child." The courts are worried about the adverse effect visitation would have on the child's custodial environment if it is granted in spite of vehement opposition from the parent who has physical custody. As a result, the courts often will pare down the amount of time and method of contact to a level that the parent with physical custody of the child will reluctantly accept.

Hence the "standard" time allocated for visitation in Japan is four hours a month in cases where there are no problems with the parent-child relationship and no possibility of child abuse exists, a level unheard of in the United States. If a case is slightly acrimonious, a third party is often present during visitation which becomes even more infrequent, averaging two hours once every three months. When the parent with physical custody adamantly continues to refuse visitation, the family court may order what is called "indirect visitation," where the non-custodial parent writes letters to the child or the custodial parent sends photographs of the child to the estranged spouse.

In a bid to encourage changes to these family court practices, scholars and advocacy groups have begun to discuss cases and studies on visitation practices in countries where post-divorce visitation is accepted. Some advocate creating laws to bring about change if court practices remain unchanged.

In some cases, parties to the dispute actually use such information to negotiate favorable terms with the estranged spouse, or would appeal for freer visitation during the mediation or litigation process with their legal representatives. At times, these efforts have produced favorable results.

An increasing number of judges, family court mediators, or *chotei iin*, and family court investigators, or *chosakan*, are expressing their desire to see changes to the status quo.

At the same time, other lawyers and women's advocacy groups voice their opposition against better terms of visitation on behalf of a significant number of women who divorced without agreeing to visitation and want to continue to care for the child without the child seeing the father, or are averse to the idea of the former husband appearing and staking claim as the father.



## **(7) Signs of Change**

Overall, visitation in Japan remains at a low level. Yet pressure for change is mounting with increased availability of information on visitation standards from other parts of the world and from actual cases involving Japanese spouses in international marriages.

The family structure in Japan is also undergoing changes. Young fathers are becoming more hands-on with child-rearing. Counseling, or psychological care, used to be virtually non-existent in Japan; it is still rare to see a counselor appointed to help parents and child who are experiencing the trauma of divorce. Yet Japanese people are now aware of post-traumatic stress disorder (PTSD) and an increasing number of victims of crime or bullying at school are receiving counseling.

With the idea of “mental care” taking root, Japanese society is becoming interested in the psychological damages children of divorce receive. Furthermore, some are starting to challenge traditionally accepted ideals of the mother-child relationship, such as the “doting mother;” the “maternal myth,” where it was believed that a doting mother equaled a child’s happiness; and the collective illusion that regarded “mother-child as one entity.” The mother will have a difficult time understanding why her child may want to or ought to see the father if she cannot acknowledge that the child can think independently of her and is capable of forming his or her own relationship with others. If the mother continues to refuse visitation by the father on the basis that it is “for the child’s sake,” or because “the child refuses to see the father,” the result will be a permanent loss of contact between father and child that is detrimental to the child’s welfare.

Acknowledging that a child has an independent persona will help correct the misconception of “mother and child as one entity.” This is gradually happening. It is hoped that external pressure and changes in domestic values will help bring out reforms to Japanese family law.

The following sections will review post-divorce parent-child laws in Japan and introduce their legal theory. Please note that these are changing in response to domestic and external pressure. Similarly, the pace of change has not been uniform across all laws.

The first section will describe the basic framework concerning divorce and laws governing parental authority in Japan. Next, characteristics of Japan’s visitation laws as seen in actual cases and family court practices will be examined, followed by an analysis of why they remain extremely restrictive compared with global standards. Finally, the paper will discuss the legal theory and practical issues on divorces involving international marriages in other countries.

## 2. Divorce and Parental Authority

### (1)

#### Types of Divorce

In Japan, a couple can divorce by submitting a form to the municipal office (Article 763 of the Civil Code). This is known as divorce by mutual consent, or *kyogi rikon*. Having agreed to a divorce, all the husband and wife need to do is complete, sign and affix their seal on the divorce form that can be obtained from the local municipal office. Two witnesses must also sign the form. Once the form is complete, it is submitted to the municipal office. No adjudication takes place at this point; the official merely checks to see that it is complete. Of course, the divorce is nullified if one spouse submits a forged form without the knowledge of the other spouse. Either party can declare the divorce void at any time should this occur.

When a child is involved, the only decision the couple must make at the time of mutual consent divorce is the “designation of parental authority” (Article 819, Paragraph 1 of the Civil Code). In Japan, both parents have parental authority as long as they are married. Upon divorce, only one parent is given this authority. If one spouse refuses to divorce, the next step is to file for mediation to discuss whether or not they can agree to divorce. By Japanese law, mediation talks must precede litigation for divorce; this is known as the *chotei zenchi*, or “Conciliation First Principle.” A lawsuit can be filed only when the mediation talks fail and the court issues a certificate attesting to this fact.

If a child is involved, custody and child support are also discussed during divorce mediation, as well as any settlement issues. If the couple has already separated with one spouse taking the child, two petitions for mediation may be filed: one requesting divorce and the other asking for visitation. In most cases, the two will be combined into one mediation proceeding and will be discussed concurrently.

If divorce cannot be established through mediation, then judgment regarding custody and other issues can be sought out independent of the divorce through determination by family court, or *shimpan*. The decision is made by the family court judge; aside from the way in which cases are proven and that little or no evidence is collected, the determination process is similar to that involved with a lawsuit. However, unlike a regular lawsuit, the judge’s discretionary power is considerable and investigation can be ordered by virtue of the judge’s office.

In Japan, the judiciary system attaches great importance to the examination of documents. This applies to family law as well. As a result, for most cases, the amount of time a judge is actually physically present during an entire *shimpan* case is about two

hours; this includes time allocated to attend each appointed session, follow the progress of the case and examine final evidence.

The mother who has moved out may request payment of marriage expenses, or *konin hiyo no shiharai*, which can be settled before the actual divorce comes through. In 1999, judges of the Tokyo Family Court came up with a guideline to calculate marriage expenses and child support payments based on past cases and theoretical considerations. This was published in a legal magazine and has since been used as a manual. The monthly payment is calculated from the husband and wife's incomes. This guideline is well known among those involved with divorce.

More than a few fathers are unhappy at the inequity of being demanded payment when it is the wife who abruptly left with the child. The wrath of the father escalates when the court essentially ignores the father's refusal to pay even in cases where the wife denies any access to the child. Judges tend to be broad-minded towards the mother who leaves with the child; they also do not see refusal of visitation as a gross violation of the law. In fact, Japanese judges are rather sympathetic towards the mother who will have to single-handedly raise the child usually without a sound income.

In one legal precedent, a judge did rule that "when separation continues after one party forces it upon the other spouse against his or her will, unless there is reason that the separation is inevitable, asking for his or her share of marriage expenses is an abuse of rights and cannot be permitted" (Tokyo Supreme Court, December 16, 1983). In this case, child support payment must still be paid, although the amount is usually reduced in half.

Other rulings have been to the contrary. Even in reference to the 1983 ruling, "the reason that separation is inevitable" can include anything from verbal abuse by the husband to fights or differences in opinions. Unless the wife is seriously at fault for breaking up the marriage, it is difficult for the husband to get out of paying marriage expenses.

If the family court determination process falls through, a judicial divorce may be sought through litigation. For this to happen, it must be proven that the divorce stems from one of the causes stipulated in Article 770 of the Civil Code. Paragraph 1 (1) through (4) states that "action for divorce is accepted if there is grave reason caused by the other party," and (5) states that divorce is accepted for "any other grave reason for which it is difficult for him or her to continue the marriage." In most cases judicial divorce is sought on the basis of (5), where the plaintiff presents a list of grievances against the estranged spouse that then become the reasons why the marriage can no longer be sustained.

The courts will generally accept a petition for divorce as long as it is evident that the claimant wants to divorce and that the couple is separated. The only exception is when the person asking for the divorce is unilaterally at fault for the break-up of the marriage, for example, because of infidelity. In this case, the petition will be denied for being "lodged by the culpable spouse." This has become a well established precedent based on a

Supreme Court decision in 1952 that found asking for a divorce despite being responsible for the break-up is unfair and provides no protection to the other spouse. The courts' fundamental view remains unchanged, although some subsequent precedents reflect a somewhat more relaxed interpretation of the 1952 ruling.

Irrespective of whether the husband or wife was unfaithful, the wronged spouse can claim compensation for psychological damages from the partner of the affair. This is an established legal precedent on which many lawsuits have been filed. This again reflects the concept of who is "at fault."

**(2)**

### **Family Court Mediation**

Mediation takes place at the family court. One judge oversees the entire process. In practice, two court appointed mediators handle each case, one male and one female. They usually oversee one case in the morning and another in the afternoon, each lasting about two hours. Sometimes this can stretch to four hours, especially during the last stages of the mediation process.

It is rare for an agreement to be reached in one session. The meetings are usually convened once every six weeks. The parties meet three or four times; sometimes eight to ten sessions are required. A judge technically heads the mediation process but is rarely physically present, appearing only when an agreement is reached, or if mediation fails, when it moves to determination. At that time, the judge will confirm with the parties of their intentions or may try to convince them to continue mediation. The judge is given a report of the day's proceeding. In general, one judge will oversee about ten divorce mediation cases on any given day.

A family court mediator does not need to be qualified in any specific field. He or she either applies for the position or is recommended to the post, and the judge selects a candidate at his or her own discretion. A mediator must be between forty and seventy years old. Female mediators tend to be wives of professors or lawyers; civil servants; or acquaintances of employees of the courts, recruited by word of mouth. Former teachers, civil servants and even lawyers fill the ranks of male mediators. While they do not receive any formal training, they are expected to conduct mediation based on on-the-job learning about the way the court thinks. They are treated as quasi-civil servants who are bound by the rules of confidentiality. They receive some remuneration; the job confers a certain amount of social status.

During mediation, the couple never appears in the same room. They are called in separately by the mediator who listens to their appeal or tries to convince them to make a decision. The no-direct-interaction rule is strictly adhered to. The husband and wife have separate waiting rooms, and painstaking care is given so that they do not run into each other in the corridors when they are called by the mediator.

This system is maintained to prevent the parties involved from exchanging harsh words or becoming violent in situations where emotions tend to run high. The husband and wife never attend the same hearing, even when they have no history of domestic violence or when lawyers are present. Furthermore, a wife may request that the husband not be in the courtroom during witness examination because the witness may feel his presence will stress him or her so much that he or she will not be able to speak freely. Sometimes a screen is set up around the witness stand.

Couples therefore have no direct interaction during mediation, not for any procedural reason but because they simply do not want to see each other. This system has caused more than a few problems. Foremost of all, without the presence of one spouse, the other spouse is completely free to say whatever he or she likes. According to some mediators, obvious one-sided lies are commonplace.

The absence of one spouse also means that mediation sessions tend to be emotional, not rational, especially when it comes to the topic of visitation. Instead of addressing the question of what is the correct and best solution concerning the child's custody, one party can adamantly refuse visitation just because he or she does not want it to happen.

In a typical mediation case, it may become clear that a child wants to see the father more frequently. Nothing stands in the way to prevent this from happening. However, the mother who has taken the child away from the father often refuses to budge from her insistence that visitation be limited to two hours once a month and only in the presence of a third party. The father would ask the mediator to find out why the wife will not let him see his child more often. After meeting with the mother separately, the mediator would often only say that "she didn't give me specific reasons."

Mediation where both parties discuss issues rationally in a way that a third party can understand, as is the norm in the United States, cannot be realized in the Japanese mediation process because the husband and wife never appear together at hearings. This reflects an underlying belief in Japan that emotional conflicts lie at the heart of family disputes and these cannot be resolved by the force of law. The best solution is to accept the emotions and work around them.

This is the reason why mediation drags on until it resembles a contest of wills involving endless haggling. In the end, the mediator effectively recommends the father to give up and accept visitation of once a month or even once every three months, terms that the mediator feels he or she can convince the mother to grudgingly accept.

One would assume that the father, in this case, would not agree to terms that are far below what he demanded. The fact remains that even if the father takes this up through the family court determination process, the results will be more or less the same. Visitation will be denied in most cases, or if granted, usually limited to two hours a month. The reasons for this and the legal principles behind visitation will be discussed in

detail in Section 3. From a procedural perspective, an unwritten rule dominates family court whereby judgment for the same case going through litigation and mediation are managed as one; i.e., they must be within a scope acceptable to both parties.

The courts are afraid that if decisions for mediation divorces are handed out irrelevant to the possibility that both parties will agree to the terms and emotional factors, the mediation process will break down, followed by a surge in cases moving to family court determination. Currently, the ratio between determination and mediation divorces is one to ten; any change to this balance would require a major overhaul of the judicial system.

Japan's family court system is not rule-based; rather, it depends on agreement derived by convincing and consenting. This is the reason why mediators listen to, negotiate with and at times threaten husband and wife separately, taking the time to convince both parties to reach an agreement. The mediator "threatens" the party demanding visitation with words to the effect that "without the other party's agreement, we can no longer mediate. If you're prepared to break it off now, that's fine with us." This is considered a threat because in reality, judgment by determination rarely produces better results; in some cases, it may turn out to be worse. By the time mediation has reached this point, several months or even a year has gone by since the applicant last saw his or her child, he or she is simply ready to accept unfavorable terms if this means renewed contact with the child.

Another feature of the Japanese judicial system is the existence of the family court investigator, or *chosakan*, for cases involving children. A court investigator is appointed to a case when a judge issues an investigation order. Court investigators are usually present at difficult custody cases.

To qualify as an investigator, candidates must have a background in psychology or sociology and pass an exam. Today, those who have studied law can also apply; in fact, fifty percent of the candidates now have legal backgrounds. The essential role of the investigator is to help judges make decisions by using their expertise to analyze the child's mental state and family environment. Today, the emphasis is more on the resolution of conflict, as can be seen in the increase in number of investigators with a legal background.

The importance of an investigator lies in the fact that he or she is allowed to see the child who is in the care of the physical custodian. The spouse with the child will often refuse visitation from the other parent when a couple separates. The estranged spouse may complain about the inequity of the situation to the mediator, painstakingly explaining why visitation is important for the child, how amicable the relationship was while they were living together, and why visitation would not harm the welfare of the child. Although the mediator may nod in agreement, the standard reply often is, "nothing can be done as long as the other party refuses to agree to visitation."

Even at the determination level, the case may not move forward if the custodial

parent continues to deny visitation by citing one reason after another, such as the child's unwillingness to see the other parent, fear of the child being abducted, and possible physical abuse. This is when a judge often appoints a court investigator to look into the matter.

The investigator will first listen to what each parent has to say separately. Next, he or she will observe the child with the custodial parent, talk to him or her and write up a report. Sometimes the investigator may visit the child's nursery and interview the teacher. At other times, the investigator will observe a meeting between the child and the estranged parent in the children's room located in the court building (known as a trial visitation).

The report includes a section on the investigator's opinion. Usually the conclusion of the investigator's report will be similar to those for mediation and determination. The report is shown to the judge as a rough draft and is finalized after the judge's approval. It is possible that some adjustment to the report's conclusion occurs before the final report is filed.

For example, the first part of a report may lead the reader to believe that the court concluded frequent visitation is of course beneficial to the child based on the investigator's observations of the child and the relationship between father and child while they were living together. Yet towards the end, the tone may change in favor of the parent who is resisting visitation with comments such as "consideration must be given to the party who has to agree to a visitation." The report then concludes that infrequent visitation taking place only once a month or once every three months "is the appropriate place to start, in order not to impose undue psychological burden on the child considering the lack of mutual trust between the parents."

Visitation usually takes place at the home of the parent with physical custody and lasts only thirty minutes. This parent's influence is felt even at the above-mentioned "trial visitation" that takes place inside the family court, because he or she is with the child right until it starts. It is highly questionable whether a thorough investigation can be conducted under the influence of the parent who has cut off contact between the child and the other parent, sometimes for over a year.

Yet the courts will refuse any request from the complainant to see the child or for the child to meet with a psychologist.

A sense of hopelessness is common amongst complainants who must continue to press for visitation under these circumstances. The mediator will not offer specific reasons as to why the parent with physical custody refuses visitation. In the end, the non-custodial parent is utterly dependent upon the decisions made by the mediator who is allowed to meet both spouses and the investigator who has access to the child. This is how Japan's family court works.

### **(3)**

#### **Sole Custody**

In Japan, one parent is given sole parental authority following a divorce (Article 819, Paragraph 1 of the Civil Code). Unless otherwise specified, this includes physical custody of the child. This means that child resides with the parent who has parental authority. This parent can execute the right to determine the place of residency as well as whether or not to allow visitation from the estranged parent.

The Japanese concept of “parental authority” is similar to that under German and other continental European law; it is akin to a combination of the American concepts of legal custody and physical custody. Normally one parent will have both parental authority and physical custodianship but this can be separated (Article 766 of the Civil Code). Called the division of parental authority and custodial rights, parental authority is granted to the parent who does not have physical custody. In general, however, Japanese courts are reluctant to award this “shared custody” type arrangement except in cases where mutual agreement exists.

In one case where the court ruled for “shared custody,” a father had originally obtained parental authority at the time of the divorce. However, the mother “abducted” the child from the nursery and raised him/her. Refusing to return the child to the father, she asked the court for parental authority (Article 819, Paragraph 6 of the Civil Code). After having ruled that the mother can continue to raise the child, the court decided that the parental authority should remain with the father because this was a mutual decision made at the time of the divorce; the court, seeing no need for this to change, effectively ordered “shared custody” of the child.

In another case, an original ruling of “shared custody” was overturned at appeal. Initially, the father had parental authority and the mother took physical custody of the child. The court’s opinion was that although it would be best for the mother to continue to have physical custody of the child, “it is vital for the father to be a presence in the child’s life based on the emotional bond they have had in the past,” and for “parents to cooperate to ensure that the child develops a healthy personality.” Furthermore, the court acknowledged that the parties involved “are capable of making the effort to consider the child’s welfare” and granted parental authority to the father and physical custody to the mother. Yet the original decision was overturned at the appeal because the court felt cooperation between the parents was no longer possible judging from their personalities and the nature of their relationship. “Shared custody” was denied, giving the mother both parental authority and physical custody of the child (Tokyo Supreme Court, September 6, 1993).

The English concept of “parental right” (the rights of the parent) differs from the Japanese concept of parental authority. This is an intrinsic right that a parent has over the child that does not cease at the time of divorce. It is an important concept underlying the idea of visitation. In the United States, this right is protected by the Constitution.

In Japan, however, decisions regarding parental authority are based on family



law; parental right is not discussed within the context of the Constitution. No statutory provision exists under Japan's Civil Code concerning visitation rights. The court's decisions concerning visitation rights have been made based on judicial precedents as disposition concerning custody, but only when requested by either parent (Article 766 of the Civil Code).

However these have been unsatisfactory. In one case, a father made a special appeal to the Supreme Court after been denied a request "to see his daughter twice a year." He argued that "a parent, even without parental authority, has the natural right to see his or her child, such right being protected by Article 13 of the Constitution that states that all people should be respected as individuals and be granted the right to pursue happiness." The Supreme Court flatly rejected this appeal, concurring with the original decision that determined such visitation "is not in the interests of the child's welfare" and finding that the father's claim was a misinterpretation of the law (Supreme Court of Japan, July 6, 1984).

The Japanese courts have yet to seriously address the issue of whether or not the restriction of visitation rights is a denial of an important constitutional right and if adequate reasons exist to justify restriction of visitation; the courts have also not shown that they have closely examined any alternative possibilities. In fact, the courts have consistently avoided stating that visitation is a right. All decisions regarding a child's custody after separation and divorce are made arbitrarily by judges based on the "best interest of the child's welfare."

In Japan, the relationship between parent and child is preserved in principle even after a divorce. The saying, "a parent remains a parent even if the marriage fails," is often used to convince the courts of the importance of visitation. But in practice, as long as the courts have power over granting visitation and as long as they refuse to see visitation as a "right," the "best interest of the child" argument will prevail, effectively implying the relationship between one parent and child will be permanently severed.

(4)

#### ***Koseki* (Family Registration System)**

According to Japan's family registration system, husband and wife usually take on the same surname when they get married (Article 750 of the Civil Code). A new register is created with the husband as the head of the household, to which the wife's name is added, along with any children in order of their birth.

When a couple divorces, the person who changed the surname at the time of the marriage, usually the wife, can revert back to her maiden name (Article 767 of the Civil Code), but she can maintain her married name as long as she informs the local authorities within three months of the divorce. The name of the person who changes the surname will be removed from the family register; this person can then start a new register. Today, changes to the register are processed electronically, but the long-standing practice was to

mark the wife's name with a big X on the register after a divorce, hence the common-used moniker, *batsu-ichi*, (literally meaning 'deleted once') referring to a divorced woman.

Children take on the surname of the parents and are added to the register in order of their birth. Even if the parents divorce, the child's last name is not changed immediately and remains on the register as is. However, the register will show the name of the parent who has parental authority.

If the mother with parental authority creates her own register after being expunged from her ex-husband's and wants to move her child onto her register, she must first obtain approval from the family court to change the child's surname to hers (Article 791 of the Civil Code). Once mother and child have the same surname, the child's name can be moved from the father's register to the mother's (Article 18, Paragraph 2 of the Family Registration Law).

The family registration system is a relic of the household, or *ie*, system that existed in pre-war Japan. Under this scheme, the name of the family patriarch appeared first on the register that listed the names of all members of the family. The household system was abolished after the war. As the concept of gender equality took hold in Japanese society, some husbands began to take on the wife's surname. In the vast majority of cases, however, the wife changed her surname to that of her husband's. Sometimes a husband would take on the wife's surname when he would marry into the wife's family as an "adopted groom" in order to perpetuate the wife's family name in a way that closely resembled the patriarchal system. This practice still exists today.

The phrases "enter into the family register" and "delete from the family register" are still commonly used today, expressions which regard the register as symbolic of the family unit into which members join or leave.

The implication of the register for post-divorce parent-child law is that as a denotative entity, it makes it difficult for the parent and child who are no longer on the same register to continue "interaction as parent and child." Moreover, the idea that divorced parents jointly continue to be involved in raising a child, commonly accepted by the rest of the world, is in conflict with the Japanese concept of family whose boundaries are clearly defined by the family registration system.

In order for a child to be able to maintain a bond with both parents and for the parents to jointly continue to raise their child after divorce beyond the realm of family and household, it is believed that registration on an individual basis is more appropriate than the family registration system.

## (5)

### **Child Support**

Child support payment is also discussed and decided at the time of divorce, even for mutual consent divorces. However, no official procedure exists to confirm whether or not payment actually has been made; it is believed that many divorces are settled without

an agreement on child support. Terms of child support are always part of mediation or litigation divorces.

A payment guideline created by judges is always used to determine the amount of child support in the same way described for marriage expenses in 2-(1).

Despite court decisions, many people got by without paying child support. However, a recent revision to the law has made it difficult for a parent to avoid child support payments as long as he or she continues to work for the same employer and earns an income. If the parent misses even one payment, he or she is required to make a lump sum payment including future child support (Article 151-2 of the Civil Execution Act).

Some continue to argue that child support payments in Japan are inadequate and stronger enforcement methods are required. At the same time, others feel aggrieved that they are obliged to pay child support when they are allowed to see their child only a few times a year or never at all. During mediation, the parent requesting visitation after separation is often told that he or she may never see the child again without agreeing to pay marriage expenses and child support. The parent would agree to this, only to find out later on that visitation is denied, or if granted, on paltry terms. They end up feeling that they have been tricked by the system.

### **3. Legal Theory of Visitation**

#### **(1) Traditional Thinking**

Japan's Civil Code has no provision for child visitation after divorce. However, through mutual consultation the divorcing parents can designate which adult has parental authority, and determine who gets custody of children after divorce. If they fail to agree, a petition can be filed with a family court (Article 766 of the Civil Code). The court handles the petition for visitation as part of custody disputes under this provision.

Japan's courts first recognized visitation issues in 1964 (Tokyo Family Court, December 24, 1964). At the beginning, there was a tendency to deny visitation rights, and a considerable amount of time lapsed before the thinking took hold that a parent should naturally have these rights after divorce.

In this first case described above, the father, who had sole parental authority and physical custody of the children after divorce, promised the mother that she would be able to see the children twice a month, but then reneged on this promise soon after he remarried, so the mother went to court. The court stated that visitation was a "minimum demand as a parent" and that this right could never be restricted or deprived unless the child's welfare was harmed. This ruling of the court clearly shows the thinking that later became the basis of the visitation right.

However, the father filed an appeal against that judgment and the Tokyo High Court dismissed the mother's demand (December 8, 1965). In the lead-up to the decision, the court said: "If the child is subject to the parental authority of another person, it is inevitable that visitation is limited in relation to the exercise of that parental authority." By pointing out that the father's new wife loved the three children as if they were her own, and that the children were happy and adapting very well to their new family life, the court held that the natural mother's visitation would "cause emotional harm to the children" and disturb their lives. "Thus there was a risk of harming the children's minds."

The ruling clearly shows that at the time, the thinking was that it was better for parents and children not to see each other after the family breaks up. The judge went on to say that, "It is fully understandable that the mother wants to see her children, and we feel sympathy, but...sometimes an act based on emotions could make children unhappy." Then, the judge lectured the mother, telling her that for the sake of the children, restraining (her desire to see them) was true love.

#### **(2) Further Developments**

The notion that a divorced parent should avoid contact with their children because it would disturb their lives is deeply rooted in traditional Japanese family values. Today, we no longer see court decisions that so blatantly deny visitation rights. However, as discussed in Section 3 below, this notion is still strong even today and reflected in court decisions in various ways.

Furthermore, many women still refuse to allow their husbands to see their children after divorce. Accordingly, we have a litany of visitation disputes between parents. The courts ought to rule against those mothers and order them to let their former husbands see their children, but they are reluctant to do so. As a result, fathers are denied this opportunity, and even if they are awarded visitation it is extremely limited

Why are the courts reluctant to order visitation? Before discussing this, we need to confirm the merits of this right. The courts used to regard a parent's natural emotions as a basis for visitation. However, as time passed, they gradually shifted focus to the children's interests, and began to proactively state the merits of visitation, saying that it was good for children's healthy development. This trend is becoming more common.

For example, an Okayama Court reviewed a case in 1990 in which a father had kept his children following a divorce, and was raising them with his mother (the children's grandmother), when his estranged wife sought visitation rights. The father's side insisted that the children had settled down well into their new home and did not want to see their mother. However, the Okayama Family Court (December 3, 1990) ruled that it was conceivable that the children resented their mother and avoided seeing her because their father and grandmother repeatedly denigrated her, and that the grandmother's snide remarks would harm the children's healthy mental development in the long run.

The court then granted the mother the right to stay with her children for two weeks during every summer holiday because she lived far away, saying: "It is necessary to reestablish the relationship between the mother and the children in a place where the grandmother is not present."

### **(3) Current Theory of Judicial Precedents**

The court decision described above was one of the most proactive decisions in Japan at that time, but since then, courts have come to adopt the view that visitation is necessary for children's healthy mental development. For example, in a recent court case in which a couple fought very bitterly for visitation both before and after their divorce, the Tokyo Family Court (July 31, 2006) ruled it is necessary for young children to see the non-custodial parent and be loved by that parent for their healthy development and character building. Therefore, the court said, as long as there are no special circumstances in which visitation violates the welfare of the children, it should be approved.

Having said that, the court also held that "given that visitation is necessary for the children's healthy development and personality building, its extent and means should

be automatically limited, and careful consideration must be given to the psychological and physical influences on the children and their wishes.” The court went on to say: “Reciprocal trust and cooperation between the parents is necessary in order to carry out smooth and stable visitation that will benefit the children’s wellbeing.”

The above view of the Tokyo Family Court is the basic legal theory of visitation in Japan today. The first part of the judgment means that, in principle, visitation is approved, but restricted in exceptional cases where the children’s welfare is in danger. In this regard, this judgment is not particularly different from that found in other countries.

However, the proposition that affirms visitation as “necessary for the healthy development of the children,” is reversed and replaced by the restriction in the latter part of the judgment, which states that visitation is only approved in the form that helps the healthy development of the children.

This sounds like a figure of speech, but this judgment holds the key to understanding why visitation is so rare in Japan, despite the fact that court precedents here are seemingly in line with other countries.

In order to explore the logic hidden in the legal theory of visitation in Japan, I will discuss the typical reasoning of courts in coming to the decision that visitation is to be denied or severely limited from three different perspectives, namely, (i) trust between parents, (ii) the child’s desires, and (iii) protection of victims of domestic violence.

The current situation of Japanese law regarding the protection of the custody right of a parent separated from a child (non-custodial parent), is also a key reason visitation remains limited or almost absent in Japan. In Section 4 “Visitation Rights” below, I will discuss this issue from two different points, (i) wrongful removal of a child and (ii) the issue of execution.

#### **(4) Trust between the Parents**

If the level of conflict between divorcing parents is high and a custodial parent takes a negative attitude toward the other parent’s visitation, children involved in the conflict will often suffer. In Japan, in cases involving high levels of parental conflict, the courts often conclude that visitation should be avoided “for the time being” because it will psychologically burden the children.

Parental friction is caused by conflict before and after a divorce, especially where the mother leaves her marital home with her child and refuses to give the father access. The father accuses the mother of wrongful removal of the child, and the hostility escalates, which results in heated disputes between the parents inside and outside the court.

Visitation carried out in the course of court proceedings could exacerbate the conflict. The custodial parent (mother) complains that the non-custodial parent (father) badmouths her, tries to elicit detailed information from the child about the status of custody, or promises the child that he will remarry the mother. On the other hand, the

father gets frustrated because the custodial mother interferes with his visits to the child by imposing unreasonable conditions every time visitation is arranged, and this frustration sometimes erupts in front of the child and causes verbal disputes between the parents. This happens in any country. However, in Japan, if such a dispute occurs, regardless of the causes it will be regarded as a dispute between the parents that puts an emotional burden on the child. This notion draws negative conclusions about visitation.

Certainly, the children don't know which parent's behavior is irrational, and regardless of which side has caused the arguments, they are hurt to see the escalating battles caused by visitation. As a result, they are likely to decide against seeing the non-custodial parent even before the court orders the suspension of the father's rights.

Therefore, Japanese courts, which maintain that visitation is not the right of parents but for the benefit of children's healthy development, conclude that it ultimately causes more conflict and does not serve the interests of the children.

In fact, during Japanese mediation sessions, the mediator tells the non-custodial parent to avoid making the custodial parent angry when seeking visitation rights. The mediator also tries to restrain the tone of the demand for visitation, pitching it as a request, not an imperative. The divorcing couple does not attend mediation meetings together, so it is possible for the mediator to soften the language the parents use and mask their raw emotions. This also contributes to agreements that seek to avoid conflict.

However, following this train of thought makes clear that the more one partner vehemently rejects visitation, the angrier the other gets. That forces them to seek visitation through legal and other means, and consequently the less chance they will have of being successful.

When we read the documents (briefs and written statements) submitted to the courts by one partner who rejects visitation, we find that although the cause of the dispute was the fact that the partner had wrongfully taken the children without the other parent's permission then cut off all communication, they blame the other parent for everything. The spurned parent desperately searched for and tracked down the children, phoned the estranged parent, sent e-mails, or visited the new homes of the children. But the custodian shamelessly asserts that all this constitutes wrongful pressure and threats, and refuses to let the other parent see the children out of "fear."

When a spurned parent commences court proceedings, strongly accuses the other parent of wrongfully removing the children, and submits documents requesting visitation, the other parent calls this character assassination. The other partner will switch the focus of the argument and say that visitation is impossible because of the strong animosity and lack of trust between the parents. That is why lawyers representing a divorcing couple see to it that the exchange of accusations over the cause of divorce will not negatively affect the demand for visitation when divorce litigation is brought at the same time.

The courts are somewhat aware of this situation and, as a way of criticizing the

refusing partner, sometimes order visitation despite the confrontation and lack of trust between the couple. However, to avoid such an order being issued, veteran lawyers sometimes portray the mother as a victim, saying that she had no option but to take her child with her. If the court is not confident that that accusation is completely false, it will refuse the father's visitation. In this scenario, the ex-husband is regarded as aggressive and uncaring about his ex-wife's emotions. He is then shocked when he is blocked from or allowed only limited visitation that requires the presence of a third-party supervisor.

In contrast, if it is obvious that one parent seeking visitation did something they can be accused of (such as adultery and domestic violence), which was either the cause of the divorce or occurred after the divorce during visitation arrangements, and if it is recognized that the custodial parent is hurt and has a strong aversion to the other as a result, and so rejects visitation, the court will sometimes order a total ban on child visits. In such cases, the lack of trust is used as a way of criticizing the partner seeking visitation.

### **(5) Intentions of the Child**

The second reason often used in Japan as a reason to deny visitation is the intentions of the child. However, the word "intention" strongly suggests an independent person. In Japan, since this word is also used for children aged three or four, another term, "the desires of the child," which contains more emotional aspects and carries weaker connotations, is used.

In Japan, irrespective of how strongly a child refuses to see either parent, the court often dismisses visitation petitions, saying that forced visits will only harm the child's mental health. Of course, in many cases the background is the custodial parent's reluctance to let the other parent see the child. However, as in the case of the lack of trust between the parents, the court considers that as long as the child currently refuses to see the other parent, it cannot force visitation, whatever the reason.

However, it is generally known that children are easily affected by custodial parent's desires, so the children's intentions must not be taken at face value. This knowledge is widely shared by judges and other legal professionals. Therefore, family court investigators make the utmost effort to understand the children's true intentions when they make inquiries about the children's desires by order of the judge. As a result, if there was a good relationship between the children and the non-custodial parent while they were living together, or if there were circumstances where visitation went well in the past, it may be granted again despite the children's expressed wishes.

The difficulty is the recognition of the children's true intentions and how to draw the line between the grant and denial of visitation. In Japan, in cases where visitation is totally forbidden, non-custodial parents are denied the opportunities to directly, or through a psychologist, interview their children and provide the results to the mediation or the court as evidence. Every inquiry needs to be conducted through court-appointed



investigators who are employees of the family court.

It can be said that family court investigators are trustworthy because they maintain a position of neutrality when conducting inquiries and also have substantial experience. However, as employees of the family court who know how disputes are settled in court, they tend to make inquiries and write opinions in line with the scenarios assumed by the court. Thus, although the courts say they carry out independent scientific inquiries, in reality, their negative attitude toward visitation is reflected in these inquiries.

In addition, in most cases, inquiries are made at the house of the custodial parent. After interviewing the parent, an investigator observes the parent together with the child, and then interviews the child alone in another room. The investigator says, “You can express your feelings honestly” and “If you’ve got anything you don’t want your mother to hear, I won’t tell her.” But it is unthinkable for children to ignore their mother’s presence and reveal their true feelings during a 30-minute interview. So most will deny wanting to meet the father, or say they “don’t care.”

Even though it is clear that the custodial parent’s intentions have a strong influence on the child’s desires, the courts are reluctant to accept that reality, and rarely order visitation. This is partly a recognition of the reality that courts cannot force the child to see the other parent as long as the child says she does not want to, and partly because the courts are inclined to avoid recognizing the fact that the custodial parent controls the child. Of course, in some courts, or depending on the dispute, judges recognize the irrational control exerted by a custodial parent, and order visitation. However, most Japanese judges are afraid that if they criticize the custodial parent, they are publicly announcing that that custodian is a bad parent who wrongfully controls the child.

Once a custodian is declared a bad parent, the judge must separate that parent from the child, or at least drive a wedge between parent and child. But this is not what Japanese judges want. They think that visitation is important, but above all, if the child now lives with this custodian and there is no particular problem, maintaining the status quo serves the best interest of the child. The paramount issue is maintaining a mother-and-child bond in a single mother family, or in other words, “maintaining a peaceful family life” (quoted from (1) above). Japanese judges often conclude that visitation demands, assertions that the views of children are false, or criticism of the custodians should be dismissed if they disturb an otherwise peaceful family and throw the children into emotional turmoil.

Traditional Japanese family values still remain

## **(6) Allegations of Domestic Violence**

In divorce and visitation proceedings, allegations of domestic violence often emerge. It is important to try to protect the victims of domestic violence. However, such

allegations are often used as bargaining chips in litigation, and ultimately misused to decide which partner should have parental authority or as an excuse to reject visitation.

In Japan, the Act on the Prevention of Spousal Violence and the Protection of Victims (the DV Act) was enacted in 2001. Victims of domestic violence can go to court for a protective order. Under Article 30 of the DV Act, if one partner files a petition for a protective order, the other will be interrogated, and if it is found that the alleging party's statement contains false allegations, a non-penal fine can be levied as punishment. In this regard, this provision serves to counteract false allegations to some degree, but it cannot deter divorcing partners from making exaggerated or sometimes false allegations of domestic violence.

At issue in particular are (i) the prohibition on "approaching the victim and demanding visitation for a period of six months" under Article 10, Paragraphs (1) and (2) of the DV Act, which is aimed at "protecting the victim who is highly likely to be subjected to life-threatening or serious bodily harm by the spouse;" and (ii) the way the protective order is handled. Under the DV Act, the rights of the alleged abuser are subject to legal restrictions but considerations of due process are given to those restrictions. However, in litigation disputes, once a protective order has been issued, even if a new petition for a protective order is not filed after a period of six months, the first protective order will be handled as if it were effective in perpetuity. Furthermore, once the protective order has been issued, the law forbids the alleged abuser from approaching the other partner or seeing their children. But beyond the scope of the prohibitions of the DV Act, the alleged abuser will be denied even the minimum level of communication access necessary for visitation with the children, even though the protective order does not prohibit such communication.

In addition, Article 10, Paragraph (3) of the DV Act states that "in cases where it is necessary to prevent the victim from being obliged to meet the spouse, including cases in which it is suspected that the spouse will take back young children," the court will also issue an order that forbids the alleged abuser from approaching the children and their domicile. This provision, of course, has the legitimate purpose of protecting the victim against violence over child custody. However, when we think about Japan's tolerant attitude toward women who remove children from the marital home, the current law has a problem in that a father's protest against a mother's wrongful removal or total rejection of post-separation visitation is denied or severely restricted.

In fact, a woman who has taken her children with her can keep her whereabouts secret even if she does not file for a protective order under the DV Act. All she needs to do is to go to the nearest police station and claim that she is a victim of domestic violence. Then, under Article 8.2 of the DV Act (Assistance by the Police), the police will reject any demand by her husband to locate the children. A woman can also rely on the assistance of municipalities. Under local ordinances, the system is in place to prohibit

alleged abusers from viewing a certificate of residence. She only needs to register as a victim of domestic violence. The information is shared not only by the police and municipalities but also widely used for administrative counseling or available on the Internet or through lawyers.

These services are provided to women by the police and municipalities without any proper screening. As a result, fathers whose children are wrongfully removed or retained by their mother will neither see their children nor be able to locate them. Custodial and visitation rights will be significantly limited. Once proceedings have started, the court will neither re-examine the appropriateness of those assistance services nor do anything to directly locate the children. If the wife retains a lawyer and files for divorce mediation, her partner can proceed with court proceedings through that lawyer. But if she remains in hiding, legal process and visitations are impossible.

Thus, the main problem with Japan's system of protection for victims of domestic violence is that no consideration is given to the rights of the other partner. Specifically, before a divorce, the restricted rights mean the parental authority of a father against whom allegations of domestic violence are filed and whose children are wrongfully taken away. After divorce, the rights refer to the father's access to his children. These are the rights stipulated in the Hague Convention on the Civil Aspects of International Child Abduction to secure protection against wrongful removal of child, but they are lightly handled in Japan.

Another problem is that in Japan if domestic violence has been proved, the abuser will be completely denied visitation. By nature, visitation is not only a right of the parent, it is also a right of the children. We should work out a method by which we can guarantee these rights while protecting domestic violence victims. In legal theory of the Constitution, this is what is called the least restrictive alternative. In fact, in other countries, alternative methods are considered, and even if one parent has a record of domestic violence, visitation is awarded to that partner while at the same time the safety of the spouse and children is secured.

Japanese courts never take account of this. They think that protection should be given to a mother who is a domestic violence victim because visits put her under heavy psychological pressure, "and there is a very high risk that the father's visitation will harm the stable life of the mother and her two children, and the wellbeing of the children." That was the legal grounds to totally ban visitation by a father (on May 21, 2002, in the first case in which the issues of domestic violence and visitation were raised in court).

Relying solely on those grounds, the court largely ignores the following issues: (i) What degree of violence actually constitutes domestic violence under the law?; and (ii) Is there any risk that "life-threatening or serious bodily harm by the spouse" will be repeated? Hence, courts tend to emphasize the feelings of the custodial parent and hand down a total ban on visitation. Moreover, this legal theory encourages mothers to make

allegations of domestic violence, because they know that their demands will appeal to judges' emotions.

## 4. Visitation Rights

### (1) Wrongful Removal of Child

In Japan, women today normally leave the marital home with their children, and this impedes the realization of visitation.

However, this phenomenon is relatively new. In the past when the traditional Japanese family system was strong, wives were replaceable and their role was to give birth to, care for children, and provide housekeeping services. When a couple divorced, the wife left her children behind and they were raised by her ex-husband's new wife. In Japan's history of litigation for visitation, at the beginning it was mainly mothers who sought visitation rights.

This pattern has reversed since the 1960s, when Japan ushered in the era of the nuclear family (*kaku kazoku*). Now, women, who are in charge of childrearing and housekeeping, claim a superior right to child access upon divorce and move out of the marital home, taking their children with them. In the 1960s, the notion of division of labor by gender was still strong, and men were not involved in childrearing and housekeeping, so fathers did not fight for custody or visitation.

Today, it is considered natural for mothers to get both parental authority and physical custody of children. On the other hand, a positive view of divorce - that it releases women from oppressive marriages - has emerged, along with a new awareness that post-divorce custody is a woman's right. As a consequence, many women feel entitled to take their children with them after divorce.

However, over the years men have gradually got involved in childrearing and housekeeping as society moves toward greater gender equality. More and more men think it is unfair that wives move out and refuse access to their children. It is not uncommon for men to be hurt by allegations of domestic violence although the truth is that many have never hurt their wives or children.

High levels of conflict resulting from the mother's wrongful removal of children are a feature of Japan's custody disputes today. After separation, mothers invariably refuse to allow their former partner to see their children, which escalates the disputes. If a father is not allowed to see his children, they will settle down in a new home with the custodial parent, and the courts will deny or limit visits because they might disturb the custody environment.

Why can't the law prohibit mothers from moving out with their children, despite these problems? What is Japan's own legal theory on this point? I will now discuss these issues.

In Japan, people do not view removing children from the family home as a violation of custody rights. When one parent leaves the marital home while still married, this is

regarded as an incident between two parents with shared-legal custody, and is therefore treated as a legal custody dispute under the civil law, instead of being determined by family courts. This is the official view of judicial authorities and the National Police Agency. If the other parent submits a “written notification of damage” to the police, they will not accept it. Until now, not a single case of normal “abduction” by a parent has been prosecuted or punished.

However, there is an exception. This general rule does not apply to cases where a spurned parent takes back a child from the other parent. In one case where a father snatched his child from outside a nursery, the Supreme Court ruled that his act constituted an abduction of a minor (the Supreme Court, December 6, 2005). This ruling caused considerable controversy. Until then, criminal penalties were rarely imposed in such cases because, as in the example of one parent fleeing with children, they were regarded as legal custody battles under civil law. In fact, before this ruling, even lawyers advised their clients to take back their children by force if visitation was blocked. Lawyers must now tell their clients they could be convicted of abduction.

Abducting a child often involves violence, and certainly it is not desirable to carry it out in front of the child. In this regard, the 2005 Supreme Court ruling is an important step towards the solution of custody disputes based on rules, not by force.

However, why is taking back a child from a parent punished while leaving the marital home with the child remains unpunished? In the 2005 Supreme Court, the mother left home with the child, and continued to refuse the father’s visitation after the split. With no prospect of breaking the impasse the desperate father acted. As we have seen above, even if fathers go to mediation or court, the proceedings often fail to reach agreement.

However, in spite of these problems, the courts distinguish sharply between the two kinds of child removal. Courts judge that one is inevitable because a parent can no longer bear to be married and stopping her leaving with her children would trap her in the relationship. In general, they reject the husband’s assertions that his wife has abducted the child without consent, by stating the circumstances that led the wife to decide to divorce, as if making a counterargument against the husband’s assertions.

The courts also say that, as the primary caretaker a mother cannot leave behind her young children, so her actions are natural. Then one may wonder why the wife does not consult with her husband before she moves out or why she does not commence mediation or court proceedings on custody after separation. These questions are immediately rebutted by the assertion that the husband will oppose divorce or forcibly prevent his wife from leaving; or that it is not realistic to go to court to decide custody because it takes too much time.

Anyway, a wife leaves her martial home with her child if she has been the primary caretaker of the child – this is a typical divorce case in Japan. The courts cannot do anything to forbid it, which seems to be their judgment.

Then, how about taking back a child from a parent? It obviously involves much less urgency than the initial removal of the child, so legal measures can be taken. The legality of the initial removal of the child should be determined in court, and then the child could be returned to the other parent where appropriate.

Taking back the child by force without going through these procedures is obviously illegal. Furthermore, taking a child back by force from its stable life with a mother is seen as destroying a peaceful family life. It is impossible to categorically state how much time is required to create a family life that must be protected - it varies depending on the necessity for the mother to retain the child or whether the child is being looked after properly. But generally speaking, as long as the mother leaves home with the child legally, she will become the de facto parent with sole authority of that child after a certain period of time, and the father will be regarded as having no parental authority, even if the couple is still legally married.

With respect to these two types of wrongful removal of child, in Japan parents can file a petition seeking the return of their child under two legal procedures. One is to file for habeas corpus.

In cases where a child has been taken away by one parent against the child's will or where a child is an infant, in which case deemed not to have the capacity to consent, and therefore "detained," the other parent can file for habeas corpus, demanding that the child be "released."

However, for that claim to be accepted, the "obvious illegality of detainment" is required (Article 4 of the Habeas Corpus Regulations), namely, the requirements of "obviousness." In addition, another requirement, "supplement," which proves that a purpose cannot be achieved without filing for habeas corpus, is required.

On the point of "obviousness," a court first checks whether the person detaining the child has legal authority or not. In contested custody disputes, if the person has lost parental authority after a divorce or lost custody to the claimant, the detention of the child, in principle, will be regarded as patently illegal and the court will issue an order for the child to be returned.

Conversely, where a person detaining a child has legal custody and is looking after the child in a responsible manner, accusations of illegality are dismissed even if that person violates the parental authority or the custodial right of the claimant. In the majority of cases where wives leave the marital home with their children, the Supreme Court declares that in the absence of "special circumstances," such an act is legal (Supreme Court, October 19, 1993), so husbands cannot rely on habeas corpus.

This judgment of the Supreme Court also referred to the principle of supplement at the same time, stating that child custody disputes should be inherently resolved not through habeas corpus proceedings but through legal proceedings of family courts.

The law was subsequently amended to allow parents to file a petition seeking

provisional injunction before a trial (Article 15.3 of the Domestic Relations Trial Act). Today, all incidents involving child “abduction” by a parent before divorce are dealt with under these proceedings. When seeking the return of a child, the parent first needs to file a petition under Article 766 of the Civil Code (Determination of Matters regarding Custody of Child) or ask a family court for a provisional injunction, demanding that the child be temporarily returned until the judgment becomes final and binding. This is the second proceeding to take back the child from one parent.

Under Japan’s code of legal procedure, for this provisional injunction to be issued, two requirements, namely, “necessity” and “probability,” must be satisfied. “Necessity” means the need to urgently secure a right in an emergency that makes it impossible to wait for a trial on the merits, because there is a likelihood that even if a claimant prevails and obtains the right eventually, it will be difficult to realize that right after the trial. The courts approve this necessity in cases where a prolonged illegal detainment of children would harm their wellbeing or make it difficult to take them back.

In fact, if the courts focus on this “necessity” during the provisional injunction procedures, a child wrongfully taken away by one parent can be immediately returned to the other parent. However, in Japan, the other requirement, which is “probability,” must also be met. This refers to the strong probability that a claimant’s right will be recognized if the parties proceed to a trial on the merits later. If judges focus on the doctrine of “probability,” they will need to make a careful judgment to determine whether a provisional injunction should be issued, just as required for a trial.

In reality, courts look at each application on a case-by-case basis, and focus on these requirements in cases where they determine that it is necessary to urgently issue a provisional injunction. If they do not recognize any urgency or cannot determine whether a return order should be issued or not, they will focus on the doctrine of “probability,” in which case the pre-trial provisional injunction won’t matter because the petition will be tried in the same proceedings as the original trial, and a conclusion will be reached concurrently with the original trial after a considerable amount of deliberation.

As explained above, at least there are legal procedures in Japan to take back a child wrongfully taken away by one parent. However, in most cases, unless there are special circumstances, that is, unless that child is being abused or badly cared for by the custodial parent who left the marital home, the child will be regarded as under the custody of the authorized parent and that custody is regarded as legal. It therefore becomes impossible for the other parent to take back the child by law.

When the other parent tries to take back that child by force, if a certain period of time has passed and it is determined that the child’s life is stable in the new environment, the act constitutes “abduction” of a minor, and arrest or prosecution is highly likely. In cases where the requirements of “force” or “stable life” are not satisfied, even if a criminal penalty is not imposed, if a parent who has abducted a child first files a petition for



provisional injunction, the court will make a decision on a return order based on the comparison of the custody environment.

What is lacking in these procedures is almost no consideration to the fact that parental authority is automatically prevented when a spouse “abducts” a child. In fact, many mothers cut off communications with their husbands. Those mothers often say: “I’m scared of violence,” “The children are restless,” “I don’t mean to refuse my ex-husband’s access to the child,” or “If my husband agrees to a divorce and allows me to have parental authority, I will let him see the child.”

Certainly one can understand the perspective of a wife who moved out of her marital home with her child without her husband’s consent. Apart from the fact that she is scared of his anger, it is not desirable to let her husband see their child. She thinks, “My boy is probably upset because he was suddenly moved out of the house without knowing the reason why, and he has been unable to be with his father since then. If he sees his father, he might say he wants to go back to his old life and will resent me.” Therefore, the wife won’t let her child see the father in order to finalize her separation from the husband.

Japanese courts refrain from hindering such a mother’s separation plans, and rather play a role of calming down her angry husband and try to ensure that he can obtain access to his child in a less restrictive way if mediation proceedings start later. Given that 90 percent of couples divorce by mutual consent in Japan, it seems that courts think it necessary to approve the “wrongful removal of child, separation and divorce” chain, instead of interrupting that chain, in order to carry out divorce procedures with the minimum involvement of courts.

In short, in order to change Japan’s current divorce system, which depends on the passivity of the courts, it is essential for the idea of post-divorce joint childrearing to take hold in Japanese society and court practices. First of all, the courts should regard unauthorized removal of child as illegal. Then, they should order visitation immediately after separation, and grant the father the right of visitation, including overnight stays. Japan needs to drastically reform its legal theory of precedents and court proceedings with respect to the process from the time immediately after separation up to divorce.

## **(2) Enforcement of Visitation Order**

In Japanese courts, mediators, investigators and judges all say: “A visitation order will not be respected even if a court orders it.” Japanese courts make efforts to persuade divorcing parents of the necessity of visitation, but there is a limit to their persuasion, and eventually they have no option but to prepare a visitation proposal that can be accepted by parents.

However, that does not mean there are no methods of enforcement. First, we have the “performance recommendation” system that is unique to family court proceedings (Article 38 of the Personal Status Litigation Act). Under this system, a parent

can file a petition with a family court if the other parent does not comply with the court's visitation order and continues to refuse to allow access to children. Then, the court will investigate the reasons why visitation is not implemented, and recommend child visits. However, that written order becomes just a piece of paper if the custodian continues to refuse visits, and the refusing party is never punished.

As a more powerful enforcement method, the "indirect compulsory enforcement" has been increasingly used in recent years (Article 172 of the Civil Execution Act). Under this system, a parent who, in breach of a court's visitation order, refuses to let the other parent see their child, will be ordered to pay, for example, 50,000 yen or 200,000 yen per day or per scheduled visitation. If the fine is large and the payment promptly imposed, this system has reportedly been effective, but still there is a limit.

Enforcement inherently does not require a court to assess the question of the appropriateness of visitation again. However, where the refusing party files an "appeal against a disposition of execution" or an "action to oppose execution," which is given in the compulsory execution proceedings, the court needs to look at the details of visitation arrangements to some extent, which is time consuming. In the meantime, the mother tells the court, "My children say they don't want to see their father" or "There has been a significant change of circumstances." Ultimately, the court is forced to modify the visitation rights (custody modification) and review the original order.

Therefore, even when a parent is initially successful in forcing a spouse to make payments, a second attempt will fail because visitation rights are reviewed over time. As a result, the court is likely to conclude that since the custodial parent strongly resists visitation and the children do not want to see the other parent, it cannot force compliance and future visitation should be prohibited.

In Japan, compulsory execution, by which enforcement officers or police officers are called to take children into custody and return them to the aggrieved parent is not allowed. In the case of the return of a child, the courts approve compulsory execution, though some people oppose it. Their reasoning is that the necessity to return a child is different from the necessity to secure visitation rights.

Among published court precedents, there is only one in which tort liability was recognized for emotional stress caused by the custodial parent's obstruction of visitation even though visitation was a "natural right as a parent based on love" and there were no special circumstances where that right would harm the wellbeing of the children. In that case, the court ordered the custodial parent to pay 5 million yen in damages (Shizuoka District Court, December 21, 1999). This case was in all the newspapers at the time, but since then, I have heard of no similar judgments in court.

The most effective weapon to make custodial parents obey visitation orders is a threat that if they fail to comply, parental authority will be removed. In Japan, like other countries, it is becoming more common nowadays in custody battles for courts to ask

divorcing parents if they allow the other partner access to their children, and to use their answers in evaluating custody. It can be said that the idea that “the non-custodial parent’s visitation is desirable for children’s healthy mental development” is taking root in Japan. However, in reality, this idea is still low in the order of priority in deciding which parent should have parental authority.

Even in cases of typical parental alienation where one parent badmouths the other and poisons the children’s minds to prevent visitation, Japanese courts rule that as long as the children are being well cared for by the custodian, it is impossible to separate them and return the children to the aggrieved partner. Japanese courts refuse to use the designation of parental authority as sanction against one parent who refuses to allow the other to see their children. Therefore, in reality, it is difficult to use sanction as leverage to enforce visitation.

## **5. Failure of International Marriages**

### **(1) Recognition of Judgments Rendered by Foreign Courts**

Generally, Japanese courts will recognize the judgments given in the courts of foreign countries if the following four requirements are met (Article 118 of the Civil Procedure Code), specifically, “recognition of the jurisdiction of the foreign court,” “receipt of a service by the party,” “non-violation of Japan’s public order and good morals,” and “existence of a mutual guarantee.”

Among these, the most important is “Japan’s public order and good morals.” For example, in one case although punitive damage to “punish one parent and serve as a warning to other parents” was recognized by a United States court, a Japanese court ruled that such damage violated Japan’s public policy, and was therefore not valid (the Supreme Court, July 11, 1997).

The question is whether or not custody decisions made by foreign courts are recognized in Japan. In the past, some Japanese courts did not recognize these decisions, saying that custody decisions do not permanently decide the status of the parties concerned and therefore it cannot be said that they are “judgments.” However, the courts in recent years take a view that as long as the requirements under the Civil Procedure Code are met, custody decisions made by foreign courts are recognized in Japan.

In the course of making decisions, how to assess the issue of “public order and good morals” becomes a problem. The case dealt with by the Tokyo High Court in 1993 (November 15, 1993) illustrates this point. A United States citizen married a Japanese woman in Texas but divorced after their child was born, and the woman became the sole custodial parent. The woman returned to Japan with the child (who was five years old at the time) in 1989, and they had not returned to the United States since then. Her ex-husband changed sole custody from her to him, and filed a petition for return of the child, and his petition was accepted without her being present.

The father, based on that judgment, asked a Japanese court to enforce the return of his child to the United States. At the first trial, the father’s claim was accepted. Then, the mother appealed. The court held that “four years have passed since the child began to live in Japan, and judging from the fact that the child, now a fifth-year elementary school student, is used to the Japanese language and can neither read nor write English, there are obvious circumstances where the child’s welfare will be violated if the return of the child is recognized in accordance with the judgment rendered by that country’s court. Under these circumstances, that judgment violates ‘public order and good morals’ and does not meet the requirements prescribed in Item (3) of Article 200 (currently Article 118) of the Civil Procedure Act.”

This judgment drew strong criticism from some legal experts because the court applied the issue of public order and good morals at the time of the judgment, not at the

time the original judgment was given in the United States court. Experts say this decision diverges from recognizing the judgments of foreign courts.

However, Japanese courts focus on the fact of residence in Japan and stability of life here. This seems to mean that it is actually impossible for them to recognize a judgment rendered by a foreign court after a certain period of time, and to order the return of a child wrongfully removed out of a foreign country by one parent. The following case (Kobe Family Court, Itami Branch, May 10, 1993) is similar to the one described above.

A mother was awarded temporary custody until her divorce was finalized in litigation for divorce filed in the United States. She later returned to Japan with her child. The child's father filed a petition demanding a change of temporary custody and the demand was accepted by a United States court. Then, the mother filed a suit in Japan seeking a designation of custody, and in response, the father fought over custody. In this case, the Japanese court granted custody to the mother, stating, among other things, that "the temporary custody order is not permanent and therefore it is questionable whether that judgment could become the subject of recognition." It added that even if the custody granted by the United States court is similar to its Japanese counterpart, and Article 118 of the Civil Procedure Act is analogously applied with respect to this matter, several reasons justify granting custody to the mother. Among the reasons cited was: (i) "the child is now in the mother's custody and has been with her for one year and five months in Japan;" (ii) "the child wants to live in Japan;" and (iii) "(in the United States court) the temporary custody was changed to the father, but that change strongly implies punishment for the mother's uncooperative attitude, and the judgment did not focus on the substance of custody."

In cases where a child is "abducted" into Japan in violation of a custody order, the child's parent who has been granted custody in a foreign court can demand under habeas corpus proceedings that their child be released from detention and returned, if a Japanese court recognizes that custody order as a judgment rendered by a foreign court.

In this case, as explained in Section 4-(1) above, the question of "obvious illegality of detention" becomes the central issue. In cases where a Japanese court recognizes a judgment of a foreign court, if the claimant has sole custody and a person detaining a child (the parent who "abducted" the child back to Japan) does not have custody, that detention will be regarded as illegal and the claimant's demand for the return of the child to the care of the claimant will be accepted. Meanwhile, if a person who is detaining a child has also custody of the child, any matter will be regarded as a "child custody dispute between the parents with joint parental authority" and thus that detention will not be deemed illegal. In this case, a Japanese court looks at the current custody environment and then considers whether or not the child should be returned. If a certain period of time has passed until an action is filed, the aggrieved parent's claim seeking the return of the child will be rejected.

“Abduction” of children across national borders involves issues of jurisdiction and governing law. The Tokyo High Court denied Japan’s adjudicative jurisdiction in one 2008 case where a parent, who had “abducted” a child into Japan in violation of a custody schedule approved by a United States court, filed a petition with a Japanese family court seeking a change of custody (September 16, 2008). In general, it is reasonable from the aspect of the welfare of a child that “judicial proceedings are carried out in a place closely connected with that child’s life.” But in this case, one parent temporarily returned to Japan according to the custody schedule but continued to stay in Japan after the scheduled departure date. Therefore, the court held that it was impossible to recognize that the child’s “address or habitual residence was in Japan.”

Some also raised the question of whether it was possible for one parent to maintain joint parental authority, when it was granted to both parents by a foreign court at the time of divorce, after that parent returned to Japan, where only sole parental authority is recognized after divorce. However, the dominant interpretation today is that joint parental authority can be maintained in situations like this. Under the Japanese family register system, such custody is registered as joint parental authority.

As explained above, more and more disputes over custody decisions made in foreign countries are being dealt with by Japanese courts, including cases where Japan’s adjudicative jurisdiction is denied when one parent seeks recognition or review of a judgment of a foreign court, or the national laws governing parents and children are not the laws of Japan. In these cases, if one parent is a Japanese citizen, the courts here make a negative judgment about the other parent’s visitation rights, based on Japanese family values that prioritize the stability of the current custody environment and respect for the child’s wishes, as discussed in Section 3 above (Legal Theory of Visitation).

A prime example of this is the ruling of the Tokyo Family Court (October 9, 1995). The petitioner, who was awarded custody in the United States, filed a demand with the Tokyo Family Court seeking visitation rights. The laws of Texas were the governing law, so at issue was the application of the provision of the laws of Texas. These state that: “The court may not reject visitation negotiations unless it finds that visitation negotiations would not be in the best interest of the child or impair the child’s physical or emotional development.” Given that the child apparently loathed the father, avoided looking at him and refused to be in a picture with him at the mediation session, the family court dismissed the father’s petition, saying “approving visitation against the child’s will significantly harm the child’s emotions and cause the child to suffer tremendous emotional stress.”

After seven years of legal battles using every available legal means – the man’s child was abducted by his estranged wife to Japan in 1988 - his hopes were dashed. If the court, without considering parental alienation by the custodial parent that led to the child’s resentment towards the father, or without reflecting the inability of Japanese courts, had

ruled against visitation only because it would harm the welfare of the child, that could not have been the true application of a foreign law as the governing law. The provisions of Texas law include the risk of impairing the child's physical and emotional development, but this provision can be construed more strictly, and it can be considered that the law is applied in a way parental visitation rights are guaranteed and the interests of the child are realized accordingly. The law, by its nature, should be understood in the same way as it is understood where it originated. Japanese courts are therefore criticized for attempting to understand even the governing law in light of Japanese legal theory.

## **(2) Ratification of the Hague Convention and the Domestic Law**

Such cases, where the application or the validity of the judgments of foreign courts becomes a problem, are becoming more common. However, Japanese courts are handling these cases from a typically Japanese point of view, so criticism and dissatisfaction are growing.

Once Japan ratifies the Hague Convention, Japanese courts will inevitably more often deal with foreign laws and have to be aware of the disparity between them and domestic laws. Japan will be required to take procedures to locate children wrongfully removed from a foreign country and return them in order to perform its obligations as a contracting nation. Japan will also need to create court proceedings, under which courts listen to parents' claims and consider them if they fight over the return of their children. Of course, we need to establish the relevant domestic law in enforcing the Hague Convention. The Convention is based on the presumption that the right to have continued direct and regular contact with both parents after divorce is guaranteed to children. If Japan is to ratify the Convention, it must respect its spirit and apply the same guarantee at home.

Otherwise, after ratification, the difference in treatment between international and domestic marriage will give rise to dissatisfaction on both sides. Parents who have "abducted" their children into Japan across national borders after the breakup of their international marriage will feel that they are being punished by strict criteria whereas parents whose children have been abducted by their estranged spouse within Japan will resent that they are not given similar protection. Courts will also confront contradictions when they make different judgments on international and domestic child "abductions," if they continue to adopt different criteria for the "welfare of children."

Moreover, as an argument for opposing the ban on child abduction and active visitation, people say that women will be left unguarded against domestic violence. However, this argument should apply equally to international and domestic marriages, and it is difficult to consider this matter by separating the two.

These problems make some reluctant to ratify the Hague Convention. Some

government officials even believe that while Japan has no choice but to ratify the Convention it will still not change the domestic law on visitation.

However, criticism against Japan's current visitation law is strong, and critics are putting pressure on the mass media and the Diet for reform. NHK, Japan's public broadcaster aired a 30-minute television program about post-divorce parent-child separations in April three times this year; once in the Tokyo Metropolitan area, once in the Kansai area and once on the nationwide. The program has deeply influenced public opinion.

I myself proposed a model law in January called the "Tanase Bill" and announced it at a meeting attended by Diet members and journalists. The Tanase Bill has given considerable encouragement to the movement organized by the parents who are separated from their children. With this bill in hand, a number of groups in the movement are calling on Diet members, the mass media and ordinary citizens to reform the current law (See Attachment 2). I am now preparing to modify the Tanase Bill to make its passage easier.

Recently one incident has received attention. A mother in Osaka left home, leaving behind her two young children who subsequently starved to death. This story was widely covered in the media to show the correlation between divorce and child abuse. Some people argue that if both parents had been involved in childrearing, this tragedy would have never occurred. Until now, many people in Japan have avoided discussing the divorce issue out of fear that it would increase negative attitudes toward divorce and worsen discrimination against children of separated parents. However, people are now beginning to look at the Osaka incident as a tragedy that was caused by sole custody. This seems to be a significant change in people's awareness.

Yet at present, Japan's visitation law lags far behind international standards, but I believe that the situation is steadily but inexorably changing.



**Table 1 Trends in Visitation and Custody Cases**

	<b>Designation of Custody and Others (Otsu 4 ) Newly received</b>		
<b>Year</b>	<b>Otsu 4 Cases</b>	<b>Face-to-face negotiation</b>	
	<b>Trial/Mediation</b>	<b>Trial</b>	<b>Mediation</b>
1955	53		
1960	77		
1965	242		
1970	825		
1975	2,016		
1980	4,512		
1985	7,855		
1989	7,727		
1993	9,421		
1998	12,590	293	1,696
1999	13,456	247	1,936
2000	15,041	322	2,406
2001	16,923	434	2,797
2002	19,112	509	3,345
2003	22,629	638	4,203
2004	22,273	725	4,556
2005	21,570	760	5,013
2006	21,997	952	5,488
2007	22,524	883	5,917
2008	23,596	1,020	6,261
2009	27,241	1,048	6,924

(Source: Annual Report of Judicial Statistics (Family Cases))

**Table 2**

Japanese calendar	Christian era	Number of divorces	In case children are involved	Number of children under 20 years old involved in divorce	Number of marriages	Number of births
<i>Showa</i> 40	1965	77,195	44,963		954,852	1,823,697
45	1970	95,937	56,683	89,687	1,029,405	1,934,239
50	1975	119,135	74,668	121,223	941,628	1,901,440
55	1980	141,689	95,755	166,096	774,702	1,576,889
60	1985	166,640	113,681	202,585	735,850	1,431,577
<i>Heisei</i> 1	1989	157,811	101,303		708,316	1,246,802
5	1993	188,297	116,511		792,658	1,188,282
10	1998	243,183	144,993	246,981	784,595	1,203,147
15	2003	283,854	170,331	292,688	740,191	1,123,610
20	2008	251,136	143,834	244,625	726,106	1,091,156
21	2009	253,000	146,408	249,864	714,000	1,069,000

(Source: Ministry of Health, Labor and Welfare, 2009 Population Survey Report)

**Table 3      The Numbers of Marriages and Divorces (2009)**

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Number of marriages	253,000
In case children are involved	146,408
Number of children under 20 years old involved in divorce	249,864
Number of marriages	714,000
Number of births	1,069,000

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(Source: Ministry of Health, Labor and Welfare, 2009 Population Survey Report)

**Table 4**

2009 Population Survey Report

1H *Jokan* (first volume) Divorce

Table 10.4 Annual number of divorces by the type of divorce and its percentage

Actual number		Total	Divorce by mutual consent	Arbitrated divorce	Judgment divorce	Reconciliation divorce	Recognized divorce	Decree divorce
<i>Showa</i> 40	1965	77,195	69,599	6,692	41	---	---	893
45	1970	95,937	85,920	8,960	64	---	---	993
50	1975	119,135	107,138	10,771	54	---	---	1,172
55	1980	141,689	127,379	12,732	46	---	---	1,532
60	1985	166,640	151,918	12,928	59	---	---	1,735
<i>Heisei</i> 2	1990	157,608	142,623	13,317	44	---	---	1,624
7	1995	199,016	179,844	17,302	66	---	---	1,804
10	1998	243,183	221,761	19,182	76	---	---	2,164
15	2003	283,854	257,361	23,856	61	---	---	2,576
20	2008	251,136	220,487	24,432	84	3,486	11	2,636
21	2009	253,353	222,662	24,654	89	3,414	22	2,512
<b>Percentage</b>		%	%	%	%	%	%	%
<i>Showa</i> 40	1965	100	90.2	8.7	0.1	---	---	1.1
45	1970	100	89.6	9.3	0.1	---	---	1.0
50	1975	100	89.9	9.0	0	---	---	1.0
55	1980	100	89.9	9.0	0	---	---	1.1
60	1985	100	91.2	7.8	0	---	---	1.0
<i>Heisei</i> 2	1990	100	90.5	8.4	0	---	---	1.0
7	1995	100	90.4	8.7	0	---	---	0.9
10	1998	100	91.2	7.9	0	---	---	0.9
15	2003	100	90.7	8.4	0	---	---	0.9
20	2008	100	87.8	9.7	0	1.4	0	1.0
21	2009	100	87.9	9.7	0	1.3	0	1.0

## **Attachment 1**

### ● Civil Code

Article 763 A husband and wife may divorce by agreement.

#### Article 766

- (1) If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If agreement has not been made, or cannot be made, this shall be determined by the family court.
- (2) 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.
- (3) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding two paragraphs.

#### Article 767

- (1) The surname of a husband or wife who has taken a new name by marriage shall revert to the surname used before marriage by divorce by agreement.
- (2) A husband or wife whose surname has reverted to the surname before marriage pursuant to the provision of the preceding paragraph may use the surname he/she used at the time of divorce by notification pursuant to the Family Registration Act within three months of the time of divorce.

#### Article 770

- (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce:
  - (i) if a spouse has committed an act of unfaithfulness;
  - (ii) if abandoned by a spouse in bad faith;
  - (iii) if it is not clear whether a spouse is dead or alive for not less than three years;
  - (iv) if a spouse is suffering from severe mental illness and there is no prospect of recovery; or
  - (v) if there is any other grave cause making it difficult to continue the marriage.
- (2) A court may dismiss a suit for divorce if it finds continuing the marriage reasonable taking into account all circumstances, even in the case there is a cause listed in items (i) to (iv) inclusive of the preceding paragraph.

#### Article 791

- (1) In the case where a child's surname differs from that of his/her father or mother, he/she may take the name of his/her father or mother by notification pursuant to the provisions of the Family Registration Act after having obtained the family court's permission.
- (2) In the case where a child's surname differs from that of his/her parents due to his/her father or mother taking a new surname, he/she may take the name of his/her parents, if they are married, without obtaining the permission referred to in the preceding paragraph by notification pursuant to the provisions of the Family Registration Act.
- (3) If a child has not reached 15 years of age, his/her legal representative may perform the acts referred to in the preceding two paragraphs on his/her behalf.
- (4) A minor who has taken a new surname pursuant to the provisions of the preceding three paragraphs may revert to using his/her previous surname within one year of attaining majority by notification pursuant to the provisions of the Family Registration Act.

Article 798        Where a person to be adopted is a minor, the permission of the family court shall be obtained; provided that this shall not apply in the cases where the person to be adopted is a lineal descendant of either the adoptive parent or the adoptive parent's spouse.

#### Article 819

- (1) If parents divorce by agreement, they may agree 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.
- (3) In the case where parents divorce before the birth of a child, the mother shall exercise parental rights and duties; provided that the parties may agree that the father shall have parental authority after the child is born.
- (4) A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority.
- (5) When the parents do not, or cannot, make the agreements referred to in paragraph (1), paragraph (3), and the preceding paragraph, the family court may, on the application of the father or the mother, make a ruling in lieu of agreement.
- (6) 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 interests of the child.

#### ● Act on Protection of Personal Liberty

## Article 2

- (1) Any person whose physical liberty is deprived without due process of law may seek relief under the provisions of this Act.
- (2) Any person may make a claim set out in the preceding paragraph on behalf of the person who is physically confined.

### ● Regulations of Protection of Personal Liberty

Article 4 The claim set out in Article 2 of this Act may be made only if it is clear that the confinement, a lawsuit or disposition concerning the confinement is carried out without authority or is in material breach of the methods or procedures specified by laws or regulations; provided, however, that in cases where there are other appropriate methods to achieve the aim of the release, such claim may not be made unless it is clear that the aim is not achieved by such method within a reasonable period of time.

### ● Act on General Rules for Application of Laws

Article 25 The validity of marriage shall be governed by the national law if a husband's national law and a wife's national law are the same, or if such law does not exist, the law of the place of residence in case they live in the same place, or if neither of these laws exist, the law of the place with which the husband and wife have close connections.

Article 27 The provision of Article 25 shall apply *mutatis mutandis* with respect to a divorce; provided, however that if either the husband or wife is a Japanese national whose habitual residence is in Japan, their divorce shall be governed by the laws of Japan.

Article 32 The legal relationship between the parent and the child shall be governed by the national law of the child if the child's national law and either the child's father's or mother's national law (if one of the parents is dead or missing, the national law of the other parent) are the same, and in other cases, the law of a place of the child's habitual residence.

### ● Family Registration Act

Article 13 A family register shall, for each person in the same family, state therein the following particulars in addition to the registered locality:

- (i) The full name;
- (ii) The date of birth;
- (iii) The cause for which a person is entered in the family register and the date of the

- entrance;
- (iv) The full names of a person's natural parents and his personal relationship with the natural parents;
  - (v)
    - If a person is an adopted child, the full names of its adoptive parents and its personal relationship with the adoptive parents;
  - (vi) In respect of husband and wife, statement of a husband or wife;
  - (vii) In respect of a person who has entered in the family register from another one, the indication of the latter's family register;
  - (viii) Other matters prescribed by Ministry of Justice Ordinance.

#### Article 18

- (1) A child who assumes the surname of its father and mother shall be entered in the family register of the father and mother.
- (2) Except in the case mentioned in the preceding paragraph, a child who assumes the surname of its father shall be entered in the family register of the father, and a child who assumes the surname of its mother shall be entered in the family register of the mother.
- (3) An adopted child shall be entered in the family register of his or her adoptive parents.

#### ● Code of Civil Procedure

Article 118 A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

- (i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.
- (ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.
- (iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.
- (iv) A mutual guarantee exists.

#### ● Constitution of Japan

##### Article 13

All of the people shall be respected as individuals. Their rights to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.



## Article 98

- (1) This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.
- (2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

## ● Domestic Relations Trial Act

Article 9 The family court shall make rulings on the following matters.

Type *Otsu*

- (iv) Designation of custody of a child and other dispositions related to the custody pursuant to the provisions of Article 766, Paragraph 1 or Paragraph 2 of the Civil Code (including mutatis mutandis application with respect to Articles 749, 771 and 788)

Article 15.3 The family court may, upon petition under Article 9, order provisional attachment, provisional disposition, appointment of a trustee or other necessary provisional injunctions specified by the Supreme Court.

3. The rulings under the preceding two paragraphs shall be made based on prima facie evidence.

Article 18 Any person, who wishes to file a lawsuit in respect of a case for which mediation is feasible under the preceding Article, shall first file a petition for mediation with the family court.

## ● Personal Status Litigation Act

Article 32

- (1) The court shall, upon petition, in its ruling to accept a claim of annulment of a marriage or divorce filed by one partner against the other partner, decide on the designation of custody of their child or other dispositions related to such custody, disposition related to the distribution of property, or disposition in respect of the pro rata share of standard remuneration (hereinafter referred to as the “Auxiliary Disposition”).
- (2) In the case of the preceding paragraph, the court may order the party to return the child, pay money, or provide financial or other benefits.
- (3) The provisions of the preceding paragraph will apply mutatis mutandis if the court, in its ruling to accept a claim of annulment of a marriage or divorce, decides on the designation of parental authority.

- (4) The court shall, in a trial to designate custody or other dispositions related to the child's custody under paragraph 1 of this Article, or in a trial to designate parental authority under the preceding paragraph, hear the statement of the child if he or she is 15 years old or above.

#### Article 38

- (1) Upon request by a right holder, the family court that has made such a ruling, may investigate the status of performance of the duties and make a recommendation to a person under duty with respect to the performance of the duties determined by the court under the provisions of Article 32.1 or Article 32.2.
- (2) The family court set out in Article 38.1 may delegate the investigations or recommendations under the provisions of Article 38.1 to another family court.
- (3) The family court under Article 38.1 and the family court to which the delegation is made under Article 38.2 may have family court-appointed investigators investigate or make recommendations pursuant to the provisions of Article 38.1.
- (4) The provisions of the preceding three paragraphs are the duties that can be determined by the trial under the provisions of Article 32.1 or Article 32.2. Such provisions shall apply *mutatis mutandis* to the performance of the duties determined by a settlement in respect of the annulment of marriage or divorce.

### ● Civil Execution Act

#### Article 24

- (1) An action seeking an execution judgment for a judgment of a foreign court shall be under the jurisdiction of the district court having jurisdiction over the location of the general venue of the obligor, and when there is no such general venue, it shall be under the jurisdiction of the district court having jurisdiction over the location of the subject matter of the claim or the property of the obligor.
- (2) An execution judgment shall be made without investigating whether or not the judicial decision is appropriate.
- (3) The action set forth in paragraph (1) shall be dismissed without prejudice when it is not proved that the judgment of a foreign court has become final and binding or when such judgment fails to satisfy the requirements listed in the items of Article 118 of the Code of Civil Procedure.
- (4) An execution judgment shall declare that compulsory execution based on the judgment by a foreign court shall be permitted.

#### Article 172

- (1) Compulsory execution for an obligation of action or inaction for which it is not possible to carry out the compulsory execution set forth in paragraph (1) of the

preceding Article shall be carried out by the method in which the execution court orders the obligor to pay to the obligee money of a certain amount that is found to be reasonable for securing performance of the obligation, according to the period of the delay or immediately if the obligor fails to perform the obligation within a certain period that is found to be reasonable.

- (2) When there has been a change in circumstances, an execution court may, upon petition, change an order under the provisions of the preceding paragraph.
- (3) An execution court shall interrogate the opposite party of the petition in cases of issuing an order under the provisions of the preceding two paragraphs.
- (4) In cases where there has been payment of money that was ordered pursuant to the provisions of paragraph (1), if the amount of damages that resulted from default of the obligation exceeds the amount of payment, the obligee shall not be precluded from claiming compensation for damages for such amount in excess.
- (5) An appeal against a disposition of execution may be filed against a judicial decision on the petition for the compulsory execution set forth in paragraph (1) or on the petition set forth in paragraph (2).
- (6) The provisions of paragraph (2) of the preceding Article shall apply *mutatis mutandis* to the execution court set forth in paragraph (1).

\* **Attachment 2**

**Law to Promote Post-Divorce Joint Childrearing and Visitation** (the 3rd draft) April 8, 2010 Takao Tanase

**Article 1 Purposes**

In light of the fact that for the healthy development of children, it is desirable that (i) children have a continued relationship and direct contact with both parents on a regular basis after divorce or separation to be loved and raised by both parents, and (ii) both parents have the rights and responsibilities to raise children equally and in cooperation with each other, this Law shall be enacted to supplement the provisions of the Civil Code and the Domestic Relations Trial Act, and clarify responsibilities and duties of the government and municipalities that implement necessary administrative policies.

**Article 2 Principles of Visitation**

- 2.1 A parent who does not live with his or her child after a divorce (hereinafter referred to as the “**Non-Custodial Parent**”) may reasonably see his or her child. The definition of a reasonable visitation shall be determined by reference to all the circumstances, including the child’s age, living environment, education, health, and places of residence, and parents’ place of residence and occupations. Any assessment shall be based on the assumption that the Non-Custodial Parent’s involvement in various aspects of the child’s daily life, including the child’s stay at the Non-Custodial Parent’s house for a period of prescribed days to the extent possible serves the best interest of the child.
- 2.2 A parent who lives with his or her child (hereinafter referred to as the “**Custodial Parent**”) shall not obstruct visitation set out in Article 2.1. When a court determines to whom custody should be awarded in formulating the “Joint-Rearing Plan” set out in Article 4, the court shall use the willingness of one parent to allow the other parent “freer visitation” as an important means by which to award custody.
- 2.3 If it is clear that visitation set out in Article 2.1 will harm the interests of the child, a family court, upon request by the Custodial Parent or a relative of the child, may limit the methods of visitation or prohibit visitation until any circumstance that harms the child’s welfare is eliminated. Such limitation and prohibition shall be carried out concurrently with the visitation support set out in Article 8, and shall be lifted promptly once it becomes unnecessary.
- 2.4 If divorcing parents cannot agree between themselves due to conflict of opinion

with regard to the implementation of visitation under Article 2.3, they may go to court seeking a judgment. The court, upon receipt of petition, shall expeditiously determine the methods by which visitation is approved or not based on the importance of the child's continued relationship with the Non-Custodial Parent.

2.5 A parent without parental authority who has been involved in the rearing of the child with the consent of the other parent shall be regarded as a parent with joint parental authority in the application of this Law while such parent is residing with the child, and a separation shall be treated in the same way as a divorce; provided, however, that this requires the acknowledgement of paternity of the child by such parent.

2.6 Any person other than the parents may request visitation under Article 2.1 if such person has been involved in the rearing of the child. This applies to grandparents and relatives who have developed close relationships with the child through the child's parents during marriage; provided, however, that such person's visitation must be conducted in a way that does not disrupt the parent's post-divorce childrearing.

### **Article 3        Joint Custody and Joint Parental Authority**

3.1 The parents may get joint custody upon divorce by promising that they will share equally childrearing responsibilities and keep the other parent informed about the child's place of residence. The government and municipalities shall, upon request by either joint-custodial parent, enter both parents as joint-custodial parents on the family register and resident register, and give necessary consideration to the child in terms of school education and other administrative aspects.

3.2 Joint-custodial parents shall jointly exercise parental authority. Either joint-custodial parent may exercise parental authority at their own discretion with regard to the day-to-day care of the child while the child is residing with them, but shall consult with the other parent and jointly make decisions on important matters with respect to the child's status and economic matters. If joint-custodial parents fail to reach an agreement through consultation, they may use alternative methods (if such alternative methods are prescribed in the agreement at the time of electing to have joint custody) or otherwise seek a decision from a family court.

3.3 The Non-Custodial Parent may get joint parental authority upon divorce. If the Custodial Parent does not agree with this arrangement, a family court may, upon request by the Non-Custodial Parent, award joint parental authority to both

parents if the court determines that it will be in the best interest of the child. The provision in the second sentence of Article 3.2 will apply mutatis mutandis with respect to the exercise of joint parental authority by the Non-Custodial Parent.

3.4 If the Non-Custodial Parent does not get joint parental authority, the Custodial Parent shall get sole parental authority; provided, however, that the Non-Custodial Parent may be designated as a parent with sole parental authority upon agreement between the parents.

3.5 If a parent who has elected to have joint custody terminates the agreement, such parent must notify the local authority where registration was made under Article 3.1, and a new joint-rearing plan must be formulated in accordance with the procedures under Article 4. If the Non-Custodial Parent exercises joint parental authority, such joint parental authority may be terminated upon agreement or court judgment by designating the other parent as a parent with sole parental authority.

3.6 The Non-Custodial Parent who does not have joint parental authority may request the Custodial Parent to provide information on the child's education, health, after-school activities and other activities, if appropriate. The Non-Custodial Parent may from time to time communicate with the child by telephone, e-mail, letter or other methods to the extent that such communication does not disrupt the Custodial Parent's childrearing. The same will apply if one parent communicates with the child who is under the care of the other parent on a visitation or under joint custody.

3.7 Administrative measures taken by the government or municipalities for joint-custodial parents under the provision of the second sentence of Article 3.1 shall also be used to provide the necessary assistance to facilitate the Non-Custodial Parent's visitation with the child unless such provision of assistance is inherently inappropriate.

#### **Article 4 Joint-Rearing Plan and Temporary Custody Order**

4.1 Divorcing parents shall determine whether both parents will have joint custody under Article 3, if not, then determine which parent will live with the child after divorce, and further determine methods of visitation with the child by a parent who is to become the Non-Custodial Parent, the exercise of joint parental authority or designation of sole parental authority, and the amount of child support to be paid by the Non-Custodial Parent, and shall notify the court thereof.

The family court shall provide the parties with counseling and assistance

necessary for them to determine these things.

- 4.2 The family court, upon receipt of notification of those things set out in Article 4.1, shall hear the circumstances from both parents, and approve the agreement after confirming that it is true and appropriate. The parties may divorce by attaching the approved agreement (hereinafter referred to as the “**Joint-Rearing Plan**”) to a divorce form.
- 4.3 If the parties cannot determine the things set out in Article 4.1 prior to a divorce, they may file for mediation through a family court and prepare the Joint-Rearing Plan. If the mediation talks fail, the Joint-Rearing Plan shall be formulated during the subsequent litigation process; provided, however, that the agreement on divorce is definitive and only the Joint-Rearing Plan is at issue, it may be determined by court decision.
- 4.4 If the parties start living apart before the Joint-Rearing Plan is formulated in accordance with the procedures under this Article, they shall determine the child’s place of residence, visitation with the child and other necessary custody matters until divorce is effected. If an agreement cannot be reached between the parties, the family court may, upon petition by the parties, temporarily determine these things (hereinafter referred to as the “**Temporary Custody Order**”).

#### **Article 5 Prohibition of Wrongful Removal of Child**

- 5.1 A person who exercises joint parental authority during marriage shall not take the child out of the child’s residence without the consent of the other spouse. If one parent retains the child or fails to return the child to the other parent without the consent of the Custodial Parent or the joint-custodial parent after visitation or joint custody under the provisions of Article 2 or Article 3 is over, such retention of the child or failure to return the child shall also be regarded as “abduction.”
- 5.2 If the child is “abducted” by one parent in violation of the provisions of Article 5.1, the other parent may go to a family court seeking a protective order. The family court shall, upon receipt of petition, immediately order the abducting parent to appear in the court with the child. If the abducting parent does not obey the summons or the court cannot locate the child, the court shall order the prosecutor to take the child into custody, and return the child to the other parent after confirming the child’s safety and mental stability.
- 5.3 After the abducting parent appears in the court and the child’s safety is secured, the court shall hold a hearing and issue the Temporary Custody Order regarding

the child's custody until the parties formulate the Joint-Rearing Plan and divorce. In the case of the retention of the child as set out in the second sentence of Article 5.1, if the parents are divorced, the court may issue the Temporary Custody Order until it is determined whether or not the Joint-Rearing Plan will be revised if either party requests such revision.

5.4 The provisions of Article 5.1 will not apply if the spouse is subjected to violence and imminent danger posed by the other spouse, or the child is abused by the other spouse, and therefore it seems necessary to do so to protect them from such danger. The same will apply if there is a risk of similar violence or abuse in the course of formulating the Joint-Rearing Plan and proceeding with divorce proceedings.

5.5 In cases where the requirements set out in Article 5.4 are met, if one parent leaves the marital home with the child without the consent of the other parent, such parent must immediately appear in the family court with the child and ask for permission for the removal of the child. The court shall hold a hearing while at the same time securing the safety of the parent and the child. If the court confirms that the requirements set out in Article 5.4 are met, it shall permit the relocation of the child's residence or the retention of the child, and determine the methods by which the other parent's visitation with the child will be approved or not.

5.6 If there is a risk that one parent will relocate the child's residence across national borders, the other parent may request the court to issue a desist order to prevent such "abduction" in advance.

## **Article 6 Revision to the Joint-Rearing Plan**

6.1 If it becomes necessary to revise the Joint-Rearing Plan that is formulated pursuant to the provisions of Article 4 after divorce due to a change in circumstances of the parents or the child, either parent may make a request to the other parent for such revision. The purposes set out in Article 1 and the principles set out in Article 2 will apply to such revision, and the court shall strictly examine the necessity of change and the possibility of alternative methods so as not to interrupt visitation.

6.2 If one parent remarries another person and that spouse wishes to adopt the child, such parent must obtain the consent of the other parent; provided however, that this will not apply if the other parent does not obey visitation or joint custody orders, and fails to fulfill his or her responsibilities to raise the child without



reason.

- 6.3 If the other parent does not consent to the revision as set out in Article 6.1, the requesting parent may file a petition with a family court seeking a judgment on the revision to the Joint-Rearing Plan. The same will apply if there are any disputes between the parents over whether or not it is necessary to obtain the consent set out in Article 6.2.

#### **Article 7 Elimination of Obstruction of Visitation**

7.1 If the Custodial Parent obstructs the Non-Custodial Parent's visitation in violation of the Joint-Rearing Plan or the Temporary Custody Order, the Non-Custodial Parent may ask the family court to eliminate the obstruction of visitation. If the court determines that there are grounds for the petition, it shall order the Custodial Parent to stop obstructing visitation. The same will apply if one of the joint-custodial parents obstructs the other joint-custodial parent's childrearing.

7.2 Either parent will be subject to a fine of up to one million yen if he or she violates the orders set out in Article 7.1. If the Custodial Parent repeatedly obstructs visitation and does not stop the obstruction in spite of the court's order, the family court may, upon request by the Non-Custodial Parent, shift parental authority to the Non-Custodial Parent and order the Custodial Parent to return the child to the Non-Custodial Parent. If either joint-custodial parent obstructs the custody of the child by the other joint-custodial parent, the family court shall, upon request by the other joint-custodial parent, shall terminate the agreement on joint custody and designate the other joint-custodial parent as the Custodial Parent and a parent with sole parental authority.

7.3 In addition to the petitions under the preceding two paragraphs, the Non-Custodial Parent or the joint-custodial parent may claim compensation for damage caused by emotional distress due to the obstruction of visitation or joint custody.

#### **Article 8 Visitation Support Services**

8.1 If smooth visitation is impossible due to a conflict between the Non-Custodial Parent and the Custodial Parent or the child's aversion to visitation, the government and municipalities shall, at the request of either parent, provide visitation support services in order to provide the parents and the child with support and assistance so that visitation can be performed. In court proceedings in which both parents are in dispute over visitation methods, a family court may,

upon petition by one parent or by the authority of the court, order the Custodial Parent or the child to receive visitation support.

- 8.2 The visitation support set out in Article 8.1 includes mental support offered to both parents and the child under the guidance of experts in the areas of psychiatry, psychology, welfare and other areas. Apart from that, if there is a high level of conflict between the Custodial Parent and the Non-Custodial Parent or there is a risk that one spouse will be subjected to violence by the other, the government and the municipalities shall act as an intermediary between the parents and assist in the child's visit to the Non-Custodial Parent and the return of the child to its Custodial Parent, or if it is necessary to secure the child's safety during visitation, they shall provide a place and have a third party monitor supervise the visitation.
- 8.3 In order to promote these services, the government shall train joint-rearing support staff. In addition to the visitation support under the preceding two paragraphs, the joint-rearing support staff may assist in resolving disputes arising from the interpretation or operation of the Joint-Rearing Plan if those disputes are not serious enough to bring them to the family court for mediation or judgment; provided, however, that the joint-rearing support staff shall obtain the advice of a lawyer or leave the solution of the disputes to the lawyer if the application of law is at issue.
- 8.4 The government and municipalities shall cooperate with the private sector engaged in similar support activities in performing visitation support services under this Article, and help such support activities conducted by the private sector. Furthermore, the government and municipalities shall consider the possibility of alternative dispute resolution, in connection with the formulation or implementation of the Joint-Rearing Plan.
- 8.5 The government shall carry out necessary investigation and research on post-divorce joint-rearing, and educate its people to perform better visitation and joint custody while at the same time preparing reports from time to time and proposing reforms of legislative, judicial or administrative policies.

#### **Article 9 Transitional Measures**

- 9.1 This Law shall come into effect one year after being enacted by amending all the related laws and regulations.
- 9.2 Those who divorced before the enforcement of this Law may take the procedures

set out in Article 4 in order to formulate the Joint-Rearing Plan pursuant to the provisions of this Law even if they have agreed to childrearing or obtained court decisions.

- 9.3 This Law shall be amended if necessary three years after its enforcement in light of the status of its operation.