

A Comparison of Japanese and Moroccan Approaches in Adopting The Hague Convention on the Civil Aspects of International Child Abduction

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I. Introduction

Parental kidnapping, the abduction and/or concealment of a child without the consent of the other parent,¹ has become a worldwide epidemic. By 2000, there were an estimated 1,000 children who were reported abducted across international borders. Although this estimate might seem insignificant compared to the reported 200,000 domestic family abductions, the number of international parental kidnappings includes only abductions that were reported to the U.S. State Department.² The problem can be linked to several factors, including “ease of international travel, a growing number of bicultural marriages, and the fact that the United States requires the permission or presence of only one parent for a child to travel outside the country.”³ Between October 1, 2008, and September 20, 2009, 1,135 cases of children abducted to a foreign country from the United States were reported to the U.S. Central Authority. Of the children reported missing, 74% were returned home from a country that signed the

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1. Hon. William Rigler & Howard L. Wieder, *Parental Child Snatching: An Overview*, U.S. DEPARTMENT OF STATE (last visited Sept. 24, 2011), http://travel.state.gov/abduction/resources/resources_545.html.

2. ROBERT L. SNOW, *CHILD ABDUCTION: PREVENTION, INVESTIGATION, AND RECOVERY* 49 (2008).

3. DEDRIA BRYFONSKI, *Preface: Should Abduction Be Used in International Custody Disputes*, in *CHILD CUSTODY* 162 (2011).

Hague Convention of the Civil Aspects of International Child Abduction.⁴

A variety of problems exist, which make solving international kidnapping a much more difficult process than domestic kidnapping. In many countries, domestic court orders from the country where the child was originally domiciled will have no effect in the country where the child has been taken. In addition, “in some countries local laws will favor the abducting parent, particularly if that parent is a citizen of the country.”⁵ Another hindrance is that an estimated 80% of children abducted internationally have more than one nationality, facilitating a parent to obtain multiple passports for the child and to abduct the child to another country without any suspicion.⁶ Due to a multitude of obstacles, parents usually spend an average of \$33,500 for “search and recovery efforts involving their internationally abducted children.”⁷

Abductions to Japan are among the most difficult cases to handle as no cases have ever been resolved successfully through the Japanese courts.⁸ Japan has been described as “a black hole from which no child ever returns.”⁹ Currently, Japan has made efforts to ratify the only standing international treaty that resolves international parental kidnapping cases, the 1980 Hague Convention on the Civil Aspects of International Child Abduction. However, Japan has a long road ahead, as the country must reconstruct its entire family code to meet standards set by the Convention. This article focuses on the 1980 Hague Convention on the Civil Aspects of International Child Abduction and analyzes Japan’s internal legal structure and efforts made to join the Hague Convention. The article then compares Japan to Morocco, examining the reforms Morocco made to its family law system in order to join the Hague Abduction Convention. The article concludes by recommending specific reforms in Japan in order for the country to transition to become a signatory of the Hague Abduction Convention.

4. *Id.*

5. *Id.* SNOW, *supra* note 2.

6. *Id.*; see also Julia Alanen, *Child Travel Abroad: Legal Requirements for Proving Parentage and Documenting Consent*, 37 FAM. L. REP. 18 (2011).

7. Alanen, *supra* note 6, at 50.

8. *International Parental Child Abduction: Japan*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/country/country_501.html.

9. FROM THE SHADOWS, <http://www.fromtheshadowsmovie.com/english/index.html> (last visited Jan. 4, 2012). (This documentary film about parental child abduction focuses on four parents who were affected by child abduction to Japan). *Update on “From the Shadows” Documentary Film*, CHILDREN’S RIGHTS COUNCIL OF JAPAN Nov. 18, 2011, <http://crcjapan.wordpress.com/2011/11/18/update-on-from-the-shadows-documentary-film/>.

II. Existing Domestic and International Remedies

Several domestic and international remedies are set in place to help curb parental kidnapping. Parents may attempt to bring civil lawsuits against the parent who abducted the child, seek criminal charges against the abducting parent, or seek family mediation. Often, however, civil lawsuits and criminal proceedings “invite further trauma to the child who is forced to see one parent inflict further punishment on the [other] parent.”¹⁰ Family mediation can be a successful option, but only if the abducting parent is flexible and willing to compromise.¹¹ The most common remedy for parents is seeking social justice through legislation. Current U.S. legislation includes the Uniform Child Custody Jurisdiction and Enforcement Act, Uniform Child Abduction Prevention Act, the Parental Kidnapping Prevention Act of 1980 and The International Parental Kidnapping Crime Act. The only effective international legislation for parents is the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Most international family-law abduction cases are resolved under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Hague Abduction Convention “has more ratifications and accessions than almost any other treaty concluded under the auspices of the Hague Conference on Private International Law.”¹² The treaty returns children to the State where they were abducted so that the State can determine custody arrangements. To obtain a return order, the petitioner must prove that:

(1) [T]he child was abducted from (or prevented from returning to) the State of the child’s habitual residence, (2) the petitioner had a right of custody under the law of the abducted-from State, and (3) the petitioner was actually exercising that right (or would have exercised that right) but for the abduction.¹³

As reflected in the preamble, States that sign the treaty are convinced that children’s interests “are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and. . . establish[ing] procedures to ensure their prompt return to the State of their habitual residence, as well as . . . secur[ing] protection for rights of access.”¹⁴ This

10. *Id.* Rigler & Wieder, *supra* note 1.

11. *Id.*

12. Robert G. Spector & Bradley C. Lechman-Su, *Family Law*, 44 INT’L LAW 155, 156 (2010).

13. *Id.* at 156–57.

14. Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law (Oct. 25, 1980) Preamble, http://www.hcch.net/index_en.php?act=conventions.text&cid=24&zoek=Convention%20on%20the%20Civil%20Aspects%20of%20International%20Child%20Abduction. [hereinafter Abduction Convention].

treaty is essentially a civil remedy “designed to preserve the status quo” by respecting the custody arrangements of the country where the child habitually resided.¹⁵ The Hague Convention does not act as an extradition treaty or a treaty designed to change existing custody orders. The treaty is only applicable to children under sixteen years of age, and will not apply if a child turns sixteen during the process of litigation.¹⁶

The removal or retention of a child is considered wrongful when it violates “the rights of custody” that a parent has at the time of removal or retention under the law of the State where the child habitually resided.¹⁷ The habitual residence of a child is usually a factual determination,¹⁸ but usually factors “education, business, profession, employment, health, family or love of a place in determining the residence.”¹⁹ The “rights of custody” may “arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”²⁰ Some parents are given *ne exeat* rights, which allow the parent to provide consent before another parent takes the child out of the country.²¹ In 2010, the United States Supreme Court further clarified that a parent with a *ne exeat* right is considered to have a “right of custody” for purposes of the Hague Convention under *Abbott v. Abbott*.²² In a six-to-three decision, the Court held that a parent with *ne exeat* rights may request the return of his or her child to the child’s original habitual residence. *Abbott* proved to be a landmark case for international family law.²³

Many countries have enacted legislation that allows the Convention to preempt existing domestic legislation.²⁴ In a Hague abduction proceeding, a court without notice may issue a temporary restraining order in order to thwart further wrongful activity by the abducting parent.²⁵

15. Rigler & Wieder, *supra* note 1.

16. Spector & Lechman-Su, *supra* note 12, at 157.

17. Abduction Convention, *supra* note 14, at Art. 3.

18. Spector & Lechman-Su, *supra* note 12, at 157.

19. Rigler & Weider, *supra* note 1.

20. Abduction Convention, *supra* note 14.

21. Bernard J. Pazanowski & David Jackson, ‘Rights of Custody’ Under Hague Convention Include *Ne Exeat* Rights, *Supreme Court Says*, 78 U.S. L.Wk. 43, 1 (2010).

22. *U.S. Supreme Court Interprets Hague Child Abduction Convention*, 104 AM. J. INT’L L 3, 525 (2010).

23. Pazanowski & Jackson, *supra* note 21.

24. Rigler & Weider, *supra* note 1. For example, Congress enacted the International Child Abduction Remedies Act to “maintain uniform international interpretation of the Convention,” which preempts the UCCJA.

25. Spector & Lechman-Su, *supra* note 12, at 160.

III. Japan and the Child of Abduction

Since 1994, the Office of Children's Issues opened 230 cases that involve 321 U.S. children who were wrongfully taken to Japan by a parent. As of January 2011, the Office of Children's Issues had 100 active cases, which involved 140 U.S. children. The U.S. Embassy in Tokyo also reported thirty-one additional cases where both parents lived in Japan, but one parent was not allowed to access his or her children. Astoundingly, the Office of Children's Issues "does not have a record of any cases resolved through a favorable Japanese court order or through the assistance of the Japanese government."²⁶ The Assembly for French Overseas Nationals for Japan declared that an estimated 10,000 children in Japan have dual citizenship and are unable to have contact with their parents who live in a foreign country. In addition, the U.S. embassy in Japan found the number of parental kidnapping cases in Japan "almost doubled between 2007 and 2009."²⁷ It has been noted,

A Japanese court will never give custody to a foreign parent If the child is a Japanese national, the system will only see it as his right to be raised in Japan. They feel it would be extremely unfair to a child to deprive him of the opportunity to live in a wonderful place like Japan.²⁸

Several cases involving international parental abductions in Japan have gained worldwide attention. The most famous case involved Christopher Savoie, a Tennessee native who discovered that his ex-wife abducted his children and took them to Japan, her native country. When Savoie traveled to Japan to take his children back to the United States, Japanese officials arrested him and the children were returned to their mother.²⁹ In a similar case, Patrick Braden and Ryoko Uchiyama had joint legal and physical custody of their daughter, but Uchiyama boarded a flight to Japan with their daughter without the consent of Braden and Braden never saw his daughter again.³⁰ Because Japan is not a signatory to the Hague Convention, these parents did not have any recourse other than to bring civil actions against other parties desperately seeking answers. In Savoie's case, Savoie brought a negligence action against the family court mediator who handled his divorce; however, the suit was dismissed.³¹ Braden

26. *Id.* *International Parental Child Abduction: Japan*, *supra* note 8.

27. *Id.* Ri Yoo, *East Asia*, 17 No. 2 HUM. RTS. BRIEF 49, 3 (2010).

28. SNOW, *supra* note 2, at 53.

29. *Id.* at 1–2. G.M. Filisko, *When Global Families Fail: As Family Law Takes On Global Dimensions, International Treaties May Hold the Key to Resolving Disputes*, 96 A.B.A. J. 56 (July 2010).

30. *Braden v. All Nippon Airways Co.*, No. B215440, 2010 WL 3993215, *1 (Cal. Ct. App. Oct. 13, 2010) (unpublished).

31. *Savoie v. Martin*, 673 F.3d 488 (6th Cir. 2010).

brought an action against the airlines for negligence and interference with custodial relations, which were both found to be without merit.³²

Currently, Japan is the only country of the original seven industrialized nations that has not signed the Convention. Although the government of Japan insists its reason for not signing the Convention is to protect women and children who escape abusive relationships,³³ much of the country's hesitation in not signing the Hague Abduction Convention is a result of the country's unique family structure and civil authority.³⁴

A. Japanese Family Law

Currently, an estimated one out of every 2.9 marriages in Japan ends in divorce. In addition, one out of every 4.5 children will watch their parents divorce before they become adults.³⁵ One fundamental difference in Japan, compared to other countries, is the archaic notion that Japan's Family Code only recognizes sole custody and "does not provide visitation rights for noncustodial parents."³⁶ Courts or parents themselves must determine who will retain sole custody of the child, which can be a very difficult task.³⁷ Article 819 of Japanese Civil Code states:

(1) If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child. (2) In the case of judicial divorce, the court shall determine which parent shall have parental authority. (3) In the case where parents divorce before the birth of a child, the mother shall exercise parental rights and duties; provided that the parties may agree that the father shall have parental authority after the child is born. (4) A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority. (5) When the parents do not, or cannot, make the agreements referred to in paragraph (1), paragraph (3), and the preceding paragraph, the family court may, on the application of the father or the mother, make a ruling in lieu of agreement. (6) The family court may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the interest of the child.³⁸

32. *Braden*, 2010 WL 3993215 at *5.

33. See Masami Ito, *Hague Treaty Seeks to Balance Rights of Kids, Parents*, THE JAPAN TIMES, June 7, 2011, available at <http://search.japantimes.co.jp/cgi-bin/nn20110607i1.html>.

34. See generally Shihoko Goto, *Outside View: Japan's Child Custody Law*, UPI, Nov. 24, 2010, available at http://www.upi.com/Top_News/Analysis/Outside-View/2010/11/24/Outside-View-Japans-child-custody-law/UPI-28431290599520/.

35. *Id.* Takao Tanase, *Divorce and the Best Interest of the Child Disputes Over Visitation and the Japanese Family Courts*, 20 PAC. RIM. L. & POL'Y J. 3, 564 (Matthew J. McCauley trans. 2011).

36. Yoo, *supra* note 27, at 3.

37. Matthew J. McCauley, *Divorce and the Welfare of the Child in Japan*, 20 PAC. RIM. L. & POL'Y J. 3, 593 (2011).

38. MINPO [MINPO] [Civ. C.] 1896 art. 819, no. 1 (Japan).

Based on Article 819, either parent will be solely vested with the responsibilities of caring for a child. The Japanese Civil Code splits custody into parental rights, or *shinken*, and physical custody, or *kangoken*.³⁹ *Shinken* is generally interpreted to mean the administration of assets, legally representing a child and making important parental decisions, whereas *kangoken* is usually caring for the child's everyday needs and education.⁴⁰ Japanese courts can "assign parental rights and duties" to one particular parent, and then grant "custodianship" to the other parent.⁴¹ The rights, however, are usually granted to the same parent.⁴² If the child is over the age of fifteen, he or she is allowed to express his or her wishes of custodianship to the court.⁴³ In relation to international abduction, Jeremy Morley, an international family attorney stated, "In Japan, the parent that has physical possession of the children is guaranteed legal custody. It is 'finders keepers, losers weepers' in its rawest and most cruel form."⁴⁴ After granting custody in a divorce proceeding, it is widely acknowledged that courts are reluctant to allow an absent parent the right to contact his or her child.⁴⁵

Visitation is often not an option, as it is not protected as a legal right in Japan. "The notion that a divorced parent should avoid contact with their children because it would disturb their lives is deeply rooted in traditional Japanese family values."⁴⁶ Following divorce, "Japanese law does not provide any constitutional or statutory protections for the right of the non-custodial parent to see his or her children."⁴⁷ Japanese courts have repeatedly ruled that visitation is not viewed as a fundamental right, but that courts may award it under Article 766 of the Civil Code. When visitation is awarded, however, it is frequently limited. Statistics from 2009 show "only 14% of cases allowed overnight stays and only 52% permitted visitation once or more per month, which is generally interpreted as visitation rights of only one day per month."⁴⁸

Further testament to the notion that Japan's family structure is seemingly outdated is Japan's family registration system. When a husband and wife divorce in Japan, the wife can revert to her maiden name according

39. *Id.*

40. McCauley, *supra* note 37.

41. Satoshi Minamikata et al., *Japan*, in 9 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: FAMILY AND SUCCESSION LAW 133 (Walter Pintens ed., 1999).

42. McCauley, *supra* note 37, at 593–94.

43. Minamikata et al., *supra* note 41, at 133.

44. FROM THE SHADOWS, *supra* note 9.

45. Minamikata et al., *supra* note 41, at 135.

46. Takao Tanase, *Post-Divorce Laws Governing Parent and Child in Japan* 20 (Sept. 14, 2010), travel.state.gov/_res/docs/.../tanase_on_visitation_law_in_english.pdf.

47. McCauley, *supra* note 37, at 591; *see also* Yoo, *supra* note 27, at 3.

48. *Id.* at 592.

to Japan's family registration system.⁴⁹ However, she can keep her married name if she notifies local government within three months of the divorce. If either parent changes his or her surname after the divorce, the name is erased from the registration system and a new register is started. Children usually keep the same surnames after the divorce, unless the mother goes through the process of changing it. If the mother does change the child's surname, the child's name is placed on the mother's register and taken off the father's register. This action can be grave for the father as it is almost impossible for "interaction as parent and child" to continue if the parent and child are not listed on the same register.⁵⁰

Another important piece of the Japanese family court structure is family court mediation or *chotei*. In most family disputes, *chotei* proceedings are mandatory.⁵¹ The private procedure involves a *chotei* committee, which usually consists of two commissioners (one male and one female) and a family court judge who helps the parents reach an agreement.⁵² This "conciliation first approach forces parents to spend time in mediation before a custody order will be made by a judge."⁵³ The parties never see each other during the mediation sessions, but are kept in separate waiting rooms and heard by the mediator who listens to their interests.⁵⁴ The cost of using the service is an estimated 1,000 yen, which is paid to the family court.⁵⁵ It is customary that conciliation can take weeks or even months, which allows the parent with custody to create a new status quo for the child that the family court will not later disturb.⁵⁶ If the parents do not come to an agreement during *chotei*, either parent may file for divorce through litigation and the case is then referred to family court.⁵⁷

B. Efforts to Sign the 1980 Hague Abduction Convention

Great pressure has been placed on Japan to become a signatory to the Hague Abduction Convention since 2007. The United States passed the Openness Promotes Effectiveness in our National Government Act of 2007 to call on the Japanese government to immediately address interna-

49. Tanase, *supra* note 46, at 18.

50. *Id.*

51. *Id.* Satoshi Minamikata, *Resolution of Disputes Over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L. Q. 489, 494 (2005).

52. *Id.*; Tanase, *supra* note 46, at 12.

53. Colin P.A. Jones, *No More Excuses: Why Recent Penal Code Amendments Should (But Probably Won't) Stop International Parental Child Abduction to Japan*, 6 WHITTIER J. CHILD & FAM. ADVOC. 351, 353 (2007).

54. Tanase, *supra* note 46, at 13.

55. Minamikata, *Resolution of Disputes*, *supra* note 51.

56. Jones, *supra* note 53.

57. Minamikata, *Resolution of Disputes*, *supra* note 51, at 495.

tional parental abduction concerns.⁵⁸ The Japanese government, however, took no action. Again, on May 21, 2009, the United States Embassy in Tokyo “sponsored a daylong Symposium on International Parental Child Abduction . . . reflecting continued concern over international child abduction cases and how they are resolved within the Japanese family law system.” A joint press statement was later released from the United States, France, Canada and the United Kingdom embassies urging Japan to sign the Convention.⁵⁹

On January 30, 2010, seven Western nations and the United States sent ambassadors to meet with Japanese Foreign Minister Katsuya Okada to “urge Japan to address its custody issues.”⁶⁰ These attempts were also futile as Japan entertained the notion, but showed no concrete signs of change. To emphasize its intentions, the United States passed House Resolution 1326 on September 29, 2010, by an astounding majority of 96%. The bill called on the Government of Japan to address:

[T]he urgent problem of abduction to and retention of the United States citizen children in Japan, to work closely with the Government of the United States to return these children to their custodial parent or to the original jurisdiction for a custody determination in the United States, to provide left-behind parents immediate access to their children, and to adopt without delay the 1980 Hague Convention on the Civil Aspects of International Child Abduction.⁶¹

Japan did not respond. In October 2010, the European Union met with Japanese Justice Minister Minoru Yanagida in Tokyo and discussed the urgency of signing the Convention,⁶² without any measurable success.

While many international efforts have been made to encourage Japan to join the Hague Abduction Convention, Japan is slowly starting to make progress. On March 18, 2010, ambassadors to Japan from New Zealand, Spain, the United States, the United Kingdom, Italy, France, Canada and Australia met with Japanese government officials for a two-day symposium where various experts in the field discussed worldwide problems in parental abduction. Officials included law enforcement, judges, authorities from the Hague Convention on the Civil Aspects of International Child Abduction, Japanese officials from the ministries of Justice, Health, Labour and Welfare, Foreign Affairs and Diet.⁶³ The Diet refers to the

58. Goto, *supra* note 34.

59. *Id.* Spector & Lechman-Su, *supra* note 12, at 156.

60. Yoo, *supra* note 27, at 3.

61. *Id.* H. Res. 1326: *Calling on the Government of Japan to Address the Urgent Problem of Abduction to and Retention of United States citizen children in Japan* . . . Govtrack.us, (last visited Sept. 24, 2011), <http://www.govtrack.us/congress/bill.xpd?bill=hr111-1326>.

62. Goto, *supra* note 34.

63. *Id.* Press Release, Embassy of the United States Tokyo, Japan (Mar. 18, 2010), *available at* <http://japan.usembassy.gov/e/tp-20100318-75.html>.

Japanese legislature.⁶⁴ The ambassadors issued a press release reiterating the call for Japan to join the Hague Convention, but also acknowledging efforts and positive initiatives made by the Japanese government.⁶⁵ By May 20, 2011, thirty-two nations had prompted Japan to become a signatory to the treaty.⁶⁶

Although still not a signatory, Japan has made several internal efforts to reform its existing family law structure. One such change has been the creation of “*habeas corpus* proceedings and applications for a court order for the recovery of the child.”⁶⁷ Such proceedings are moving Japan closer to the goal of signing and ratifying the Convention. The idea of “mental care” is also gaining increased attention.⁶⁸ More people are now aware of post-traumatic stress disorder and understand the importance of counseling and psychological care. Attention has been drawn to the psychological ramifications of divorce on children and the need for counseling. In addition, fathers are becoming more involved with the upbringing of their children, which is a significant change from existing Japanese norms. Furthermore, children are now viewed as independent from their mothers, breaking away from Japan’s traditional notions that the mother and child are one entity.

Views on visitation are also changing in Japan. Courts now understand that “post-divorce visitation is beneficial for the healthy psychological development of the child.”⁶⁹ Even with this understanding however, courts still feel that visitation places a burden on the child and, therefore, if awarded, will grant extremely limited time for visitation.⁷⁰ Many advocacy groups conducted studies on post-divorce visitation in other countries to draw attention to the need for reform. In some litigation, the parties have been able to use this information to their benefit.⁷¹ However, much more work is needed to defy the opposition from women’s advocacy groups. Such groups feel that interference from the child’s father will only create hardship.

An unintentional reform was made by Japan with the amendment of Article 226 of the Penal Code in 2005.⁷² The amendment applies to all

64. *Diet*, in *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/pallas2.tcl.sc.edu/EBchecked/topic/162773/Diet>.

65. Press Release, *supra* note 63.

66. Maya Kaneko, *Debate Awaits on Child Custody Pact*, THE JAPAN TIMES, May 23, 2011, available at <http://search.japantimes.co.jp/cgi-bin/nn20110522x3.html>.

67. Chairman’s Statement, International Symposium on Child Abduction 2 (Dec. 4, 2009), available at <http://www.hcch.net/upload/abduct-berlin09statement.pdf>.

68. Tanase, *supra* note 35, at 9.

69. *Id.* at 8.

70. *Id.*

71. *Id.* at 9.

72. Jones, *supra* note 53, at 357.

kidnapping or abduction to or from Japan, deviating from the original code, which covered only those cases where a person was abducted from Japan. The purpose of the amendment was to curb human trafficking, but can certainly be applied to parental abduction cases. The legislation is now in place to return abducted children; however, Japanese law enforcement officials feel these matters should be handled by the civil justice system and often ignore the legislation.⁷³

On May 20, 2011, the Japanese Cabinet established a strategic plan to bring Japanese legislation into conformity with the Hague Convention. Chief Cabinet Secretary Yukio Edano stated the plan “would put the Foreign Ministry in charge of the cases related to international child abduction, including finding abducted children, taking measures to prevent child abuse and advising parents on the voluntary return of children.”⁷⁴ The government of Japan created the Division for Issues Related to Child Custody, as a part of the Ministry of Foreign Affairs, to act as a Central Authority.⁷⁵ According to the government’s plan, the Hague Convention will only apply to those abductions that occur after Japan signs the treaty and will not be retroactive. Even if Japan signs the treaty, the Diet will need to ratify the treaty.

On July 28, 2011, Parliamentary Vice Foreign Minister Ikuo Yamahana met with government officials, lawyers and academics and asked them to identify “concrete functions for the central body and problems that need to be resolved for the body to properly function.”⁷⁶ In early July, a Justice Ministry panel met to begin establishing judicial procedures to comply with the Hague Abduction Convention for procedures on returning an abducted child with the expectation to compile a report by February 2012.⁷⁷

In September, U.S. President Barack Obama asked Japanese Prime Minister Yoshihiko Noda to achieve “specific, tangible results” on its progress with signing the Hague Convention.⁷⁸ The foreign and justice ministries asked the public to make comments on proposed legislation to join the Convention.⁷⁹ The public comments were received and reported

73. *Id.* at 358.

74. *Id.* Kaneko, *supra* note 66; Tricia Escobedo, *Japan Takes a Step Closer to Reforming Its Child Custody Laws*, CNN WORLD, May 20, 2011, available at http://articles.cnn.com/2011-05-20/world/japan.child.custody.law_1_child-abduction-hague-convention-child-abuse?_s=PM:WORLD.

75. Press Release, *supra* note 63.

76. *Preparations to Join Hague Child Custody Pact Kick Off*, THE JAPAN TIMES, July 28, 2011, available at <http://search.japantimes.co.jp/cgi-bin/nn20110728a9.html>.

77. *Id.*

78. Takeshi Endo & Kentaro Nakajima, *Obama Frank in Calling for Action from Noda*, THE DAILY YOMIURI, Sept. 24, 2011.

79. *Japan to Allow Parents to Refuse Kids’ Return to Violent Ex-partners*, JUI PRESS, Sept. 30, 2011.

to the Fourth Meeting of the Round Table on the Modality of the Central Authority for the Implementation of the Hague Convention.⁸⁰ As of November 15, Noda announced that the bill to join the Hague Convention on the Civil Aspects of International Child Abduction would be sent to the Diet.⁸¹ The legislation is proposed to make an exception for returning children to an abusive household that could place the child in danger.⁸² However, the United States, Britain, Canada, France, Australia and New Zealand have asked Japan to limit the number of exceptions to returning children. The countries have also asked Japan to ensure a quick return of children who are abducted to Japan and to protect foreign parent's rights of custody in court proceedings.⁸³ Only time will tell what modifications the Japanese Diet will pass and whether the reforms will be enough to join the Convention after years of international protest and disapproval.

IV. Learning from Morocco

Only a few years ago, Morocco was in a very similar situation to that of Japan. As of 2003, the United States State Department received reports of 904 unresolved international parental abduction cases, and 25% of those cases involved countries with Shari'a-based family law,⁸⁴ such as Morocco. Unlike Japan, however, no other country in Morocco's region had joined the Hague Convention. Morocco was under international pressure to sign the 1980 Hague Convention on the Civil Aspects of International Child Abduction and could not do so because of domestic legislation. Moroccan abductions were the subject of several U.S. lawsuits involving the attempt or actual abduction to or from Morocco.⁸⁵ Nevertheless, Morocco soon made reforms to its family law structure, and ratified the treaty June 1, 2010. In order to understand the dramatic trans-

80. *Result of the Public Comment Regarding the Modality of the Central Authority for the Implementation of the Convention on the Civil Aspects of International Child Abduction (The Hague Convention)*, STATES NEWS SERVICE, Nov. 24, 2011.

81. Osamu Kawakami, *Noda Tells Obama of TPP Plans; BSE, Relocation of Futenma Base, Child Abduction Pact Also Discussed*, THE DAILY YOMIURI, Nov. 15, 2011.

82. *Preparations to Join Hague*, *supra* note 76.

83. *Id.* 6 *Nations Make Request to Japan over Hague Convention*, JIJI PRESS, Dec. 7, 2011.

84. Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. U. J. INT'L HUM. RTS. 7 (2004).

85. *See, e.g.*, *Mesnaoui v. Christopher*, No. Civ. S-10-1129, 2010 WL 2740162 (E.D. Cal. July 9, 2011) (unpublished) (dismissing plaintiff father's suit for lack of subject matter jurisdiction after wife abducted child to Morocco); *Assidon v. Abboushi*, 16 A.3d 939 (D.C. Cir. 2011) (granting custody to mother with supervised visitation to father after she fled Morocco because of father's violence); *Ivaldi v. Ivaldi*, 685 A.2d 1319 (N.J. 1996) (remanding to determine if inconvenient forum applies to custody dispute between father who lives in the United States and mother who took child to live in Morocco); *Lee v. Lee*, 49 So. 3d 211 (Ala. Civ. App. 2010) (appealing award of sole custody to father after mother made preparations to abduct their child to Morocco).

formation of the legal system in Morocco, it is essential to discuss the family law structure in place before ratification of the Hague Convention.

A. Moroccan Family Law

Shari'a notions of kinship and filiation define Moroccan family law, as custody decisions are based on Islamic law. Moroccan law has a tendency to be more conservative than other legislation in Islamic states in North Africa. Shari'a seems to be the only unifying source of law in the country.⁸⁶ In Morocco, rules of divorce are set in the Code of Personal Status or Mudawwana, and are derived from Maliki law.⁸⁷ The code is referred to as "Code de la femme."⁸⁸ Custody has two separate components in Shari'a which are *hadana* and *wilaya*. *Hadana* means "nurturing, nursing or raising, [and] determines who looks after the children and where they reside."⁸⁹ In the Moroccan system, *hadana* is almost always given to the mother, and if the mother dies or remarries, *hadana* is given to her mother. Only after all females are deceased, will *hadana* be given to a paternal unit.⁹⁰

Wilaya is defined as "power, authority and supervision [and] consists of supervision over the child's upbringing and education, making sure that the child is brought up as Muslim; and at the same time providing maintenance for the child."⁹¹ This right usually belongs to the father, and will pass to his father if he dies. Customarily, the mother's share of custody is ranked of second importance to that of the father's share.⁹² Therefore, the mother's role is to solely care for the child and keep the child within easy access of the father, usually within the same town. Although mothers are granted custody of the children in a majority of cases, fathers have the right to control if the child may leave the country of Morocco. Even if a child has a passport, officials may ask for verification that the father has approved the child for travel.⁹³ In addition, if the mother tries to remarry, she will lose her rights to custody of the children.⁹⁴

86. Morocco, FOREIGN LAW GUIDE, available at <http://foreignlawguide.com.colaws.lib.law.sc.edu/ip/flg/Morocco.htm>. (last accessed Sept. 24, 2011).

87. ZIBA MIR-HOSSEINI, MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW 84 (rev. ed. 2000).

88. Morocco, *supra* note 86.

89. *Id.* See also MIR-HOSSEINI, *supra* note 87.

90. Morocco, *supra* note 86.

91. *Id.*

92. *Id.* at 146–47.

93. *Id.* International Parental Child Abduction: Morocco, U.S. DEPARTMENT OF STATE (last visited Sept. 24, 2011), http://travel.state.gov/abduction/country/country_509.html.

94. MIR-HOSSEINI, *supra* note 87, at 147.

The father must provide maintenance for the child, called *nafaqat al-hadana* and pay a fee to the mother, called *urjat al-hadana*,⁹⁵ even though the mother has custody of the child. Moroccan courts consider many factors in making custody determinations, including “parents’ religion, place of permanent residence, income, and the mother’s subsequent marital status.”⁹⁶ However, after the age of fifteen, children are given the choice of which parent they would rather live with.⁹⁷

Great reforms were made between 2003 and 2004, when H.M. King Mohammed VI made several changes to the Moroccan Mudawwana. The original family code was codified in 1957, but much of its legislation dated back to 1915. The new legislation, resulting from a three-year study,⁹⁸ called for increased responsibility from both spouses, allowing for a type of joint-custody arrangement. In addition, women and men were allowed to get married without the approval of a tutor.⁹⁹ A hotly debated area in Moroccan family law was that a husband could obtain a divorce without his wife’s consent. The new legislation introduces the idea of a woman’s right to divorce and requires the court’s approval before a divorce could become final, in addition to mutual consent. Furthermore, if any money is owed to the wife and child, the husband has to pay such debt before the divorce will be registered. Most importantly, the code established family courts and a family mutual assistance fund to finance and enforce Moroccan Mudawwana. This reform was characterized as a “historic asset that rehabilitates women’s rights, particularly the right to dignity, equality and protection, preserves children’s rights and guarantees the coherence, balance and stability of family and of the whole of Moroccan society.”¹⁰⁰

In addition to reforms to the family structure, Africa paid close attention to international law due to particular developments at the time. First, private international-law institutions were being established in Africa, which drew in more academic scholars to the area.¹⁰¹ Second, private international scholars were attempting to harmonize laws in parts of Africa to conform to current trends. Third, African experts received global notoriety in institutional and academic circles for their work as they

95. *Id.*

96. *International Parental Child Abduction: Morocco*, *supra* note 93.

97. Morocco, FOREIGN & COMMONWEALTH OFFICE (Nov. 15, 2010), *available at* <http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/child-abduction/country-specific-info/morocco>.

98. *Id.* Morocco, *supra* note 86.

99. Morocco, *supra* note 86. Zineb Touimi-Benjelloun, *A New Family Law in Morocco: “Patience Is Bitter but Its Fruit Is Sweet,”* UN WOMEN (Dec. 19, 2003), *available at* http://www.unifem.org/gender_issues/voices_from_the_field/story.php?StoryID=264.

100. *Id.*

101. Richard Frimpong Oppong, *Private International Law Scholarship in Africa (1884-2009)—A Selected Bibliography*, 58 AM. J. COMP. LAW 319, 321 (2010).

were increasingly invited to contribute to eminent work around the world.¹⁰² Fourth, constitutional values and advances in human rights laws were strengthened in Africa. Lastly, private international law was shaped by “regional economic integration together with related advances being made in Africa.”¹⁰³ With increased interest in international law and interest in being part of a global community, Morocco became concerned with joining the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

B. Efforts to Sign the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Morocco became the first Islamic country and the first North African country to join the Hague Convention on the Civil Aspects of International Child Abduction. At a conference in Malta in the Spring of 2010, Mr. Brahim Lisser, Director of Civil Affaires of Morocco, told the Hague Convention that Morocco had ratified the New York Convention of 1989, and the Hague Convention of October 19, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children to show its commitment to “transfrontier co-operation in order to protect children.”¹⁰⁴ In addition, Morocco entered into specific bilateral agreements with the Netherlands, Egypt and other European countries to resolve disputes in family law. Furthermore, a study was prepared to “determine and make the mechanism of mediation most efficient for children’s rights.”¹⁰⁵ Visitation rights were also established by Moroccan legislation to preserve and protect children’s rights.¹⁰⁶ Morocco then created the Ministry of Justice of Morocco as its central authority.¹⁰⁷

On March 9, 2010, Morocco “deposited its instrument of accession” to the Hague Abduction Convention¹⁰⁸ and on June 1, 2010, Morocco acceded to the Hague Convention,¹⁰⁹ and became the eighty-second party to the

102. *Id.* at 322.

103. *Id.* at 324.

104. Brahim Lisser & Samira Meddoun, *Morocco*, 16 THE JUDGES’ NEWSLETTER ON INTERNATIONAL CHILD PROTECTION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Spring 2010), http://www.hcch.net/index_en.php?act=publications.details&pid=5173.

105. *Id.*

106. *Id.*

107. PETER THOMAS SENESE & CAROLYN ANN VLK, *THE WORLD TURNED UPSIDE DOWN* 268 (2011).

108. *Child Abduction-Hague Convention-Morocco-Accession*, 36 FAM. L. REP. (BNA), at 1287 (2010).

109. Adejoke Babington-Ashaye et al., *International Legal Development Year in Review: 2010 (Africa)*, 45 INT’L LAW 435 (2011).

treaty.¹¹⁰ As a result of Morocco not being an original member country to the Convention, the treaty will not become effective between Morocco and another country unless the member country accepts Morocco's accession. As of October 5, 2011, Morocco's accession was accepted by Argentina, Belgium, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Israel, Latvia, the Netherlands, New Zealand, Serbia, Slovakia, Spain, Sweden, Ukraine, Uruguay, the Bahamas, and Uzbekistan.¹¹¹

In order to show continuing efforts towards success, Morocco held a Judicial Seminar on Cross-border Protection of Children and Families for the Hague Convention in Rabat on December 13, 2010.¹¹² The conference featured judges and experts from several countries to discuss solutions to ongoing problems relating to international child protection. A few days later, over fifty Moroccan judges received training in the "practical operation of the 1980 Hague Child Abduction Convention" by using various hypothetical case studies. The judges also vocalized their desire to see a Moroccan Hague Network Judge designated.¹¹³

V. Analysis

In comparison to the tremendous strides taken by Morocco to join the Hague Convention, Japan has much work to do in ensuring not only ratification, but continued abidance to the principles of the Hague Convention. However, Japan has made some progress in moving closer to the guidelines set by the Hague Abduction Convention. With the establishment of family courts, habeas corpus proceedings, social services such as counseling and psychological therapy, and mediation, Japan is on its way to becoming a signatory to the Convention. Most importantly, like Morocco's Ministry of Justice, Japan has established a central authority in its Ministry of Foreign Affairs. While Japan's legal structure is not entirely equivalent to that of Morocco, many elements are similar. Japan would be wise to assimilate many of the strategic reforms Morocco made in order to join the Hague Convention.

First, one of the essential reforms needed for a country to join the

110. Jeremy Morley, Morocco. Hague Abduction Convention. Update, *International Family Law* (Apr. 20, 2010), available at <http://www.internationalfamilylawfirm.com/2010/04/morocco-hague-abduction-convention.html>.

111. Spreadsheet Showing Acceptances of Accessions to the Child Abduction Convention, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Oct. 6, 2011), http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36.

112. 17 THE JUDGES' NEWSLETTER ON INTERNATIONAL CHILD PROTECTION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 31 (Spr. 2011), http://www.hcch.net/index_en.php?act=publications.details&pid=5379.

113. *Id.* at 34.

Hague Convention is to establish substantive law to guide custody determinations. Of the 146,408 divorces in Japan in 2009, only 3.6% involved both parents taking part in child rearing.¹¹⁴ Japan's system seems to favor sole-custody, but Morocco had a very similar system that valued one parent, usually the mother, under Shari'a law. Although Morocco allowed the father to make important decisions about the child, such as where the mother and child could live and whether the child could travel abroad, all decisions regarding daily functions and routine care were left to the mother, essentially creating a sole custody system, similar to that of Japan. Both systems included matrifocal tendencies. While Japan's Civil Code typically breaks custody into *shinken* and *kangoken*, the Moroccan Code of Personal Status similarly divides custody into *hadana* and *wilaya*. Morocco successfully uprooted its custody system and allowed joint responsibility to be established among parents, as one parent was given *hadana* and the other *wilaya*. In Japan, the same ideology should be adopted. Instead of granting one parent parental rights and physical custody, efforts should be made to grant *shinken* to one parent and *kangoken* to the other to allow for increased responsibility for both parents and bring about an understanding of joint custody.

Second, Japanese courts, or the Japanese Diet, need to establish visitation as a fundamental right. One of the key reforms Morocco made to join the Hague Convention was to establish visitation rights. However, these rights were already inherent within the Moroccan system as such measures were implied when Moroccan mothers were prohibited from moving away from the father so that the father could have access to the child. Similarly, in Japan, an understanding of the psychological benefits of visitation on the child is already taking root. Courts have even granted visitation rights in some cases, but have made the rights extremely limited. It is time for Japan to push this notion and make visitation rights fundamental within the constitutional system.

Third, Japan needs to dissolve its current registration system, or at the very least, modify the system. Allowing a child to be taken off a father's register when a mother changes her name after divorce, resulting in the loss of parental rights for the father, is abhorrent. The registration system should be discarded completely or altered so that the child's name will remain under both parents' registers, regardless of the marital status of the parents. Such changes will bring Japan one step closer psychologically to joint parental responsibility.

Fourth, in order to comply with the Hague Convention, services must be available to ensure the return of children to their habitual place of res-

114. Kaneko, *supra* note 66.

idence. Like Morocco, Japan should implement law enforcement mechanisms to find abducted children and return the children safely. Fortunately Article 226 of the Japanese Penal Code is already in effect to return abducted children. The Japanese government needs to force Japanese law enforcement officers to comply with Article 226 to ensure abducted children are returned home.

Lastly, before signing the Hague Convention, Morocco entered into specific bilateral agreements to resolve familial disputes with neighboring countries to promote collaboration and global cooperation. In an effort to ease global tension, Japan would be strongly urged to do the same with the United States, the United Kingdom, France and Canada, as these four countries have repeatedly called on Japan to increase efforts to prevent parental abductions.¹¹⁵

With these reforms in place, Japan could transition into becoming the next signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

VI. Conclusion

Japan has been repeatedly referred to as a “haven for parental abductions.”¹¹⁶ Much of the reason underlying these allegations is the failure of Japan to sign the Hague Convention. Although Japanese government officials have publicly announced plans to become a signatory to the treaty, Japan must accomplish reform before being deemed ready to join the Hague Convention.

Although Morocco was in a similar situation to Japan only a few years prior, the Moroccan government took great strides to improve the existing government structure and legal system to conform to the requirements of the Hague Convention. As stated by the Moroccan delegation at the Malta Conference, “Morocco does not spare any effort in respecting children’s rights, their well-being and their good health. We spare no effort in educating children . . . [and] we will continue to endeavour to conclude partnership agreements and enhance cooperation in order to better collaborate with a number of other countries in the world.”¹¹⁷

With many similarities between Japan and Morocco, Japan would be prudent to follow in the footsteps of Morocco to end the injustice of international parental abduction. By taking such measures as instituting notions of joint custody, establishing visitation as a fundamental right, abolishing or modifying the current Japanese family registration system,

115. Press Release, *supra* note 63; *6 Nations Make Request to Japan*, *supra* note 83.

116. Kaneko, *supra* note 66.

117. Lisser & Meddoun, *supra* note 104.

ensuring the compliance of law enforcement officers to existing legislation, and entering into bilateral agreements with the United States, the United Kingdom, France and Canada, Japan will be much closer to readying its internal structure for review by the Hague Convention. Japan needs to be reminded that “[t]he real victims of the political impasse aren’t the Japanese government or the disputing parents but the children who are forced into such extreme positions.”¹¹⁸

118. Goto, *supra* note 34.