Upcoming legal reforms: a plus for children or plus ca change?

Domestic revisions designed to ease fears over Hague Convention could actually encourage parental abduction

By COLIN P. A. JONES, The Japan Times, Tuesday, Aug. 9, 2011

Those focused on the government's stumbling efforts to protect the children of Fukushima from radioactive contamination may find this hard to believe, but Japanese family law just got more child-friendly — maybe. If Japan finally signs the Hague Convention on child abduction, as it appears it will, it could become even more so. There is a big "maybe" here too, so it remains to be seen whether these two steps taken by the Diet will steer the country away from its status as a black hole for parental abduction or leave it treading the same sorry path.

On May 27 a law was passed amending a number of provisions in the Civil Code relating to children and their parents. First, Article 766 of the code was revised to require parents seeking a cooperative (i.e., nonlitigated) divorce to decide upon visitation, child support payments and other matters relevant to their children's upbringing after divorce. Furthermore, the new provision says that the welfare of the children must be the primary consideration when these matters are decided.

This may not seem particularly revolutionary, but in the Japanese context it is: This is the first time visitation or other forms of post-separation contact between parent and child have ever been mentioned in legislation (unless you include the U.N. Convention on the Rights of the Child, to which Japan is a signatory, but which doesn't seem to count for very much in this context).

Similarly, the seemingly basic notion that the best interests of children should be a primary consideration in divorce is also new to Japanese law. Before these amendments, the welfare of children had never been at issue in the vast majority of divorces as far as the law was concerned.

Since the amendments have not yet taken effect, it is not clear how they will work in practice, a matter that will doubtless be resolved by implementing regulations. Currently, parents seeking a cooperative divorce simply fill in a form specifying which child ends up with which parent and file it with their local government office. Perhaps they will now need to check boxes showing that they have provided for visitation and so forth.

Another significant change in the law will make it possible for public authorities to

suspend for up to two years the parental authority of those who abuse or neglect their children. The supposed inability of child welfare officials to act aggressively has been cited in recent high-profile child abuse cases. Under prior law the termination of parental authority was permanent, rendering it a very blunt instrument.

Of course, any change that clarifies the principles underlying the laws relating to children in Japan is certainly a welcome step forward. Yet at the same time, I believe that the character of these amendments reflects a continuation of what I see as the core problem with Japanese family law.

Both the amendments described above approach the problem by addressing deficiencies in Japanese parents. Other amendments to the Civil Code making it clear that even nondivorcing parents must exercise their parental rights and responsibilities for the benefit of their children further reinforce this impression.

The fact that there are now multiple statutory mandates commanding parents to act in the best interests of their own children suggests that the people who drafted the legislation have a pretty low opinion of the parenting skills of their fellow citizens. Those portions of the recent amendments making it easier to suspend parental authority make it clear that they are primarily concerned with protecting children from their parents, rather than protecting the parent-child relationship itself.

Of course, anyone who has ever tried to get an abducted child returned from Japan, or even used the nation's legal system to try and just see their children, is likely to feel that the real problem is with the courts, and arguably it is. After all, most child custody disputes that end up in court involve parents who have different views on what is best for their children. As I read them, however, the new provisions do not even make it clear that Japanese judges are also required by law to treat the welfare of the children as a primary consideration in resolving such disputes. Doubtless the judiciary already considers itself to be doing all it can for children of divorce — "the best interests of the child" is a phrase that has been used in internal court manuals for years before any similar language appeared in the Civil Code.

The problem is that a parent can already get away with a form of "murder" in Japan, insofar as they are often successful in abducting children and making the other parent disappear from their lives. Japanese courts either cannot do anything about this type of situation or sometimes even declare it to be in the best interests of the child. So adding a provision to the law saying, effectively, that "murder is bad" may have little merit if courts still have no power to enforce change or are allowed to keep resolving cases by absolving the murderers. But there is nothing in these amendments giving them greater enforcement powers or requiring them to change their ways.

Indeed, family court judges may simply regard these amendments as a codification of their existing practices. After all, the revisions even provide them with further grounds for telling parties why their parenting is defective. And while a Civil Code amendment is apparently required to tell average citizen parents the blindingly obvious, why should highly educated judges need a law to tell them to make decisions in the best interests of children when they already think that is what they are doing? That their decisions may involve decreeing a parent should receive three photographs a year of their child in lieu of actually seeing them after divorce (as still happens in some cases) is an example of the fundamentally upside-down logic of Japanese family court practice — a "logic" these amendments fail to address.

Meanwhile, on the Hague Convention front, a legislative committee appears to be considering domestic legislation that will ensure no abducted child ever has to be returned after Japan signs it. A basic premise of the convention is that judicial determinations about children after their parents separate should be made in the country where the children have been living. Children who are unilaterally removed to another country should thus promptly be located and returned to their country of habitual residence.

The convention does contain an exception that says a child does not have to be returned if there is a "grave risk" that doing so "would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation." The Japanese government appears poised to drive truckloads of abducted children through this very limited exception.

Based on current proposals that I have seen, Japanese authorities may be allowed to refuse to return a child if (a) either the child or taking parent have been subject to abuse (including "violent words"), (b) the taking parent cannot return to the child's home country because of fear of criminal prosecution upon return, (c) the taking parent is the primary caregiver but cannot raise the child in the home country for financial or other reasons, or (d) the helpfully vague "there are other circumstances" making return potentially harmful to the child.

This may seem well-intentioned, but it is important to understand that the Hague Convention is not about "keeping" children in their home countries. It is about parents respecting the law of the countries in which their children live before they unilaterally change their residence.

Furthermore, joining the convention implicitly involves accepting that other convention signatories are civilized nations whose legal systems are equally capable of dealing with problems such as domestic violence. Although the stance of judges on international relocation varies around the world, if a parent who is the child's primary caregiver applies to a court in the child's home country for permission to move overseas with the child, it may well be granted if the reasons for doing so are legitimate. A similar logic applies to seeking protection from

domestic violence or financial support. All of these are matters that should be dealt with first by the courts in the place where the child has the deepest roots, not where they have just gotten off a plane with mum or dad.

In May of this year the Supreme Court of the U.K. dealt with a "typical" Hague case — that of a British woman who brought her children back from Norway to escape from alleged "psychological abuse" by her Norwegian husband. Noting that, among other things, she had not sought to avail herself of the courts or public authorities in Norway, the court confirmed that the children should be returned there. This is the way the convention is supposed to work, at least in England and Wales, where courts are very aggressive about enforcing it. Not only could the proposed exceptions to the return encourage overburdened Japanese family court judges to not be aggressive, but they might even have the effect of actually encouraging abduction.

This is because if drafted vaguely enough, the exceptions will make it possible for a Japanese parent to get off a plane with her children and claim that they were subject to abuse by the foreign parent or will be destitute if forced to return. They can support these claims using evidence that has not been evaluated by the courts best situated to do so — those in the home country. On the other hand, fleeing back to Japan after an official record is created is likely to support arguments in favor of return, if they establish that the home country authorities were addressing the problem, as will likely be the case. Similarly, abducting children back to Japan before a home country court can rule on custody limits the amount of official evidence (in the form of court rulings) that the other parent can use to assert their return. This is precisely the type of forum-shopping that the convention is intended to prevent, but upside-down logic may prove contagious.

What form the legislation implementing the convention takes remains to be seen, but whatever happens, visitation/access may prove key to its operation. While the convention was originally drafted to remedy abductions by noncustodial fathers, today the majority of abductors are mothers who are also the children's primary caregivers. This means that the person seeking return is often a noncustodial father. Thus, in England (where I have been doing research on the subject), many Hague cases end up being more about securing access (visitation) than return of the children, and are settled through parallel mediation. In other words, a father fearing loss of all contact with his children may file to have them returned, but may agree to their relocation abroad if he gets assurances that he will continue to see them nonetheless.

Unfortunately, visitation in Japan is unenforceable and often proves meaningless regardless of whether it is agreed to by the other parent or ordered by a family court. Nothing about the recent Civil Code amendments changes this grim reality or even makes visitation a judicial priority. Indeed, the new Civil Code provisions only speak in terms of "postdivorce" visitation, meaning that courts could be free to continue allowing denial of access to be used as leverage in postseparation,

predivorce mediation.

If parents continue to disappear from children's lives in Japan, despite changes in family law and the country joining the Hague Convention, the country will remain a black hole of abduction and parental alienation. The only difference will be that for official purposes the problem will be deemed to have been dealt with, meaning that another generation of children may have to experience the loss of a parent before policymakers turn their attention to it again.

Colin Jones is a professor at Doshisha University Law School in Kyoto. His most recent book in Japanese, "Kodomo no Tsuresari Mondai" ("The Child Abduction Problem"), was published in March by Heibonsha Shinsho.