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The Hague Convention on International Child Abduction and Japan's Move Toward Ratification

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Cross-border child abduction has recently attracted great attention in Japan. The problematic, incoming abduction cases arise when a Japanese parent, usually a mother, married to a foreign spouse and living abroad (*inter alia*, the U.S., Canada or the U.K.), comes back to Japan with the child after the marriage breaks down, seeking shelter at his/her parents' or relatives' home. The left-behind parent desperately seeks the return of the child, mostly in vain. The U.S. counts 230 child abduction cases in relation to Japan since 1994 (100 active cases as of January 2011), but no single child has so far been returned successfully. This is due to current Japanese domestic law that fails to provide effective remedies.

The left-behind parent can seek a family court decree in Japan that appoints or confirms him/her as a sole custodian and orders the return of the child. However, family court proceedings, usually introduced by conciliation, are time-consuming and inefficient. Furthermore, pursuant to Japanese law, the judge tends to appoint the abducting Japanese parent as a sole custodian, holding that the child has already been settled in the new environment. Because the attribution of custody rights is based on continuity and adequate conditions of custody *in the future*, the fact that one parent illegally abducted the child *in the past* is not a decisive factor.

The left-behind parent can also request a writ of *habeas corpus* at the district court. This approach has been fairly successful in national cases thanks to the district court's expeditious summary proceedings and penal sanctions. In disputes between couples, judges used to compare both parents' conditions of custody to assess whether the retention of the child was apparently unlawful. This examination, however, imposed a difficult task upon district courts that are geared towards an adversarial system and are, unlike family courts, not provided with the authority or personnel to carry out *ex officio*

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investigations. Hence, the scope of *habeas corpus* has largely been restricted to give priority to family court decrees since 1993.

Other means, such as civil claims for return orders, penal sanctions or the enforcement of foreign return orders, do not ensure prompt returns of children, either. Absent effective measures, current Japanese law risks confirming the *status quo* created by the abducting parent and offering the latter a safe haven. To tackle this problem, the U.S., the U.K., Canada and several other countries started to urge Japan to join the 1980 Hague Convention on International Child Abduction.

Pursuant to the Hague Convention, once a child is wrongfully removed from a Contracting State A where he/she habitually resides to another Contracting State B, the latter is required to immediately send him/her back to State A, without going into the substantive custody issues. The Convention does not demand the return of the child to the left-behind parent, but solely to State A. Custody issues are to be decided by the judiciary of State A. State B cannot refuse the return order except in exceptional circumstances. The Convention has achieved remarkable success and garnered 86 Contracting States so far. In addition to Western countries, China (only Hong Kong and Macao), Sri Lanka, Thailand, Singapore, Morocco and South Africa have joined it. After Russia's accession in July 2011, Japan became the only remaining Non-Contracting State among the G8.

Opinion has been divided in Japan as to the pros and cons of ratifying the Convention. Some argue that Japan should adapt itself to the international standard as a developed country and put an end to the circumstances that enable the abducting parent to always win. Others hold that the Hague system does not suit Japan's culture and tradition, which is not familiar with the concept of joint custody after divorce or the return of the child as an exercise of parental authority. In addition, it allegedly fails to save Japanese parents suffering from domestic violence or other problems in a foreign country, obliging them to seek judicial remedies there with considerable burden. After careful deliberations, the Japanese government eventually declared in May 2011 that it would become a Contracting State. However, this will require some fundamental reforms in domestic law.

First, Japan has to set up an active central authority for the first time. The Ministry of Foreign Affairs will assume this responsibility. Central authorities are key players in the Hague system. They exchange information and cooperate with each other to enable the swift return of children. Japan's central authority will also closely work with other administrative or judicial bodies nationally to find out the whereabouts of children, take protective measures, prevent further abductions, encourage voluntary returns of children, and assist both parties in return and access proceedings.

Second, Japan needs to institute specific return proceedings at the family court. In order to abide by the requirement of prompt returns, these proceedings should be designed as non-contentious summary proceedings, limiting the scope of evidence and hearing of the parties. Jurisdiction should be concentrated in a small number of family

courts to achieve expeditious proceedings, judges with expertise and a uniform interpretation of the relevant legal instruments. As of September 2011, a legislative subcommittee is consulting on an implementation act and will presumably make proposals along these lines. Though unlike the current proposal to restrict the method of enforcement to payment orders, coercive measures should be provided as a final recourse.

Third, return orders can exceptionally be refused, *inter alia*, when “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” (Article 13, Paragraph 1 b)). The Japanese government suggests that it include also cases in which the accompanying parent, especially the mother, would fall victim to domestic violence again, be arrested or prosecuted, or be subject to financial hardship after return. If the domestic violence on the mother has an impact on the child, the return can indeed be refused pursuant to Article 13. However, the proposed extensive interpretation, which is comparable to Swiss rules, may well contradict the general understanding and jeopardize the functioning of the whole system.

A better way for Japan would be to restrict the scope of Article 13 and secure safe returns instead. When protective measures, such as placement of the child and the mother, are taken in the country of origin, the return can be ordered. Other Contracting States also use “undertakings”, in which the left-behind parent promises to drop denunciation, provide accommodation or perform maintenance after the return. To confer judicial effects to undertakings lest they be breached, the left-behind parent could be requested in advance to obtain a so-called “mirror order” in the country of origin. This is time-consuming, though, and may not work out in a civil law jurisdiction. A more effective approach seems to be the judicial network of liaison judges who directly communicate and take necessary steps to order protective measures or remove arrest warrants. After ratification, it would be desirable that Japanese judges also join the judicial network.

Although extensive reforms and efforts of implementation are needed, the ratification of the Hague Convention is worthwhile. It is reported that Japanese parents are being disadvantaged in some countries because Japan is not yet a Contracting State. They namely lose joint custody rights after divorce, on the ground that there is no way to ensure the return of the child if he/she is abducted to Japan. Once Japan joins the Hague system, these parents, as well as those living in Japan who suffer from outgoing child abduction to a foreign country, will greatly benefit.

It is important to be aware that the Hague Convention realizes the best interests of the child by ensuring his/her prompt return. Once wrongfully removed from a familiar environment and taken to another country, a child may well lose his/her cultural identity, contact with the left-behind parent and the opportunity to grow up in a stable family relationship. This does not conform with the children’s rights protected by the 1989 Convention on the Rights of the Child. Experience shows that the Hague Convention has established an adequate mechanism, even if careful examination is required in

exceptional circumstances to protect the child. Within the framework of the Convention, it is now up to Japan to design suitable and appropriate methods of implementation.