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Japan's Failure to Protect Japanese-American Children from International Parental Kidnapping in Violation of the Hague Convention on Child Abduction

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COMMENT

JAPAN'S FAILURE TO PROTECT JAPANESE-AMERICAN CHILDREN FROM INTERNATIONAL PARENTAL KIDNAPPING IN VIOLATION OF THE HAGUE CONVENTION ON CHILD ABDUCTION

TARJA CAJUDO*

I. INTRODUCTION	478
II. BACKGROUND	481
A. JAPANESE FAMILY REGISTRY SYSTEM, STATUS OF FORCES AGREEMENT, AND CONSTITUTION	481
B. JAPANESE CIVIL AND CRIMINAL CODES	485
i. Marriage	485
ii. Ward Office Divorce	486
iii. Divorce through Conciliation.....	486
iv. Divorce Through Family Court and District Court	487
v. Custody	488
vi. Criminal Parental Abduction	490
C. THE HAGUE CONVENTION AND IMPLEMENTATION ACT	491
III. ANALYSIS	493
A. THE FAMILY REGISTER ACT ARTICLE 76 AND APPLICATION OF THE CONCILIATION SYSTEM VIOLATE THE	

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HAGUE CONVENTION ARTICLES 8, 11, AND 21	493
B. CIVIL CODE ARTICLES 819, 820, 821, AND 824, AND APPLICATION OF CRIMINAL CODE ARTICLE 224 VIOLATE THE HAGUE CONVENTION ARTICLES 1, 2, 8, 13, AND 21	497
i. Mother Preference	497
ii. Visitation laws violate Hague Convention Article 21	498
iii. Visitation laws violate Hague Convention Article 13	499
C. IMPLEMENTATION ACT ARTICLES 2, 7, AND 28 ON ‘HABITUAL RESIDENCE,’ ‘RIGHTS OF CUSTODY,’ AND ‘GRAVE RISK’ VIOLATE THE HAGUE CONVENTION ARTICLES 1 AND 7 ON ‘RIGHTS OF ACCESS’ AND ‘PROMPT RETURN OF CHILDREN’	502
IV. RECOMMENDATIONS	504
A. FAMILY REGISTER ACT ARTICLE 76	505
B. CIVIL CODE ARTICLES 819, 820, 821, AND 824	505
C. IMPLEMENTATION ACT ARTICLE 28(2)	506
D. UNITED STATES SANCTIONS THROUGH THE GOLDMAN ACT AND UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT	507
V. CONCLUSION	509

I. INTRODUCTION

The Hague Conference on Private International Law established the Convention on the Civil Aspects of International Child Abduction in 1980 (Hague Convention) in response to the legal issues surrounding international parental kidnapping.¹ Ninety-six countries, including the United States and Japan, have adopted the Convention as of 2016.² Before signing and ratifying the Convention

1. See United Nations Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98 [hereinafter Hague Convention]. See generally COLIN P.A. JONES, TOWARDS AN “ASIAN” CHILD ABDUCTION TREATY? SOME OBSERVATIONS ON SINGAPORE AND JAPAN JOINING THE HAGUE CONVENTION (Asian L. Inst., Working Paper No. 31, 2013) (showing that 22,000 children in Japan have one non-Japanese parent); Barbara Stark, *Foreign Fathers, Japanese Mothers, and The Hague Abduction Convention: Spirited Away*, 41 N.C. J. INT'L L. 761, 764 (explaining that increased marriages between Japanese nationals and Westerners contribute to the increasing number of cases of international parental kidnapping).

2. Hague Conference on Private International Law, *Convention of 25 October*

in 2014, Japan was known as a “black hole” for abducted children of divorced parents because most kidnapped children taken to Japan were never seen again.³ Even after ratifying the Hague Convention, Japan continues to be non-compliant⁴ because its unique Family Register Act,⁵ Civil and Criminal Codes with respect to family law,⁶ and its Hague Convention Implementation Act⁷ all effectively lack joint custody, meaningful enforcement mechanisms, and adequate remedies for abandoned parents.⁸

1980 on the Civil Aspects of International Child Abduction, STATUS TABLE, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last visited Feb. 25, 2017).

3. E.g., Keelikolani Lee Ho, *The Need for Concentrated Jurisdiction in Handling Parental Child Abduction Cases in the United States*, 14 SANTA CLARA J. INT'L L. 596, 603 (2016) (citing Commander Paul Toland's Statement before the United States House of Representatives Tom Lantos Human Rights Commission (Dec. 2, 2009)) (using his personal experience to urge the Commission to take action on international parental kidnapping); see also Robin S. Lee, *Bringing Our Kids Home: International Parental Child Abduction & Japan's Refusal to Return Our Children*, 17 CARDOZO J.L. & GENDER 109, 137 (2010) (lamenting about the fact that victims of international parental kidnapping would not be reunited, if at all, until after children become adults); Jason Nitz, Comment, “*Splitting the Baby*” Internationally: Evaluating the “Least Restrictive” Conundrum when Protecting Children from International Parental Abduction, 16 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 417, 418 (2014) (citing Christopher Savoie's statement at a capitol press conference introducing House Resolution 1326 and sharing his personal experience to urge the House to condemn Japan for failing to sign on to the Hague Convention).

4. See U.S. DEP'T ST., BUREAU OF CONSULAR AFFAIRS: ANNUAL REPORT ON INTERNATIONAL PARENTAL CHILD ABDUCTION 30 (2016) [hereinafter IPCA] (naming Japan in the 2016 annual report to Congress as out of compliance with the Hague Convention due to an inability to enforce return orders issued by the courts in Japan); E-mail from Jeffery Morehouse, Executive Dir., Bring Abducted Children Home, to author (Feb. 16, 2017) (on file with author) (discussing the 2016 IPCA Report).

5. Koseki [Family Register Act], Act no. 224 of 1947 (Japan).

6. MINPŌ [MINPŌ] [CIVIL C.] art. 725-1044 (Japan); KEIHŌ [KEIHŌ] [PENAL C.] art. 224 (Japan).

7. The Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, [Implementation Act], Act No. 48 of 2013, art. 4(1), <http://www.japaneselawtranslation.go.jp> (Japan).

8. See IPCA, *supra* note 4, at 32 (proposing continued efforts to bring Japan into compliance with its obligations to enforce return orders); Colin P.A. Jones, Professor, Doshisha Law Sch., Presentation at American Bar Association International Law Event: 1+1=1 Understanding Japanese Family Law 6 (2014) [hereinafter Jones, 1+1=1], www.americanbar.org/content/dam/aba/events/international_law/primer1.pptx (last visited Feb. 25, 2017) (exposing the

The American military presence in Japan creates unique custody issues for Japanese-American military families.⁹ For example, the seminal case of *Toland v. Futagi* held that US Naval Commander Toland could not gain custody of his daughter after his ex-wife kidnapped her from a U.S. military base in Japan.¹⁰ When his ex-wife later committed suicide, Toland attempted to gain custody from the child's Japanese grandmother. However, the Japanese court declined to resolve the issue and the Maryland court similarly declined jurisdiction.¹¹ In *Savoie v. Martin*, U.S. citizen Savoie could not retrieve his children from his ex-wife after she refused to return them from a visit to Japan despite a Tennessee court granting Savoie full custody.¹² In both cases, the Japanese legal system failed to provide a remedy to the American military member when the kidnapping parent took physical control over the children despite the standing custody arrangement.¹³

weaknesses of the Japanese legal framework regarding compliance with the Hague Convention).

9. See Thomas D. Farrell & David L. Manz, Farrell & Associates & The Manz Law Firm, Presentation at American Bar Association International Law Event: US Military Families in the Asia-Pacific (2014), http://www.americanbar.org/content/dam/aba/events/international_law/2014/06/internationalfamilies/Military1.pptx (last visited Feb. 25, 2017) (educating lawyers on the family law system in Japan as US military members will encounter it).

10. See *Toland v. Futagi*, 40 A.3d 1051, 1065-66 (Md. 2012) (declining to exercise jurisdiction over an interstate child custody dispute when a Japanese court also declined jurisdiction over the dispute since the child had been settled in Japan).

11. *Id.* at 1051.

12. See *Savoie v. Martin*, 673 F.3d 488 (6th Cir. 2012) (declining declaratory and injunctive relief to the plaintiff parent when the defendant judge lifted the injunction that was preventing the abducting parent from taking the children to Japan). See generally Charlie Reed, *Overseas Custody Rights: American Parents Struggle to Reunite with Children in Japan*, STARS AND STRIPES: PACIFIC EDITION (Aug. 4, 2009), <https://www.stripes.com/news/overseas-custody-rights-american-parents-struggle-to-reunite-with-children-in-japan-1.93766#.WLKkDBIrLeQ> (last visited Feb. 25, 2017) (reporting as one of the official news agencies of the Department of Defense and explaining the custody issues military families face in Japan).

13. See *Savoie*, 673 F.3d at 496 (recognizing the U.S. custody arrangement that was in place prior to the abduction); *Toland*, 40 A.3d at 1051 (conceding that the American father was the only living parent). The Japanese and American courts adjudicated the *Savoie* and *Toland* cases prior to Japan's ratification of the Hague Convention in 2014. Both *Savoie* and *Toland* led the international campaign pressuring Japan to ratify the Hague Convention. See Paul Toland, Statement

Japan's Family Registry Act, Civil and Criminal Codes with respect to family law, and Implementation Act should be amended to better protect Japanese-American children of American military members and to comply with the Hague Convention, especially with respect to the Article 13 "grave risk" and "consent" provisions.¹⁴ The Japanese Family Register Act,¹⁵ Civil and Criminal Code regarding family law,¹⁶ and Implementation Act¹⁷ fail to protect abandoned parents and kidnapped children, especially as experienced by American military members.

Part II of this Comment provides the historical and legal background giving rise to this problem, the modern legal context in which this problem exists, and the applicable international law against which Japanese legal culture clashes.¹⁸ Part III of this Comment analyzes how Japan's Family Register Act, Civil and Criminal Code in family law, and Implementation Act violate the Hague Convention.¹⁹ Part IV of this Comment provides recommendations to amend Japanese law and utilize international pressure so that Japan fulfills its obligations under the Hague Convention.²⁰ Part V of this Comment briefly concludes that Japan fails to comply with its obligations under the Hague Convention.²¹

II. BACKGROUND

A. JAPANESE FAMILY REGISTRY SYSTEM, STATUS OF FORCES AGREEMENT, AND CONSTITUTION

The historical development of Japanese Law with respect to

before the United States House of Representatives Tom Lantos Human Rights Commission (Dec. 2, 2009), <http://www.bachome.org/news/category/testifying> (urging the Commission to increase pressure on Japan to sign on to the Hague Convention); Jeff Sagnip, *Smith, Moran Offer Bipartisan Resolution on Abducted U.S. Children in Japan*, U.S. CONGRESSMAN CHRIS SMITH (May 5, 2010), <http://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=184357> (condemning Japan for failing to sign on to the Hague Convention).

14. Hague Convention, *supra* note 1, at 101, art. 13.

15. Koseki [Family Register Act].

16. CIVIL C. art. 725-1044; PENAL C. art. 224.

17. Implementation Act, Act No. 48 of 2013, art. 4(1).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

international parental abduction begins with the Family Registry System.²² This section discusses the origin and modern implications of the Family Registry System, U.S.-Japan Status of Forces Agreement, and Japanese Constitution.

The Japanese government traditionally structured society by giving the head of the household authority to represent every individual member over several generations.²³ This deeply held tradition prioritizes the group over the individual and continues to influence Japanese legal culture.²⁴ Remnants of the traditional system exist in the modern Family Registry System that lists registration of families up to two generations.²⁵ Thus, the importance of the group rather than the individual remains the basis for Japanese family law.²⁶

The modern implications of the Family Registry System provide the bedrock to Japanese family law. When a Japanese citizen registers a significant life event, such as a birth, divorce, or adoption, the registration itself legally recognizes the event.²⁷ However, this system also maintains some nationalistic aspects of the pre-war

22. Koseki [Family Register Act].

23. Jones, 1+1=1, *supra* note 8, at 5-6. See generally Hisaya Nonoyama, *The Family and Family Sociology in Japan*, 31 AM. SOCIOLOGIST 27, 27-28 (2000) (exploring the Japanese family as an institution from its inception during the Meiji government to its evolution after World War II).

24. See Colin P. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan*, 174 ASIAN-PAC. L. & POL'Y J. 166, 202 (2007) [hereinafter Jones, *In the Best Interests of the Court*] (stating that the recordings in the household registry are a core source of identity to Japanese people and sets forth their relationships with parents, spouses, and children); Jones, 1+1=1, *supra* note 8, at 8 (clarifying that the occupying American force wanted an individual system while the occupied Japanese government wanted the traditional household based system).

25. Jones, 1+1=1, *supra* note 8, at 8.

26. See Koseki [Family Register Act], art. 9 (stating that the person at the head of the register remains so, even after his or her name is removed from the register); Kristy Horvath & Margaret Ryznar, *Protecting the Parent-Child Relationship*, 47 GEO. WASH. INT'L L. REV. 303, 316-17 (2015) (describing the family registry system as the "core source of identity for people in Japan" since it records "births, marriages, and legal custody of children after divorce").

27. Colin P. Jones, *Japan's Koseki System: Dull, Uncaring But Terribly Efficient*, JAPAN TIMES (June 22, 2016), <http://www.japantimes.co.jp/community/2016/06/22/issues/japans-koseki-system-dull-uncaring-terribly-efficient/> (last visited Feb. 25, 2017).

family registry, which only recognized Japanese citizens.²⁸ For example, non-Japanese spouses still cannot establish their own family name in the registry.²⁹ Instead, non-Japanese spouse's names are noted in the margins of the registry beside their Japanese spouse's family name.³⁰ Since Japan is a civil law system that does not rely as heavily on the judiciary as common law systems do, the family registry is the center of domestic relations in Japan before disputes reach the courts.³¹

Japanese law prefers that divorcing parties privately agree on visitation rights.³² This stems from a Japanese legal culture that values routine and stability over having both parents in the life of the child.³³ In 2017, the Tokyo High Court ruled that a father's visitation of 100 days out of the year would burden the child³⁴ and that simply

28. Colin P.A. Jones, *Japan's Discriminatory Koseki Registry System Looks Ever More Outdated*, JAPAN TIMES (July 10, 2016), <http://www.japantimes.co.jp/community/2016/07/10/issues/japans-discriminatory-koseki-registry-system-looks-ever-outdated/#.WJicTLYrKT8> (stating that the pre-war Koseki did not allow non-Japanese citizens to become part of the registry or forced them to become Japanese to enter the Koseki).

29. Koseki [Family Register Act], art. 16(3) (asserting that when a Japanese national and foreigner marry the new registry will be created for the Japanese national). See generally CIVIL C. art. 739 (declaring that marriages do not take effect until they are registered with the Family Registry).

30. Jones, *Japan's Discriminatory Koseki Registry System Looks Ever More Outdated*, *supra* note 28; see Koseki [Family Register Act], art. 16(3) (stating that a registry entry is for Japanese nationals only).

31. See CIVIL C. arts. 739, 791 (mandating most family law matters be registered in the Koseki before they take effect); Linda D. Elrod, *Japan Joins Hague Abduction Convention: England Returns Child*, 48 FAM. L.Q. 351, 352 (2014) (giving context as to why Japan's unique family law structure delayed Japan's adoption of the Hague Convention); Toshiaki Iimura et al., Commentary, *The Binding Nature of Court Decisions in Japan's Civil Law System*, CHINA GUIDING CASES PROJECT (2015) (describing the role of case law in the Japanese civil law system).

32. Horvath & Ryznar, *supra* note 26, at 317 (explaining that divorcing parents may agree to a visitation arrangement but clarifying that such a possibility only came about in 2011 through amendment of the Japanese Civil Code).

33. See Kyodo News, *'Good Parent' Ditched in Custody Case Reversal*, JAPAN TIMES (Jan. 27, 2017), <http://www.japantimes.co.jp/news/2017/01/27/national/crime-legal/reversal-high-court-ditches-good-parent-rule-granted-dad-custody-daughter/#.WJfrRrYrKT-> (last visited Feb. 26, 2017) (reporting on a case that awarded a mother custody because she took the daughter away first and planned to allow the father to visit only once a month).

34. *Id.*

seeing the parent is not necessarily healthier for the child's development.³⁵ This case demonstrates how Japanese courts reflect the broader culture which values privacy and peaceful resolutions of domestic relations over litigation.³⁶

The U.S.-Japan Status of Forces Agreement (SOFA)³⁷ is another important aspect of Japanese law. Under the SOFA, American service members have certain rights within Japanese and U.S. military relations.³⁸ Service members may engage with the Japanese family law system as well as the American family law system. This is an important choice for American service members starting families with Japanese nationals.³⁹

Japan's Constitution appears to provide a compatible legal culture for courts to comply with international law.⁴⁰ The Constitution affords protections to individuals within domestic relations. For example, the preamble provides for all people's equal treatment

35. *Id.*

36. *See generally* ROBERT M. MURCH, *THE JAPANESE NEGOTIATOR: SUBTLETY AND STRATEGY BEYOND WESTERN LOGIC* (1988) (studying Japan's culture of peaceful resolutions as demonstrated through its successful business culture).

37. Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Japan-U.S., June 23, 1960, Ministry of Foreign Affairs [hereinafter SOFA].

38. When service members arrive for duty in Japan, they receive training on these rights. Joshua M. Austin, *Untangling Myths on Options for Divorce in Japan*, 18th WING JUDGE ADVOCATE (Mar. 26, 2015), <http://www.kadena.af.mil/News/Features/Display/Article/770996/untangling-myths-on-options-for-divorce-in-japan>; *Family Law*, MARINE CORPS BASE CAMP SMEDLEY D. BUTLER, <http://www.mcbbutler.marines.mil/Base-Information/Legal-Assistance/Family-Law/> (last visited Feb. 6, 2017) (explaining that U.S. courts will not always recognize divorces on Japanese soil); Mark E. Sullivan, *Overseas Divorce Issues – Far East*, LEGAL ASSISTANCE FOR MILITARY PERSONNEL (Jan. 24, 2008), <http://www.nclamp.gov/publications/the-legal-eagle/overseas-divorce-issues-far-east/> (last visited Feb. 26, 2017) (detailing the issues involved in getting custody of children of divorce in Japan before the country signed the Hague Convention).

39. *See* Austin, *supra* note 38 (explaining the differences in how support and custody decisions are made in Japan and the United States); *cf.* Chiyomi Sumida, *Child Abduction Treaty to Take Effect in Japan*, STARS AND STRIPES (March 31, 2014), <http://www.stripes.com/news/child-abduction-treaty-to-take-effect-in-japan-1.275440> (last visited Feb. 25, 2017) (highlighting the amount of children taken to Japan and not returned to parents before the Hague Convention was signed).

40. *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], preamble, paras. 2-3 (Japan).

under the law⁴¹ and purports to abolish discrimination in Article 14(1).⁴² Indeed, Japan's Constitution establishes the equal rights of husband and wife in marriage⁴³ and the rights of the individual in divorce.⁴⁴

B. JAPANESE CIVIL AND CRIMINAL CODES

Japanese family law is founded in part on the Civil Code⁴⁵ and Criminal Code.⁴⁶ This section discusses the Civil Code's provisions on marriage,⁴⁷ divorce,⁴⁸ and custody,⁴⁹ as well as the Criminal Code's provision on kidnapping.⁵⁰

i. Marriage

Japanese Civil Code Article 818(3) states that "parental authority shall be exercised jointly by married parents."⁵¹ This joint custody is only available to married parents since divorce proceedings only provide for one parent to maintain parental authority.⁵² Japanese Civil Code Article 766(3) states that "[f]amily court may change the agreement or determination under the provisions of the preceding two paragraphs and order any other proper disposition regarding

41. *Id.* ("We recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations.")

42. *Id.* art. 14(1), paras. 2-3 ("All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin.")

43. *Id.* art. 24, para. 1 ("Marriage shall be based sole on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.")

44. *Id.* art. 24, para. 2 ("With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.")

45. CIVIL C. Part IV & Part V (Family Law).

46. PENAL C. art. 224.

47. CIVIL C. art. 818(3).

48. *Id.* art. 766(3).

49. *Id.* arts. 820-24.

50. PENAL C. art. 224.

51. CIVIL C. art. 818(3).

52. *See id.* art. 819 (recognizing that the court will determine "which parent" will retain parental authority).

custody over the child, if it finds this necessary.”⁵³ There are three types of divorce that are generally attempted in the following order as prescribed by the courts: (1) mutual agreement in a ward office; (2) conciliation proceeding by a family court; and (3) decision by a family court or, if that fails, a judgment by a district court.⁵⁴

ii. Ward Office Divorce

Potential problems arise when the Japanese spouse affects a ward office divorce without the American spouse’s informed consent. For example, a Japanese spouse may fraudulently elicit the American spouse’s signature if he or she cannot understand Japanese.⁵⁵ In order to protect American military families who encounter the Japanese family law system, American military families receive training on their divorce options in Japan.⁵⁶ The ward office divorce is available for American couples without children, or a Japanese-American couple, but only so long as all issues are agreed upon.⁵⁷ Since it is not available for two Americans with children, American military members encounter the ward office divorce uniquely in mixed Japanese-American military families.⁵⁸

iii. Divorce through Conciliation

When a mutual agreement at the ward office fails, the next available type of divorce is conciliation by a family court.⁵⁹ This option is more impactful than arbitration or mediation because the resulting settlement is as final as a legally binding judgment.⁶⁰ The conciliation process serves as the necessary first step for domestic

53. *Id.* art. 766(3).

54. Austin, *supra* note 38.

55. *See, e.g.*, Stark, *supra* note 1, at 780-81 (using *Savoie v. Martin* as an example to show that this ward office divorce fraud may be less common for international spouses who speak and read Japanese).

56. *See* Austin, *supra* note 38 (noting that Japanese divorce law greatly differs from American divorce law and is complicated by factors including whether the married couple has children, which nationality each spouse holds, and whether the couple is able to mutually agree to the terms of the divorce).

57. *Id.*

58. *Id.*

59. *Id.*

60. SUPREME COURT OF JAPAN, GUIDE TO THE FAMILY COURT OF JAPAN 11 (2015).

disputes because Japanese norms require privacy in domestic relations.⁶¹ Japan's highest court, the Supreme Court, published a guidance on family courts explaining that some individuals who serve as judges are actually lawyers who work part-time in domestic relations conciliation cases.⁶² This reveals the quasi-judicial nature of conciliation proceedings.

iv. Divorce Through Family Court and District Court

When conciliation fails, the next step is a family court decision.⁶³ Only when a family court order fails will the district court issue a judgment.⁶⁴ Family court decisions are not enforceable apart from a levy of monetary fines.⁶⁵

There are no 'party name v. party name' titles for ongoing family law cases as in the U.S. system because most family law disputes go through the conciliation system first, which aims to be non-adversarial.⁶⁶ Further, Japanese family law cases that reach the adversarial judicial system are private with only a select few published.⁶⁷ Thus, ongoing family law cases are sourced through

61. See Yoko Konno, Comment, *A Haven for International Child Abduction: Will The Hague Convention Shape Japanese Family Law?*, 46 CAL. W. INT'L L.J. 39, 51 (2015) (citing Roger Pulvers, *Colorful Proverbs Capture a Peculiar Sensibility*, JAPAN TIMES (June 26, 2006) <http://www.japantimes.co.jp/life/2006/06/27/language/colorful-proverbs-capture-a-peculiar-sensibility/#>. WLNmWBIrLeR) ("A well-known Japanese proverb illustrates this cultural norm: '[N]ot even a dog wants to bother with domestic disputes because they are tedious and shameful.'").

62. See SUPREME COURT OF JAPAN, *supra* note 60, at 8-13 (publishing a guidance on family courts and emphasizing family court judges' legal expertise without mentioning whether judges in family court have any specific expertise in family law).

63. Austin, *supra* note 38.

64. *Id.*

65. Telephone Interview with Paul Toland, USN, Co-Founder & National Director, Bring Abducted Children Home (Feb. 10, 2017).

66. See E-mail from Colin P.A. Jones, Professor, Doshisha Law Sch., to author (Feb. 24, 2017) (on file with author) ("Family court judgments are not public so you are reliant on whatever cases either the court or a lawyer decides to publish—often in abbreviated annotated format. Japan is not a case law system... particularly in the area of family law and many court decrees are essentially administrative dispositions made by the court in lieu of clear governing law.").

67. Since most of Japanese family law takes place through the conciliation system and almost all family law cases are private, ongoing family law cases are sourced through news reports. See *id.*

news reports without party names.

An ongoing Tokyo case⁶⁸ demonstrates that such monetary fines do not result in the return of the child when the kidnapping parent simply continues paying the fine.⁶⁹ The Tokyo High Court accepted the Tokyo Family Court's reasoning that the father would not comply with a December 2015 order to allow the mother to visit the child monthly.⁷⁰ Thus, when the father refused to comply with the visitation orders, the mother asked the Family Court to order "indirect compulsory execution" to compel the father's compliance, the Family Court granted the order and issued a fine of one million yen.⁷¹

This fine of one million yen may signal a change in the Japanese court system's view of divorce, custody, parental kidnapping, and families in general. Though indirect compulsory execution orders are common, they usually amount to 50,000 yen or 100,000 yen per refusal.⁷² Further, parents commonly pay the fines to continue preventing visitation.⁷³ In this case, the Tokyo Family Court seemed to place a higher value on visitation rights as indicated by the unusually high and financially prohibitive fine. Since the father plans to appeal the fine to the Tokyo High Court,⁷⁴ a decision upholding the fine may move Japanese legal culture one step closer to recognizing the value of both parents' presence in a child's life.

v. Custody

The relationship between the parents affects the default custody arrangement. For example, a mother has automatic parental

68. *Husband Ordered to Pay Wife 1 Mil. Yen Each Time He Refuses Child Visitation Rights*, MAINICHI, <http://mainichi.jp/english/articles/20170121/p2a/00m/0na/018000c> (last visited Feb. 6, 2017).

69. See *Husband Ordered to Pay Wife 1 Mil. Yen Each Time He Refuses Child Visitation Rights*, *supra* note 68 (explaining that only after the Tokyo Family Court imposed a fee of one million yen for each refusal of visitation did the father of a 7-year-old girl permit his estranged wife to see their daughter for the first time in five years).

70. *Id.*

71. *Id.* (specifying that the amount of one million yen per refusal was based on the father's income and other factors).

72. *Id.*

73. *Id.*

74. *Id.*

authority in custody determinations between unmarried parents unless the parents have a different agreement or the court orders that the father has parental authority.⁷⁵ The court orders which parent has parental authority, granting custody determinations between divorced parents to only one of the parents.⁷⁶

The term “parental authority” originates from the Japanese Civil Code Authority Articles 820, 821, and 824. “Parental authority” is defined as the “duty to care for and educate the child,”⁷⁷ the “right to determine the child’s residence,”⁷⁸ and the “right to administer the child’s property.”⁷⁹ Since Japanese culture largely adheres to traditional gender norms, mothers usually retain custody of children while fathers often decide not to pursue custody of the children.⁸⁰

Japan’s Civil Code allows for a unilateral divorce, outlined in Article 770, in five scenarios: (1) infidelity, (2) malicious desertion, (3) uncertainty whether or not the spouse is dead or alive for three years or more, (4) serious mental disease without hope of recovery, or (5) a “grave reason” which makes continuing the marriage impossible.⁸¹ These provisions present an especially difficult legal position for American service members who are unaware that their spouses could unilaterally terminate the marriage and leave with the children.

75. Austin, *supra* note 38 (“In Japan, the general practice is to award custody to the mother unless there is an overriding reason to award custody to the father.”).

76. CIVIL C. art. 819, para. 2 (“In the case of judicial divorce, the court shall determine *which parent* shall have parental authority.” (emphasis added)). Since 2011, an amendment has allowed amicable couples to determine custody and visitation issues without entering the judicial system. *Id.* art. 819, para. 1 (“If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child.”); *see also* Horvath & Ryzner, *supra* note 32, at 315-19 (evaluating Japan’s legal framework with respect to joint custody and visitation rights).

77. CIVIL C. art. 820.

78. *Id.* art. 821.

79. *Id.* art. 824.

80. *See* Stark, *supra* note 1, at 773 (explaining that the father often accepts minimal visitation privileges in order to avoid potential unpleasant confrontations and an additional burden on the child); 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. 564, 571 (Matthew J. McCauley trans., 2011) (noting that courts often restrict visitations in cases of deep animosity between the mother and the father because of the damaging effect of the forced visitations on the child).

81. CIVIL C. art. 770.

Provisions of the Civil Code also highlight the ways in which Japanese legal structures view the differing roles and rights of men and women in the family. Japanese Civil Code Article 731 sets the marriageable age at 18 for men and at 16 for women⁸² while Article 733 prevents divorced women from remarrying until 100 days after the divorce.⁸³ Only non-pregnant divorced women may marry immediately after divorce.⁸⁴

vi. Criminal Parental Abduction

The Criminal Code contains another important aspect of international parental kidnapping.⁸⁵ Japanese Penal Code Article 224 states the punishment for “abduction of a minor” as “a person who kidnaps a minor by force or enticement shall be punished by imprisonment with work for not less than 3 months but not more than 7 years.”⁸⁶ This vague phrasing allows “parental abduction” to be both a criminal and non-criminal act.⁸⁷

A court may find a father criminally liable for an action, but not find a mother equally liable for the same action.⁸⁸ For example, the Kobe District Court concluded that a child is not illegally restrained under the Habeas Corpus Act⁸⁹ when the child “is happy in the

82. *Id.* art. 731.

83. *Id.* art. 733 (recently amended to shorten the original six month waiting period).

84. *Contra id.* art. 733 (stipulating the mandatory six months waiting period for divorced women before remarriage); Global Legal Monitor, *Japan: New Instructions Allow Women to Remarry 100 Days after Divorce*, LIBRARY OF CONGRESS (Feb. 26, 2016), <http://www.loc.gov/law/foreign-news/article/japan-new-instructions-allow-women-to-remarry-100-days-after-divorce/> (last visited Feb. 25, 2017).

85. PENAL C. art. 224, para. 1.

86. *Id.*

87. Colin P.A. Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, US EMBASSY JAPAN OFFICIAL MAGAZINE (Feb. 1, 2012), <https://amview.japan.usembassy.gov/en/divorce-law-in-japan/>.

88. *Compare* Saikō Saibansho [Sup. Ct.] Oct. 19, 1993, 1993 (O) 609, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 10, http://www.courts.go.jp/app/hanrei_en/detail?id=1429 (Japan) (finding no criminal activity since remaining with the kidnapping mother was not detrimental to the children), *with* Saikō Saibansho [Sup. Ct.] Dec. 6, 2005, 2004 (A) 2199, 47 SAIKŌ SAIBANSHO KEISHŪ [KEISHŪ] 1, 10 (Japan) (finding criminal activity when a father used force to remove infant children from the mother).

89. JINSHIN HOGO HŌ [Habeas Corpus Act], Law No. 199 of 1948, art. 1

current situation in which he or she is being reared” even if a mother used violence to take an infant child from the father’s hands.⁹⁰

By contrast, in *Savoie*, the Japanese courts ruled that a father who took his children off the street was committing a crime.⁹¹ However, a mother who takes her children on the train or a plane to live with her parents or refuses to return to the United States from Japan is not considered a criminal under Japanese law.⁹² This discrepancy seems to stem from a cultural devotion to public order and a reluctance to get involved in ‘civil disputes.’⁹³

C. THE HAGUE CONVENTION AND IMPLEMENTATION ACT

The key international treaty in international parental kidnapping is the Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction (Hague Convention) that aims “to secure the prompt return of children wrongfully removed to or retained in any Contracting State.”⁹⁴ Under the Hague Convention, a claim may be brought to return a child younger than sixteen years old who was wrongfully removed from his or her place of “habitual[] residenc[e].”⁹⁵ Japan implemented the Hague Convention through The Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (Implementation Act).⁹⁶ Article 21 of

(Japan) (restating the Constitutional rights of illegally detained persons in Japan to recover their freedom in a “prompt and easy manner”).

90. 1993 (O) no. 609, 47 MINSHŪ 10 (reasoning that the abandoned father failed to show that granting custody to the kidnapping mother was more detrimental to the child and thereby failed to establish a habeas corpus request).

91. See Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, *supra* note 87.

92. *Id.*

93. See SUPREME COURT OF JAPAN, *supra* note 60, at 11 (offering statistics that show increased adjudication of domestic relations cases and encouraging efforts to combat this trend by “strengthen[ing] the conciliation proceedings”); Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, *supra* note 87 (explaining that since Japanese culture values privacy of the home, Japanese courts prefer to exhaust the non-judicial conciliation process in which parties arrive at their own agreement in lieu of a court order).

94. Hague Convention, *supra* note 1, at 98, art. 1.

95. *Id.* at 99, art. 4.

96. Implementation Act, art. 26 (“A person whose rights of custody with respect to a child are breached due to removal to or retention in Japan may file a petition against the person who takes care of the child with a Family Court to seek

the Hague Convention protects the parent's right of access to his or her child.⁹⁷ Articles 3 and 5 describe custody rights while Article 13 outlines the exceptions to a return order, which include consent, acquiescence, grave risk of harm, and the child's objection.⁹⁸ Under Article 13, a court may deny returning a child if he or she objects to the return when he or she is of an age and maturity that allows the court to consider his or her views.⁹⁹

The role of international law in Japan is key to international parental kidnapping law. The legal hierarchy in Japan is as follows, from highest to lowest: Constitution, International Law, Statutes, Regulations, Agencies, and Local Laws.¹⁰⁰ Generally, Japan follows international law at the discretion of the judiciary.¹⁰¹ As such, Japanese courts follow international law to different degrees depending on the particular treaty and whether the treaty has been ratified by Japan.¹⁰² Judges play a major role in adopting international law principles and conforming these principles into norms within the Japanese legal culture.¹⁰³ Although Japanese courts have not always willingly applied international treaty obligations similarly to domestic laws, Japanese courts have begun doing so today, especially towards "children, women, . . . and foreigners."¹⁰⁴

By signing and ratifying the Hague Convention, Japan agreed to cooperate with other signatories to "secure the voluntary return of the child or to bring about an amicable resolution of the issues."¹⁰⁵ The Implementation Act, however, provides an exception to issuing return orders when certain circumstances exist.¹⁰⁶ Under Article 28,

an order to return the child to the state of habitual residence pursuant to the provisions of this Act.").

97. Hague Convention, *supra* note 1, at 102, art. 21.

98. *Id.* at 98-101, arts. 3, 5, 13.

99. *Id.* at 101, art. 13.

100. *Cf.* Timothy Webster, *International Human Rights Law in Japan: The View at Thirty*, 23 COLUM. J. OF ASIAN L. 242, 244 (2010) (debating the legal force of international law in Japan).

101. *Id.* at 243.

102. *See id.* at 242.

103. *Id.* at 243 ("Explicitly or implicitly, the political branches have essentially entrusted judges with importing international law into Japan.").

104. Kanami Ishibashi, *Implementation of International Law in Japanese Courts*, 3 KOREAN J. OF INT'L AND COMP. L. 139 (2015).

105. Hague Convention, *supra* note 1, at 99, art. 7(c).

106. Implementation Act, art. 28 (prohibiting return orders in certain

a Japanese court will not issue a return order if it finds: (1) the abandoned parent consented to the removal; (2) returning the child would present a “grave risk;” (3) the child objects to the return; or (4) the return would contradict human rights principles.¹⁰⁷ Thus, the Implementation Act provides considerable discretion to judges who fail to abide by the Hague Convention principles. Indeed, the Hague Convention may not help many families seeking their Japanese-American children since the treaty is not retroactive.¹⁰⁸

III. ANALYSIS

A. THE FAMILY REGISTER ACT ARTICLE 76 AND APPLICATION OF THE CONCILIATION SYSTEM VIOLATE THE HAGUE CONVENTION ARTICLES 8, 11, AND 21

Japan fails to comply with the Hague Convention in part because of its unique Family Registry System. This section discusses how the Family Registry System fails to provide for joint custody upon divorce, that it has a preference for custody determinations outside of the judicial system, and that substantial advantage is given to Japanese parents over non-Japanese parents in custody disputes, all in violation of the Hague Convention.

The Family Registry System only allows joint custody for married couples as a child may only be registered under one family name.¹⁰⁹ Because this system is a remnant of the traditional societal

circumstances, such as “prior consent,” “grave risk,” “child’s objection,” and violation of Japanese principles of human rights).

107. *Id.*

108. Sumida, *supra* note 39 (“The treaty will not be applied to the cases to return children who have been already in Japan after being removed from their original residence.”). See generally *Parental Kidnapping Treaty in Effect for Japan*, BLACK TOKYO (April 1, 2014) <http://www.blacktokyo.com/2014/04/01/parental-kidnapping-treaty-in-effect-for-japan/comment-page-1/#comment-4882> (last visited Feb. 6, 2017) (introducing the non-Japanese community of Japan’s perspective on ways in which the Hague Convention might be applied in Japan).

109. See Family Register Act art. 76 (“Persons who wish to divorce shall submit . . . the name of *the* party who will have parental authority, and the name child(ren) who will be subject to *that* party.” (emphasis added)); see also CIVIL C. art. 818, para. 1, no. 1 (“Parental authority shall be exercised jointly by *married* parents.” (emphasis added)).

organization of Japan,¹¹⁰ it fails to consider contemporary family constructions in which divorced couples continue to co-parent shared children. The Family Registration law reflects Japanese tradition which favors the family unit over the individual.¹¹¹ The child's required appearance under one parent's registry¹¹² and singular custody upon divorce¹¹³ makes joint custody inflexible and unusual. Because of this lack of joint custody, Japanese courts allow one parent to maintain all rights regarding the child to the exclusion of the other parent. As a result, Japanese courts do not recognize the abandoned parent's rights to access his or her child, as provided for under Article 21 of the Hague Convention.¹¹⁴

As such, Article 76 fails to provide legal rights to the parent who loses parental authority in the Family Registry System.¹¹⁵ Thus, in international parental kidnapping cases, Japan avoids the "wrongful removal" element of Article 3 of the Hague Convention when the kidnapping parent retains the child on his or her family registry.¹¹⁶ Because a wrongful removal is a "breach of rights of custody"¹¹⁷ while those rights were actually exercised "at the time of removal,"¹¹⁸ a Japanese parent with sole custody may withhold a child from the non-custodial parent without entering the scope of the Hague Convention.¹¹⁹

Preference for custody determinations outside of the judicial

110. See *supra* Part II.A.

111. See Family Register Act art. 9 (stating that the person at the head of the register remains so even after his or her name is removed from the register).

112. This determination is akin to a legal custody determination. For example, only the parent with parental authority may register the child for school. CIVIL C. art. 820; Family Register Act arts. 76 to 77-2 (stating that divorcing parties must enter the name of the parent who will have parental authority).

113. CIVIL C. art. 819 ; see also Stark, *supra* note 1, at 772 (discussing rare instances in which divorced parents agree to some form of joint custody outside of the legal determination of custody).

114. See Hague Convention, *supra* note 1, at 102, art. 21.

115. Horvath & Ryznar, *supra* note 26, at 318-19 (asserting that a loss of parental authority upon divorce hinders further development of the parent-child relationship).

116. See Hague Convention, *supra* note 1, at 98, art. 3.

117. *Id.* art. 3(b).

118. *Id.*

119. See *id.*; see also *id.* at 100, art. 8 (outlining the process to request a return order that begins with a claim that "a child has been removed or retained in breach of custody rights").

system fails to comply with the Hague Convention. Japanese judges overwhelmingly rule to maintain the status quo of whichever parent has physical control of the child, which rewards the parent who abducts the child first.¹²⁰ The conciliation system is the first step in the family court process because Japanese culture seeks resolution of domestic disputes by avoiding open litigation.¹²¹ The Supreme Court's guidance on family law describes immediate litigation of domestic matters as "not desirable" and strongly prefers a system that maintains domestic peace by resolving "matter[s] amicably and voluntarily in mutual concession."¹²²

Because the Japanese legal system eschews litigation proceedings in domestic relations cases, the Japanese court system does not hear Hague Convention actions on international parental abduction.¹²³ As of 2015, the Japanese government had not returned any of the approximately 400 American children abducted since 1994.¹²⁴ Further, Japanese law enforcement does not enforce family law orders because they are typically administrative dispositions that do not provide the authority for Japanese law enforcement to execute such orders.¹²⁵ The combination of these gaps in judicial jurisdiction and law enforcement allow Japan to violate Article 11 of the Hague

120. Telephone Interview with Paul Toland, *supra* note 65; see SUPREME COURT OF JAPAN, *supra* note 60, at 11 (explaining the 'conciliation-first principle' as a necessary part of family court since it promotes maintenance of domestic peace among relatives). *Contra* E-mail from Andrew Ellis, Country Officer, U.S. State Department, to author (Feb. 27, 2017) (on file with author) (emphasizing that Japanese courts do issue return orders but lack the enforcement mechanism to execute those orders).

121. See SUPREME COURT OF JAPAN, *supra* note 60, at 11; Stark, *supra* note 1, at 771 n.78 (citing Noriko Mizuno, *Sex Discrimination in Japanese Family Law*, in *FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES* 155, 158 (Barbara Stark ed., 1992)) (explaining that the Japanese family law reflects a Japanese culture that believes disputes should be "resolved through mutual consultation").

122. SUPREME COURT OF JAPAN, *supra* note 60, at 11.

123. *The Goldman Act to Return Abducted American Children: Ensuring Administrative Action: Hearing Before the Subcomm. on Africa, Global Health, Global Human Rights, and International Organizations of the Comm. on Foreign Affairs House of Representatives*, 114th Cong. 44 (2015) [hereinafter *Goldman Act: Ensuring Administrative Action*] (statement of Captain Paul Toland, USN, Co-Founder & National Director, Bring Abducted Children Home).

124. *Id.* at 43 (statement of Captain Paul Toland, USN, Co-Founder & National Director, Bring Abducted Children Home).

125. Telephone Interview with Paul Toland, *supra* note 65; see E-mail from Colin P.A. Jones, *supra* note 120.

Convention that requires enforcement of return orders and Article 21 that protects a parent's right to access his or her child.¹²⁶

Japanese legal culture gives substantial advantage to a Japanese parent in international parental kidnapping cases, especially as experienced by American military members,¹²⁷ thereby weakening the non-Japanese parent's rights under the Hague Convention to receive a return order for the wrongfully abducted child.¹²⁸ A petitioner initiates a domestic relations case by filing the relevant forms to the court with jurisdiction.¹²⁹

Because American service members often live with their Japanese spouses and children in Japan,¹³⁰ a ward office divorce is one way the Japanese parent could affect a divorce and a custody award to the disadvantage of the non-Japanese parent. There is no equivalent in American law for a ward office divorce because of America's different legal traditions.¹³¹ The non-Japanese parent likely fails to understand the Japanese custody process, making it possible for a Japanese parent to rely on this unique procedural, rather than judicial, system to keep full custody of the child without the non-Japanese parent's knowledge.¹³² The non-Japanese parent often lacks the knowledge, including language ability, to effectively navigate the family registry system. Thus, by the time the non-Japanese parent becomes an abandoned parent, he or she enters the Japanese judicial

126. See Hague Convention, *supra* note 1, at 100, 102, arts. 11, 21.

127. See, e.g., *Savoie*, 673 F.3d at 490 (mentioning the risk of losing children to the Japanese legal system that the lower court recognized); *Toland*, 40 A.3d at 1066 (deferring to the Japanese courts to resolve the custody dispute first). See generally Mallory Simon, *Dad in Japan Custody Battle Thought Wife Would Take Kids*, CNN (Oct. 2, 2009), http://edition.cnn.com/2009/WORLD/asiapcf/10/02/japan.savoie.custody.battle/index.html?eref=ib_us (describing Christopher Savoie's arrest and imprisonment in Japan when he attempted and failed to bring his children to the US Consulate to enforce his US custody order).

128. See SUPREME COURT OF JAPAN, *supra* note 60, at 15 (outlining the way a petitioner initiates a domestic relations case using forms only available in Japanese).

129. *Id.*

130. Cf. Telephone Interview with Paul Toland, *supra* note 65 (suggesting the Department of Defense does not yet have a tracking system with statistics on how many Japanese-American military families are stationed in Japan that would enable data collection on parental abductions).

131. Austin, *supra* note 38.

132. See Jones, *Towards an "Asian" Child Abduction Treaty?*, *supra* note 1, at 8-9.

system and international judicial system at a substantial disadvantage. As mentioned above, a lack of custody under the Japanese Family Registry Act substantially limits the remedy an abandoned parent may receive under the Hague Convention.¹³³

B. CIVIL CODE ARTICLES 819, 820, 821, AND 824, AND
APPLICATION OF CRIMINAL CODE ARTICLE 224 VIOLATE THE
HAGUE CONVENTION ARTICLES 1, 2, 8, 13, AND 21

A culture clash exists between Japanese and Western ideas of parenthood and family that perpetuates Japan's noncompliance with the Hague Convention.¹³⁴ For example, some parts of the Japanese Civil Code contradict the equal rights granted by the Japanese Constitution. The marriageable age¹³⁵ and remarriage restrictions¹³⁶ in the Civil Code demonstrate different standards for men and for women.¹³⁷ These laws reflect the gender bias inherent to the Japanese family law system's many levels; these biases also permeate the custody determinations that allow Japanese courts to avoid compliance with the Hague Convention. This section discusses how the Civil Code's gender bias and lack of visitation rights violate the Hague Convention.

i. Mother Preference

The Japanese family law system heavily favors granting custody to mothers over fathers.¹³⁸ This is because the Japanese family law system is accustomed to mothers caring for children with little help

133. See Hague Convention, *supra* note 1, at 100, art. 8 (providing that a claim for a return order begins with a removal in "breach of custody rights").

134. This culture clash exists between the east and west generally as China faces similar custody and enforcement issues. See Reuters, *In China, Calls for End to Aggressive Child Custody Tactics*, JAPAN TIMES (Dec. 29, 2016), <http://www.japantimes.co.jp/news/2016/12/29/asia-pacific/social-issues-asia-pacific/china-calls-end-aggressive-child-custody-tactics/#.WOELRIrLeQ> (revealing that Chinese courts tend to grant custody to the parent who physically has the child and encourage parents to enforce court orders themselves).

135. CIVIL C. art. 731.

136. *Id.* art. 733 (recently amended to shorten the original six month waiting period).

137. See *supra* notes 79-81.

138. See CIVIL C. art. 819, para. 4 (mandating that "[a] father shall *only* exercise parental authority with regard to a child of his . . . if both parents agree that he shall have parental authority" (emphasis added)).

from the husband,¹³⁹ who often declines to request custody upon separation and divorce.¹⁴⁰ Because of this clash of cultures, the Japanese judiciary does not value the role of both parents in the life of the child, especially for divorced fathers. Thus, the courts continue violating Article 21 and contradicting the Hague Convention's aims when they interpret domestic laws in such a way that denies return orders to abandoned parents'.¹⁴¹

ii. Visitation laws violate Hague Convention Article 21

The Japanese family law system's concept of visitation rights conflict with the principles of the Hague Convention.¹⁴² In an ongoing Tokyo case, a Tokyo High Court returned a child to her mother by disregarding the "good parent" rule, which grants custody to a parent more likely to allow visitation, and applied a "continuity principle" instead, reasoning that seeing the parent more often was not necessarily healthy for the child's development.¹⁴³ The court's ruling effectively rewarded the parent who kidnapped the child first¹⁴⁴ and conflicts with Article 21 of the Hague Convention,¹⁴⁵

139. See, e.g., Francesca Sforza, *The Man that Fights Japanese Law to See his Children Again: "My Wife Took them and the Judicial System Protects Her"*, LA STAMPA (Jan. 6, 2017), <https://www.kizuna-cpr.org/italian-case> (last visited Feb. 26, 2017) (highlighting an ongoing case in which a Japanese grandmother uses the reasoning that mothers can raise children without help from husbands as an argument against her abandoned son-in-law).

140. Stark, *supra* note 1, at 772-73 (explaining the various processes for determining custody of children in a divorce and asserting that, during a disputed custody battle, "fathers usually acquiesce to minimal visitation because they are worn down by the process"). See generally Tanase, *supra* note 80, at 564.

141. See Hague Convention, *supra* note 1, at 98, 102, arts. 1, 2, 21 (requiring states to ensure the "rights of access" and cooperation in returning abducted children to their parents).

142. See Tanase, *supra* note 80, at 573-75 (citing *Rikon, Mensetsu Kōshō Chōtei Jiken—Shinken no Mensetsu Kōshō wo Megutte 4-nen Arasotta jirei*, 259 KĒSU KENKYŪ 95-146 (1999)) (describing a case in which the examiner denied visitation rights to the noncustodial parent based on the "will of the child" and arguing that Japanese courts often mistake the "will of the child" for the "will of the custodial parent" to deny visitation).

143. Kyodo News, *supra* note 33 (criticizing the Tokyo High Court's decision to overturn a lower court's ruling to award custody to father based on the "good parent rule," and subsequently grant custody to the mother who kidnapped the child).

144. *Id.*

145. See Hague Convention, *supra* note 1, at 102, art. 21.

which is based on the principle that a parent has a right to access his or her child and that a child benefits from contact with both parents.

iii. Visitation laws violate Hague Convention Article 13

Japanese visitation laws do not comply with Article 13 of the Hague Convention, which requires a child's views should be taken into account with respect to a return order.¹⁴⁶ Japanese family law tends to restrict visitation rights to visits with intense supervision for short periods of time—an unnatural family environment that fails to elicit the child's trust in the abandoned parent.¹⁴⁷ Thus, a child may understandably refuse to return to the abandoned parent because no meaningful relationship can be maintained through these manufactured visitations. The kidnapping parent also exerts disproportionate influence over the child's perspective, potentially criticizing the abandoned parent without giving the abandoned parent the opportunity to repair the damage to his or her reputation in the eyes of the child.¹⁴⁸

Japanese visitation laws skew the power of the child's objection to return by stunting the bond between the abandoned parent and the child.¹⁴⁹ By failing to provide a viable framework in which a child may maintain relationships with both parents after divorce, Japan's Civil Code violates the Hague Convention principles that prioritize the child's interests.¹⁵⁰ Although Article 13 allows a court to deny a return order when a child objects to a return,¹⁵¹ Japan's prohibitively

146. *See id.* at 101, art. 13.

147. *Cf.* Horvath & Ryznar, *supra* note 26, at 317-19 (asserting that, despite changes to the Japanese Civil Code which allowed for some visitation rights to non-custodial parents, rights to visitation are not necessarily guaranteed in Japan).

148. *See Stark, supra* note 1, at 774 (criticizing Japanese custody determinations that ignore negative influences that custodial parents can have on the perceived "will of the child").

149. *Id.*

150. *See* Hague Convention, *supra* note 1, at 98 (Preamble) (proclaiming that signatory states are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody . . ."). *See generally* Suvendrini Kakuchi, *Foreign Spouses in Japan Seek Easier Child Custody Laws*, THE LAW OFFICE OF JEREMY D. MORLEY – INTERNATIONAL FAMILY LAW, www.international-divorce.com/japan_custody.htm (last visited Feb. 6, 2017) (asserting that there is a higher risk of domestic abuse because spouses are afraid to leave their abusers for fear of losing their children).

151. Hague Convention, *supra* note 1, at 101, art. 13 (conditioning that

strict visitation proceedings distort the purpose of this exception by removing the child's ability to object to the return free from the kidnapping parent's influential bias.

Japan's Criminal Code as applied to parental child abduction also fails to comply with the Hague Convention. Japanese legal culture fails to appreciate the notion that a parent can abduct his or her own child.¹⁵² In the Italian father case, both police and social services in Japan recognized that a mother kidnapping her children was unfortunate but maintained that the father did not have a legal remedy because it was neither criminal nor necessarily abusive for a mother to remove her children from their father.¹⁵³ The father in that case now argues that the 'court's decision simply awarded custody to the parent who took the children away first.¹⁵⁴ This is another example in which the particular legal culture in Japan poses a barrier to complying with the Hague Convention; specifically, it is an example in which Japan violates the Hague Convention's Article 21 rights of access by failing to allow a child to maintain a relationship with both parents.¹⁵⁵

Since the criminal code was not applied in this case, it shows that parental kidnapping in Japan is not consistently a criminal action.

contracting States are not required to return the child if the other person "consented" to the child's removal, if there is "grave risk" to the child, or if the child is above a certain age and "rejects to being returned;" the article mandates that "authorities shall take into account the information relating to the social background of the child").

152. See Jones, *Divorce and Child Custody Issues in the Japanese Legal System*, *supra* note 87 (affirming that "both the characterization of parental abduction as a non-crime and the arrest of some parents for criminal abduction can co-exist" in the Japanese legal system, yet Japanese authorities rarely recognize the latter).

153. Sforza, *supra* note 139 (telling the story of an Italian father who is fighting for custody of his children after his Japanese wife and her parents kidnapped the children).

154. *Id.*

155. See Hague Convention, *supra* note 1, at 102, art. 21 (obliging signatories to "promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject); E-mail from Jeffery Morehouse, *supra* note 4 (reporting that "[o]f the 40 pre-convention cases that filed an access application, only one of the BAC Home parents is reporting having some ongoing Skype access to his kidnapped child. Three reported to having 1-3 Skype sessions with their children before the kidnapping parent again cut off all access without recourse. The overwhelming majority have received nothing.").

Further, the court perpetuated the assumption that the mother is the correct parent to have custody, regardless of the father's wishes.¹⁵⁶ It also perpetuated a common cultural norm that a mixed child should choose to identify with his or her Japanese identity to the exclusion of his or her mixed identity.¹⁵⁷ The father recognized that he would be arguing his case from a disadvantaged legal position because the court would expect him to conform to stricter behavioral norms in court than might be expected from a Japanese parent.¹⁵⁸

In a 2004 case, the Court of the Second Instance in Sendai High Court ruled that a father's act of kidnapping his own child was not justified when there was "no special circumstance in which it was actually necessary for the father to commit such an act and the act was violent and coercive."¹⁵⁹ However, the dissenting Justice Takkii opined that kidnapping should not automatically be criminalized in such instances where the father's act derived from parental affection.¹⁶⁰

Justice Takkii's opinion suggests that Japanese legal culture remains divided as to the criminal nature of parental kidnapping in general. Although the court found parental kidnapping in that case, the majority opinion narrows the rule with qualifying language that contemplates "special circumstances" and elements that require violence and coercion.¹⁶¹ Further, the fact that the dissent's even narrower rule was offered at all goes to the pervasiveness of this opinion in the culture at large—that the parent's love for the child justifies parental kidnapping.¹⁶² Thus, the Japanese Criminal Code's inconsistent application violates Article 7 of the Hague Convention

156. Sforza, *supra* note 139 (referring to the Japanese grandmother's comments to the Italian father, "[w]hat's the problem if you don't see them for one or two years? I raised three kids without my husband").

157. *Id.* (highlighting the cultural preference for mixed children to remain in Japan using the Japanese grandmother's view that "[the children] are in Japan, why should the kids speak Italian").

158. *Id.* (positing that it would be useless for the Italian father to act angry in a Japanese court because of the cultural preference for keeping children of mixed-Japanese ethnicity in Japan).

159. Saikō Saibansho [Sup. Ct.] Dec. 6, 2005, 2004 (A) 2199, 59 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] no. 10, http://www.courts.go.jp/app/hanrei_en/detail?id=793 (Japan).

160. *Id.* (Takkii, J., dissenting).

161. *Id.*

162. *Id.* (Takkii, J., dissenting).

requiring judicial proceedings to return the child.¹⁶³

Under Article 7(f), Japan agrees “to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child.”¹⁶⁴ In the Italian father case, the broader legal culture, including the police and social services, acted with a view to obtaining a quiet resolution when it should have acted “with a view to obtaining the return of the child.”¹⁶⁵ Similarly, in the Sendai case, the court sets out a rule that criminalizes parental kidnapping only in the presence of violence and coercion.¹⁶⁶ Such an interpretation legitimizes the kind of parental kidnapping that occurred in the *Toland* and *Savoie* cases—one parent quietly traveling with the child outside of the other parent’s home jurisdiction and without the other parent’s consent.¹⁶⁷

C. IMPLEMENTATION ACT ARTICLES 2, 7, AND 28 ON ‘HABITUAL RESIDENCE,’ ‘RIGHTS OF CUSTODY,’ AND ‘GRAVE RISK’ VIOLATE THE HAGUE CONVENTION ARTICLES 1 AND 7 ON ‘RIGHTS OF ACCESS’ AND ‘PROMPT RETURN OF CHILDREN’

Japan’s Implementation Act insufficiently defines “habitual residence” and, as such, allows violations of the Hague Convention.¹⁶⁸ This section discusses how the Implementation Act’s

163. See Hague Convention, *supra* note 1, at 99, art. 7 (listing obligations to which Contracting States agree, including creating judicial and administrative mechanisms that will “achieve the . . . objects of this Convention”).

164. *Id.* at 99, art. 7(f).

165. *See id.*

166. 2004 (A) 2199, 59 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] no. 10.

167. *See Savoie v. Martin*, 673 F.3d 488 (6th Cir. 2012) (leaving the United States and traveling to Japan); *Toland v. Futagi*, 40 A.3d 1051, 1065-66 (Md. 2012) (leaving the United States jurisdiction of a United States military installation in Japan).

168. *See* Jeremy D. Morley, *Ineffective Access Rights in Japan Under Hague Abduction Convention*, THE LAW OFFICE OF JEREMY D. MORLEY – INTERNATIONAL FAMILY LAW (June 19, 2015), <http://www.internationalfamilylawfirm.com/2015/06/> (stating that it is not possible to make a Hague Convention access application in Japan “if the child is habitually resident in Japan” when a violation to the alleged right of access occurs); *see also* Jeremy D. Morley, *Japan and The Hague Abduction Convention: Implementation and Practical Effects*, THE LAW OFFICE OF JEREMY D. MORLEY – INTERNATIONAL FAMILY LAW, (June 11, 2014), http://www.internationalfamilylawfirm.com/2014/06/japan-and-hague-abduction-convention_11.html (noting that United States courts have exercised “fact-sensitiv[ity]” and “enormous diversity” when interpreting “habitual residence,” but

weak definitions of “habitual residence” and “intolerable situation,” as well as weak enforcement mechanisms, violate the Hague Convention.

The Implementation Act’s weak definition of “habitual residence” and “intolerable situation” violates the Hague Convention because it provides too much discretion to Japanese courts that may prefer maintaining half-Japanese children’s residence in Japan.¹⁶⁹ In *Toland*, although the father attempted to regain custody from the moment of abduction, he was unable to prevail in Japanese court; thus, by the time he brought the case in U.S. courts, the child had spent her entire childhood in Japan and ordering her to relocate to the U.S. proved untenable.¹⁷⁰

Although Japan was not a party to the Hague Convention at the time of the *Toland* case, this situation presents a difficult situation for parents hoping to overcome the “habitual residence” and “intolerable situation” arguments when Japanese courts have protected the abducting parent.¹⁷¹ American military members are particularly vulnerable to such interpretations because military families often live within the local communities, even calling the duty station country ‘home’ over the U.S. Indeed, the Hague Convention itself does not define “habitual residence.” Thus, a Japanese court’s interpretation of “habitual residence” may prevent the abandoned parent from retrieving the child under a Hague Convention return order.

Finally, the Implementation Act’s weak enforcement mechanisms violate the Hague Convention because it prevents execution of return orders. In 2015, Japan issued its first return order of a child from Japan to the United States; however, the order was never enforced.¹⁷²

lower courts in Japan have only established “some precedent” about “habitual residence”).

169. See Implementation Act, art. 2(v) (defining “habitual residence” as a state “where a child held his/her habitual residence at the time of his/her removal or immediately before the commencement of his/her retention”).

170. See *Toland v. Futagi*, 40 A.3d at 1059-60 (Judge Salant held that the child’s “home state” was Japan because she spent her life there).

171. See Morely, *Japan and The Hague Abduction Convention: Implementation and Practical Effects*, *supra* note 168, (explaining that the Implementing Act includes a provision that will not require a court to “order the return of the child” if the party against the return can prove that the child would be at “grave risk” of an “intolerable situation” if returned).

172. IPCA, *supra* note 4, at 32 (noting that authorities made an effort to enforce

Failure to enforce a return order also effectively fails to comply with the objectives of the Hague Convention.¹⁷³ Since Japanese enforcement officers may not forcibly remove the child from the kidnapper's home and must wait until the child "make[s] the first move to reach out to the enforcement officer,"¹⁷⁴ the Implementation Act employs weak enforcement mechanisms that fail to execute return orders.¹⁷⁵

Because of these fundamental failures, Japan fails to comply with the Hague Convention by utilizing inconsistencies in the Family Registry Act, Civil Code, Criminal Code, and Implementation Act.

IV. RECOMMENDATIONS

As this Comment demonstrates, Japanese legislatures and judicial systems have shifted towards complying with the Hague Convention by passing the Implementation Act.¹⁷⁶ However, there are three ways in which Japan could alter its domestic laws to fully comply with the Hague Convention and provide proper remedies for abandoned parents. First, Japan should amend the Family Registry System Article 76.¹⁷⁷ Second, Japan should amend Civil Code Articles 820, 821, and 824.¹⁷⁸ Third, Japan should amend Implementation Act Article 28(2).¹⁷⁹ Finally, the international community can encourage

the order but were ultimately unable to do so, indicating that there is a "systematic flaw" in implementation of "return orders" in Japan).

173. See Hague Convention, *supra* note 1, at 98, art. 1 (stating that the objectives are to ensure that "wrongfully removed" children are "prompt[ly] returned" and that "rights of custody" remain "effectively respected").

174. Implementation Act, art. 7(v) (prohibiting the use of force when attempting to execute a return order); see E-mail from Andrew Ellis, *supra* note 120 (pointing out that such a standard is unreasonable and "will never happen").

175. See E-mail from Andrew Ellis, *supra* note 120 (caveating the fact that Japanese courts do issue return orders with the fact that the Implementation Act's weakness is a lack of enforcement mechanisms to execute the orders).

176. See *supra* Part II.C (explaining that by establishing the Implementation Act, Japan put the Hague Convention into effect).

177. See *infra* Part IV.A (stating that the amendment should provide equal rights to parents who are not Japanese).

178. See *infra* Part IV.B (explaining that these amendments would offer an improved framework to establish custody arrangements in instances where Japanese-American couples divorce).

179. See *infra* Part IV.C (noting that this amendment would prevent contradictions by reducing the amount of discretion Japanese judges have in cases involving the Hague Convention).

Japan to enact these changes by imposing targeted sanctions through the Goldman Act.¹⁸⁰

A. FAMILY REGISTER ACT ARTICLE 76

Japan's rich cultural history has provided positive and negative consequences in modern times. For example, Japan's communal culture creates an organized, cooperative, and respectful society.¹⁸¹ However, this same culture harms individual children and parents who do not conform to or perform within the parameters of this society.¹⁸² As such, Family Registry System Act No. 224 should be amended to give equal rights to non-Japanese parents and provide for truly shared custody of children.¹⁸³ This would allow Japanese courts to comply with the Hague Convention by ensuring both parents maintain a relationship with the child instead of allowing a parent to resort to kidnapping the child from the fellow parent.

B. CIVIL CODE ARTICLES 819, 820, 821, AND 824

Because Japan often permits the judiciary to interpret international law, Japanese Civil Code Articles 820, 821, and 824 should be amended to provide a better framework for Japanese-American divorcing couples to determine custody. In these relatively early stages of Hague Convention ratification in Japan, Japanese legal systems have the power to establish a culture of compliance rather than resistance.

180. See *infra* Part IV.D (explaining that the United States' enforcement of the Goldman Act may place sufficient pressure on Japan to act in accordance with the Hague Convention).

181. See generally MURCH, *supra* note 36 (providing insight into Japan's culture through the lens of achieving successful business dealings with Japanese companies).

182. See Roxana Saberi, *Being 'Hafu' in Japan: Mixed-Race People Face Ridicule, Rejection*, AL JAZEERA AMERICA (Sept. 9, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/9/9/hafu-in-japan-mixed-race.html> (last visited Feb. 25, 2017) (quoting tweets that disparage mixed-race Japanese people).

183. Jiji Press & Kyodo News, *New Bill Seeks to Promote Parent-Child Interaction Following Divorce*, JAPAN TIMES (Feb. 6, 2017), <http://www.japantimes.co.jp/news/2017/02/06/national/new-bill-seeks-promote-parent-child-interaction-following-divorce/#.WLNPPRIrLeQ> (last visited Feb. 26, 2017) (reporting that Japanese lawmakers are scheduled to propose a bill in June 2017 that requests "the state to consider introducing a joint parental custody system").

The judicial system determines the role of international law in Japan. Timothy Webster uses the application of international human rights norms in Japan to show that judges rather than legislators promulgate international law.¹⁸⁴ Amending the Civil Code from “a person who exercises parental authority” to “the persons who exercise parental authority” will allow both parents to have legal authority over children. This legal authority will give the abandoned parent an equal voice with the kidnapping parent in conciliation and litigation. The abandoned parent might overcome the court’s tendency to legitimize the kidnapping parent’s physical control under Civil Code Article 821.¹⁸⁵

Japan seems to be making progress in the realm of visitation rights. For example, a group of lawmakers are preparing to introduce a bill that requires divorcing parents to state any visitation agreements in writing.¹⁸⁶ However, even if this bill succeeds, Japan must still effectively enforce the visitation agreements to comply with the Hague Convention’s Article 21 Rights to Access obligation.

C. IMPLEMENTATION ACT ARTICLE 28(2)

The Implementation Statute has provided a space for Japan to circumvent the Hague Convention. Because Japanese legal culture itself promotes biases and principles that contradict those of the Hague Convention, Japanese legislatures should amend Article 28(1) and 28(2) of the Implementation Act to limit the discretion Japanese judges have when deciding a case under the Hague Convention. Since Japanese family courts do not specialize in family law,¹⁸⁷ parties should not have to rely on the judge’s discretion to determine

184. See Webster, *supra* note 100, at 242 (noting that the critical role of “disseminating contemporary international human rights norms” has been left to judges over time).

185. CIVIL C. art. 821 (“Residence of a child shall be determined by a person who exercises parental authority.”).

186. Jiji Press & Kyodo News, *supra* note 183 (explaining that the bill would require divorcing couples to write out “frequency of the visitations” and a method of splitting the costs of caring for their children).

187. Konno, *supra* note 61, at 49 (clarifying that the “broad scope” nature of family court prompts judges in these courts to not pursue a family law specialization); see SUPREME COURT OF JAPAN, *supra* note 60, at 8-13 (stating that the court officials are experts in domestic problems without mentioning whether judges in family court have any specific expertise in family law).

whether a child will be at risk if returned to the state of habitual residence. Moreover, the police force does not have authority to enforce Japanese family law orders. Thus, judges tend to rule to maintain the status quo to avoid the appearance of noncompliance when a parent refuses to return the abducted child.¹⁸⁸ Also, Article 28 (1)(iv) should provide a definition for “intolerable situation” that prevents courts from rewarding the kidnapping parent. Further, courts should require evidence of domestic violence claims before denying return orders and visitation rights.¹⁸⁹ Because Japanese culture does not lend itself to compliance with Western society’s notions of healthy, mixed-culture children,¹⁹⁰ the Implementation Act should limit the court’s discretion in issuing return orders that tend to favor the status quo and the Japanese parent.

D. UNITED STATES SANCTIONS THROUGH THE GOLDMAN ACT AND UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

The international community has significant influence over Japan as can be seen through the international pressure that caused Japan to adopt the Hague Convention. Thus, international pressure may again successfully influence Japan to comply with the Hague Convention through implementation of the above-mentioned changes in domestic law and policy. The Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (Goldman Act) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) are the two statutes the United States has implemented on international parental kidnapping that may pressure Japan to comply with the Hague Convention. For example, the Goldman Act gives

188. Telephone Interview with Paul Toland, *supra* note 65 (explaining that judges are not able to change from the status quo because they would not be able to enforce a ruling outside of this and would lose respect).

189. Tanase, *supra* note 80, at 588 (commenting that allowing uninvestigated allegations of domestic violence to be a source of visitation denial would be “too crude” for “modern family law”); *see* Telephone Interview with Paul Toland, *supra* note 65 (opining that a claim of domestic abuse can sometimes be used as a “red herring” in cases involving visitation).

190. *See* Sforza, *supra* note 139 (supporting the widely-held assumption that a mixed child’s Japanese culture is most important within their identity when a grandparent considered it unnecessary for the children to speak Italian); Saberi, *supra* note 182 (presenting examples of the pervasive racism against mixed-race children still present in modern Japan).

the U.S. Secretary of State the power to act in response to noncompliant countries,¹⁹¹ and establishes procedures for the return of children who are victims of parental abduction.¹⁹²

Since Japan and the United States share a powerful alliance, implementing the acts would likely cause Japan to seriously evaluate their domestic laws and policies with respect to the Hague Convention. For example, the Goldman Act gives the Secretary of State the power to “withdraw, limit, or suspend” development, security, and economic assistance.¹⁹³ These acts would communicate to Japan that an alliance with the United States must include Japan’s compliance with its obligations under the Hague Convention.

Similar to the way Japanese society uses peer pressure to maintain a peaceful society, the U.S. should use the same social pressure on Japan to maintain a peaceful international society. The U.S. is the logical leader in the international community to push Japan to comply with the Hague Convention as the presence of American military families in Japan evidences a strong national security aspect to this issue for both the United States and the Pacific region.

The UCCJEA, in most states, honors foreign court orders for custody.¹⁹⁴ For international child abduction cases, if an American service member and his or her spouse separate or divorce, the custody determination at the outset will affect the legal rights the noncustodial parent has for the future. If a Japanese court grants full custody to the Japanese parent, the American parent has a weaker claim, if any at all, when an international kidnapping issue arises.¹⁹⁵

191. Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, § 202 (2014) [hereinafter Goldman Act] (listing potential actions from public condemnation to withdrawal of security assistance).

192. *Id.* (detailing the process of addressing “patterns of noncompliance” regarding parental abduction).

193. *Id.* §202(d)(5-8) (stating that “development assistance,” “economic assistance,” and assistance to a country’s central government can all be subject to “withdrawal, limitation, or suspension”).

194. *See generally* Uniform Child Custody Jurisdiction and Enforcement Act (NAT’L CONFERENCE COMM’RS UNIF. STATE LAWS 1997), prefatory note, 1-6 (noting that the UCCJEA does not allow an “enforcing court” to make any changes to a “custody determination”).

195. *See* Sullivan, *supra* note 38 (explaining that if there are child custody matters involving children who are citizens of the United States, a United States citizen who is part of a divorcing couple would benefit from having courts in the

In such a case, even U.S. law would fail to protect the abandoned parent against the Japanese system. Thus, the abandoned American parent needs the power of the Hague Convention to maintain a relationship with his or her child if the Japanese parent decides to restrict access. If the U.S. declines to apply the UCCJEA to Japanese custody determinations it may pressure Japan to amend the relevant family law and come into compliance with the Hague Convention.¹⁹⁶

V. CONCLUSION

Japan continues to be non-compliant with the Hague Convention through a combination of the Family Register Act, Civil and Criminal Codes, and Implementation Act. Japan should implement the amendments outlined in Part IV in order to change the legal culture such that Japan will come into compliance with the Hague Convention. International pressure, specifically from the United States, may be an effective way to push Japan to make these amendments. In this way, American military families will be able to exercise their rights under the Hague Convention to regain access or return of their kidnapped children in Japan. The international community will also no longer view Japan as a “black hole” for international parental abduction, thereby repairing this aspect of Japan’s reputation in the international legal community.

United States enforce the “decree”).

196. *See supra* Sections IV.A-C (noting that Japan may comply with the Hague Convention by offering equal rights to parents who are not Japanese, having an improved framework for custody proceedings among Japanese-American couples who are divorcing, and putting parameters on the Japanese judges’ capacity to use their own discretion when ruling on a case involving the Hague Convention).