Access to the Child in Cross-Border Family Separation

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All the websites cited below were last accessed between 12 September and 15 October 2021.

Abbreviations: AGRAL = 法の適用に関する通則法 *Hō no tekiyō ni kansuru tsūsoku-hō* [Act on General Rules on Application of Laws] (Law No. 78 of 2006); CC = 民法 *Minpō* (Law No. 89 of 1896); CEA = 民事執行法 *Minji shikko-hō* [Civil Execution Act] (Law No. 4 of 1979); DRCPA = 家事事件手続法 *Kaji jiken tetsuzuki-hō* [Domestic [Civil Code] Relations Case Procedure Act] (Law No. 52 of 2011); HCCH = Hague Conference on Private International Law; Implementation Act = 国際的な子の奪取の民事上の側面に関する条約の実施に関する法律 *Kokusaiteki na ko no dasshu no minji-jō no sokumen ni kansuru jōyaku no jisshi ni kansuru hōritsu* [Act for Implementation of the Convention on the Civil Aspects of International Child Abduction] (Law No. 48 of 2013); PSLA = 人事訴訟法 *Jinji soshō-ho* [Personal Status Litigation Act] (Law No. 109 of 2003); UNCRC = United Nations Convention on the Rights of the Child, 20 November 1989 (Treaty No. 2 of 1994, entry into force 22 May 1994 for Japan).

I. INTRODUCTION

In cross-border family separation, the question of how to maintain contact between the child and both parents is crucial.[1] It is generally considered to be in the best interests of the child to have access to the parent residing abroad after family separation. The 1989 United Nations Convention on the Rights of the Child (UNCRC) defines it as a child's human right to maintain on a regular basis personal relations and direct contact with both parents unless it is contrary to the child's interests (Art. 10(2)). This is particularly important in cross-border parental child abduction cases, as the 1980 Hague Child Abduction Convention[2] ensures not only a prompt return of the child to the state of habitual residence, when abducted in breach of rights of custody, but also an effective exercise of rights of access (Arts. 1 and 21).

Japan accepted the Child Abduction Convention and enacted the Implementation Act in 2014. Although the Convention has largely been successfully implemented in Japan with the valuable support of administrative authorities, the judiciary, lawyers, academics, NGOs, and other stakeholders,[3] there have been several left-behind fathers in Germany,[4] France[5] and the U.S.[6], among others, who were no longer able either to have their abducted children returned or to have access to them. On 1 February 2019, the Committee on the Rights of the Child suggested in its concluding observations, as regards Japan, that the return of and access to abducted children be

1 In this paper, the term "access" is used in the broader sense to include "visitation", "contact", and "shared parenting time".

2 HCCH Convention on the Civil Aspects of International Child Abduction, 25 October 1980 (Treaty No. 2 of 2014, entry into force 1 April 2014 for Japan).

3 Y. NISHITANI, The HCCH's development in the Asia-Pacific region, in: Gulati / John / Köhler (eds.), Elgar Companion to the Hague Conference on Private International Law (2020) 66 ff.

4 See, for example, W. WAGNER, Kampf um Sorgerecht in Japan: Herr Echternach vermisst seine Kinder, Spiegel Online of 3 February 2018; L. DUHM, Internationaler Sorgerechtsstreit: Herr Echternach gibt nicht auf, Spiegel Online of 1 June 2020 (available at *http://www.spiegel.de/*); C. NEIDHART, Fälle von Kindesentführungen nach Japan: Wenig Mitleid für verlassene Väter, Süddeutsche Zeitung, 26 November 2018; T. HAHN, Vater ohne Kinder, Süddeutsche Zeitung, 1 October 2020 (available at *https://www.sueddeutsche.de/*).

5 J. HUGUES, Enfants confisqués au Japon: le calvaire des parents français, Le Petit Journal, 10 March 2019 (available at *https://lepetitjournal.com/*); "French father goes on hunger strike for kids 'abducted' by Japanese wife", The Japan Times, 12 July 2021 (available at *https://www.japantimes.co.jp/*).

6 See Supreme Court of Japan, 21 September 2017, Saiko-sai Saiban-shū Minji 257, 63.

effectively guaranteed.[7] Further on 8 July 2020,[8] the European Parliament adopted a resolution urging Japan to fulfil its obligations under the UNCRC and the Child Abduction Convention by duly enforcing return and access orders and introducing joint custody after divorce of the parents. Notably, it indicates that in 2019 the President of France, Emmanuel MACRON, the Prime Minister of Italy, Giuseppe CONTE, and the Chancellor of Germany, Angela MERKEL, personally discussed these issues with the Prime Minister of Japan, Shinzō ABE (all titles being held at that time).

While the 2019 amendment of the Japanese Implementation Act of the Child Abduction Convention strengthened the execution methods for return orders,[9] the Japanese government decided to further deliberate on whether to undertake a comprehensive reform of the Civil Code for the protection of children after divorce. To this end, the Legislative Council of the Ministry of Justice established the Subcommittee on Family Law on 10 February 2021,[10] which has been holding monthly meetings since 30 March 2021 to discuss whether to introduce joint parental authority and whether to ensure access to the child after divorce, as well as how to guarantee the payment of child support. As of 15 October 2021, the Subcommittee has not yet adopted clear guidelines on the envisaged reform but is still debating fundamental policies on whether and to what extent to introduce joint custody and access after divorce and how to ensure an effective recovery of child support.[11] Given this state of discussion, the underlying paper on access in cross-border family separation primarily concentrates on studying the existing Japanese law on access based on the statutory rules, case law and academic opinions, and limits itself to a partial discussion of the envisaged reform.

In what follows, the characteristics of Japanese family law are expounded on (II.), before analyzing the current legal settings regarding access in cross-border family separation (III.). After examining the implementation of access

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7 CRC/C/JPN/CO/4-5 (available at *https://ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx*).

8 "Parliament sounds alarm over children in Japan taken from EU parents", European Parliament Resolution of 8 July 2020 (available at *https://www.europarl.europa.eu/portal/en*).

9 Law of 17 May 2019 (Law No. 2 of 2019, entry into force 1 April 2020). The requirement of the simultaneous presence of the taking parent with the child has been abolished, and the judge may now immediately order the execution by substitution without referring to the indirect execution in advance. For an overview, see *https://www.mofa.go.jp/mofaj/files/100039100.pdf*.

10 Legislative Council Meeting No. 189 of 10 February 2021 (Inquiry No. 113 of the Minister of Justice).

11 For Subcommittee meeting minutes and further materials, see the website of the Ministry of Justice at *https://www.moj.go.jp/shingi1/housei02_003007*.

under Japanese law (IV.) and reflecting on measures for carrying out access (V.), some final remarks on future developments conclude this paper (VI.).

II. Characteristics of Japanese Family Law

1. Marital Family Unit

Family law in Japan has remained traditional until today, grounded on heterosexual marriage between a man and a woman. Once married, the spouses constitute a family unit with their children and bear the same family name. A distinction is still made between the status of children born within and out of wedlock, although they formally enjoy the same rights (Arts. 772 ff. CC).[12]

Under the current Japanese law, parental authority (親権 *shinken*), which generally includes physical (personal) and patrimonial custody rights (監護権 *kango-ken*), is shared by the parents only insofar as they are married. After divorce, there is no joint parental authority or custody. Either the father or the mother obtains sole parental authority and custody (Arts. 766 and 819 CC).[13] There is no post-marital spousal maintenance, but only a one-time compensation payment made between the spouses at the time of divorce. The matrimonial property regimes are grounded on separation of assets, and spouses rarely enter into a prenuptial agreement. Thus, the compensation paid to a housewife at divorce is relatively limited. Even after divorce, both parents in principle bear obligations to pay child support (Art. 877 (1) CC), but this is not arranged in 57.2% of all single-mother cases, and the percentage of fulfilled child support is only 24.3%. As a result, the poverty rate of single-parent families reaches 48.1%, whereas the average poverty rate is 13.9% in Japan.[14] Thus, dissolution of marriage as a "clean-break" of family bonds entails various drawbacks.[15]

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12 Y. Nishitani, Kindschaftsrecht in Japan – Geschichte, Gegenwart und Zukunft, ZJapanR / J.Japan.L. 37 (2014) 78 ff.

13 Arts. 766 (1) and 819 (1) CC.

14 Hōmu-shō [Ministry of Justice], *Yōiku-hi fu-barai kaishō ni muketa kentō kaigi – Torimatome (Kodomo-tachi no seichō to mirai o mamoru aratana yōiku-hi seido ni mukete)* [Report of the Advisory Board for Combatting Non-Payment of Child Support – Towards a New System of Child Support to protect Children's Growth and Future] (2020) (*https://www.moj.go.jp/content/001337164.pdf*). While most single parents have a job to earn their living, Japan is the only example among 31 OECD countries where working single-parent households experience a higher poverty rate than non-working single-parent households. This is because single mothers earn much less than male workers within a context of notable gender gaps. M. Shimo-ebisu, *Rikon-go no ko no yōiku-hi (kango hiyō) – Kodomo no seikatsu hoshō no kanten kara* [Child support (payment for child custody) after divorce – From a

2. Divorce

In Japan, there are generally five classifications of divorce at present: (i) consensual divorce, (ii) divorce by in-court conciliation, (iii) divorce by family court decree, (iv) divorce by judicial settlement, and (v) divorce by family court judgment.[16]

(i) The type of divorce that is most frequently employed is consensual divorce (Art. 763 CC), which constitutes 88.3% of all divorce cases.[17] It is conducted out of court by the spouses simply filling out and submitting a divorce form at a municipal office. No substantive oversight is carried out, so spouses decide on divorce and its consequences themselves. Spouses are only required to enter which parent will have sole parental authority over which child and are invited to indicate whether they have already agreed upon access and child support.[18]

In the event of disputes, parties can institute proceedings under the DRCPA at the family court. (ii) The spouses are first directed to in-court conciliation (Art. 257 DRCPA), which is generally conducted in the framework of caucuses so as to hear the parties separately. When the spouses reach an agreement on divorce and its consequences, including

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viewpoint of maintaining the child's living standard], in: Ninomiya (general editor) / Inubushi (volume editor), *Gendai kazoku-hō kōza* [Modern Family Law Series], Vol. 2: *Kon'in to rikon* [Marriage and Divorce] (2021) 281 ff.

15 Y. NISHITANI, Identité culturelle en droit international privé de la famille, Recueil des cours de l'Académie de droit internationale de La Haye 401 (2019) 170 ff.; IDEM, Reformüberlegungen zum japanischen Familienrecht ("Reformüberlegungen"), in: Gebauer / Huber (ed.), Gestaltungsfreiheit im Familienrecht (2017) 103 ff.; IDEM, *supra* note 12, 80 ff.

16 For further details, *see supra* note 15; also Y. NISHITANI, Family Law in East Asia: A Comparative Perspective, in: Libro Homenaje Eugenio Hernández-Bretón, Vol. 3 (2019) 2377 ff.; IDEM, Familienrecht in Ostasien – Tradition und Moderne in Japan und der Republik Korea –, in: Festschrift für Dieter Martiny zum 70. Geburtstag (2014) 1179 ff.; IDEM, State, Family and Child in Japan, in: Confronting the Frontiers of Family and Succession Law. Liber Amicorum Walter Pintens, Vol. 2 (2012) 998 ff.

17 In 2020, out of all 193,253 divorce cases, (i) consensual divorce occurred in 170,603 cases (88.3%), (ii) divorce by in-court conciliation accounted for 16,134 cases (8.3%), (iii) divorce by family court decree constituted 2,229 cases (1.2%), (iv) divorce by judicial settlement occurred in 2,545 cases (1.3%), and (v) divorce by family court judgment totaled 1,740 cases (0.9%). Ministry of Health, Labour and Welfare, *Jinkō dōtai chōsa 2020: Rikon* [Population Census 2020: Divorce] (available at: *http://www.e-stat.go.jp/*).

18 Over 60% of spouses indicate having entered an agreement on the payment of child support, but it is not clear how true this is and whether the agreement was made orally, in writing, or as a notarial deed. SHIMOEBISU, *supra* note 14, 287.

parental authority, custody, access, division of spousal assets, and the payment of compensation and child support, the agreement is recorded and ascribed the same effects as *res judicata* (Art. 268 DRCPA). (iii) When both parties concur upon divorce but disagree over its consequences, the judge may proceed to render a decree, considering all circumstances of the case as well as the interests and equity as between the parties (Art. 284 DRCPA). The decree, however, immediately loses its effects once a party files an objection (Art. 286(5) DRCPA).

Failing family court conciliation or decree, the party seeking divorce institutes independent contentious divorce proceedings under the PSLA at the family court. (iv) Once spouses reach an agreement on divorce while the case is pending at the family court, divorce is declared as a judicial settlement (Art. 37 PSLA). Otherwise, (v) the judge renders a divorce judgment when one of the legal divorce grounds is fulfilled (Art. 770 CC). The divorce judgment may entail the determination of parental authority, custody measures, including access, and child support as ancillary matters (Art. 32 PSLA).

Given the high percentage of amicable solutions by consensual divorce, or divorce by conciliation, or judicial settlement at family courts, Japanese family law is characterized by its placing emphasis on the autonomy of the spouses to respect their agreement and by giving priority to their amicable solution. The state intervenes only to a limited extent to regulate the involved family relationships, which may well occur at the cost of protecting weaker parties, particularly women and children.[19]

3. Parental Authority, Custody, and Access

In its legal sense, parental authority includes both physical (personal) and patrimonial custody. After divorce, either the father or the mother obtains sole parental authority in Japan. This has long been seen as catering for peaceful family relationships and child welfare, given that quarrelling parents would hardly be able to cooperate and coordinate care for their children jointly. Moreover, the idea of sole parental authority stems from the old, patriarchal "house" system that existed until the end of WWII. Under

19 For further details, see N. MIZUNO, *Hikaku-hō teki ni mita genzai no Nihon no Minpō: Kazoku-hō* [The Contemporary Japanese Civil Code from a Comparative Perspective: Family Law], in: Hironaka / Hoshino (ed.), *Minpō-ten no hyakunen* [Centenary of the Civil Code], Vol. 1 (1998) 654 f., 666 ff.; Y. NISHITANI, Reformüberlegungen, *supra* note 15, 112 ff. For a comparison with the tendency toward private ordering and contractualization in Europe, see F. SWENNEN (ed.), Contractualisation of Family Law. Global Perspectives (2015) 1 ff.; D. FENOUILLET / P. DE VAREILLES-SOMMIÈRES (eds.), La contractualisation de la famille (2001) 1 ff. It should be noted that the Japanese system has less intervention of mandatory rules.

the "house" system, divorce generally meant expelling the wife from the house of the husband, who automatically obtained sole parental authority at the time of divorce, while the mother could, where necessary, only be attributed custody to care for the child.[20]

Despite the remaining "clean-break" principle of dissolving marriage, the family courts today seek to accommodate different interests of the parties. When there are several children, the father may be given parental authority over some children and the mother authority over others by family court conciliation or decree. Moreover, in about 0.5% of divorce cases completed by family court conciliation or decree, parental authority is attributed separate from custody. The judge can provide the father with sole parental authority and the mother with sole custody, or vice versa,[21] such that the parent with custody cares for the child.[22] These measures allow both parents to be engaged in child rearing to some extent.

In recent years, practices in the family courts have gradually become responsive to granting access to the non-custodial parent.[23] The number of custody disputes including access after separation or divorce of the parents is rapidly increasing. The proceedings in disputes over access are also tending to become longer. As background, authors point to the increasing number of divorce cases, rising societal interests, an increasing awareness among the parties as regards the access, the growing number of fathers participating in child rearing, and greater interests of parents and grandparents toward the child due to the declining birth rate.[24] Since 2011, access has explicitly been provided for, along with child support, as a custody measure to be taken after divorce (Art. 766 CC),[25] a development which has also served to augment the number of petitions for access brought by the

20 See NISHITANI, *supra* note 12, 80 ff.

21 See the 2020 Judiciary Statistics at *https://www.courts.go.jp/app/sihotokei_jp/search*.

22 A. ŌMURA, *Kazoku-hō* [Family Law] (3rd ed., 2010) 172.

23 The first decision that granted a non-custodial parent access as a custody measure after divorce was the Tōkyō Family Court decree of 14 December 1964, Katei Saiban Geppō 17-4, 55. The decision was, however, reversed on appeal, on the grounds that the rights of the non-custodial parent after divorce may be restricted and it would better serve the child's welfare to secretly observe the child's growing up. Tōkyō High Court, 8 December 1965, Katei Saiban Geppō 18-7, 31.

24 M. KINOSHITA / T. MISAKI, *Menkai kōryū jiken ni okeru dairi-nin katsudō ni tsuite* [Activities of Representatives in Access Cases], Katei no Hō to Saiban [Family Court Journal] 13 (2018) 11; see also Y. NAKAMOTO, *Rikon o meguru oyako no menkai kōryū no jitsumu* [Access Practices between the Parents and the Child after Divorce], Koseki Jihō (Special Volume) 767 (2018) 10 ff.

25 Art. 766 CC [Determination of Matters regarding Child Custody after Divorce, etc.]: "(1) If parents divorce by agreement, the matters of who will have custody

non-custodial parent. Access may also be granted under this provision *mutatis mutandis* for parents who are still married but living separately.[26] As a matter of principle, family court judges and a majority of authors consider that contact of the child with both parents ought to be ensured and generally enhanced in the best interest of the child. Access may also enhance the payment of child support by the non-custodial parent and deter child abduction or parental alienation.[27]

Some authors, however, are cautious toward access, with a view of not burdening the child with disputing and arguing parents after divorce or separation.[28] Furthermore, in practice questions remain as to the circumstances and extent to which contact should be maintained between the non-custodial parent and the child. Unlike in Western countries, the Japanese family courts are still reserved about granting access where there is disagreement between the parents, as will be further analyzed below. This primarily relates to the question of how to define and understand the best interests of the child. The above-mentioned Subcommittee on Family Law is debating this point, which represents an issue where unanimity is not easily reached.[29]

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over a child, visitation and other contacts between the father or mother and the child, sharing of expenses required for custody of the child and any other necessary matters regarding custody over the child shall be determined by that agreement. In this case, the child's interests shall be considered with the highest priority.

(2) If the agreement set forth in the preceding paragraph has not been made, or cannot be made, the matters set forth in the preceding paragraph shall be determined by the family court.

(3) The family court may change the agreement or determination under the provisions of the preceding two paragraphs and order any other proper disposition regarding custody over the child, if it finds this necessary.

(4) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding three paragraphs."

26 Supreme Court, 1 May 2000, Minshū 54-5, 1607; cf. Tōkyō High Court, 17 May 2016, Hanrei Taimusu 1437, 127.

27 M. TANAMURA (ed.), *Menkai kōryū to yōiku-hi no jitsumu to tenbō: Kodomo no shiawase no tame ni* [Practices and Developments regarding Access and Child Support: For the Happiness of the Child] (2nd ed., 2017) 3.

28 See the citations in note 48, *infra*.

29 Since any reform on caring for children after divorce can profoundly impact the entire Japanese society, the Subcommittee is carefully proceeding in consultations. Thus, it is now primarily summoning experts and comparatively examining the state of discussions not only in family law, but also in developmental psychology, clinical psychology, child psychiatry, and family sociology. See also the preparatory work of the Expert Group on Family Law: SHŌJI HŌMU KENKYŪ-KAI, *Kazoku-hō kenkyū-kai hokoku-sho: Fubo no rikon-go no ko no yōiku no arikata o chūshin to*

III. Legal Settings for Cross-Border Cases

In cross-border cases, there are two specific avenues for ensuring access to the child. One is obtaining the assistance of the Japanese Central Authority pursuant to the 1980 Hague Child Abduction Convention. The other is obtaining an access order at family court, particularly when the law of a Western country that guarantees access to the child is designated by the Japanese conflict-of-law rules (AGRAL).

1. 1980 Hague Child Abduction Convention

As mentioned above, Japan accepted the 1980 Hague Child Abduction Convention in 2014. Once a child habitually residing in a contracting state is wrongfully removed to or retained in a different contracting state, the Convention ensures the child's prompt return, grounded on administrative and judicial cooperation (Art. 1). The return mechanism under the Convention has the objective of entrusting a custody decision on the merits to the contracting state of the child's habitual residence, so as to deter forum shopping by the taking parent and to avoid conflicting decisions.[30] The Convention also supports the exercise of access rights by a parent living in a different state from where the child resides (Art. 21).

In enacting the Implementation Act, the Japanese legislature did not introduce separate access proceedings for the purpose of the Convention, unlike the return proceedings that are conducted under concentrated jurisdiction at the Tōkyō Family Court or Ōsaka Family Court. This is because the Japanese government followed a narrow interpretation of Article 21 of the Child Abduction Convention. According to this view, the provision neither provides an independent source of jurisdiction nor imposes any duty on courts. Rather, Article 21 requires only that the Central Authority provides assistance to the parent living in a state different from the child.[31] Thus, for the purpose of a petition for access to the child, the usual family court proceedings for custody measures are employed. Requests can also be made while the return proceedings are pending before the Tōkyō or Ōsaka Family Court, even though no joinder of return cases and access cases is allowed.[32]

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suru sho-kadai ni tsuite [Report of the Expert Group on Family Law: Various Problems Surrounding Child Rearing After Divorce of the Parents] (2021) 7 ff.

30 Y. Nishitani, Child Protection in Private International Law – An HCCH Success Story?, in: Gulati / John / Köhler (eds.), *supra* note 3, 262.

31 R. Schuz, The Hague Child Abduction Convention. A Critical Analysis (2013) 424.

32 O. Kaneko, *Kokusaiteki na ko no tsuresari he no seidoteki taiō: Hāgu jōyaku oyobi kanren hōki no kaisetsu* [Institutional settings to tackle cross-border child abduction: Commentary on the Hague Convention and the relevant acts and regulations] (2015) 295 f. Although no joinder of return cases and access cases is allowed, the

On the other hand, as a part of administrative cooperation under the Convention, the Japanese Central Authority[33] provides organizational assistance for the exercise of access by the left-behind parent.[34] Once the left-behind parent is granted his or her application for such assistance, the Japanese Central Authority provides necessary information and bears costs for up to four instances of mediation or supervised access at NGOs. Private entities qualified to receive financial support for the exercise of access include the "Family Problems Information Center" (FPIC)[35] and the "International Social Service Japan" (ISSJ),[36] among others.[37] Notably, for the exercise of access under the Convention, there is no need for a wrongful removal or retention of the child. When, for example, a mother who obtained sole parental authority after consensual divorce lawfully moves the child from Japan to a foreign country, the Convention still applies for the purpose of ensuring the father's access to the child.[38]

2. Custody and Access Cases under Foreign Law

In cross-border access disputes before the Japanese family courts, the governing law can be foreign law. Grounded on the principle of nationality, this is the case in Japan when one of the parents and the child have the same foreign nationality (Art. 32 AGRAL).[39] When a foreign law is designated which guarantees effective enforcement of access rights or even shared

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Implementation Act facilitates the administration of justice and constitutes jurisdiction for access cases at the Tōkyō or Ōsaka Family Court, at one of which the return proceedings will be pending (Art. 148 Implementation Act).

33 The Minister for Foreign Affairs is appointed as the Japanese Central Authority (Art. 3 Implementation Act); its task is carried out by the Hague Convention Division of the Consular Affairs Bureau at the Ministry of Foreign Affairs. See *https://www.mofa.go.jp/fp/hr_ha/page22e_000249.html*.

34 Art. 16 ff. Implementation Act.

35 家庭問題情報センター *Katei Mondai Jōhō Sentā*; see *http://www1.odn.ne.jp/fpic/*.

36 日本国際社会事業団 *Nihon Kokusai Shakai Jigyō-dan*; see *http://www.issj.org/*.

37 For further details, see *https://www.mofa.go.jp/mofaj/files/000033396.pdf*.

38 SCHUZ, *supra* note 31, 425; KANEKO, *supra* note 32, 39. This is why, insofar as the exercise of access is concerned, the Convention applies to "old cases", where the wrongful removal or retention of the child occurred prior to its entry into force in Japan.

39 Art. 32 AGRAL [Legal Relationship Between Parents and Child]: "The legal relationship between parents and their child shall be governed by the national law of the child if it is the same as the national law of one of the parents (if one of the parents is dead or unknown, as the national law of the other parent). In other cases, it shall be governed by the law of the child's habitual residence." For an English translation, see M. DOGAUCHI et al., Act on General Rules on Application of Laws, Japanese Annual of International Law 50 (2007) 87 ff.

parenting for the non-custodial parent, the Japanese family courts will generally follow these rules.

In a noteworthy case decided by the Tōkyō High Court on 19 May 2017,[40] the spouses and two children (aged six and four) were all Canadian nationals from the Province of Nova Scotia who resided in Japan. The parents were still married but living apart. The judge applied Canadian law to custody issues, in particular the law of the province of Nova Scotia (Arts. 32 and 38(3) AGRAL). After carefully examining the living conditions of both parents and their respective relationships with their children, the judge ordered shared parenting under joint custody. The judge adopted a parenting plan prepared in accordance with the models provided by the Canadian Department of Justice.[41] As a result, the judge appointed the mother as the primary caregiver, while allowing the father to spend time with the children from Friday to Tuesday – overnight – on alternate weekends and to share vacations or holidays.

In Canada, the judge often orders shared parenting to promote "maximum contact" between the child and the non-custodial parent, insofar as it is in the best interests of the child.[42] The outcome of this case, governed by Canadian law, rightly catered for the living conditions, social environment, and personal views of the Canadian parents and children.[43] As this case demonstrates, when foreign law governs custody and access under Article 32 AGRAL, the Japanese judge renders access orders or shared parenting orders pursuant to the standards applicable in that foreign country. While the 1996 Hague Child Protection Convention[44] would have led to the application of the *lex fori* (Art. 15), i.e., Japanese law in the underlying case, Article 32 AGRAL has the advantage of pointing to the national law of the parties, which enables respecting the lifestyle of foreign families living in Japan.

Yet, as a matter of fact, most custody or access cases brought before the Japanese family courts are governed by Japanese law. This is because one of the parents is usually a Japanese national and the child also obtains Japanese nationality by birth (*jus sanguinis*) pursuant to Article 2(1) of the Nationality Act.[45] Even if the child also obtains – in addition to Japanese nationality –

40 Tōkyō High Court, 19 May 2017, Katei no Hō to Saiban 12 (2018) 58.

41 See *http://www.justice.gc.ca/eng/fl-df/parent/plan.html.*

42 J. D. PAYNE / M. A. PAYNE, Canadian Family Law (7th ed., 2017) 548 ff.

43 It is however indicated that the same result could have been reached by applying Japanese law. See Katei no Hō to Saiban 12 (2018) 59 f.

44 HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (not yet ratified by Japan).

45 国籍法 (Law No. 147 of 1950).

foreign nationality by birth, the child is treated as a Japanese national for the purpose of determining the applicable law (Art. 32 and 38 (1) AGRAL).[46] Once Japanese law applies to custody and access, the judge will follow the Japanese standards, which entail further challenges in granting access orders.

IV. Access under Current Japanese Law

1. Theoretical Background

Under Japanese law, it is still disputed among academics whether access ought to be granted as a matter of principle for the sake of the child's welfare, or whether access should be only exceptionally allowed when it corresponds to the best interest of the child. Notably, as the mother obtains sole parental authority in 91.1% of divorce cases by family court conciliation or decree,[47] access is generally a matter regarding whether and to what extent the father should be present in the child's life after divorce or separation of the parents. This is primarily a question of how to define, understand, and realize the best interests of the child.

Some authors in Japan take the latter cautious position toward granting access to the non-custodial parent, believing that denying access and a "clean-break" of the family relationship will generally better serve the interests of the child after divorce or separation of the parents. They reason that divorced or separated parents usually wrangle without agreeing on how to raise and care for the child. Preventing access would duly deter psychological pressure and loyalty conflicts for the child. These authors generally claim that access cannot be qualified as a "right", as access orders are not enforceable as such, and they instead rely solely on voluntary implementation by the parties.[48]

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46 International jurisdiction of the Japanese courts is granted either ancillary to contentious divorce proceedings (Art. 3-4 PSLA) or based on the child's domicile as an independent non-contentious case on custody measures including access (Art. 3-8 DRCPA). See Y. Nishitani, New International Civil Procedure Law of Japan in Status and Family Matters, Japanese Yearbook of International Law 62 (2019) 122 ff.; idem, International Adjudicatory Jurisdiction in Matrimonial Matters in Japan, Ibid., 180 ff.

47 For the relevant statistics, see *supra* note 21.

48 T. Kajimura, *Saiban-rei kara mita menkai kōryū chōtei/shinpan no jitsumu* [Practices of Family Court Conciliation and Decrees on Access in Case Law] (2013) 1; also K. Hasegawa, *Menkai kōryū gensoku jisshi seisaku no mondai-ten* [Problems with the Policy of Realizing Access in Principle], in: Kajimura / Hasegawa (ed.), *Kodomo chūshin no menkai kōryū* [Access in the Interests of the Child] (2015) 13 ff.; T. Uchida, *Minpo* [Civil Law], Vol. 4 (2014) 134.

A majority of authors, however, adopt the former favorable position of enforcing access in principle, considering that maintaining contact with both parents after their divorce or separation is important for the child, as provided for by the UNCRC. These advocates of access opine that having regular contact with both parents generally accords with the best interest of the child (with access needing to be exceptionally excluded to protect the child in domestic violence cases). This academic opinion also contends that access orders can be enforced by indirect execution in the form of a monetary order; direct execution by bailiffs, who would remove the child so as to allow access, is not conceptually permissible.[49] Some authors even conceive of a parental duty to enforce access, i.e., an obligation of the custodial parent to ensure access by the non-custodial parent, and an obligation of the non-custodial parent to exercise access to the child.[50] Furthermore, the prevailing view points out the positive effects of access on the psychological development of children, who can, by maintaining contact to the non-custodial parent, enjoy mental stability, feel the certainty of being loved by both parents, become independent early on, develop identity, and establish self-confidence.[51]

While the practices of the family courts do not yet seem to be fixed, recent trends go in the same direction as the majority of authors, considering that access of the non-custodial parent ought to be granted in principle. This means that access should only be excluded when and to the extent that the best interest of the child obviously requires so.[52] The question remains,

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49 M. MURAKAMI et al., *Tetsuzuki kara mita ko no hikiwatashi/menkai kōryū* [Handover of and Access to the Child from a Viewpoint of Procedural Law] (2015) 100 ff.; S. NINOMIYA, *Kazoku-hō* [Family Law] (5th ed., 2019) 127 ff.; M. TANAMURA, *Rikon to kodomo o meguru giron: Kazoku-hō gakusha kara mita genjō to kadai* [Discussions surrounding Divorce and Children: The Current State and Challenges from a Viewpoint of a Family Law Expert], in: Odagiri / Machida (eds.), *Rikon to menkai kōryū: Kodomo ni yorisou seido to shien* [Divorce and Access: Institutions and Support for the Sake of Children] (2020) 4 ff.; R. YAMAGUCHI, *Mensetsu kōshō no kenri-sei to kazoku-sei* [Access in the Context of Rights and Family Relationships], in: Noda / Kajimura (eds.), *Shin Kazoku-hō jitsumu taikei* [New Series of Practices in Family Law] (2008) 328 ff.

50 NINOMIYA, *supra* note 49, 128.

51 A. MITSUMOTO, *Kodomo tachi no pia sapōto* [Peer Support for Children], in: Ninomiya (ed.), *Menkai kōryū shien no hōhō to kadai. Bekkyo/rikon-go no oyako he no sapōto o mezashite* [Methods and Challenges for Supporting Access. Seeking to Provide Support for Families after Divorce or Separation] (2017) 180 ff.; N. ODAGIRI, *Kodomo chūshin no menkai kōryū ni mukete* [Seeking Access Focused on the Child], in: Odagiri / Machida (eds.), *supra* note 49, vii ff.

52 Ōsaka High Court, 3 February 2006, Katei Saiban Geppō 58-11, 47; Tōkyō Family Court, 31 July 2006, Katei Saiban Geppō 59-3, 73; see T. KATAYAMA / Y. MURAOKA, *Dairi-nin no tame no menkai kōryū no jitsumu: Rikon no chōtei/shinpan*

however, as to when and to what extent access indeed ought to be granted and exercised.

As mentioned above, since the 2011 reform of the Civil Code, access is explicitly provided for in the Civil Code, together with child support, as one of the custody measures to be taken at divorce in the best interests of the child (Art. 766 (1) CC).[53] It is positively evaluated by academics, on the grounds that stipulating and characterizing access as one of the legal consequences of divorce raises the awareness and importance of access in determining childcare after divorce. Notably, this provision has also clarified that access, as one of the custody measures, is independent of parental authority, as opposed to certain previous academic views.[54] This readily enables its justification and flexibly allows access by the non-custodial parent, although the custodial parent has sole parental authority after divorce.[55]

Yet in Japan, access is not yet conceived in legal terms as a "right" of the parents, nor as a "right" of the child. In the 2011 reform of the Civil Code, the legislature refrained from taking a position in this respect, given that academic opinions are still divided and some authors indeed refuse to qualify access as a "right" and restrict it for fear of exacerbating family relationships after divorce or separation of the parents.[56] Defining access as a "right" may have also

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kara jisshi ni muketa chōsei/shien made [Access Practices for Representatives: From Family Court Conciliation or Decree on Divorce to Arrangements or Support for the Implementation of Access] (2015) 5.

53 This position accords with the Supreme Court decision of 6 July 1984, Katei Saiban Geppo 37-5, 35.

54 Academic opinions as to the characterization of access have largely been divided. (i) While initial authors held access as a "natural right" of the non-custodial parent deriving from legal parentage, (ii) other authors contended that access is related to "custody measures" to be determined by the family courts. As opposed to these opinions, (iii) another view considered access as one of the functions of "parental authority", which is potentially attributed also to the non-custodial parent. On the other hand, (iv) recent authors qualify access as a "right" belonging both to the child and the parents, focusing on the interests of the child which the parents are obliged to guarantee. Other views qualify access as a (v) "right" of the child to grow up in a favorable environment, or (vi) as a "constitutional parental right" of the non-custodial parent, to be vindicated by granting joint custody after divorce. For the state of discussion, see K. KURIBAYASHI, *Rikon-go no oyako no kōryū – menkai kōryū – no hoshō. Ko no kenri/rieki no shiten kara* [Ensuring Contact – or Access – between the Parents and the Child after Divorce. From a Viewpoint of the Right or Interests of the Child], in: Ninomiya / Inubushi, *supra* note 14, 313 ff.; YAMAGUCHI, *supra* note 49, 319 ff.

55 A. KUBOTA, *Menkai kōryū no genjō to kadai* [The State and Challenges of Access], Katei no Hō to Saiban 13 (2018) 4 f.; TANAMURA, *supra* note 49, 5 ff.

56 T. TOBISAWA (ed.), *Ichimon Ittō: Heisei 23nen Minpō-tō kaisei. Jidō gyakutai bōshi ni muketa shinken seido no minaoshi* [Q & A: The 2011 Amendment of the Civil

led to complications about entitlement and its exercise in high-conflict cases.[57] This cautious attitude yields several practical consequences.

First, whether and the extent to which access is desirable is decided on a case-by-case basis. By not defining access as a "right" of the child or the parents or both, family court judges maintain discretion in determining access. This entails the risk of readily denying access to the non-custodial parent – usually the father – in high-conflict cases, considering that an access order contrary to the will of the custodial parent – usually the mother – may be harmful to the child's well-being.[58]

Second, by treating access as a custody measure, Japanese law excludes access to persons other than the parents who are close to the child – e.g., grandparents, siblings, and stepparents – even though there can be exceptional cases where access by third persons may be meaningful to the child.[59] This restrictive position of Japanese law has been confirmed by the Supreme Court judgment of 25 March 2021, dismissing a petition for access filed by grandparents who had previously been the child's *de facto* caregivers.[60] This attitude clearly contrasts to the law in Germany, France, and other Western countries.[61] This comparative difference is arguably justified by social conditions and the family relationships. While Western legal systems extensively accept and accommodate non-traditional, non-biological, and patchwork families,[62] Japanese family law is still bound to the conventional marital unit. As a hallmark, the ratio of children born out of wedlock is limited to 2.3% in Japan, whereas the corresponding ratio reaches 60.4% in France, 55.9% in Portugal, 51.9% in the Netherlands, 39.6% in the U.S., 33.9% in Germany, and 33.0% in Canada (2018).[63]

Third, by characterizing access as a custody measure, emphasis is still placed on the decision-making authority of the custodial parent, although access is now clearly separated from parental authority. Since the custodial

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Code. Reform of the Rules on Parental Authority to Combat Child Abuse] (2011) 12; for further details, see *supra* note 54.

57 A. ŌMURA, *Minpō dokkai* [Commentary on the Civil Code] (2015) 97 f.

58 ŌMURA, *supra* note 57, 98.

59 See YAMAGUCHI, *supra* note 49, 328 f.

60 Supreme Court, 25 March 2021, Saiban-sho Jihō 1765, 4.

61 For Germany, § 1685 (1)(2) BGB; for France, see K. KURIBAYASHI, *Ko no rieki no tame no menkai kōryū: Furansu hōmon-ken-ron no shiten kara* [Access in the Interest of the Child: From the Viewpoint of Visitation Rights in France] (2011) 123 ff.

62 Caution is required though when constitutional parental rights conflict with access by non-parents, particularly grandparents. See *http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2003_15/pdf/2003_15.pdf*.

63 See OECD Statistics "Share of births outside of marriage", *https://www.oecd.org/els/family/database.htm*.

parent is entitled to decide alone on where, how, and in which environment the child resides and is raised, the view of the custodial parent is often given priority as to whether and to what extent the child should have contact with the non-custodial parent. It may *de facto* result in a "veto right" of the custodial parent, who is opposed to the non-custodial parent maintaining regular contact with the child.[64] This also means that the discussion on the admissibility of access after divorce or separation has not necessarily focused on the best interests of the child, which are still understood differently among judges and authors, but rather on a balancing of the interests between the parents.[65]

2. Legal Settings

a) Consensual Divorce

The out-of-court and judicial implementation of access in Japan needs to be analyzed according to the context. According to a 2016 survey, 75.9% of single-mother families and 72.7% of single-father families do not make any access arrangements with the non-custodial parent.[66] This largely owes to consensual divorce, which constitutes 88.3% of all divorce cases and is carried out by a simple declaration without any substantive oversight by the municipal office. Parents are often opposed to or unaware of the importance of maintaining contact between the child and the non-custodial parent after divorce. Still, consensual divorce can simply be declared without indicating whether the parents have already agreed on the exercise of access (*supra* II.2.).

To overcome these drawbacks, it is helpful for the parents to receive support from family registrar officers of the relevant municipality prior to or at the time of declaring consensual divorce. The officers can inform both parents of the importance of access for the child and encourage them to arrange access accordingly. After divorce, local governments could also assist the parents in exercising access. Such measures have notably been taken for the first time by the Municipality of Akashi in Hyōgo Prefecture, whose mayor is a trained lawyer who understands the usefulness of and the

64 KURIBAYASHI, *supra* note 61, 3 ff.

65 KUBOTA, *supra* note 55, 7 ff.

66 See KŌSEI RŌDŌ-SHŌ [Ministry of Health, Labour and Welfare], *Zenkoku hitorioya setai-tō chōsa* [Nationwide Survey on Single-Parent Families, etc.] (2016) (*https://www.mhlw.go.jp/toukei/list/86-1.html*). Upon consensual divorce, only 23.7% of the parents arrange access for the non-custodial parent. See KATEI MONDAI JŌHŌ SENTĀ [Centre for Information on Family Conflicts (on behalf of the Ministry of Health, Labour and Welfare)], *Oyako no menkai kōryū no enkatsu na jisshi ni kansuru chōsa kenkyū hōkoku-sho* [Report on a Smooth Implementation of Contact between the Child and Parent] (2016) 16 ff. (*http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000183795.html*).

need for supporting mechanisms provided by municipalities for childcare after divorce.[67] The "Akashi model" has successfully been transposed and followed by other local governments (see *infra* V.1.).

b) Family Court Conciliation

When the parents do not reach an agreement on divorce or access themselves, they can refer to the family court. First, custody measures, including access, can be determined upon the parents' divorce by conciliation at the family court (Art. 257 DRCPA). Second, parents can also bring their disputes over access to the family court independent of divorce, whereby in-court conciliation is generally first instituted to seek an amicable solution (Arts. 150 ff. DRCPA). Once the parents reach consensus in in-court conciliation, their agreement is recorded and legally binding as *res judicata* such that it constitutes a title for execution (Art. 268 DRCAP).[68]

More importantly, parental agreement and cooperation are crucial for implementing access successfully in the best interest of the child. Thus, family courts assist parents by providing information and educational programs on the importance of access and child support. This "parental guidance" is offered while conciliation proceedings are pending. The Family Bureau of the General Secretariat of the Supreme Court made a series of videos and posted them on their website.[69] When the parents come to the family court for hearings, the videos are made available in the waiting room for the parents. The videos indicate how children suffer and feel responsible for the parents' disputes and discuss what parents should pay attention to in talking to children; the videos also describe how parents should negotiate peacefully between themselves and cooperate without involving children in their conflicts. Family court probation officers may also give an in-person individual or group lecture. This "parental guidance" has often enhanced mutual understanding of the parents and enabled them to reach an agreement on access in conciliation. In conflict cases, family court probation officers may individually assist parents and discuss what is best for the child.[70]

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67 For further details, see the website of the Municipality of Akashi: *https://www.city.akashi.lg.jp/kodomo-kyoiku/youikushien.html*. See also H. NOTO, *Kiso jichi-tai ni yoru menkai kōryū shien* [Support of Access by Basic Communities], in: Ninomiya (ed.), *supra* note 51, 189 ff.

68 Cf. Supreme Court, 28 March 2013, Minshū 67-3, 864 = Hanrei Jihō 2191, 46 = Hanrei Taimusu 1391, 126.

69 Detailed videos have also been made according to the age group of children. See the website of the courts in Japan: *https://www.courts.go.jp/links/video/index.html*.

70 T. CHIMURA et al., *Menkai kōryū ga kadai to naru chōtei jiken ni okeru Ōsaka katei saiban-sho no arata na torikumi ni tsuite* [New Measures of the Ōsaka Family

The family court judge may also suggest that provisional or trial access be carried out before the parents reach a final agreement in in-court conciliation. When both parents agree through their counsels, trial access can effectively be conducted with the assistance of family court probation officers. Trial access allows the parents to see how access can work, whether the other parent is cooperative, and how the child feels and reacts. This can alleviate tensions and conflicts between the parents and facilitate an amicable solution.[71] The current reform discussion at the Subcommittee on Family Law also contemplates adopting rules on trial access based on the parties' agreement or court decision.[72]

When closing conciliation, family court probation officers having expertise in behavioral science assist the parties in setting detailed conditions on access, such as the modalities, frequency, and place of access, as well as whether to ask for supervision and how to pick up and drop off the child. Once approved by the family court conciliation committee, these access clauses agreed upon between the parties are declared as legally binding by the judge and become enforceable after they are entered in the registry (Art. 268 DRCPA).[73]

Because the proceedings for access are primarily grounded on conciliation, reaching agreement between the parents by resolving their conflicts is the most important factor. In this respect, the family court no longer fulfils a "judicial function to convince" the parents but a "judicial function to explain" to parents today.[74]

Court for Conciliation Cases on Access], Kasai Chōsa-kan Kenkyū Kiyo 25 (2018) 37 ff.; R. KAGAWA / S. AZEGAMI / K. NAKAYAMA, *Tōkyō katei saiban-sho ni okeru oya gaidansu no torikumi ni tsuite: Genjō to kadai* [Treatment of Parental Guidance at the Tōkyō Family Court: The Current State and Challenges], Katei no Hō to Saiban 24 (2020) 40 ff.

71 A. UENO / S. WATANABE, *Menkai kōryū o meguru funsō no tokuchō to bengo-shi no taiō ni tsuite* [Characteristics of Conflicts over Access and Counsels' Coping], in: Odagiri / Machida (eds.), *supra* note 49, 164 f.

72 The envisaged reform allows the judge to consider the results of trial access in rendering an access order. See the materials of the 3rd meeting of the Subcommittee, *supra* note 11.

73 CHIMURA, *supra* note 70, 44 ff.

74 M. ŌTSUKA, *Nihon no kaji chōtei seido to uin-uin gata chōtei no tōgō: Kaji funsō kaiketsu puroguramu no sakutei ni tsuite* [Integrating the Japanese Family Court Conciliation System and a Win-Win Style of Mediation – Toward Drafting a Program for Family Disputes Resolution], Hōsei Kenkyū 79-3 (2012) 641 ff.

c) Family Court Decree

When despite all the efforts no agreement is reached between the parents, the family court judge renders a decree (Art. 272(4) DRCPA). An access order in the form of a family court decree will be granted insofar as the non-custodial parent proves that access serves the best interests of the child and that access is in accordance with the care and education of the child by the custodial parent. Since custody measures belong to non-contentious matters under the DRCPA, the judge, as a guardian of state, considers the entirety of circumstances and compares both parents' conditions of custody and access in rendering a decree.

In examining the circumstances of the case, the judge carefully considers the family environments, the relationships of the parents and the child, and the age and maturity of the child. For necessary investigation, family court probation officers play a key role as they conduct necessary investigation and provide support to the parties and the child, such as interviewing and advising the parents, hearing the child's view in court, and paying a visit to the kindergarten or school to examine the child's life and societal adaptation. Based on the assessment of probation officers, the judge determines whether allowing or refusing access will better serve the child's interests.[75]

Although recent practices of the family courts have gradually shifted toward allowing access, some judges still seem reluctant to grant access as a matter of principle when they are confronted with resistance by the custodial parent. This could readily lead to excluding access in high-conflict cases or in the absence of meaningful cooperation by the custodial parent.[76] In fact, when exercising access would severely burden and cause mental instability to the child due to escalated conflicts between the parents, access is often denied.[77] Yet the resistance of the custodial parent alone should not be the decisive factor. When the non-custodial parent can exercise access to the child without help of the custodial parent, access may be granted particularly when the child is mature and approves access of the non-custodial parent.[78] Although the custodial parent's having remarried and his or her

75 Supreme Court, 1 May 2000, *supra* note 26; also Ōsaka High Court, 31 August 2016, Hanrei Taimusu 1435, 169.

76 Tōkyō High Court, 19 February 1990, Katei Saiban Geppō 42-8, 57; Tōkyō High Court, 27 June 1985, Hanrei Taimusu 601, 60.

77 Fukuoka High Court (Naha Branch), 28 November 2003, Katei Saiban Geppō 56-8, 50; Nagano Family Court (Ueda Branch), 11 November 1999, Katei Saiban Geppō 52-4, 30.

78 Tōkyō Family Court (Hachiōji Branch), 31 January 2006, Katei Saiban Geppō 58-11, 79; Yokohama Family Court, 30 April 1996, Katei Saiban Geppō 49-3, 75. The Tōkyō High Court decision of 28 October 2010 (Katei Saiban Geppō 64-8, 72) also

spouse or relatives having adopted the child used to be considered a ground for denying access to the non-custodial parent,[79] such fact alone no longer suffices to prevent access.[80]

It is not infrequent that the custodial parent – usually the mother – will make allegations of domestic violence or child abuse by the non-custodial parent – usually the father – to prevent access to the child. When it is proven that the father was violent toward the child, access may indeed be refused insofar as it is likely to cause physical or psychological harm to the child. This would also be the case when the father was violent only toward the mother but the child is nevertheless likely to be exposed to psychological harm or indirectly affected by the mother's post-traumatic stress disorder (PTSD).[81] Yet depending on the case, the child may be able to uphold a close relationship with the father despite his having a past history of domestic violence. Access is then possible with the support of the custodial parent and desirable where it helps to further the interests of the child and deter parental alienation. Supervised access with a family member or an NGO staff member may also be feasible in some cases,[82] with the proviso that necessary measures to ensure the safety of the child are taken against the violent father. Judges and other practitioners are particularly cautious about domestic violent cases in the wake of two tragedies that occurred in 2017: in the first the custodial mother was killed by her former husband when bringing the child to him for access in Nagasaki; in the second the child was killed during access by a non-custodial father who was suffering from depression and who subsequently committed suicide in Itami.[83]

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granted the non-custodial mother access despite resistance of the custodial father; here the court was of the view that maintaining contact with the mother was necessary so as to allow the child to grow up soundly and develop its personality.

79 Ōita Family Court (Nakatsu Branch), 22 July 1976, Katei Saiban Geppō 29-2, 108; Ōsaka Family Court, 28 May 1968, Katei Saiban Geppō 20-10, 68; Tōkyō High Court, 8 December 1965, Katei Saiban Geppō 18-7, 31.

80 Ōsaka High Court, 31 August 2016, *supra* note 75; Ōsaka High Court, 3 February 2006, *supra* note 52; Yokohama Family Court, 30 April 1996, *supra* note 78.

81 Sendai Family Court, 7 August 2015, Hanrei Jihō 2273, 111; Tōkyō High Court, 22 August 2007, Katei Saiban Geppō 60-2, 137; Tōkyō Family Court, 31 October 2002, Katei Saiban Geppō 55-5, 165; Tōkyō Family Court, 21 May 2002, Katei Saiban Geppō 54-11, 77; Yokohama District Court, 16 January 2002, Katei Saiban Geppō 54-8, 48; Urawa Family Court, 2 April 1982, Katei Saiban Geppō 35-8, 108. For further analysis, see KURIBAYASHI, *supra* note 54, 323 ff.

82 KINOSHITA / MISAKI, *supra* note 24, 16 f.; also Tōkyō High Court, 3 July 2013, Hanrei Taimusu 1393, 233; Tōkyō High Court, 25 June 2013, Katei Saiban Geppō 65-7, 183.

83 See Y. SENDA, *Mata okotte shimatta Itami-shi no menkai kōryū satsujin jiken – Rikon chokugo no menkai kōryū no risuku* [Another Case of Murder during Access

The family court judge will further decline access when there is a serious risk that the non-custodial parent would wrongfully remove or retain the child. The child ought not be subject to the plausible danger of parental abduction.[84] Moreover, the fact that the non-custodial parent has severely breached the agreed conditions of access in the past – such as not returning the child at an agreed time and place – may also justify restricting future access to the child. However, a failure to pay child support or the non-custodial parent's having previously committed adultery does not constitute immediate grounds for refusing access to the child, given that a breach of maintenance obligations or a duty of loyalty owed to the spouse is an issue separate from contact with the child.[85]

Access may be turned down when an elder, mature child clearly refuses contact with the non-custodial parent.[86] From roughly the age 15, the judge can hardly request that the child maintain contact with the non-custodial parent against his or her will. Yet when a younger child or infant refuses access, the family court probation officers will carefully examine the background of the child's rejection, such as conflicts between the parents, the child's nature, concern for exacerbating the parents' problematic relationship, the influence of the custodial parent, and the child's fear of the non-custodial parent. Insofar as the child is prevented from making a sensible decision or refuses access without reasonable grounds, family court probation officers may recommend ordering access, which is generally followed by the judge. In such a case, a softer form of access, such as exchanging letters, may possibly be used instead of immediately arranging a meeting in person.[87] On the other hand, when mature children express their wish to see their non-custodial parent, access may well be ordered by the judge despite the custodial parent's reservations.[88]

To facilitate a smooth exercise of access in the best interest of the child, supporting or guiding both parents is crucial, as will be discussed below.

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to the Child in Itami City – Risk of Access Immediately after Divorce] (Article published online on 24 April 2017) (*https://news.yahoo.co.jp/byline/sendayuki/20170424-00070247*).

84 Yokohama Family Court (Sagamihara Branch), 9 March 2006, Katei Saiban Geppō 58-11, 71; Tōkyō Family Court, 5 June 2001, Katei Saiban Geppō 54-1, 79. In the Tōkyō High Court decision of 14 April 2016 (Hanrei Jihō 2323, 138), the judge did not find there to be a risk of abduction and ordered that the non-custodial mother be allowed to see the child once a month from 11 a.m. until 4 p.m. and be permitted to send letters or gifts.

85 KINOSHITA / MISAKI, *supra* note 24, 15; NAKAMOTO, *supra* note 24, 16 f.

86 Ōsaka High Court, 28 April 2017, Hanrei Jihō 2355, 52.

87 NAKAMOTO, *supra* note 24, 17 f.; ODAGIRI, *supra* note 51, at x ff.

88 Tōkyō High Court, 26 April 2016, Hanrei Taimusu 1434, 131.

Notably, in exercising access there are various methods and modalities available. When the child shows reluctance toward having access to the non-custodial parent or where some time has elapsed since the child last saw that parent, the child may be encouraged to move forward gradually, such as first exchanging pictures and letters, talking to the non-custodial parent on the phone or video chat, and then inviting the non-custodial parent to school events. Since access can be carried out in various forms, a flexible and soft approach may be more suitable to the child, depending on the individual case.[89]

d) Frequency of Access

Even if access is granted by family court conciliation or decree, its frequency may still be restricted in Japan. Of all cases where access was determined by family court conciliation or decree, 42.7% consist of access once a month, 8.2% twice or more a month, and 2.1% more than once a week; by contrast 5.0% consist of access once every two to three months, 1.6% once every four to six months, 0.3% provide for access during long vacations, and 29.0% of cases leave the details to the parents' further arrangements. An overnight stay with the non-custodial parent is agreed upon in only 8.5% of all access arrangements.[90] This means that an access on average solely takes place once a month for a couple of hours during the daytime on the weekend. Only as an exception in cross-border cases where the non-custodial parent is living abroad, access may be granted for long vacations, such as summer vacations or Christmas holidays.

The frequency of access in Japan is far less than in Germany, France, the U.S., Canada, or other Western countries. The usual form of access in Germany consists of the child staying overnight with the non-custodial parent – usually the father – from Friday evening until Sunday night or Monday morning during the alternate weekend, possibly also a weekly one-day meeting, and spending half of long vacations with the non-custodial parent. The amount of the time spent by the non-custodial father relative to the custodial mother does not extend beyond 30% in Germany (with the child accordingly being in the care of the custodial mother for at least 70% of the time). Notably, presumably about 4 to 7% of parents go even further and

89 In the Tōkyō High Court decision of 12 June 2015 (Hanrei Jihō 2266, 54), despite the father's past exercise of violent acts and his use of language that caused the custodial mother and the children to suffer PTSD, access was granted in the form of the father being sent pictures of the children once every four months and the children being given the father's letters once every two months.

90 For the relevant statistics, see *supra* note 21. The entire number of cases in which access was determined by family court conciliation or decree was 11,288 in 2020.

practice co-parenting or shared parenting in Germany, with the time spent by the non-custodial father ranging from 30% to 50%. Co-parenting is mostly grounded on a mutual agreement of the parents and, in exceptional cases, by a court order.[91]

This difference between Germany and Japan certainly results from diverging family forms, living and working conditions, societal environments, customs, and traditions. In the past, Japan's "clean-break" approach toward family bonds upon the dissolution of marriage generally meant the non-custodial parent would lose contact with the child. Hard labor and long working hours often prevented fathers in Japan from obtaining custody or having frequent access to the child. Until recently, fathers in Japan were less inclined to maintain contact with the child after divorce, presumably because they often founded another family relatively soon. There are even recurring cases in Japan where the custodial mother sues the non-custodial father to regularly visit the children to preserve family ties for the sake of the child.[92] Fathers in Germany, on the other hand, generally wish to be engaged in the child's life and have struggled to enforce their parental rights vis-à-vis mothers. This has also been reflected in the legal framework of parental responsibility and access to the child.[93]

Considering the differences in cultural and societal conditions, the ultimate question is how to define the "best interest of the child" in maintaining contact with the non-custodial parent. This needs to be answered in the respective legal system pursuant to the individual circumstances, including the family and social environment of the child.

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91 See A. STEINBACH / L. AUGUSTIJN / S. SCHNEIDER, Erste Ergebnisse der Studie "Familienmodelle in Deutschland" (FAMOD): Zur Bedeutung des Wechselmodells für das kindliche Wohlbefinden nach elterlicher Trennung oder Scheidung, Zeitschrift für das gesamte Familienrecht 2021, 729 ff.; cf. BGH, 1 February 2017, BGHZ 214, 31.

92 Tōkyō High Court, 17 May 2016, *supra* note 26; Saitama Family Court, 19 July 2007, Katei Saiban Geppō 60-2, 149; see also CHIMURA et al., *supra* note 70, 35 ff.

93 See, in particular, the "Zaunegger" case: BVerfG, 29 January 2003 (BVerfGE 107, 150); ECtHR 3 December 2009, *Zaunegger v Germany* (App. No. 22028/04); also J. SCHERPE, Nichteheliche Kinder, elterliche Sorge und die Europäische Menschenrechtskonvention, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2009, 937 ff.; for various organizations advocating for fathers' rights, see *https://www.vaterrechte.de/*; *https://www.advogarant.de/; https://starkevaeter.com/verein-fuer-vaeterrechte/.*

V. Implementing Access in Practices

1. Introduction

Once access is determined by the parents' agreement or family court conciliation or decree, viable avenues ought to be contemplated to carry out access in practice. To remedy ongoing resistance and denial of access by the custodial parent, several legal measures are available. It is, however, a delicate question whether to use execution powers or coercive measures to realize access. To implement access smoothly with the cooperation of both parents, mechanisms for assisting and supporting parents should also be contemplated.

2. Remedies in Cases of Non-Compliance

a) Recommendation to Comply

After rendering an access order, which is subsequently not abided by on the part of the custodial parent, the family courts can examine the state of non-compliance. Insofar as access arrangements are no longer suitable for the case, the non-custodial parent can file a petition for an amendment of the access order. The number of such cases seems to be growing.[94] The family court may also give advice and recommend that the custodial parent allow the other parent to exercise access to the child (Art. 289 DRCPA). Such a family court recommendation is meant to encourage and enhance voluntary compliance by the custodial parent to permit the exercise of access. A recommendation is, however, not effective enough, as it does not provide any sanctions in the event of breach.

b) Indirect Execution

A more effective method is indirect execution by monetary order (Art. 172 CEA). The Japanese Supreme Court rendered its groundbreaking decision on 28 March 2013 and for the first time authorized indirect execution as regards access.[95] In the underlying case, the Sapporo Family Court had rendered a decree, ordering that the custodial parent, the mother, allow the father access every month on the second Saturday from 10 a.m. until 4 p.m. Access was to take place outside the mother's residence. The mother was supposed to deliver the daughter at an agreed place and, in the absence of such an agreement, at the East Exit of the JR Sapporo Station. Further details regarding access were also fixed in the decree. The mother, however,

94 Ōsaka High Court, 31 August 2016, *supra* note 75.
95 Supreme Court, 28 March 2013, *supra* note 68.

did not comply with the access order. The Supreme Court ultimately ordered the mother to pay 50,000 Yen (about 400 EUR) every time she failed to allow the father to see their daughter. The Court reasoned that the custodial parent incurs clear obligations to abide by an access order when it specifies, *inter alia,* the date and frequency of access, the duration of each meeting, and the manner of handing over the child. According to this precedent, the custodial parent is legally responsible for breaching an obligation to allow access and is subject to indirect execution by monetary order, insofar as the access order contains clear conditions of access.[96]

While this has become established case law, the amount of money to be paid for indirect execution varies depending on the case. The usual amount is said to be 10,000 Yen (about 75 EUR) for each breached access session for each child, but some judges ordered payment of 50,000 Yen or 100,000 Yen. The Tōkyō Family Court once ordered the payment of one million Yen for each breached access session, but the appellate court held it to be excessive and reduced the amount to 300,000 Yen.[97] The courts tend to render a high monetary order to put the custodial parent under pressure to abide by an access order.

On the other hand, a petition for indirect execution by the non-custodial parent may be dismissed when the child is clearly opposed to access and has, since the initial access order, attained an age such that the custodial parent is no longer able to fulfil the obligation to provide access to the non-custodial parent. Holding the custodial parent liable for an act which cannot realistically be undertaken is not permissible.[98] Furthermore, along the lines of the Supreme Court decision of 26 April 2019, a petition for indirect execution may be considered as an "abuse of rights" when the child is rigorously opposed to seeing the non-custodial parent and ordering access would obviously run counter to the best interest of the child, such as when the child demonstrates serious symptoms like dyspnea or nervous breakdown.[99]

c) Damages

When the custodial parent does not comply with an access order, payment of damages could be further ordered for causing financial and mental dam-

96 See H. SAKAE / Y. WATANUKI, *Mensetsu kōshō no gutaiteki keisei to shikkō* [Constituting and Executing Access Orders], in: Noda / Kajimura (eds.), *supra* note 49, 341 ff.

97 Tōkyō High Court, 8 February 2017, Hanrei Taimuzu 1445, 132.

98 Nagoya High Court, 18 March 2020, Hanrei Taimusu 1482, 91.

99 Supreme Court, 26 April 2019, Hanrei Jihō 2425, 10. The underlying case concerned handing over the child based on custody rights, but the same considerations will apply to access cases.

age to the other parent (Art. 709 CC). In the Shizuoka District Court (Hamamatsu Branch) decision of 21 December 1999, the custodial mother was held liable to pay five million Yen (about 40,000 EUR) as compensation for hindering access of the non-custodial father. The judge opined that the mother caused mental harm to the father by refusing to afford him access to their son, despite the family court conciliation procedure in which both parents had agreed that the father would see the child every other month.[100] By the same token, other courts decided to compensate the pecuniary and psychological damage inflicted on the non-custodial parent for a refusal of access in amounts between 200,000 and 120,000 Yen.[101]

Notably, a group of non-custodial parents sought reparation from the state for violating the Constitution of Japan by not undertaking legislative measures allowing them to exercise their access rights to their children. The Tōkyō High Court, however, dismissed these claims on 13 August 2020, considering, first, that neither Article 13, 14, 24 or 26 of the Constitution of Japan guarantees access as a human right, and, second, that the state does not directly incur obligations to enact statutes allowing the exercise of access pursuant to the UNCRC or the Hague Child Abduction Convention.[102]

d) Coercive Measures

Current Japanese law does not permit direct execution of an access order such that a court bailiff takes the child from the custodial parent and hands the child over to the non-custodial parent. This is because an access order obliges the custodial parent to tolerate access as a recurring act of the non-custodial parent, a duty which cannot be fulfilled by somebody else as replacement.

The fundamental idea is different in the U.S., in which federal court marshals may take the child away from a non-complying custodial parent and hand the child over to the non-custodial parent for the purpose of access. Moreover, common law jurisdictions, including the U.S., the U.K., Canada, and Australia, provide for "contempt of court" for breach of an access order. The doctrine of "contempt of court" may entail imprisonment or confiscation of all of the custodial parent's assets. Common law systems

100 Shizuoka District Court (Hamamatsu Branch), 21 December 1999, Hanrei Jihō 1713, 92.

101 Tōkyō District Court, 2 November 2020, Case No. 2019 wa 24304 (120 Million Yen); Kumamoto District Court, 27 December 2016, Case No. 2015 wa 640 (700,000 Yen); Tōkyō District Court (Tachikawa Branch), 1 October 2015, Case No. 2013 wa 2920 (224,200 Yen); Tōkyō High Court, 3 March 2010, Katei Saiban Geppō 63-3, 116 (700,000 Yen).

102 Tōkyō High Court, 13 August 2020, Hanrei Jihō 2485, 27.

justify such coercive measures as effective means of sanctioning the custodial parent and obliging him or her to abide by an access order. It is, however, doubtful whether such coercive measures would be viable for access in Japan, where a long-term cooperation between the parents is required and state intervention has largely been restricted in family law.

In comparison, Germany, as a civil law country, notably provides for execution of access orders by means of fines or imprisonment of the custodial parent (§§ 89 and 90 FamFG[103]). These measures are, however, rarely employed in practice, as they are either ineffective or will do harm to the child by depriving him or her of the primary caregiver. Thus, in the case of non-compliance with access orders, German family courts, which retain continuing subject-matter jurisdiction (§ 165(1)–(4) FamFG), usually summon both parents to the court and encourage them to abide by the access order, possibly by making necessary adjustments. This method seems to work in usual cases.

Since access is a recurring act and is grounded on a long-term relationship between the parents, its implementation requires effective cooperation of the parents. While in Japan the Subcommittee on Family Law is contemplating an introduction of direct execution so as to hand over the child to the non-custodial parent for access,[104] this ought to be carefully assessed, as using sanctions or coercive measures will not help restore confidence between the parents. For the sake of the best interest of the child, some other solution could be envisioned.

3. Remedies on the Merits of Custody or Access

When an access order is breached, the non-custodial parent could also request to transfer sole parental authority or custody to him or her in the best interest of the child. In the Tōkyō High Court decision of 20 January 2003,[105] the father had obtained sole parental authority in a consensual divorce but consistently resisted the mother having access to their three children. Considering both the impact of this high-conflict situation on the children and the previous custody of the mother, the judge appointed the mother as the custodial parent. Similarly, the Fukuoka Family Court decided on 4 December 2014 to change the parent having parental authority to the other parent after continuous breach of an access order.[106]

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103 Act on Proceedings in Family Matters and Non-contentious Matters of 17 December 2008 (Federal Law Gazette I, p. 2586, 2587).

104 See minutes and materials of the 3rd, 4th and 6th meetings (see *supra* note 11).

105 Tōkyō High Court, 20 January 2003, Katei Saiban Geppō 56-4, 127.

106 Fukuoka Family Court, 4 December 2014, Hanrei Jihō 2260, 92.

Pursuant to Japanese case law, the decisive factors in determining parental authority or custody are continuity, stability, and the personal relationship with the child.[107] This may well hinder switching parental authority or custody to a parent who has not been the primary caregiver. A possible way-out could be to adopt the "friendly parenting rule" so as to give priority to the parent who is collegial and willing to allow the other parent to exercise access to the child.

Notably, the Chiba Family Court (Matsudo Branch) applied the "friendly parenting rule" in its decision on 29 March 2016.[108] The father was granted sole parental authority because he was ready to allow the mother to spend 100 days a year with the child, whereas the mother consistently resisted the father's access. This groundbreaking decision solicited an expectation that the criteria for determining parental authority or custody might be changed. However, the appellate Tōkyō High Court decided on 26 January 2017 to grant the mother sole parental authority following the conventional standards of continuity and stability of custody.[109]

Nevertheless, this case shows that the "friendly parenting rule" could possibly be adopted within the framework of current Japanese law. This rule may help with implementing access effectively and cooperatively between parents. At the same time, it can put the custodial parent under pressure to abide by an access order, as otherwise he or she will lose parental authority or custody.[110]

4. Assisting the Parents

a) Family Courts

It goes without saying that contact with the child is best implemented when both parents agree and cooperate amicably. When the parents cannot cooperate and carry out access themselves, they ought to be assisted to realize the best interest of the child. The family courts in Japan have developed programs for parental guidance and other methods to support the parents (*supra* IV.2.). Yet family court judges can intervene only when a party requests a one-time decision or a modification of a decision; courts do not

107 Cf. Kyōto Family Court, 17 February 2017 (2017WLJPCA02176004) (the mother successfully filed claim for the handover of the child living with the father after separation).

108 Chiba Family Court (Matsudo Branch), 29 March 2016, Hanrei Jihō 2309, 121.

109 Tōkyō High Court, 26 January 2017, Hanrei Jihō 2325, 78.

110 See also Tōkyō High Court, 20 January 2003, *supra* note 105; Ōsaka High Court, 22 June 2005, Katei Saiban Geppō 58-4, 93.

have jurisdiction to monitor the long-term childcare and exercise of access after concluding the case.

The practices in the U.S. and Australia may deserve attention in this respect. The U.S. and Australia have a monitoring mechanism for implementing and adjusting parenting plans, while allowing adjustments for altered circumstances. A family court judge is appointed for a child and is responsible for taking necessary measures, supporting and monitoring access, and assisting the parents and the child until the child reaches the age of majority. To some extent, the continuing jurisdiction of the deciding family court in Germany can fulfil a similar function (§ 165(1)-(4) FamFG). These legal settings seem to facilitate the parents abiding by access orders in a flexible way.

Arguably, however, such continuing jurisdiction is not conceivable under the current judicial system in Japan. This is because judges are transferred every two or three years to different courts and different divisions on civil, commercial, criminal, family, or juvenile matters throughout Japan. Family court judges cannot continuously fulfil the function of a guardian. Instead of assigning family court judges with the task of monitoring access, administrative agencies can better assist the parents, possibly with the help of some NGOs.

b) Local Governments

Under the guidance of the Ministry of Health, Labour and Welfare,[111] some local governments have started to provide services designed to assist parents with access. At present, this is the case with the Prefectures of Tōkyō, Chiba, Kumamoto, Ōita, and Okinawa, as well as the Municipalities of Akashi, Shizuoka, Hamamatsu, Takamatsu, and Kita-Kyūshū.[112] These local governments provide support for access up to once a month for the duration of one year. The officers pick up the child, assist the child and parents, and help arrange venues where they can meet. Prior to or upon consensual divorce, the officers also inform both parents of the importance of access for the child, which is possibly complemented by the legal advice of a lawyer. The officers can also give the parents advice, provide an opportunity to listen to the child, or share information on the child. These services are affordable for single-

111 For further details on the support projects of the Ministry of Health, Labour and Welfare, see *https://www.mhlw.go.jp/content/000781679.pdf; https://www.mhlw.go.jp/content/11920000/000823666.pdf*.

112 KŌSEI RŌDŌ-SHŌ [Ministry of Health, Labour and Welfare], *Reiwa gannen-do: Boshi katei no haha oyobi fushi katei no chichi no jiritsushien shisaku no jisshi jōkyō* [2019 Report on the Implementation of Measures to Help Mothers in Single-Mother Households and Fathers in Single-Father Households become Independent] (2021) (available at: *https://www.mhlw.go.jp/content/11920000/000823666.pdf*).

parent families, who are often not well-off, as the costs for the assistance with access are borne by the central and local governments.[113]

In the exemplary case of Akashi City, officers may arrange access at Akashi Municipal Planetarium, in a park, or any other place. When access is arranged at the city hall, the custodial mother brings and hands over the child to the officer in charge, who brings the child to the non-custodial father waiting on a different floor, who receives the child without personally meeting with the mother. These settings enable and facilitate exercising access in the best interest of the child even in high-conflict and domestic violence cases.[114]

c) NGOs

Furthermore, assistance in maintaining contact between the non-custodial parent and the child is provided effectively by numerous NGOs, such as FPIC, ISSJ, FLC, and many others.[115] There are at least 14 such NGOs active in Tōkyō, five in Ōsaka, four in Yokohama, and three in Nagoya, Fukuoka, and Kōbe.[116] These NGOs are equipped with knowledgeable social workers and provide professional assistance for exercising access.

Arguably, FPIC is of particular importance among such NGOs. As of 1 April 2020, FPIC had 267 members (100 in Tōkyō) and 794 special members (343 in Tōkyō), most of whom are former family court probation officers and knowledgeable about practices in family disputes. The members are actively engaged, *inter alia,* in supporting and advising on access, providing legal and psychological counseling, conducting out-of-court mediation after divorce or separation of the parents, and assisting in execution measures for the handover of children. FPIC has 12 offices in Japan (Tōkyō, Ōsaka, Nagoya, Fukuoka, Chiba, Utsunomiya, Hiroshima, Matsue, Yokohama, Niigata, Morioka, and Matsuyama), which all provide support services for exercising access.[117]

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113 NINOMIYA, *supra* note 49, 189 ff.; M. KOIZUMI, *ADR (Saiban-gai funsō kaiketsu tetsuzuki) ni yoru menkai kōryū no torikime* [Agreement on Access by ADR (Alternative Dispute Resolution Methods)], in: Odagiri / Machida (eds.), *supra* note 49, 197 ff.

114 *https://city-akashi-kosodate.jp/soshiki/other_division/shiminsoudan/youikushien/kosodate0042.html*.

115 For FPIC and ISSJ, *supra* notes 35 and 36; for FLC ("Female Life Cycle"), see *http://www.vi-p.org/*.

116 See *https://parentingtime.jp/index.html*.

117 See materials provided at the 2nd meeting of the Subcommittee on Family Law on 27 April 2021 (*supra* note 11).

Notably, the costs for FPIC services need to be borne by the parties themselves, which amount to between 15,000 and 25,000 Yen (between about 115 and 200 EUR) for each supervised access session, and between 10,000 and 15,000 Yen (between about 80 and 115 EUR) to have the child picked up and dropped off for an access session.[118] Although the number of cases of assistance in access is quite high and reached 1,447 and 1,439 in 2018 and 2019, respectively,[119] it is generally only affordable for wealthy families and not for average single-parent families engaged in frequent access. Considering that access supervised by professionals is crucial in cases where the child is to maintain contact with the non-custodial parent in high-conflict or domestic violence cases, it would be desirable that the government to a certain extent subsidizes parents in exercising access, as in the case of the assistance that is provided by the Japanese Central Authority under the 1980 Child Abduction Convention.[120]

VI. Conclusion

Today's practice and state of discussion indicate that the judiciary, administrative authorities, and academia have generally been enhancing and supporting access within the framework of current Japanese law. Within the current reform discussion, the Subcommittee on Family Law is suggesting a clarification of the legal nature of access and the grounds for maintaining contact of the child with both parents. To legally justify access as a "right" of the child or the parents, it is indeed necessary to refine the theoretical foundations and define the notion of access. This will help delineate the range of persons who are allowed to have access to the child, such as grandparents of the child. Standardized guidelines will also help to assess the desirability, modality, and frequency of access.

For a smooth implementation of access, the introduction of parental guidance and assistance mechanisms is being debated. Better assistance and supervision of the parents' agreements, particularly in the context of consensual divorce, will be useful to help parents arrange and implement the exercise of access and the payment of child support. It has also been contemplated to institutionalize access assistance by eligible NGOs, which will be certified by the government. Such reasonable, desirable measures can hopefully be soon materialized through a legislative reform.[121] With a view

118 *http://fpic-fpic.jp/doc/menkai_kouryu6.pdf.*

119 See *supra* note 116.

120 See *supra* at III.1.

121 See the minutes and materials of the 3rd through the 6th meetings of the Subcommittee on Family Law, *supra* note 11.

to realizing the best interests of the child, different effective measures ought to be further developed to enable and facilitate the exercise of access.

As is being discussed in the Subcommittee on Family Law, the implementation of access is closely related to the introduction of joint parental authority after divorce. Notably, some academics still take a reserved view toward introducing joint parental authority after divorce, considering that quite a high percentage of women (25.9%) experience physical or verbal violence, economic subordination, or sexual abuse during their marriage.[122] Obliging women to take important decisions over the childcare jointly with their former husband – e.g., determining residence, schooling, and medical treatment for the child – will put women under high pressure and may jeopardize their stable life after divorce. This problem is related to the fact that the Japanese courts are generally reluctant to restrict parental authority in domestic violence cases. In the entirety of family courts in 2020, there were only 30 decrees ordering withdrawal of parental authority and 130 decrees ordering temporary suspension of parental authority.[123] Comparatively, in 2020 in Germany there were 7,215 instances of an entire withdrawal of custody rights and 8,770 cases of a partial withdrawal.[124] These statistics allude to the drawbacks of Japanese law in effectively coping with domestic violence as a result of difficulties with investigation and a hesitation of the state to intervene in family matters.[125] Upon introducing joint parental authority and strengthening access in Japan, appropriate measures for the exercise of oversight – particularly in the case of consensual divorce – and for combatting domestic violence will be urgently needed.[126]

In cross-border child abduction cases where the child has been removed from the U.S., Germany, France or any other Western state to Japan, the largest disappointment of the left-behind parent is that access is not readily enforceable while return proceedings are pending or while execution of a return order by substitute is sought, or after the child has been allowed to reside in Japan. While the envisaged legislative reform should carefully assess the impact that reinforcing access will have on the entire legal system, society, and family life in Japan, it ought to be recalled that a maintaining on a regular basis personal relations and direct contact with both

122 See NAIKAKU-FU – DANJO KYŌDŌ SANKAKU-KYOKU [Cabinet Office – Gender Equality Bureau], *Danjo-kan ni okeru bōryoku ni kansuru chōsa* [Survey on Domestic Violence between Men and Women] (2020) (*https://www.gender.go.jp/policy/no_violence/e-vaw/chousa/h11_top.html*).

123 See the 2020 Statistics of Judiciary, *supra* note 21.

124 See the statistics at: *https://de.statista.com/statistik/daten/studie/162531/umfrage/sorgerechtsverfahren-in-deutschland-seit-1999/*.

125 NISHITANI, *supra* note 12, 98.

126 See minutes of the 1st through the 5th meetings of the Subcommittee, *supra* note 11.

parents is a human right of the child under Article 10(2) UNCRC. As a Contracting State of the UNCRC and the Child Abduction Convention, Japan is required to abide by its treaty obligations and take appropriate legislative and other measures accordingly. Introducing joint parental authority and enhancing access after divorce seems to be an unavoidable outcome that is, in my eyes, to be expected in the current reform discussion. Further developments are anxiously awaited.

SUMMARY

The paper examines access to the child in cases of cross-border family separation. When Western foreign law applies to access, Japanese family courts grant frequent access to the non-custodial parent pursuant to the standards of the governing substantive law. Yet insofar as Japanese law applies to access, it is a challenge whether and to what extent access can be granted. Because of the "clean-break" principle and a lack of joint parental authority or custody after divorce, it is only a recent development in Japan that granting access and enforcing access orders are viewed more favorably in practice. However, due to the concern over exacerbating problematic family relationships and putting the child under pressure or danger, family courts are still cautious in granting access in high-conflict cases. The Subcommittee on Family Law established by the Legislative Council of the Ministry of Justice is now deliberating on possible statutory reforms. The envisaged statutory amendment will require in particular redefining the legal nature of access, reflecting on the appropriateness and frequency of access, and contemplating possible measures to assist the parents in amicably carrying out access after separation or divorce. In the ongoing discussion on access, one should bear in mind that Japan needs to abide by its obligations under the United Nations Convention on the Rights of the Child and Hague Child Abduction Convention, which entail ensuring that the child maintains personal relations and direct contact with both parents on a regular basis.

ZUSAMMENFASSUNG

Der Beitrag untersucht den Umgang mit dem Kind bei grenzüberschreitenden Trennungen von Familien. Wenn auf den Umgang ein westliches ausländisches Recht anwendbar ist, sprechen die japanischen Familiengerichte dem nicht sorgeberechtigten Elternteil einen regelmäßigen Umgang nach dem Standard des maßgebenden materiellen Rechts zu. Ist aber japanisches Recht auf den Umgang anzuwenden, stellt es eine Herausforderung dar zu entscheiden, ob und inwieweit ein Umgang gewährt werden soll. Wegen des in Japan bislang übli-

chen „clean break"-Prinzips und der fehlenden gemeinsamen elterlichen Sorge nach der Scheidung ist es eine neuere Entwicklung, dass die heutige Praxis gegenüber dem Umgang positiv eingestellt und bereit ist, Umgangsentscheidungen zu vollstrecken. Trotzdem lassen die Familiengerichte bei schwerwiegenden Konflikten Vorsicht wegen der Besorgnis walten, dass ein Umgang problematische Familienverhältnisse weiter verschlechtern und das Kind unter Druck setzen oder einer Gefahr aussetzen könnte. Die Kommission für das Familienrecht, die vom Legislativausschuss des Justizministeriums errichtet worden ist, berät zurzeit über mögliche Gesetzesreformen. Schwerpunkte dieser Reformarbeiten sind unter anderem eine Neubestimmung der rechtlichen Merkmale des Umgangs, Überlegungen zur Angemessenheit und Häufigkeit des Umgangs sowie zur Entwicklung möglicher Unterstützungsmaßnahmen für eine einvernehmliche Ausübung des Umgangs. In der aktuellen Diskussion um den Umgang ist zu bedenken, dass Japan gemäß dem UN-Übereinkommen über die Rechte des Kindes sowie dem Haager Kindesentführungsübereinkommen gehalten ist, es dem Kind zu ermöglichen, regelmäßige persönliche Beziehungen und unmittelbare Kontakte zu beiden Elternteilen zu pflegen.