

# **Is International Child Abduction a Crime?**

## **A Problem from Rapidly Increasing International Marriages**

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### **A Japanese woman arrested**

A Japanese woman who had taken her daughter back to Japan during a divorce suit was arrested by United States law enforcement officials when she visited Hawaii in April 2011. She is reportedly now undergoing a criminal trial in Wisconsin and expected to receive a sentence in late November. (For this case, an official plea bargain was concluded on November 23rd, 2011, at a court in Wisconsin in the United States, stating that the mother hands the daughter over to the father in the United States within 30 days.) This 43-year-old Japanese woman married a man in Wisconsin in 2002. The husband was born in Nicaragua and has U.S. citizenship. They have a daughter, who is now 9 years old. The relationship between the husband and the wife deteriorated, however, and the husband filed with the state court for dissolution of their marriage in 2008. Immediately after that, the Japanese woman went back to Japan with their daughter allegedly because of the husband's domestic violence. In June 2009, the state court delivered a sentence, which has already become final, approving the dissolution and awarding sole custody of the daughter to the father, and ordering that the daughter be handed over to the him immediately or in Japan. In response to this, the woman filed another lawsuit in Hyogo Prefecture in Japan claiming divorce, designation of custody, and payment of expenses for raising the child, as well as a lawsuit calling for a switch of the parental custody. The court in Japan awarded parental custody to her, against which the husband filed a protest. The daughter is now living with her relatives in Hyogo, and reportedly has not been notified of the series of lawsuits and her mother's apprehension. In any case, whatever judgment the courts may deliver, the situation of a girl caught in the middle of such conflict between her own parents is heart rending.

### **Increasing cases regarding international child custody and visitation**

In the first place, why did such an unfortunate case occur? Will this sort of problem not arise if Japan joins the Hague Convention on international child abduction? What is the nature of the Hague Convention, and what are the pros and cons for members of the convention? First, the background for the case mentioned above includes an increase in international marriages due to globalization. The number of international marriages in 2009 amounted to

34,393, and there are 30,000 to 40,000 international marriages a year. On the other hand, international marriage breakups and divorces are also increasing. The number expanded to 19,404 in 2009, leading to continuous increase in cases related to international child custody and visitation from 640 in 2007 to 774 in 2008 and 846 in 2009. A breakup of an international marriage tends to easily slip into fierce disputes because of cultural friction or difficulty in cross-cultural communication. Inconsistency of legal systems among nations also makes problems harder to solve. For example, European nations and the United States have adopted the principle of joint parental rights, joint custody, and joint nurturing between parents after divorce, and they are in the process of establishing legal and social support systems to protect the best interests and rights of the children, including support for consensus building on issues relating to child custody and visitation, and improvement of visitation assistance schemes.

In this situation, in Europe and the United States, a parent who took a child away without consent from the other parent or approval from a court would be regarded as committing a crime and subjected to severe punishment. To the contrary, Japan has adopted the principle of sole parental authority after divorce, and seemingly has not ensured adequate and effective systems for problem solving and social support regarding parent-child visitation and handover of children. Taking children away without permission also does not constitute a crime and is not regarded as illegal, except for extraordinary cases. Moreover, in terms of the parent-child relationship after divorce, Japan has deeply rooted unique sentiments of parents and children, ideas held by persons involved, and customs, such as nurturing by the mother and a strong tie between a mother and children, which are not found in Europe. This fact indicates vast differences between Europe and Japan.

### **The Hague Convention with 86 member countries**

The Hague Convention on the Civil Aspects of International Child Abduction was adopted at the Hague Conference on Private International Law in October 1980, and entered into force in 1983. This convention currently has 86 member countries around the world, including the United Kingdom, the United States, Canada, France, Italy, Australia, Germany, and Russia. The objective of this convention is to prevent international child abduction and enable cooperation among nations to take abducted children back to their country of residence quickly. The Hague Convention provides that member states shall preserve the stability of children's life and the continuity of a nurturing environment, and the Central Authority shall be responsible for cooperation for the immediate return of the children. The convention also guarantees the right of visitation between parents and children, and attempts to prevent causing further child abduction, taking into consideration the feelings of a parent who is not living with the children. The convention adopts the Central Authority system as an

administrative mechanism for the return of children. In this system, each party state designates its Central Authority for fulfilling obligations under the convention, and the Central Authority shall take every appropriate measure to ensure the prompt return of children, including promoted cooperation among member states' judicial administration authorities, location and identification of children, prevention of danger or damage through tentative measures, facilitated voluntary return or dispute resolution, exchange of information on the social background of children, and ensured safety in child return.

The Hague Convention shall not be applicable unless there is any infringement on the right of custody or visitation, a child in question is already 16 years of age or older, or there is illegal abduction or detention beyond borders. Furthermore, the convention is never applied retrospectively to illegal abduction that occurred before joining the convention. The stance of the Hague Convention is that a final decision shall not be made about the future of children but an order shall only be issued for prompt return to the country where the habitual residence was located originally. Nevertheless, a court may exceptionally reject issuing an order to return children, in the cases that over one year has passed since abduction and a child in question has been accustomed to a new environment; parents have not executed the custody right upon abduction; there is an agreement or ex-post facto approval; return of a child is likely to cause damage to the child's physical or mental state or to place the child in an intolerable situation; a child in question is opposing the return; or the return is against the basic principles regarding human rights or the guarantee of fundamental freedoms.

### **The pros and cons of the convention**

What benefit would the Hague Convention offer Japan upon joining? As a party to the Hague Convention, Japan would be able to drive cooperation and collaboration with the Central Authorities in other member states, and to solve problems related to international child abduction or visitation more quickly and smoothly. What is more, Japan would also be able to request the speedy return of children who were abducted illegally beyond Japanese borders. Within the country, membership would help improve legal or social support systems for parental rights or custody. On the other hand, however, the convention requires parties to care of and assist children and the abductor, or taking parent (TP), when they had been isolated overseas and returned to their home country. For a taking parent who has finally regained a peaceful life after managing to escape from the domestic violence or relentless interference of their spouse in caring for the child, the taking parent could lose his or her peaceful life if the child were returned to the former country of residence. Whereas the benefits of joining the convention include the promotion of international cooperation, trust earned worldwide, and compliance with the world standard, the expected downsides may affect the protection of Japanese nationals, the unique conception of family, the respect for the view on the relationship between parents and children, and

inadequate measures against domestic or other sorts of violence, etc. Currently, as Japan decided to assign the role of the Central Authority to the Ministry of Foreign Affairs, the government is hastening to develop domestic law for implementing the responsibilities and authorities of the Central Authority and cooperation with other relevant agencies, as well as return procedures under the Hague Convention including the concentration of jurisdictions, trial processes, reasons for rejection of return, and arbitration. The Hague Convention is not only an international and diplomatic issue, however, but rather it is also closely related to domestic issues, especially the nature of the relationship between parents and children after divorce and social and legal support in Japan. To prevent a case like that mentioned above in the future, it is necessary to drive division of responsibilities and cooperation among relevant organizations, focusing on the protection of children's interests.