International Parental Child Abduction

and

Japan’s Response to the Internationalisation of the Family

Geraldine Carney
BA LLB, MA

A thesis submitted for the degree of Doctor of Philosophy at Monash University in 2019
(School of Languages, Literatures, Cultures and Linguistics)
Copyright notice

© Geraldine Carney (2019).

I certify that I have made all reasonable efforts to secure copyright permissions for third-party content included in this thesis and have not knowingly added copyright content to my work without the owner's permission.
Abstract

Japan has long faced criticism for the way its sociolegal structures manage international parental child abduction. On 1 April 2014, Japan became party to the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction (‘the Hague Convention’), the key international treaty for addressing international parental child abduction cases. This development sharpened the focus on Japan’s track record of handling international parental child abduction cases. While the adoption of the Hague Convention was viewed by many international commentators as a positive step towards Japanese compliance with international standards, concerns remain regarding Japan’s ability to apply the provisions of the Hague Convention faithfully, particularly in the context of its domestic family law.

This thesis examines how the Japanese legal system has engaged with international legal frameworks to manage international parental child abduction and how this integrated legal system plays out in reality for Japanese people and others who come under its operation. The critical problem that frames this thesis is the nature of the relationship between national and international laws, in particular whether divorce and custody laws in Japan have in fact lagged behind shifts in the internationalisation of marriage, what issues arise from any gaps between the two and what, if any, solutions can be proposed in response to those issues. I examine the broader consequences of internationalisation for Japanese society and the progression of international relationships, as well as the body of law present in Japan and in international law, which regulates the union and dissolution of familial relationships between people from different nations and the custody of their children. I ground my sociolegal investigation in a number of case studies of child abductions involving Japan in order to provide a
practical context for my research. My secondary research question involves an enquiry into what makes for a ‘successful’ case of return to a parent whose child has been abducted or wrongfully retained. What makes these laws operate efficiently? What hinders them?

These case studies are critical to my aims of situating the operation of Japanese law in broader social, historical and political context, and assessing the role and efficacy of international family law and its fusion with domestic law in Japan. I identify the determination of the best interests of the child as central to the operation of international family law in Japan and discuss its interface with the ‘rights’ of parents. I also examine concepts for a better legal process; central to this discussion is the conclusion that family law is solid and incremental in its ability to change, as opposed to the ‘light and liquid’ nature of other modern sources of authority and power (Bauman 2012, 1). In scrutinising the legal capacities and struggles of both abducting and left-behind parents across fluid international borders, the thesis reveals the broader social and philosophical shifts that both shape the legal landscape and determine how effectively Japan will be able to manage international custody issues in the future.
Declaration

This thesis is an original work of my research and contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature:

Print Name: Geraldine Carney

Date: 10 May 2019
Publications during Enrolment

Acknowledgements

The completion of this research project would not have been possible without the assistance of my two brilliant supervisors, Professor Carolyn Stevens and Dr Jeremy Breaden. I am so fortunate to have been supervised by two such wonderful Japanese Studies scholars and outstanding people. I am forever grateful to them both for their enthusiasm for this project and the knowledge, patience and encouragement they have shared with me.

I would also like to thank my copy editor, Dr Camille Nurka (PhD, Gender Studies), for her excellent and thorough work in assisting me to prepare the thesis for final submission.

Portions of this thesis relating to social media usage appeared in an article published in New Voices in Japanese Studies, 'Disrupt, Support and Document: The Role of Social Media in International Parental Child Abduction Cases Involving Japan' in July 2016. I wish to thank the editors of that volume, Ms Elicia O'Reilly and Dr Adam Broinowski, and two anonymous peer reviewers for their comments and feedback which assisted to indirectly shape part of this work. I would also like to thank Associate Professor Stacey Steele for her kind support of my research and her feedback on an early unpublished portion of this work.

I would like to thank the Japan Foundation and the Japan Institute at the Australian National University who have provided financial support for conference and workshops attendances over the course of this research.
Many people have been so generous with their time in discussing my research with me and I have benefited greatly from their professional and personal insights. I would like to thank Dr Masato Takimoto and Dr Shani Tobias, who supervised this project in its initial stages, and the following people who have taken the time to speak to me about my research: the Honourable Chief Justice Diana Bryant and the Honourable Justice Victoria Bennett of the Family Court of Australia, Judge Kentaro Ono and Mr Koji Tobisawa of the Supreme Court of Japan, Judge Aya Kobayashi and Ms Satomi Asaki of the Family Court of Japan, Dr Simon Avenell, Dr Yuko Kinoshita and staff of the Japan Institute at ANU, Professor Masako Murakami, Professor Vera Mackie, Professor Finbarr McCarthy and Mr Maurice Edwards.

I would also like to acknowledge the enormous influence of the late Professor Malcolm Smith. I am so fortunate to have been taught and supervised by Professor Smith, who was a wonderful mentor and friend to me, as he was to so many of his students. I remain indebted to him for his guidance and encouragement.

Lastly, I thank my wonderful family, particularly my beautiful Mum and Dad for their endless support and my amazing partner Dave for everything he has done to help me complete this project.
A Note on Japanese Names, Transliterations and Laws

Japanese names appear in this thesis with the personal name first and the family name second.

Japanese terms are rendered in this thesis using the Hepburn system, except those terms and names in common English usage.

Table of Contents

Chapter 1

Introduction

1.1 Introduction ........................................................................................................................................ 1
1.2 Statement of Problem: Background and Research Questions ............................................................ 3
  1.2.1 International Law and International ‘Legal Culture’ ................................................................. 10
  1.2.2 Japanese Law and Japanese ‘Legal Culture’ ............................................................................. 13
1.3 Statement on Methodology ................................................................................................................. 18
1.4 Limitations and Concessions .............................................................................................................. 24
1.5 Aims and Rationale of this Study for Wider Sociolegal Studies of Japan and International Relations .................................................................................................................. 26
1.6 Cultural Differences and Conceptual Terms: Marriage, the Family and the Law in Japan ................................................................................................................................................. 31
  1.6.1 Marriage within a Japanese Context ......................................................................................... 31
  1.6.2 International Marriage in Japan ............................................................................................. 32
  1.6.3 Custody ..................................................................................................................................... 34
  1.6.4 Domestic Law versus International Law ................................................................................. 35
1.7 Conclusion and Thesis Structure ......................................................................................................... 36

Chapter 2

Legal and Cultural History: The Family, Human Rights and the Law

2.1 Introduction ......................................................................................................................................... 40
2.2 International Law and the Family ....................................................................................................... 40
  2.2.1 The Emergence of Modern International Law ......................................................................... 40
2.2.2 Harmonising Different Legal Traditions – Private International Law ................................................................. 41
2.2.3 Creation of Universal Standards – Public International Law ............ 43
2.2.4 The Development of International Family Law ................................................................. 45
2.3 International Human Rights Law and the Family ................................................................. 46
2.3.1 The Evolution of International Human Rights Law.............................. 46
2.3.2 Child Custody and Access as a Human Rights Issue ......................... 50
2.3.3 The Prosecution of the Rights of the Child through Activism.............. 52
2.4 The Emotional and Psychological Toll of Parental Child Abduction ........ 57
2.5 Conclusion ......................................................................................................................... 62

Chapter 3

Japanese Law and the Family

3.1 Introduction .................................................................................................................. 63
3.2 Law and the Family during the Meiji Era................................................................. 64
3.3 Reform of Family Law under the Allied Occupation ............................................. 65
3.4 The Household System as an Enduring Force and the Koseki ..................... 67
3.5 Marriage within a Japanese Context ................................................................. 70
3.6 Divisions within Divisions: Japanese Law on Child Custody ....................... 76
3.7 The Hague Convention in Japan ............................................................................ 84
3.8 Japan’s Adoption of the Hague Convention: Drivers for Reform ............... 97
3.9 Conclusion .................................................................................................................. 104

Chapter 4

Point: Savoie v. Savoie

4.1 Introduction ................................................................................................................. 105
Chapter 5

Counterpoint I: Pre-Hague Convention

5.1 Introduction .............................................................................................................. 170
  5.1.1 Social Media as a Tool and Subject of Analysis .................................................. 171
5.2 The Case of Kayako Yamada: Abduction from Japan to the Czech Republic .......... 176
5.3 The Case of Qin Weijie: Abduction from Japan to China ........................................ 180
5.4 The Case of Masako Suzuki Akeo: Abduction from Canada to Japan .................. 189
5.5 The Internal Outliers: Abduction Cases within Japan ............................................. 196
  5.5.1 The Case of Toshiro and April Sugimoto ............................................................. 199
5.6 Filipino-Japanese Child Custody in Japan ............................................................... 202
5.6.1 Japanese-Filipino Children and the *Nationality Act* Case of 2008 ................................................................. 209

5.6.2 The Philippines to Japan: Gender and Migration ........................................... 212

5.7 Conclusion ................................................................................................................. 221

**Chapter 6**

**Counterpoint II: Post-Hague Convention**

6.1 Introduction ................................................................................................................. 223

6.1.1 The Hague Convention in Japan: The Statistics ........................................... 223

6.1.2 The Hague Convention in Japan: The First Cases ..................................... 227

6.2 The Case of James Cook and Hitomi Arimitsu ............................................. 233

6.2.1 *Cook v. Arimitsu* ............................................................................................. 235

6.2.2 Family Law Proceedings in the United States ........................................... 237

6.2.3 Hague Convention Application and Proceedings ...................................... 239

6.2.4 Enforcement of the Hague Convention in Japan ..................................... 246

6.2.5 Supreme Court Appeal and Impeachment Petition ..................................... 253

6.3 Key Points ................................................................................................................. 257

6.3.1 Family Court Probation Officers ................................................................. 257

6.3.2 Processing Time for Return Applications .................................................. 262

6.3.3 Access .................................................................................................................. 263

6.3.4 Expanded Exceptions to Return under the *Implementing Act* .................. 265

6.3.5 Lack of Enforcement Measures ................................................................. 267

6.4 The Use of Habeas Corpus ................................................................................. 276

6.5 Conclusion ................................................................................................................. 279
Chapter 7
Analysis and Concluding Remarks

7.1 Introduction............................................................................................................ 281

7.2 The Problem of Socioeconomic Capital ............................................................... 282
  7.2.1 Media Literacy...................................................................................................... 283
  7.2.2 Legal Literacy .................................................................................................... 288
  7.2.3 The Influence of Socioeconomic Capacity on the Operation of the Law .......... 292

7.3 Time Sensitivity of Abduction Cases ...................................................................... 296

7.4 Gender Issues.......................................................................................................... 299

7.5 Japan v. the West? Contesting the ‘Culture Clash’ Narrative ................................. 306

7.6 The Best Interests of the Child ............................................................................... 311
  7.6.1 The Hague Convention ...................................................................................... 318
  7.6.2 Enforcing the Hague Convention ...................................................................... 320

7.7 Envisaging a More Effective Legal Process .......................................................... 327

Chart of Key Laws and Treaties.................................................................................. 342

Glossary........................................................................................................................ 343

References..................................................................................................................... 347
Chapter 1
Introduction

1.1 Introduction

Internationalisation has an impact on every aspect of our lives.\(^1\) Despite an increasing focus on regulation of the movement and habitation of people by the governments of the world, national borders are becoming increasingly permeable, while greater access to transport and communication means people from different nationalities, ethnicities and cultures are connecting more than ever before. One of the consequences of this social mobilisation is an increased number of transnational relationships. What happens to the children of transnational relationships in the event of the relationship breaking down is a vexed issue, as some parents living as expatriates in their spouse’s country may seek to return to the support structures offered by their natal home and have their child raised in accordance with their own cultures and traditions. In some circumstances, parents in failed transnational relationships may be driven to abduct their children in order to secure their custody as well as for other reasons relating to their wellbeing and upbringing.

International parental child abduction is an increasingly pressing issue in our modern global society. For a number of years, Japan has faced criticism from the international community for failing to address the issue of international child abduction after the breakdown of international relationships involving its citizens and for protecting

\(^1\) This thesis adopts the explanation of internationalisation proffered by Breaden and Stevens (2014, 4) as a ‘conscious and often intentional’ process in which the action is the focus, as opposed to globalisation, in which the product is the focus. This theory of internationalisation seems most appropriate in the context of cross-border relationships, albeit in a globalised world. See Rubenstein (2007) for discussion on the effect of globalisation on citizenship and nationality.
abductors and freezing out foreign parents from the lives of their children (Buerk 2011). On 1 April 2014, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter, the Hague Convention) entered into force in Japan. This has sharpened the focus on Japan’s track record of managing international parental abduction cases. While the adoption of the Hague Convention was viewed by many international commentators as a positive step towards compliance with international standards by Japan, there are concerns about Japan’s ability to apply faithfully the provisions of the Hague Convention and whether the ratification was merely a token gesture aimed at improving its standing in the eyes of major international partners, such as the United States. In this thesis, I look beyond the highly critical discourse of many Anglophone commentators; this project has not been constructed with the end-goal of recommending that Japan ‘step into line’ with legal approaches in Europe, North America, Australia or elsewhere. While legal systems in place in other states are used as reference points for discussion, this thesis is not intended as an exercise in comparative law. Rather, my priority is to examine how the Japanese legal system has engaged with international legal frameworks to manage international parental child abduction, and how this integrated legal system plays out in reality for Japanese people and others who come under its operation.

From this pragmatic question, a critical problem emerged which frames this thesis: whether divorce and custody laws in Japan have in fact lagged behind shifts in the internationalisation of marriage, what issues arise from any gaps between the two and what, if any, solutions can be proposed in response to those issues. In particular, I examine the broader consequences of internationalisation for Japanese society and the progression of international relationships, as well as the body of law present in Japan and in international law, which regulates the union and dissolution of familial
relationships between people from different nations and the custody of their children. I have framed my sociolegal investigation with a number of case studies of child abductions involving Japan in order to provide a practical context for my research. My secondary research question involves an enquiry into what makes for a 'successful' case of return to a parent whose child has been abducted or wrongfully retained (a ‘left-behind parent’). What makes these laws operate efficiently? What hinders them?

By analysing these case studies and contextualising my findings in the current social, legal and political conditions of Japan, I have been able to reach some macro conclusions, with regard to my original research questions, about whether there is a disjuncture between the Japanese legal system and the current state of internationalising marriage and the family. In particular, I investigate the role and efficacy of international family law and its fusion with domestic law in Japan. I identify the determination of the best interests of the child as central to the operation of international family law in Japan and discuss its interface with the ‘rights’ of parents. I also suggest concepts for a better legal process. Central to these speculations is the proposal that, as opposed to the ‘light and liquid’ nature of other modern sources of authority and power (Bauman 2012, 1–15), family law is a more solid and dense entity, limited in its capacity for rapid change, despite the fluidity of the social circumstances of the people it regulates.

1.2 Statement of Problem: Background and Research Questions
Parental abduction refers to the taking or retention of a child by one parent in violation of the other parent’s custody or access rights according to laws of the jurisdiction governing the parent-child relationship prior to the removal or retention (the concept of custody is discussed at 1.6.3). Parental child abduction is not a new phenomenon. Greek mythology conveys stories of children being taken from their father to be raised by
others (Terr 1983, 151) and newspapers have carried stories of parental child abduction since the late nineteenth century (Greif and Hegar 1993, 5–6). The issue of parental abduction came to worldwide attention in the modern celebrity context in 1971, when Yoko Ono and John Lennon found themselves embroiled in a case of parental child abduction after Ono’s former husband, Anthony Cox, disappeared with their eight-year-old daughter, Kyoko (Davidson 2011). Despite earlier public awareness of parental child abduction, it only began to be seen as a legal and social problem in the 1970s, in the wake of growing public concern regarding child welfare and issues which were more traditionally considered private affairs, such as family violence, in line with women’s movements, which focussed on the rights of family members (Greif and Hegar 1993, 7).

Much of the early research that posited parental child abduction as an important social issue grew from the North American legal and psychological fields (see, for example, Bodenheimer 1977; Terr 1983; Agopian 1984; Sagatun and Barrett 1990).

*International* parental child abduction is the taking of a child from their home country by one parent without the other parent’s consent or the authorisation of a court, or refusal to return a child to their home country after an agreed time. Japanese society has often been described by the English-language media as a ‘black hole’ or ‘haven’ for parental child abduction (see, for example, Birmingham 2011; Jones 2011b; McCurry 2013; Willacy 2012). Many commentators, predominantly in the mainstream Western media, have lamented the dearth of legal avenues available in Japan to left-behind parents to assist them in locating their children and enforcing their custodial or visitation rights as recognised in another state (see, for example, Dingle 2011b; Bramham 2013). The criticism levelled at the Japanese legal system’s handling of international parental child abduction cases has been directed at two key areas: namely, the way parental abduction cases are handled within the domestic legal system and
Japan’s engagement with international law. Becoming a contracting party to the Hague Convention was an important milestone for Japan and provided new ways of understanding and narrating parental child abduction as an international social, legal and political issue.

International parental child abduction is an increasingly common corollary of the rise of internationalisation, forces of globalisation and accompanying human mobility between nationalities, ethnicities and cultures. Certainly, these factors have affected Japanese citizens’ work, education, travel and leisure choices, and have inspired the flow of people across Japan’s borders in an unprecedented way. Transnational relationships have become more common. The number of marriages in Japan where one spouse is of another nationality increased more than 11 times between 1965 and 2006, climbing from 4,156 to 44,701 unions in that period and accounting for 6.1% of all marriages in Japan in 2006 (Yuzawa 2014, 45). These marriages are commonly known as international marriages (the concepts of marriage and international marriage in Japan are discussed in detail at 1.6.1 and 1.6.2). The number of international marriages has trended downwards since the peak of 2006, but still reached 21,180 unions and accounted for 3.5% of all marriages in Japan in 2017 (MHLW 2018a [see subcategory kekkon, 2017, table 9.19]). A total of 1.9% of births registered in Japan in 2017 involved a Japanese and non-Japanese parent, accounting for 18,134 children (MHLW 2018a [see subcategory shushō, 2017, table 4.32]). The decline in the number of international marriages is, perhaps in part, a reflection of the reduction in the overall marriage rate in Japan in the same period; in 2017, it dropped to 4.9%, which is its lowest rate since the end of the Second World War (MHLW 2018a [see subcategory kekkon, 2017, table 9.2]; MHLW 2018b, 30).
Bearing in mind the peak international marriage rate of 6.1% in 2006, divorces in international marriages registered in Japan are overrepresented when compared to the total number of divorces. Divorces between Japanese and non-Japanese couples made up 5.5% of all divorces in Japan in 2017, accounting for 11,659 dissolved marriages out of a national total of 212,262 and represented 6% of all divorces in Japan in both 2015 and 2016 (MHLW 2018a [see subcategory rikon, 2017, table 10.13]). This overrepresentation is reflected at judicial and administrative levels in Japan: the total number of new international family law cases handled by Japanese family courts grew from 5,726 in 2000 to 9,297 in 2017, representing a 62.3% increase (Supreme Court of Japan 2001, table 10; Supreme Court of Japan 2018a, table 10). Of those cases, the number identified as involving the designation of physical custody of a child and related matters (ko no kangosha no shitei sono hoka no shobun), or the designation or change of legal custody of a child (shinkensha no shite mata wa henkō), increased from 756 to 1,667, representing a 120.5% increase (Supreme Court of Japan 2001, table 10; Supreme Court of Japan 2018a, table 10). The total number of cases of the same designation (international and domestic) handled by Japanese family courts in the same period rose 84.5% (Supreme Court of Japan 2000, table 2; Supreme Court of Japan 2018a, table 2). This difference does not necessarily indicate that the actual number of international custody disputes is increasing at a faster rate in Japan, but it does establish that these cases are rapidly becoming more visible at an institutional level.

---

2 The Supreme Court of Japan defines international family law cases (kaji shōgai jiken) as adjudications (shinpan) or mediations (chōtei) in the family law jurisdiction, in which at least one of the parties concerned (including the applicant, respondent or intervenor) is non-Japanese (Supreme Court of Japan 2018a, table 10).
It should be noted that these statistics are indicative of a potentially much larger issue, as the vast majority of divorces in Japan are completed by consent and without the involvement of the family courts or other third party; the requisite paperwork is simply completed by the parties and filed with the local government office (Jones 2007a, 205; Suzuki et al. 2013, 40). The dissolution of the marriage becomes effective once the local office in charge of registrations has accepted the notice (Fuess 2004, 148). These divorces by consent are known as kyōgi rikon and constituted 87.2% of divorces in Japan in 2017 (MHLW 2018a [see subcategory rikon, 2017, table 10.4). They are also historically the overwhelmingly popular choice: on average, approximately 90% of divorces were obtained by consent in the second half of the twentieth century (Fuess 2004, 149). It follows that the overall number of children of failed international relationships would be much greater than the number of adjudications and mediations for these types of cases, given that the vast majority of divorces do not come within the purview of the courts.3 Also, these figures do not necessarily reflect divorces involving Japanese citizens that are concluded overseas.

Japan’s reputation as an ‘abduction superpower’ (rachi taikoku) sits uneasily alongside its increasing internationalisation (Jones 2011a; Minamida 2011) and the mounting international frustration in relation to its management of parental child abduction. This is the problem that informs the central thesis question as to whether divorce and custody laws in Japan are aligned with shifts in the internationalisation of marriage. Specifically, I address the following components of the problem:

3 In her seminal research on the Tokyo Family Court, Taimie Bryant observed that even where divorce was by agreement, disputes over issues ancillary to the divorce, such as property division, child custody and maintenance, meant many parties resorted to court processes for resolution, meaning the statistics with respect to kyōgi rikon may be more nuanced than they would appear at face value (T. L. T. Bryant 1984, 8). Regardless, this is still the most popular method of divorce in Japan.
1. How have divorce and custody laws in Japan reflected shifts in the internationalisation of marriage?

2. What are the disjunctures arising from the current state of Japanese divorce and custody laws and shifts in in the internationalisation of marriage?

3. If problems do arise, what solutions can be proposed in response to these problems?

Secondary to these key questions, I assess the factors which can influence the ‘success’ of a return of a parentally abducted child to a left-behind parent under the Japanese legal system. What makes these laws operate efficiently? What hinders them?

This thesis examines these global research questions through a review of the theory and evolution of international family law, and Japanese family law and its management of the internationalisation of marriage and the family (Chapters 2 and 3); an examination of case studies to identify gaps between the legal framework and social realities (Chapters 4, 5 and 6); and analysis of the adequacy of the existing legal systems and discussion of possible future legal responses (Chapter 7).

The precise scope of international parental abduction of children to and from Japan is unknown. Prior to the ratification of the Hague Convention in 2014, there was no formal mechanism for recording international abduction cases in Japan. It is estimated that more than 300 children were parentally abducted from the United States to Japan between 1994 and 2013 (US House of Representatives Committee on Foreign Affairs [‘US House Committee’] 2013). There were also reported to be at least 37 British nationals involved in parental abduction cases to Japan as of 2013 (Ryall 2013), as well as 33 reported cases of abductions of French children to Japan (Vaulerin 2013). In
Australia, as at 2013, there were reports of at least 15 children having been abducted to Japan (Australians with Abducted Children 2013). Not as widely addressed in the Western media is the fact that international parental abduction works both ways: the Japanese media has reported a high incidence of such abductions by Filipino wives of Japanese men (see Shibata 2009).

While much of the pressure applied to Japan to ratify the Hague Convention came from North America, Australia and Europe, it is important to bear in mind that parental abductions to Japan from these regions alone do not reflect the true magnitude of the issue. In particular, the overwhelming majority of transnational marriages in Japan involve individuals from countries outside these regions. Brides were the non-Japanese party in 68.9% of international marriages in Japan in 2017 and overwhelmingly hailed from other Asian countries. For example, 34.6% were of Chinese nationality and 24.5% were from the Philippines (MHLW 2018a [see subcategory kekkon, 2017, table 9.18]). The highest number of non-Japanese grooms in 2017 came from South and North Korea, accounting for 25.3% of international marriages, followed by the United States in 16% of cases (MHLW 2018a [see subcategory kekkon, 2017, table 9.18]).

The predominance of these particular pairings is reflected in the numbers of international divorce-related cases handled by the family courts in Japan. In 2017, cases involving a Filipino wife and Japanese husband accounted for 289 of 2,070 international divorce-related cases (13.9%), while cases involving a Chinese wife and Japanese husband accounted for 260 cases (12.5%), by far the highest-ranking pairings among the tallied cases (Supreme Court of Japan 2018a, table 31). In cases involving non-

---

4 The third highest ranking pairing was between South Korean wives and Japanese husbands, which made up 122 international divorce-related cases in 2017 (approximately 5.8%) (Supreme Court of Japan 2018a, table 31).
Japanese husbands, disputes between South Korean husbands and Japanese wives were the most common, accounting for 100 cases of the 2,070 international divorce-related cases (4.8%) (Supreme Court of Japan 2018a, table 31). The incidence of parental abduction cases within these groups is unclear.

1.2.1 International Law and International ‘Legal Culture’

The issue of international parental child abduction cannot be separated from layers of legal framework, the first of which is international law (the concepts of international law and domestic law are discussed at 1.6.4 below). International parental abduction involves many different and intertwined dimensions, including the physical distance between the countries involved, the economic considerations of the abducting parent, and the cultures of the parents and their attendant customs and beliefs with respect to parenting and gender roles within the family. International law is just another of these dimensions but provides a particular point of interest as it envisages the creation of a framework to address and even ‘solve’ the issues that can arise when transnational relationships fall apart.

Interracial and cross-cultural marriages have been found to be overrepresented among families involved in parental abduction, including international abductions (Hegar and Greif 1994, 137–8). A study undertaken by the American Bar Association Center on Children and the Law and based on data provided by 97 left-behind parents found that 83% had a different nationality to the abducting parent, 69% had differing ethnicity and 58% had a different religion (Chincone et al. 2001, 4). Maureen Dabbagh, a Virginia

---

5 Husbands from the United States ranked second highest among international divorce cases involving a non-Japanese husband, accounting for 98 of these cases (4.7%) (Supreme Court of Japan 2018a, table 31).
Supreme Court mediator, goes so far as to identify a direct correlation between the continued increase in the incidence of international parental child abduction and the rise in bicultural marriages (2012a, 3).

While some discord in any relationship is not uncommon, spouses living away from their natal home face a number of other practical challenges, including the difficulties of living in a different culture, possibly managing a different language, and being separated from their familiar support structures, such as family and friends. Having children can highlight differences between intercultural couples in their attitude to raising children, as well as conflicts in religious and cultural attitudes which may become irreconcilable (International Social Service Australian Branch 2005, 7). Clashes between parents over child-rearing issues are often battles over a basic difference in philosophy, values or beliefs that, until the birth of a child, the parents had not resolved. While these differences in values may not necessarily be culturally linked, it may be that differences in culture provide a scapegoat for interpersonal clashes between couples, particularly where the practical issues created by living away from one’s home become overwhelming.

Cross-cultural trainer and counsellor Dugan Romano believes that most people in cross-cultural relationships tend to revert to their own childhood to find a model of parenting, which means they may not only have different values, but also conflicting models, having been brought up in different countries and cultures (2008, 108–9). The strain may be compounded where the parents are from different linguistic backgrounds. Indeed, parents in cross-cultural marriages have been found to be significantly more likely to have worried about the possibility of abduction than other parents (Hegar and Greif 1994, 5). There is also evidence that abductors in cross-cultural marriages, both
male and female, are more involved in their children's care than other parental abductors, which may indicate that these parents are motivated to abduct by a desire to continue as active parents and maintain patterns of child care which have cultural meaning to them (Hegar and Greif 1994, 4) These ties to the culture of origin are evident in the finding that almost three quarters of parents born abroad who internationally abducted their children fled back to their country of origin (Hegar and Greif 1994, 5).

The opening of national borders, ease of travel and a greater willingness by people to experience different cultures has increased the risk of children worldwide being involved in cross-border private disputes, including international child abduction, disputes regarding custody and relocation, and problems maintaining contact with both parents. International law strives to meet this increased risk by providing legal frameworks to assist states to work together to protect children (Hague Conference on Private International Law n.d.b, 1). International parental abduction is predominantly addressed under international law by a series of conventions adopted by the Hague Conference on Private International Law (hereafter, the Hague Conference). The Hague Conference has 83 members (comprising 82 states and the European Union), including Japan, which joined on 27 June 1957. The Hague Conference's statutory mission is to work for the unification of the discrete rules adopted by states under the umbrella of 'private international law' by developing and servicing multilateral legal instruments. Since 1980, the Hague Conference has developed a suite of four 'children’s conventions', including the Hague Convention, concerned with protecting children in situations involving more than one state. The Hague Convention is the key legal mechanism in

---

6 Current as of 1 October 2018.
7 The other children’s conventions are the Hague Convention of 29 May 1993 on Protection of Children and
international law dealing with the issue of international parental child abduction. There are currently 99 contracting parties to the Hague Convention, whose objects are ‘to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States’ (art. 1). By restoring the pre-abduction status of the family involved, the Hague Convention provides a deterrent for parents who may otherwise resort to abduction as a way of ‘forum shopping’ in search of a more favourable outcome (International Social Service Australian Branch 2005, 16). The text of the Hague Convention also refers to the protection of children from the damage they can suffer from being wrongfully removed or retained by a parent across borders (preamble, line 3–4).

1.2.2 Japanese Law and Japanese ‘Legal Culture’

The second layer of legal framework affecting this study is country-specific or local laws. Given my law and society approach, I see local legal systems as intimately connected to demographic, economic, legal and cultural factors, which influence how a state’s legal system responds to the issue of international parental child abduction.

Certainly, Japan has not been immune to the wide-reaching effects of internationalisation – which impinge upon its citizens’ work, education, travel and leisure choices – and the way they interact with the world generally, both within and without its national borders. Marriage between Japanese and people of other

---


8 Current as of 1 October 2018.
nationalities can be regarded as a reflection of Japan’s strengthening of international ties (Yung et al. 2010, 3).

As there is no comprehensive mechanism for the recording and reporting of incidents of international parental child abduction, the demographics of the families involved in incidents involving Japan are unclear. In 2010, the Ministry of Foreign Affairs (MOFA) in Japan conducted a small-scale survey of 64 Japanese expatriates who had experienced the problem of international child abduction (2010). Of those surveyed, 18 people had abducted their children, 19 had had their children abducted and 27 had foreign court orders or other limitations placed on the movement of their children (MOFA 2011, 1). Of the cases surveyed, 26 were connected to the United States, 9 involved Australia, 7 involved Canada and 18 were connected to ‘other’ countries (MOFA 2011, 1). The survey was conducted through embassies of countries that are signatories to the Hague Convention and government agencies overseas with more than 1,000 Japanese expatriates (a total of 121 agencies) (MOFA 2011). The survey was heavily qualified by the recognition of the need to conduct a more empirical and comprehensive survey (MOFA 2011, preamble, par. 3). In particular, the nature of its dissemination through government embassies and agencies indicates that the respondents are already in contact with authorities and would be more likely than others to report abductions.

Japan’s road to signing the Hague Convention involved negotiating a combination of naiatsu (internal pressures) and gaiatsu (external pressures). Internal pressures have included Japan’s turbulent domestic political situation, the state of the Japanese domestic family law and concerns regarding its compatibility with the Hague Convention, the desire to protect Japanese victims of domestic violence fleeing home from abroad, the problems faced by Japanese left-behind parents whose children have
been abducted overseas, and a shift in social expectations towards fathers playing a greater role in their children’s lives (discussed further in Chapter 3).

External pressure has manifested in international criticism of Japan’s management of parental abduction cases in the form of political, diplomatic and media commentary. Much of the criticism of Japan’s response to international parental abduction has been focussed on its delay in signing the Hague Convention, which became a proverbial thorn in the side of its diplomatic and political relationships with the international community. Up until its ratification of the Hague Abduction Convention in January 2014, it was a widely reported fact that Japan was the only member of the Group of Eight nations to have not signed the Hague Abduction Convention, with the Russian Federation acceding on 28 July 2011 (see, for example, Hyslop 2012; Mainichi Daily News 2013; Sankei Shimbun 2013).

Japan’s refusal to sign the Hague Convention was raised in the first face-to-face talks between the then US President Barack Obama and former Japanese Prime Minister Yoshihiko Noda in September 2011 (Endo and Nakajima 2011), and again in the first summit between the President Obama and current Japanese Prime Minister Shinzō Abe in Washington on 23 February 2013, when Prime Minister Abe indicated that Japan was moving close to ratifying the Hague Convention (Japan News 2013). Previously, the Cabinet of former Prime Minister Naoto Kan had announced in May 2011 that Japan intended to join the Hague Convention (Onishi 2011), but a proposal to accede to the treaty and associated Bills submitted to the National Diet in March 2012 by the administration of his successor, Prime Minister Yoshiko Noda, stalled in the midst of dysfunctional deliberations between the ruling parties (Yokota 2013). The proposal and Bills were eventually abandoned when the House of Representatives (shūgi’in) was
dissolved ahead of the election in November 2012 (Yokota 2013). Under the government of new Prime Minister Shinzō Abe, a Bill approving Japan’s participation in the Hague Abduction Convention passed unanimously through both houses of the Diet in April and May 2013 (Hasegawa 2013).

While Japan has now ratified the Hague Convention, it is important to note that the treaty is not designed to operate retroactively to return children who have been wrongfully removed or retained prior to its coming into force.9 Further, the Hague Convention applies only to a limited, albeit growing, number of countries. While it is open to any state to join, the Hague Convention is only applicable between those states that have ratified it, and those states that have acceded to it and the states that have accepted the accession.10 While Japan was criticised for its late entry to the Hague Convention, many Asian countries have declined to join, including the People’s Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau), Vietnam, Malaysia and Indonesia.11 Parents falling victim to parental abduction involving states that are not a party to Hague Convention continue to have no legal avenue in the absence of a specific bilateral treaty covering child abduction, other than to attempt to seek redress through domestic legal proceedings in the destination country.

9 The Hague Convention and Japan’s associated domestic legislation do, however, provide for assistance in facilitating visitation, regardless of when the Hague Convention came into force (as discussed further in Chapter 3).

10 The Hague Abduction Convention provides that only states which were members of the Hague Conference at the time of its 14th session in 1980 may ratify the treaty (art. 37). Other states may accede, giving rise to an acceptance procedure (art. 38). This means the accession only affects the relations between the acceding state and those contracting states which have accepted the accession.

11 Current as of 12 October 2018.
Additionally, the fact that a state has joined the Hague Convention does not guarantee its complete adherence to it, as although individual states may take measures to enforce compliance,\textsuperscript{12} the treaty does not provide for any formal mechanisms for enforcement (Bannon 2011). In this regard, it is worth noting that the interaction between international treaties and the constitutional and domestic laws of contracting states is complex. The processes incorporating international treaties into domestic law differ from country to country with wide-ranging effects. In Japan, the constitution provides that treaties entered into by Japan shall be ‘faithfully observed’ (art. 98). This is qualified, however, by a requirement that the Cabinet (the administrative branch of government) obtain approval of a treaty by the National Diet (the legislative branch) (art. 73). A ‘treaty’ requiring approval in this context is generally understood to be an agreement that somehow limits the conduct of private individuals (Jackson, Louis and Matsushita 1982, 304).\textsuperscript{13} There is no requirement that Japan enact domestic legislation to bring international treaties into force; those agreements which are self-executing and clear may be directly applied by Japanese courts (Ishibashi 2015, 143). In the case of the Hague Convention, domestic legislation was considered to be necessary to establish procedures for the return of children and other matters relating to the treaty in Japan,\textsuperscript{14} which is in line with good practice guidelines on implementation issued by the Hague Conference (2003). The impact the Hague Convention is permitted to have in Japan

\textsuperscript{12} For example, the United States enacted a law on 8 August 2014 providing for sanctions to be administered by the Secretary of State in response to non-compliance with the Hague Convention (\textit{Sean and David Goldman International Child Abduction Prevention and Return Act of 2014}. Public Law No. 113-150).

\textsuperscript{13} This point of reference can be malleable. For discussion of instances where approval has not been obtained, see Jackson, Louis and Matsushita 1982, 304–6.

\textsuperscript{14} The legislative advisory committee (hōsei shingikai) of the Ministry of Justice established a subcommittee on the Hague Convention at its 165\textsuperscript{th} meeting on 6 June 2011 (MOJ 2011b). The subcommittee’s terms of reference were premised on the need for a law to practically implement the Hague Convention in Japan
therefore lies in the hands of the legislators who drafted the legislation implementing it into domestic law and the interpretation of the courts who apply it.

With the first applications under the Hague Convention now being processed and, in some cases, litigated, Japan has reached an interesting moment in its history with respect to the treatment of international parental abduction cases. The circumstances and outcomes of the first applications for the return of children wrongfully taken or retained across international borders involving Japan raise many important questions with regard to what the ratification of the Hague Convention could mean for Japanese law and society. What could these first outcomes mean for the handling of these types of cases by Japan in the future? How does Japan’s participation in the Hague Convention so far differ from its handling of parental abduction cases within its own borders or of those cases involving states which are not signatories to the Hague Convention? How might the operation of the Hague Convention influence the popular and legal perception of the form of the family in Japanese society?

1.3 Statement on Methodology
For this project, I employed a sociolegal or ‘law and society’ methodology to analyse the phenomenon of international parental child abduction involving Japan. I undertook this analysis primarily though the close examination of case studies of parental abductions to and from Japan. The law and society field is so broad that it has been described by Lawrence Friedman, President of the Law and Society Association, as a ‘very big tent, and getting bigger all the time’ (2005, 2). A widely held assumption by law and society scholars is that the legal system is not entirely autonomous, but ‘always bears the deep imprint of the society in which it is imbedded’ (Friedman 2005, 2). This is the starting

(MOJ 2011c, 1).
point for my proposed research, dealing, as it does, with the family unit and the roles of husband and wife, parent and child, which are at the same time formal legal constructions and an integral part of everyday life (Friedman 2005, 6).

This means that while I have analysed legal and political documents (for example, Bills, laws, arguments, judgments and committee notes) from the international legal community and in Japan, I have triangulated my findings from these primary sources with both primary and secondary sources in English and Japanese on Japanese demography and society, and these social changes’ effects on marriage and the family. Primary sources in this area include census statistics, Ministry of Health, Labour and Welfare White Papers, media reports (print, television and new media), personal stories of parties to parental child abductions published as non-fiction, and so on. Secondary sources include academic analyses of the phenomenon in the disciplines of legal studies, sociology and gender studies. Such approaches consider the social meaning of cases of international child abduction and include analyses of how the perception of gender roles informs legal and public responses to parents’ actions in these cases.

Case studies of parents involved in parental child abductions are a key source of data in my larger research. I draw on case studies in this thesis because they demonstrate the complex sociolegal dimensions of parental child abduction in the legal documents, media reports and social commentary that they generate. The case of the Savoie family, examined in Chapter 4, is highly visible in both a discursive and practical sense and, as such, provided a natural starting point for my case study selection. I have sought to provide a counterpoint to the Savoie case by selecting types of cases that are obscured in academic and popular discussions of parental child abduction, which tend to focus on the Hague Convention and to cite the same few high-profile cases (including the Savoie
case). I employ a thematic narrative analysis (see Riessman 2008, 53–76; see also Polkinghorne 1995 on the ‘analysis of narratives’) to identify common threads and points of discord in the cases. I further employ a narrative constructionist approach to connect the narrative to the historical, political and sociocultural context (see Esin, Fathi and Squire 2014). This approach is consistent with the sociolegal conceptual framework, which seeks to contextualise legal developments rather than treating them as self-contained subjects of analysis.

The abduction case studies draw on a number of international and domestic legal structures. The main legal documents are as follows:

1. international treaties and conventions, such as the United Nations Convention on the Rights of the Child (UNCRC) and the Hague Convention;
2. domestic law of Japan, such as the Constitution of Japan (nihonkoku kenpō) and the Civil Code (minpō), as well as legislation relating to the implementation of the Hague Convention in Japan, which took effect on 1 April 2014;
3. domestic policy of Japan, which is largely seen in the materials prepared by and for the legislative advisory subcommittee established by Japan’s Ministry of Justice in 2011 to consider the implications of Japan ratifying the Hague Convention and to draft enabling legislation; and
4. judgments of Japanese and foreign courts.

I have provided my own translations of those documents that are only available in Japanese, and I have gathered primary and secondary documents, including judgments,

---

15 See Pavlenko for discussion on the importance of analysing autobiographic narratives in their broader contexts, which ‘shape both the tellings and the omissions’ (2007, 181).
media reports and non-fiction books using internet access and during trips to Japan, including to the National Diet Library in Tokyo in November 2011, May 2013 and November 2015.

Over the course of my research, it became apparent to me that the use of social media by parties to parental child abductions was not only a source of information, but a subject of examination of itself. Accordingly, the thesis gives some consideration to social media use, which contextualises parental child abduction within the frame of the social and civic technologies that saturate our everyday lives. Despite its wide use in social, commercial and academic contexts, the term ‘social media’ tends to defy conventional academic definitions due to its disparate and evolving nature. It may be broadly understood as a collection of mobile and web-based platforms which facilitate the building of communities and networks through the sharing and generation of content by users on a range of levels, with the possibility of reaching out to a larger number of users (El Ouirdi et al. 2014, 123). In particular, I have examined social media as a tool to document publicly cases of abduction (sometimes leading to reunions between separated parents and children), to reach out for support and to advocate for redress and legal change. While social media is an important tool of contemporary activism (for further discussion see Postmes 2007, 174–9), its usage is heavily tempered by disparate individual circumstances (see Hargittai 2007). I aim to highlight the different ways in which parties to parental abduction employ social media as an adjunct to the available legal options, noting that it is beyond the scope of this thesis to address correlations between individual circumstances and social media usage, or to quantify or exhaustively categorise social media usage.
Social media can be characterised as a conduit through which individuals present and inhabit a carefully crafted image of themselves; this performative aspect can be regarded as a natural extension of the seminal theory of Erving Goffman on the presentation of the self (1959) (see Manago et al. 2008). Custody disputes have the potential to entrench parents in polarised positions, perhaps even more so in cases involving Japan, given the ‘all or nothing’ custody scenario often presented to parents under the family law. It is therefore important to view the social media sites produced in this context with caution and accept that they may be, consciously or not, a careful presentation of one parent’s version of events rather than an objective ‘truth’.

A last statement on methodology concerns my conceptual framework. At the outset of this section I mentioned the ‘law and society’ viewpoint. This conceptual framework makes an explicit link between social phenomena and legal structures (Freidman 2005, 7). In other words, whenever there is societal change, there is necessarily a response in the legal system. This guides my understanding of the primary and secondary sources gathered for this thesis. Sociolegal perspectives posit that notions of justice and the law’s capacity to effect change and ensure justice arises from a social context in which certain values are embedded.

In this thesis, I look at the social context of parental child abduction: that is, I examine how cultural values pertaining to family and gender roles affect the establishment, operation and revision of the laws. This approach incorporates a gender-based conceptual framework, which takes account of the Japanese national context, as employed, for example, by other scholars in this field, such as Vera Mackie, as per her analysis of the Japanese family registration law (2009). In that study, she keeps in mind the gendered power relations embedded in legal ideology and how these play out in
society to point out areas of potential legal reform where advancements in Japanese society, technology, medicine and conceptions of the family have exceeded the existing legal structures (2009).

In deploying an interdisciplinary approach that combines law and sociology, I am able to situate legal cases and decisions in human context to provide a pragmatic study of human needs in cases that are charged with emotional intensity. The legal regulation of kinship relations in cases of international parental child abduction, I argue, has a firm basis in the moral philosophy of natural rights, which entreats the law to consider familial relationships as having intrinsic value.

Sociolegal studies are imbued with a sense of morality as per the legal pursuit of justice, which is vitally linked to the development and application of human rights law. In Chapter 2, I argue that international parental child abduction and the custody rights of parents are human rights issues. An-Na‘im argues that the success of the human rights project is intrinsically bound to a commitment to its universal application, and it is precisely this insistence on the universality of human rights which calls for its examination to be as inclusive as possible (2013, 97–8). The universality of the concept of human rights, however, creates multiple layers of complexity that must be mediated in its understanding and application, as, in reality, the practice of human rights takes place in the context of profound social, cultural, religious and ethical diversity (An-Na‘im 2013, 101–2). Law is often drawn upon as the source of formal human rights and as the primary discipline for studying them. As An-Na‘im points out, however, a legal approach alone cannot adequately account for the complexities involved in understanding the ‘social practice’ (2013, 109) of human rights, how and why human rights are violated, the effect of social and political forces and traditional normative
systems on how human rights laws are interpreted and implemented, the disparity that different power structures can create in the application of human rights, or the mindset of violators of human rights and their victims and other human behavioural factors which can affect how much traction human rights can gain in a given society (109–10). These are all relevant considerations to the study of human rights issues such as international parental child abduction. Accordingly, an interdisciplinary ‘law and society’ approach can encourage a more flexible methodological enquiry, which, in turn, facilitates a focus on the practical issue at hand.

1.4 Limitations and Concessions

As flagged in the Statement of Methodology, one of the most significant limitations of my proposed study is that I did not directly interview parties involved in parental child abductions to Japan. My main reason for structuring the proposed research without interviews was due to practical concerns relating to time constraints. In particular, I conducted my research as a part-time PhD student, employed as a lawyer in Melbourne with a demanding litigation file load. My ability to undertake prolonged fieldwork in Japan and other countries was therefore limited by this commitment, though my professional experience certainly gave me insights into the research, which I may not have had without practising during this time. I also found that the topic of child abduction is an extremely sensitive one and interviewing parties to these cases would potentially require long periods away from Melbourne in order to build the trust of the interviewees.

Further, the confidentiality and privacy issues that could be raised by an interview-based research approach would be extremely complex from an ethical point of view, particularly where both sides of a story (that of the abductor and that of the left-behind
parent) are sought. The study of such an emotionally laden subject gives rise to the strong possibility for bias. This means that interviews may not necessarily be the best source of neutral data. Regardless of the source, it is important to bear in mind that there is always going to be a ‘version’ of the objective truth presented in these cases. Through the course of my research, however, I was fortunate to discuss my topic and conduct ‘off-the-record’ interviews with a number of judges and officials from the Family Court in Australia and Japan, as well as the Supreme Court of Japan, and family lawyers practising in the area of international family law. These interviews over the course of a number of years have widened my perspectives on the issue of international parental child abduction, particularly the logistical problems involved, and have informed my findings in an indirect but very valuable way.

Interviews, however, are not a mandatory component of sociolegal research and I have used a wide range of legal sources and secondary materials in order to gain a wide-reaching perspective. It is important to note that it is often in the interests of parties to international child abduction cases to have their stories heard, and many have contributed to newspaper articles, written non-fiction books, accessed new media or appeared on television in order to convey their views. While this may be more applicable to left-behind parents who are seeking to reinstate contact with their children, many abducting parents have also made their stories public.

When I started my dissertation, Japan had not yet signed the Hague Abduction Convention; therefore, my research topic is in an emerging area of the Japanese law and jurisprudence. While this is a positive aspect of my research and makes it a timely project, it also presented difficulties in that during the writing stages, my research subject was a ‘moving target’. New information was constantly generated as more
applications under the Hague Convention were (and are being) made in Japan and the law was implemented in different ways. During the final stages of this project, I found it difficult to turn away from new information in order to draw my conclusions and complete the project; therefore, this dissertation must be viewed as a working discussion of an evolving area of Japanese and international law.

That said, this is clearly a topic with far-reaching potential for future research. As discussed above, Japan is at interesting point in time in its legal and social history with its recent ratification of the Hague Convention. Future quantitative and qualitative studies of how the Japanese legislature and courts deal with the issues arising from the implementation of the Hague Convention on a case-by-case basis in the coming years would be most valuable.

1.5 Aims and Rationale of this Study for Wider Sociolegal Studies of Japan and International Relations

This study aims to provide an understanding of parental child abduction both from a domestic perspective and in international context. The central premise of the thesis is that internationalisation of the family has contributed to the growing incidence of parental child abduction. Internationalisation has affected every facet of modern life and the family unit has not been immune to changes arising from the flow of people across borders. The rise of low-cost travel and cheap airfares has made international movement more accessible to all classes of people in the developed world (Page 2011, 2) and more recently in the developing world and newly industrialised countries,\(^\text{16}\) providing new

\(^{16}\) Statistics published by the World Bank indicate that outbound tourism from lower-middle-income economies (which include the Philippines, Vietnam, India and Indonesia) increased by 45.5% between 2010 and 2016, while outbound tourism from upper-middle-income economies (which include China, Brazil, the Russian Federation and Thailand) increased by 57% (2018b).
work and leisure opportunities. The number of people forcibly displaced from their home countries due to conflict or persecution is also rising, with the number of new refugees under the mandate of the United Nations High Commissioner for Refugees (UNHCR) reaching a record high in 2014 (UNHCR 2018, 18). Total international migration is estimated to have risen by around 49.3%, from approximately 172.6 million people to more than 257.7 million people, between 2000 and 2017 (United Nations Department of Economic and Social Affairs 2017 [see Total International Migrant Stock, Table 1]).

There has never been so much opportunity for people to interact, start relationships and create families with people of other cultural backgrounds and nationalities. Accordingly, the internationalisation of both the nuclear and extended family offers a pragmatic reason to study international family law and international parental child abduction in particular, as children are increasingly more likely to have parents of different nationalities, meaning that custody issues after marriage breakdown carry a particular and complex set of challenges (Stark 2005, 1). Furthermore, these problems are emotionally charged because the parents may feel strongly about the child’s cultural upbringing in the event of divorce.

In order to understand how family breakdown is legislated in such conditions, the thesis evaluates family law in relation to its applicability to cross-border families.

International migration is well recognised as a phenomenon growing in scope and complexity with far-reaching effects on individuals, families, nations and regions. Migration regulation is given status as a high priority within the international community, with the United Nations General Assembly holding a second High-Level Dialogue in New York in October 2013 on the subject of international migration and development after an inaugural one in 2006 (Office of the High Commissioner for Human Rights n.d.). Migration regulation is perceived to be a priority because it
represents legal and social order laid across the potentially chaotic movement of people across borders. Despite high level diplomatic and political concern regarding this aspect of the internationalisation of the world’s population, Dr Rob George of the University of Oxford, a leading expert on child relocation disputes, has noted that the *international aspect* of family law is a curiously underexplored area for family lawyers, with the frequent omission of international legal issues from mainstream family law discussion (George 2012, 37, 52). Such oversight prompted United Kingdom Supreme Court Justice Lady Brenda Hale to label it family law’s ‘forgotten international dimension’ (Hale 2009, 1).

Finally, this thesis examines Japan’s response to the internationalisation of the family. The past decade has witnessed a spate of high-profile international parental child abductions and high-level political interventions,¹⁷ and increasing use of the Hague Abduction Convention.¹⁸ While there is some academic scholarship addressing legal

---

¹⁷ For high-profile cases of parental child abduction to Japan, see the cases of Christopher Savoie, discussed in detail in Chapter 4, and Douglas Galbraith (Galbraith 2009). See also the case of Michael Elías, whose two children were abducted from the United States to Japan in 2011 (Chiaramonte 2011). For high-level political intervention, see the efforts of US House of Representatives member Chris Smith to introduce domestic legislation to address cases of international parental child abduction, and his particular focus on abductions to Japan (see US House Committee 2013, 2015, 2016, 2017, 2018a and 2018b). Also see the report from the inquiry into international parental child abduction to and from Australia conducted by the Legal and Constitutional Affairs References Committee of the Senate of Australia in 2011 (Senate of Australia 2011).

¹⁸ A report published by the Hague Conference in 2011 estimated that there had been an increase of approximately 56% in the total number of return applications received under the Hague Convention by signatory states in 2008 compared to 2003, and a 106% increase in the number of applications in 2008 compared to 1999 (Lowe 2011, 9). This is reflective of both an increase in the number of signatory states over this time, as well as increasing use of the treaty in existing established signatory states (Lowe 2011, 9). Remarkably, Mexico recorded a 522% increase in the number of return applications received in 2008.
interventions in international parental child abductions in Australia, the United States and Europe, the complex issues it raises are far from settled. The case studies in my thesis provide context for the situation faced by Japan in navigating its way through international custody issues. Focus on Japan’s treatment of these issues is perhaps sharper than ever, given its status as a new signatory to the Hague Abduction Convention. The question of how Japan deals with the increasing internationalisation of families in the context of international parental child abduction offers fertile ground for further research because of the potential for the ever-increasing occurrence of international marriages. This is particularly so given Japan’s demographic situation moving through the twenty-first century. Japan’s declining birth rate and ageing demographic profile, as well as its consequently shrinking population, are well documented. The latest forecast from the Statistics Bureau of Japan indicates that Japan’s population could fall from 127 million in 2015 to 94.4 million by 2055, representing a reduction of 34.5% in 40 years (2018, 8 [tōkeihyō, chapter 2]). This sort of decline is not previously recorded in world history, at least not since the Industrial Revolution (Lincoln 2011, 456–57). Combined with increasing longevity, Japan’s shrinking population threatens to push its dependency ratio, an indicator of economic pressure on the productive population, to unprecedented levels. The dependency ratio is forecast to reach 93% by 2050, meaning Japan will have approximately only one working adult for each dependent (Lincoln 2011, 459). Japan’s changing demographic brings with it a number of potential long-term problems, including low economic growth, a shift in economic output toward less productive sectors, pressure on social security and

compared to 2003, leaping from 27 to 168 applications (Lowe 2011, 11–12). A subsequent report published by the Hague Conference indicated that the increase in applications had slowed somewhat from 2008 to 2015, with a more modest 15.75% increase recorded (Lowe and Stephens 2018, 6).

19 For a sample of the discussion of such issues, see Kaye 1999; Kirby 2010; and Weiner 2000.
national health insurance schemes, deflation, and inability to reduce or eliminate overall national debt (Lincoln 2011, 463–5).

Perhaps the most obvious and immediate solution to Japan’s total population decline and its potentially dire implications is to allow more non-Japanese people to become permanent residents of Japan. This would strengthen the working population, improve the dependency ratio, bolster the gross domestic product, and provide support for the social security and national health systems (Lincoln 2011, 470). Japan has already taken some steps in this direction by relaxing the requirements for permanent residency for highly skilled non-Japanese workers in April 2017. This means that some specially qualified workers are able to apply for permanent residency after only one year, compared with five years previously (Nagata 2018). Japan is also moving to expand its non-Japanese ‘blue-collar’ work force by creating two new visa categories in 2019, though these are not designed as pathways to permanent residency (Suk 2018). Already, Japan’s foreign workforce has grown from approximately 486,000 in 2008 to 1.27 million in 2017 (Cabinet Office of the Government of Japan 2018, 3), which is due, in part, to the government’s controversial Technical Intern Training Program (gaikokujin ginōjisshū seido). These sorts of incremental changes to Japan’s movement-control policies expose its society to a further wave of internationalisation, intensifying the attention concentrated on its family law structures.

---

20 Established in 1993, the Technical Intern Training Program accepts workers from developing countries to work for a set period (up to five years) in host entities in set industries, including construction, fishing, food manufacturing, agriculture and textiles (MOJ and MHLW 2017, 1, 4). As of 2016 there were 228,589 workers in Japan under the program; the largest number of workers were from Vietnam, China and the Philippines, making up 38.5%, 35.3% and 9.9% of the total respectively (MOJ and MHLW 2017, 3). The program has faced criticism for exploiting foreign workers for cheap labour and exposing them to situations of abuse by employers (see, for example, Kobayashi 2018).
1.6 Cultural Difference and Conceptual Terms: Marriage, the Family and the Law in Japan

This section outlines a number of key concepts which are employed in this thesis and whose meaning can be transformed by the social, legal and cultural context in which they are used. Accordingly, while they are not ‘contested concepts’ (Gallie 1956) as such, they do warrant explanation for the purposes of this project.

1.6.1 Marriage within a Japanese Context

Conventional marriage in contemporary times commonly suggests a heterosexual and monogamous relationship that is closely linked to the establishment of the family unit, while also being independent of existing kinship ties (Vatuk 2008). More broadly, marriage is a cultural seal of approval of a relationship which is signified by sexual and economic union (Tovar 2000, 1301). Legal marriage is a common institution among all states, but its definition in each is fashioned by legislative and cultural differences (Tovar 2000, 1301).

Given the sociolegal orientation of my research methodology, rather than focussing on the ritual aspects of marriage in Japan, I will focus on how marriage is legally defined in Japan, formalised as an exclusive heterosexual relationship, and which incorporates a set of assumptions and values specific to the Japanese cultural context. In this thesis, I am primarily concerned with contemporary formations of marriage, but for the purpose of historical depth and providing some context to the current situation of marriage today, I provide a brief overview of the history of forms of marriage in Japan since the Edo period in my literature review in Chapter 3.21

---

21 For an earlier historical account on marriage and sexual rites in prefeudal Japan, see Ryang (2006).
1.6.2 International Marriage in Japan

There are a number of colloquial terms in English for marriages between partners who differ in their citizenship, culture and race, such as ‘cross-cultural marriages’, ‘transnational marriages’ and ‘mixed marriages’. The Japanese expression that most often denotes the idea of an international marriage is kokusai kekkon. Itsuko Kamoto of Kyoto Women’s University has traced how this concept evolved, asserting that it is a product of new social phenomena that evolved in the Meiji period (2001). In particular, Kamoto notes that kokusai kekkon represented a split from the Western concept of ‘mixed marriage’ or marriage between racial groups in a community (zakkon) (2001, 10). Kamoto proffers the idea that kokusai kekkon is tied to the impact of international marriage on nationality, whereas the concept of mixed marriage implies a mixing of race and its signifiers, including religion, culture and ethnicity (2001, 10; see also Senda 2007).

Kamoto identified two preconditions for the establishment of an international marriage. First, the marital institution involved should be socially recognised from both an international and domestic perspective, reflecting the desire by Meiji-era Japan to be recognised as a civilised nation (bunmeikoku) with civilised laws (Kamoto 2001, 11). Second, the marriage should be between a Japanese national and a person with foreign citizenship (Kamoto 2011, 11).

Kokusai kekkon has been popularly understood to relate predominantly to the marriage of a Japanese woman and a Western man (Ma 1996, 28–34). This concept has been perpetuated in popular culture since the early twentieth century with the most famous example being Giacomo Puccini’s 1904 opera, Madama Butterfly. Following the Second World War, ‘war brides’, or Japanese women who married American soldiers, provided a
considerable boost in the number of international marriages in Japan and perpetuated the common understanding of international marriage as being between a Western man and a Japanese woman (N. Piper 1997, 326). Later, in the five-year period between 1965 and 1970, the relatively small number of international marriages mainly involved Japanese women and foreign husbands (N. Piper 1997, 326). There is, however, increasing diversification in the form of kokusai kekkon, perhaps as an obvious correlation to the greater opportunities for Japanese citizens to work and travel abroad, greater freedom for women in their life choices generally and the burgeoning non-Western foreign population in Japan. This is an important development considering that race and gender provide important building blocks for analysing international marriage, and I endeavour in subsequent chapters of the thesis to isolate how these factors play out in international custody disputes.

In its broader sense, and due to complex citizenship laws, international marriage as a category of marriage also includes marriage between Japanese citizens and second-, third- or subsequent generation immigrants to Japan with citizenship in another country (Economist 2011). This is particularly pertinent to Japan’s significant Korean population (most generally known as zainichi-chōsenjin, zainichi-kankokujin, or simply zainichi), which has its origins in the forcible removal of Korean citizens from their homeland after Japan’s annexation of Korea in 1910 and the subsequent mobilisation of the Korean population in support of the Japanese campaign in the Second World War. According to figures released by the Ministry of Justice, there were close to 580,000 Koreans resident in Japan in 2017 (MOJ 2018e [see subset for 2017, table 17-12-01-2]). A significant number of these are third- or fourth-generation Koreans who were born in Japan, do not speak Korean and may have no particular ties to their Korean heritage (Kerr 2001, 343). This means that if a Japanese national marries a third-generation
zainichi with North or South Korean citizenship who has lived his or her entire life in Japan, their marriage is considered ‘international’. Equally, if a zainichi who has never left Japan marries a Korean studying at a Japanese university, their marriage is deemed as between two Korean nationals according to Japanese law. This is because of the consanguineous view of ethnic identity; zainichi Koreans and Japanese nationals may be culturally and linguistically the same, but their ‘blood’ is different.

National and ethnic identities are further complicated by a large number of foreign nationals of Japanese descent (nikkeijin) from Brazil and other Latin American countries, who have also had a significant presence in Japan. In 1990, legislation controlling immigration was relaxed to address Japan’s labour shortage, with hundreds of thousands of Brazilian and other nikkeijin being granted ‘long-term resident’ (teijūsha) visas for durations of six months to three years (Sharpe 2011, 114–15). A large majority of nikkeijin work under these visas as manual labourers (Tsuda 1999, 688). As the teijūsha visas are renewable, these Brazilian people and other nikkeijin have essentially become a permanent part of Japanese society (Tsuda 1999, 689). Marriages between Japanese nationals and South American nikkeijin are classified as international even though their ‘blood’ is considered Japanese. For the purpose of this project, I have adopted the term ‘international marriage’ with a view to encapsulating the concept of kokusai kekkon as well as less obvious cross-cultural unions, such as marriages involving third- or fourth-generation Koreans resident in Japan.

1.6.3 Custody

Custody is typically understood to mean the right of a parent to govern and make decisions with respect to the day-to-day life of a child. The term ‘custody’ has become outmoded in recent times in a number of Western family law systems in favour of the
more emotionally neutral concept of ‘residence’. This concept presumes an inherent and equal ‘parental responsibility’, being all the duties and authority which, by law, parents have in relation to a child. This parental responsibility towards a child is not extinguished by the dissolution of the parents’ relationship. Custody is, however, still a key concept of Hague Convention and is defined in the treaty as including rights relating to the care of the child, including the right to determine his or her place of residence (art. 5).

In the Japanese legal system, the broad concept of custody is embodied in the term *shinken* or parental authority/power. *Shinken vests* in both parents during a marriage and may be exercised jointly or severally (Civil Code, art. 818[3]). During a marriage, *shinken* includes physical custody of the child (*kangoken*), as well as legal custody, being the right to make legal decisions on behalf of the child and the obligation to support them (Jones 2007a, 213). While it is possible for a court to grant one parent physical custody and the other legal custody upon divorce, such cases are rare (as discussed further in Chapter 3). There is no legislative provision or judicial precedent for joint custody and it is not possible for parents to agree to it in a legally operative manner. Divorce in Japan essentially requires that one parent be assigned as the sole custodian of the child.

### 1.6.4 Domestic Law versus International Law

Domestic law, also referred to as municipal law, is an international law concept which refers to the national or internal law of a country (Nygh and Butt 1997, 265). Domestic law is a marker for the boundaries of a nation’s exclusive legislative prerogative. Domestic law is often contrasted with international law, which is the body of law which provides rules and norms to govern interactions between nations and, increasingly,
private citizens of different nations. International law has traditionally been understood to comprise private international law (pertaining to the regulation of conflicts of law in transactions between private legal persons) and public international law (a body of rules and norms designed to govern interactions between nations). The traditional distinction between public and private international law has been worn down by the spread of human rights and the increased involvement of states in commercial activities (Stark 2005, 3). Many modern public international treaties extend to affect the rights and relations of private citizens. Antoniolli explains this change in international law as a shift from a body of ‘rules of abstention’ to ‘positive rules of cooperation’ (2005, 661). Since the late twentieth century, the neologism ‘intermestic law’ has been used to define the increasing interconnectedness of international law and domestic law and the blurring of domestic and foreign legal boundaries (see, for example, Manning 1977). This thesis adopts the conventional meaning of domestic law and its counterpart, international law, and examines the complex interplay between them in the context of international family law disputes.

1.7 Conclusion and Thesis Structure
Chapter 2 further explores the development of international law relating to the family, including the emergence of the rights of the child, which has laid the foundations for contemporary understandings of the best interests of the child standard.

The case studies in this thesis are arranged into three chapters (Chapters 4, 5 and 6). The first of the three deals with the case of Christopher and Noriko Savoie. The Savoie case is arguably the most high-profile case of parental abduction involving Japan and is often cited as emblematic of the international parental child abduction issue in Japan, despite its occurring in an unusual set of circumstances. For this reason, and also due to
large volume of data available about it, I have used the Savoie case as the ‘point’ from which to compare and contrast my other cases studies as ‘counterpoints’.

The second of the case study chapters (Chapter 5) examines a selection of other case studies. They cover abduction both to and from Japan and involve a range of countries not often raised in popular discussion of this issue, including the Czech Republic, China, the Philippines and Canada. Chapter 5 also includes a case study of abduction within Japan involving non-Japanese citizens. These case studies provide a contrast to the dominant Savoie case and reinforce common threads running through parental child abduction cases. They also demonstrate the various difficulties encountered by parents in seeking to address parental child abduction by legal means. While serving as counterpoints, all of the case studies in Chapter 5 share with the Savoie case the same critical bracket in time; they all take place prior to 1 April 2014 and therefore fall outside the full operation of the Hague Convention. In selecting these cases, I tried to demonstrate the range, variation and combination of factors involved in international child abduction cases. The cases examined in Chapter 5 are much less well-known cases of child abduction.

The third and final case study chapter (Chapter 6) examines the story of James Cook and Hitomi Arimitsu. The Cook/Arimitsu case provides another counterpoint to the Savoie case. Despite fundamental similarities to the case of the Savoie family, the Cook/Arimitsu case bears out many interesting differences. A key point of distinction of this case from the Savoie case, and its other counterpoint cases, is that the wrongful retention of the children took place in late 2014 and therefore came under the operation of the Hague Convention. Through the lens of the Cook/Arimitsu case, we can examine how Japan handles cases of international parental abduction in practice under the new
legal regime. It also sheds some light on how Japanese courts may interpret the treaty in the future, as well as how rigid and unworkable the outcomes offered under the law can be for parties to international abduction cases.

Following Japan’s ratification and its implementation of the Hague Convention into its domestic law, people around the world are now monitoring how it is being managed by the Japanese legislature, executive branches and courts over time. Some commentators greeted the news of Japan’s joining the Hague Convention with expressions of doubt that it will be effectively implemented by Japan, fearing that domestic laws will blunt its effectiveness (Matsutani 2012; in particular, see comments by Japanese family lawyer Takao Tanase) or that the Japanese judiciary will lack the will to implement it (Jones 2013). This thesis examines its application in its formative and early years in Japan. While joining the Hague Convention was a significant step, it is only one element of the parental abduction issue for Japan. As noted, the Hague Convention does not apply retroactively to return children who were wrongfully returned to or retained in Japan prior to its effective date of 1 April 2014, leaving parents whose children were abducted prior to that time on the wrong side of that legal boundary. Questions remain as to whether Japan will agree to return children who have been illegally removed to or retained in Japan prior to the Hague Convention taking effect. There are also questions as to whether Japan’s accession to the Hague Convention will have any impact on its domestic policies and laws with respect to divorce, child custody and visitation. Indeed, some commentators have warned that characterising parental abduction as a cross-cultural problem risks diminishing its true magnitude, linking the issue to features of Japan’s legal system (see Jones 2007a, 168; Matsutani 2010). The recent implementation of the Hague Convention in Japan can, however, give rise to a broader consideration of the multiple drivers for the way in which Japanese family law has
evolved and why it is, at least from a black-letter legislative perspective, moving into a phase of reform. In this way, this thesis contributes to our sociolegal understanding of Japan’s attitude towards the internationalisation of the family and broader society as well.
Chapter 2
Legal and Cultural History: The Family, Human Rights and the Law

2.1 Introduction
This chapter traces the development of international law, in particular how it has progressed from two conceptually separate spheres of ‘private’ and ‘public’ to a more cohesive and normative force, and how the increasing movement of populations across borders has propelled international law into a key role in the regulation of cross-border family disputes, including international parental child abduction. Integral to such regulation is the advancement of the child from a subordinate position in the family structure to a citizen of the state with their own substantive rights. The rise of the child as an independent legal person has been supported by a humanitarian movement which informs the debate about the best way to manage international parental child abduction today. Throughout history, this movement has accessed public means as a way of advocating for the rights of children and families. This humanitarian movement and the body of international law which has developed alongside it have played a key role in shaping modern understandings of the best interest of the child standard so prevalent in family law systems around the world.

2.2 International Law and the Family

2.2.1 The Emergence of Modern International Law
Nation-states are the most significant units in the international political and legal system (Coleman and Maogoto 2003, 35). The emergence of the nation-state and the concept of absolute power to be exercised within geographical boundaries without interference from external actors (referred to as national sovereignty) is widely regarded
to have resulted from the power vacuum created by the deterioration of the Roman Empire (Coleman and Maogoto 2003, 38) and the series of treaties signed in 1648, known as the ‘Peace of Westphalia’.\textsuperscript{22}

‘International law’ is a term created by English philosopher Jeremy Bentham to describe ‘principles of legislation in matters betwixt nation and nation’ ([1789] 1823, x). His optimistic view of the potential for a universal law to realise his utilitarian aims and his proposals for the codification of international law into written form can be regarded as the foundations of international law as we know it today, including the development of private international law as a separate legal discipline (Janis 2010, 1–24).\textsuperscript{23}

\textbf{2.2.2 Harmonising Different Legal Traditions – Private International Law}

Private international law has traditionally been understood to pertain to the regulation of conflicts of law in disputes between private legal persons. A major step in the evolution of private international law took place in 1893, when the Government of the Netherlands convened the first session of the Hague Conference, with the aim of negotiating treaties based on straightforward principles that could be adopted by all nations to liberalise private international relations, transactions and cross-border dispute resolution (van Loon 2005; Carrington and Dyer 1994).

By its own description, the Hague Conference represents a ‘melting pot of different legal traditions’ (Hague Conference n.d.a). Conflicts between the laws of different countries in this ‘melting pot’ can arise due to differences between the structures of legal systems,

\textsuperscript{22} See Osiander for a critique of the conventional understanding of the link between the Peace of Westphalia and the birth of modern sovereignty (2001).

\textsuperscript{23} Private international law refers to the body of rules relied upon when a legal dispute involves a foreign element.
including principles of civil procedure. Perhaps more importantly, conflicts can arise due to the values expressed in those legal systems. The formation of the Hague Conference came in the midst of a changing legal environment under the influence of emerging modern nationalism. David S. Clark, an international and comparative law specialist, observes that there were two key periods for this nationalistic development: the American and French revolutions, which permanently altered the European and American legal systems in the nineteenth century, and the Second World War, which led to more than 80 former colonies gaining their independence from 1945 under the oversight of the UN (2012, 34). Clark notes that these new political units commonly emphasised the special features of the populations within them as tied to citizenship to the exclusion of those outside their borders (2012, 34). Nationalism, together with its close relation statism, which prioritises exclusive control over sovereignty and its implementation through jurisdiction by a state (2012, 34), produced fertile ground for cross-border conflicts of law. Issues of relevance at the time related to rules of civil procedure, such as international service of documents, and family law, including the appropriate jurisdiction for marriages and divorces involving a foreign element (Members of the Permanent Bureau 2004, 488). Transnational transactions and issues were, however, much more peripheral at the time of the first Hague Conference in 1893 compared to today, and its founding figure, Tobias M. C. Asser, is credited with ‘extraordinary vision’ in identifying areas of potential conflict between the laws of nations and endeavouring to bring about common solutions to differences in the legal order of nations (Members of the Permanent Bureau 2004, 486–7).

Hans van Loon, Secretary General of the Hague Conference, has observed that at its inception, the Hague Conference was an organisation with a very European focus (van Loon 2002, 24). Indeed, the first successful convention concluded by the Hague
Conference in 1896, which addressed civil procedure, was ratified exclusively by European nations (Droz 1994, 3). Since this time, the Hague Conference has developed into a global organisation. Japan was a founding member, accepting the Statute of the Hague Conference on Private International Law on 25 June 1957. The 1980s and 1990s saw an expansion in membership, with more states including Australia, the People’s Republic of China and a number of Latin American countries joining (Yuen 2013). This was followed by a marked increase in the membership of Asian Pacific countries in the period from 2001 to 2010, including Sri Lanka, Malaysia, New Zealand, India and the Philippines (Yuen 2013). Its 83rd and most recent member, Kazakhstan, joined on 14 June 2017.\(^{24}\)

### 2.2.3 Creation of Universal Standards – Public International Law

Different to private international law, public international law has historically referred to the rules and norms governing disputes between nations. Public international law grew from an understanding that states are legitimate and independent political units and that there is a need to regulate disputes between them in order to promote consistency, peace and order. The most visible contemporary manifestation of the significance of public international law is the work of the UN.

Before the UN, there was the League of Nations. It was formed in the 1920s as a result of the Paris Peace Conference which ended the First World War. Its establishment marked the beginning of contemporary understanding that international law automatically applies to all states regardless of location or character (Harris 1998, 16). According to David Harris, Professor of Public Law at the University of Nottingham, prior to that time, international law, or the ‘Law of Nations’ as it was known, was not

\(^{24}\) Current as of 1 October 2018.
much more than the ‘Public Law of Europe’; the law created to govern the relations between the society of Christian states which constituted Europe in the sixteenth and seventeenth centuries has endured to provide the basis for international law as we know it today (1998, 15–16). The First World War and its aftermath also created a sense of urgency for states to reinforce control over territories and populations in the wake of expanding mass travel and emerging security concerns (Lloyd 2003, 244–5), leading to the development of a viable passport system, which depended on an ‘atmosphere of international recognition’ (Lloyd 2003, 44). The implementation of an effective international travel management system is an important and tangible outcome of the development of both private and public international law.

The UN was created in 1945 to replace the League of Nations, which is widely viewed as a failure due to the outbreak of the Second World War in Europe in 1939 (Henig 2010). The UN was established by the Charter of the United Nations and the Statute of the International Court of Justice (hereafter, the charter). The charter is a binding constituent treaty and was signed by the United Nation’s 51 founding states in 1945 (United Nations n.d.). It came into force the same year, after a majority of signatories had ratified it (United Nations n.d.). According to the charter, the aims of the UN include maintaining international peace and security, developing friendly relations among nations based on respect for the principle of equal rights and self-determination, achieving international cooperation in solving international problems, and promoting and encouraging respect for human rights and fundamental freedoms (art. 1). The UN is now the world’s largest international organisation, with 193 member states, most of whom have ratified the charter (United Nations n.d.). Japan became a member on 18 December 1956. The International Court of Justice (ICJ) is the principal judicial organ of the UN. The Statute of the International Court of Justice provides that only states
may be parties to cases before the ICJ (art. 34). It does not hear civil disputes between private citizens and therefore cannot be utilised to adjudicate international custody disputes.

2.2.4 The Development of International Family Law

International family law has evolved as a product of both private and public international law; although, traditionally, it has been understood to lie primarily in the realm of private international law (Stark 2005, 3). Indeed, family law and its relationship to conflict of law principles featured heavily in the first session of the Hague Conference in 1893 (Droz 1994) and notable conventions concluded since include those concerning maintenance obligations, recognition of divorces, protection of minors, intercountry adoption, and the Hague Convention. Over time, however, international family law has come to be increasingly influenced by public international law. This is reflective of the gradual erosion of the boundary/distinction between public and private international law generally as the rights and obligations of private citizens and corporations have increasingly become international concerns (see foreword by the Hon. Murray Gleeson in Tully 2010). The erosion between public and private international law may also be seen in the increasing cooperation between the two fields: for example, in the interplay between the Hague Conference and other international organisations, including the UN. In the interests of harmonising their work and increasing the potential for strategic cooperation between the two, the Hague Conference has had a standing invitation to participate as an observer in the work and sessions of the UN General Assembly since 2005 (United Nations 2005, 1543).

International family law provides the key structures to manage issues arising from relationships involving a foreign element, including the recognition of marriage and
divorce, determining the appropriate jurisdiction in custody and property disputes, and international parental child abduction.

2.3 International Human Rights Law and the Family

The issue of international parental child abduction is quite often framed in terms of a human rights issue (see, for example, Clemens 2003, 174–8; Alanen 2008, 79–84; Schnitzer-Reese 2009). In this section, I will examine the emergence of human rights law as a branch of international law and its influence on international family law and the emergence of the rights of the child. I will also explore the presumption that custody over a child is a ‘human right’.

2.3.1 The Evolution of International Human Rights Law

The growing field of international human rights is the most powerful international public law influence in the family law sphere. International family law expert Barbara Stark argues that international family law owes its evolution as a serious legal subject to the intersection of the advancement of the human rights movement and the spread of globalisation (Stark 2006).

The protection of human rights against state interference as an international legal concern has its germination in events after 1945, representing a reaction to the atrocities of the Nazi regime during the Second World War (Harris 1998, 624–5; Stark 2006, 1572). The political common ground achieved by the Allies in the postwar period lent support for the growth of ideas about human rights, which had emerged from concepts of ‘natural rights' and ‘natural laws' in the eighteenth and nineteenth centuries (Buck 2011, 20–1). The lynchpin of the burgeoning human rights movement championed by the UN is the Universal Declaration of Human Rights (UDHR), which was adopted
by the UN General Assembly on 10 December 1948. The UDHR aspired to set a common
standard of rights and freedoms for all people and nations, and to define the human
rights and fundamental freedoms expressed in the charter. Although it is not binding,
the UDHR has come to be regarded as paragon of international human rights and is
accepted as international customary law (Buck 2011, 21).

The aspirations of the UDHR were expounded on and given legally binding form in two
international treaties concluded by the UN in 1966, namely the International Covenant
on Civil and Political Rights (ICCPR) and the International Covenant on Economic,
Social and Cultural Rights (ICESCR). The UDHR recognised the family as the ‘natural
and fundamental group unit of society’ entitled to protection by society and the state (art.
16[3]). The paramount position of the family was reinforced in the ICCPR (art. 23[1]),
which also provides for the protection of privacy and family against any arbitrary or
unlawful interference (arts. 17[1] and 17[1]). The family also occupies a key position in
the ICESCR, which imposes an obligation on member states to extend the widest
possible protection and assistance to the family unit (art. 10[1]).

A particular concern to protect the rights of children grew from the human rights project
and found its place as an integral movement. Paula Fass provides a historical account of
how the rights of children emerged as an international negotiation point throughout the
twentieth century, during which two World Wars had brought into stark relief the
vulnerability of children to neglect and abuse (Fass 2011). Both the charter and the
UDHR built on conventions adopted by the International Labour Organization in 1919
prohibiting children from working in hazardous conditions and the nonbinding
Declaration of Geneva adopted by the League of Nations to protect children’s rights; for
the first time, the charter and the UDHR defined the rights of children in a legally
binding manner (Fass 2011, 17–18). In 1959, the UN adopted the Declaration of the Rights of the Child, culminating in the UNCRC, which was adopted and opened for signature by the UN General Assembly on 20 November 1989, and which created a comprehensive and legally binding mechanism to provide for the civil, political, economic, social, health and cultural rights of children. There are 196 parties to the UNCRC; all member states of the UN have ratified, accepted, acceded or succeeded to the treaty, with the exception of the United States, making it the most widely ratified international human rights treaty in the world (UN 2015). Japan ratified the UNCRC on 22 April 1990. The extent to which international treaties are ‘legally binding’ on contracting states is a much vexed issue, which I will address in later chapters. To this end, John Jackson, former Professor of Law at the University of Michigan, provides a useful starting point: namely, that ‘understanding an international legal system necessitates understanding the relationship of national legal and political systems to that international system’ (Jackson 1992, 311; for a recent discussion of this issue relating to Japan, see Webster 2012).

The UNCRC provides for a number of rights of the child which pertain to their family life and the manner in which they are raised. Notably, it contains a number of general provisions which directly relate to the issue of parental child abduction:

- Contracting states are to ensure that a child shall not be separated from his or her own parents against their will, except where such separation is necessary for the best interests of the child (art. 9[1]).
- Contracting states are required to respect the rights of a child who is separated from one or both parents to maintain personal relations and direct contact with

---

Current as of 1 October 2018.
both parents on a regular basis, except if it is contrary to the child’s best interests (art. 9[3]).

- Contracting states have a positive obligation to recognise that both parents have common responsibilities for the upbringing and development of the child and support parents in doing so (art. 18).

The UNCRC also contemplates the particular situation of transnational families by providing that a child whose parents reside in different states has the right to maintain personal relations and direct contact with both parents on a regular basis, save for exceptional circumstances (art. 10[2]). It also requires member states to take measures to combat the illicit transfer or non-return of children abroad by promoting the conclusion of bilateral or multilateral agreements or accession to existing agreements (art. 11).

The guiding principle of the UNCRC is that the ‘best interests of the child’ shall be a primary consideration in all activities concerning children, whether by public or private social welfare institutions, courts of law, or administrative or legislative authorities (art. 3[1]). The establishment of the ‘best interests’ principle as a universal standard in the UNCRC coincided with what Parker et al. describe as a subtle movement in many Western legal systems from the mid-1970s, which attributed agency to children as subjects in their own right, rather than merely the objects of disputes between adults (Parker et al. 1999, 737). The way the best interests of the child are formulated and applied is a key component of analysis in my case studies in Chapters 4, 5 and 6.

An important example of the recognition of the child as a person in their own right came with changes to the modern passport system, the key format for recognition of legal
status and agency in the international sphere. Up until 2002, a child’s identity could be subsumed within the family unit. In 1969, the International Civil Aviation Organization (ICAO) recommended that in order to simplify travel procedures, its contracting states should allow children under the age of 16 to enter their borders without a passport, provided that the child’s particulars were recorded in the accompanying parent’s passport (ICAO 2011, 3–10; Topol 2014). This eventually led to a rise in ‘family passports’, whereby the particulars of children and spouses would be entered into the passport of the ‘primary’ holder (Topol 2014). The ICAO subsequently adopted a ‘one passport, one person’ policy in 2002, requiring that a separate passport be issued to each person regardless of their age (std. 3.15, Annex 9 – Facilitation; Topol 2014). The ‘one passport, one person’ standard recognises children as individuals in their own right and is a tangible reflection of the principle embodied in article 7 of the UN CRC that children have the right to a legally registered name and nationality. This legal concept pairs with the proposition that a passport is also uniquely probative of nationality in international law. That is, the act of issuing a passport by one state constitutes a formal representation to other states that the holder is its national.26

2.3.2 Child Custody and Access as a Human Rights Issue

To the extent that one accepts that universal human rights exist,27 the rights of the child appear clear on moral and legal grounds (MacIntyre 2007, 68–70; cf. Dhiman’s ‘high-priority goals’ [2011, 47–50]). The issue of international parental child abduction directly affects some of these rights: most saliently, the rights of a child to remain with his or her parents and maintain personal relations and direct contact on a regular basis with a parent from whom they may be separated, as enshrined in article 9 of the

---

26 See Muchmore (2004, 315) for a detailed examination of this proposition.

27 See Mégret (2011, 200–4) for discussion as to the existence and universality of human rights.
UNCRC. Whether parents have rights (as opposed to duties and obligations) to raise their children is more controversial. The universal nature and experience of the parent-child bond creates a strong emotional, social and (in a majority of cases) biological sense that parenting is a ‘God-given right’ (US Congress 1995, S 8401). Arguments for the existence of parental rights stem from a variety of moral grounds, including proprietarianism (the notion that children are the property of their parents), biology, the best interests of the child, constructionism (based on the social contract of parenthood), causation (the notion that the child would not exist but for the parents), and the fundamental interests of parents and children (Austin n.d.). Similarly, moral grounds exist for rejecting the notion of parents’ rights – for example, with respect to children’s liberation and the lack of discretion (an essential characteristic of moral rights) involved in the exercise of such ‘rights’ (that is, there is a clash between the right to raise a child on the one hand and the obligation to do so on the other) (Austin, n.d.).

The UNCRC refers to the rights of parents and provides protection for the family unit. For example, it provides that state parties are to ensure protection and care for the child, taking into account the ‘rights and duties’ of his or her parents (art. 3). It also provides that state parties shall respect the ‘responsibilities, rights and duties’ of parents, inter alia, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the treaty (art. 3). The UNCRC, contends van Rossum, is premised on dominant values visible in modern liberal societies and pedagogical sciences pertaining to the family: that the nuclear family is the ‘basic unit of thought’ (2010, 36) and that it is

---

28 Comment by former US Republican Senator Jesse Helms in objection to the United States signing the UNCRC. Senator Helms and other senators submitted a resolution objecting to the treaty at the same time stating that the ‘laws and traditions of the United States affirm the rights of parents to raise their children’
preferable for both biological parents to raise a child in a consistent, affective and stable environment (2010, 36–7). It is not certain, however, that a parent’s right as a parent extends to the right to raise and spend time with the child, particularly in the event of the breakdown of the family unit. That said, ‘ongoing, warm and available involvement of both parents, in a climate of well-managed interparental conflict’ after a family breakdown is a keystone ideal of, and starting point for, many Western family law systems (McIntosh 2009, 389). In this way, a parent’s ongoing contact with a child may be regarded as a ‘high priority’ goal or claim, complementary to the rights of the child but not equivalent. In some cases, the claims of parents compete with the rights of the child in a way that may not be in the best interests of the child. For example, Jaffe argues that while a shared parenting arrangement is the ideal outcome for many divorcing or separating parents and their children, parents who have engaged in litigation regarding parenting arrangements have reached a stage where it should not be presumed or even necessarily encouraged (2014).

2.3.3 The Prosecution of the Rights of the Child through Activism

The legal rights of the child as embodied in the UNCRC are now an established part of international law and domestic legal systems around the world and there is a growing body of jurisprudence in relation to their application (see Liefaard and Doek 2015), although domestic political situations continue to shape the degree of legal acceptance of the treaty (see Isaacs and Triggs 2018 in relation to Australia’s immigration policy). There is evidence of the UNCRC’s normative impact even in the courts of states which have not yet incorporated it into their domestic law, such as England and Wales (J. (US Congress 1995, 8400; see also Clemens 2003, 170).

29 See also Rathus (2014), who traces the turbulent relationship between family law and social science research on the effects of shared parental authority and how it has affected judicial decision making in Australia.
Williams 2015), as well as the United States, which is not a party to it at all (Dohrn 2015). The Supreme Court of India provides a good example of how the UNCRC is invoked in strategic litigation to protect the rights of children. In the 1996 case of *M. C. Mehta vs. State of Tamil Nadu and Others*, Mr Mehta, a lawyer, commenced public interest litigation to bring the court’s attention to the employment of children’s hazardous employment in match factories in the town of Sivakasi. The Supreme Court chose to broaden its consideration of the matter to encompass the problem of child labour in India generally, referring to India’s constitution and its international obligations, including under the UNCRC. While the Supreme Court recognised the poverty which drove parents to seek employment for their children, and while Mr Mehta’s writ was ultimately dismissed, the court criticised the lack of progress on the abolition of child labour in India and made directions to the government and the employers of children for the improvement of the conditions of child labourers and their families, including ensuring the education of children, the deployment of alternate income streams to families to lessen the need for child labour, and an investigation into key hazardous industries where children were employed. While the judgement clearly does not offer a perfect outcome, it demonstrates the significant potential of international human rights law to at least improve the lives of children

Even before the legal articulation of the universal rights of the child through the mechanism of international human rights law, private citizens have used whatever means available to them to lobby for and protect the rights of children. In 1873, Etta Angell Wheeler, an investigator with the Department of Public Charities and Correction in Manhattan, New York, was called to investigate a severely battered and neglected

---

child, Mary Ellen McCormack (Markel and M. D. 2009). There being no law against child abuse at the time, Etta made a creative report of the matter to the American Society for the Prevention of Cruelty to Animals, who was prepared to regard Mary as a type of animal who should come within the legal protection available for them (Markel and M. D. 2009). The matter was prosecuted in the New York Supreme Court, Mary Ellen’s adoptive mother was found guilty of battery and assault, and the case led to the establishment of the New York Society for the Prevention of Cruelty to Children, apparently the first of its kind in the world (Markel and M. D. 2009).

Thankfully, the legal status of the child has strengthened immeasurably since such dark days for children, but many issues relating to the treatment of children around the world remain to be worked on, including international parental child abduction, meaning activists still use whatever tools are available to them to agitate for change. In the twenty-first century, a key apparatus for activism is social media. As discussed in Chapter 1, I utilised social media in this project both as a tool for data collection and a subject of study. Social media is utilised by concerned parties to help address the issues arising from the creation and dissolution of international families: to document their cases, call for support and sway public opinion, and potentially disrupt the status quo on international custody issues.

Social media and human rights are intimately connected. The advent of social media has affected almost every aspect of contemporary life. The political and legal spheres concerned with creating policy for control and implementing these policies through law are still coming to grips with how their work is changing in the wake of new forms and unprecedented levels of social communication. At times, the heightened level of social connection produced by social media aids policy-making and justice; at other times, it complicates and disrupts. The area of human rights offers many examples of the
complicated intersection between legal and political processes and the use of social media. For example, social media was famously lauded for its role in the democratic uprisings known as the ‘Arab Spring’ in the Middle East and North Africa region in 2011, where it provided freedom of expression and a means of organising in otherwise tightly controlled societies (see Khondker 2011; Joseph 2012). Even so, others have argued that social media can be used as an insidious form of social control and surveillance by agencies of the state (see Morozov 2011; Fuchs et al. 2012).

The relationship between social media and the advancement of human rights is complex and still emerging. It is a relationship which is double-sided, as suggested by Akerström: ‘Every character and function that interactive digital media facilitates can be seen as double-sided, where the dark side inevitably connects to the light’ (2015, 120). While not ignoring the tension in this relationship and the ‘dark side’ of mass digital communication, I argue that social media can assist parties involved to, at the very least, partially address the situation where the law in effect at the time cannot help. As well as filling in a gap left by mainstream media coverage, social media content created by both individual and groups of left-behind parents, including Facebook pages, tweets, blogs and online forums, assists to fill the vacuum between the realities of international parental child abduction and the legal solutions available to left-behind parents. While this gap creates bitter disappointment, helplessness and despair at the outcomes achievable through law, social media provides an extra-legal platform for left-behind parents to connect and share information with other parents in the same position, wherever there is internet access in the world. It also provides a virtual space for them to continue to advocate for change, even though their individual cases may be lost in legal terms. In some cases, content generated by left-behind parents can play a complementary role to the legal process by providing practical information to other left-
behind parents regarding their legal options. Social media platforms such as Skype and Facebook provide a readily accessible means of communication to support the honeymoon phase of new long-distance relationships and help established families maintain ties across great distances and national borders. Social media can, however, also support and document the disruption of relationships. My examination of the use of social media in cases of parental child abduction can be seen, in part, as belonging to this flipside: it is technology acting to support the downside of international relationships.

In his fictional critique of social media networks, *The Circle* (2013), author Dave Eggers discusses the ‘communion’ found by those publicly documenting their painful experiences. While the intense bereavement felt by left-behind parents at the loss of their relationships with their children cannot be understated, social media can have a positive effect in these cases by bringing people with common issues together and potentially allowing parents to reconnect with children who have been abducted or are otherwise lost in another country, even though it may be many years later. It is one manifestation of a ‘virtual community’ (Castells 2001, 386–9), which has arisen from the greater distribution of communications technology for public use. It provides a vital support mechanism for the immense emotional and psychological pressures faced by parents.

I examine the role of social media in my case studies in Chapters 4 and 5; while it is not necessarily a common thread throughout these cases, social media has played an important role in the lives of many parents dealing with international parental child abduction. There is significant scope for technology, including social media, to play an even greater role in future international parental child abduction cases as the children
involved, born after 2000 and consisting of members of ‘Generation Z’ and younger, are
technologically savvy and sensitive to issues of identity (Steinmetz 2017); that is to say,
these children are likely to be curious about their left-behind parents and have the
capacity to locate them.

2.4 The Emotional and Psychological Toll of Parental Child Abduction

Occasionally when attending conferences on human rights issues or international law, I
was asked by other delegates about my own children ... it irritated me that they treated
left-behind parents as a species to be studied and regurgitated for intellectual merit,
ignoring the humanity of their terrible situation (Pascarl 2007, 184–5).  

As per these words of a mother who experienced the international abduction of her children first hand, the emotional and psychological impact of parental child abduction on the people involved in these sorts of cases cannot be overemphasised. The emotional and psychological toll of parental child abduction is intimately connected to the concept of the best interests of the child, as supported by the developments in international law over the past 50 years. Awareness about the repercussions of parental child abduction has been growing in the medical and sociological arenas since the 1980s. This has been accompanied by a movement to reconceptualise the legal issue of parental child abduction as a form of emotional and physical child abuse (see, for example, Dabbagh 2012b).

31 Jacqueline Pascarl is an Australian national whose two children were abducted from Australia to Malaysia in 1992 by their father, a member of the royal family of the sultanate of Terengganu.

32 For an early clinical study of parentally abducted children, see Terr (1983). Terr found emotional effects evident in 16 of the 18 parentally abducted children he treated, including post-traumatic stress response syndrome, mental indoctrination and grief.
From a sociolegal perspective, an understanding of the personal elements of international parental child abductions is vital to judging whether the legal mechanisms in place are adequate to deal with the complex issues involved (Freeman 1998, 603). In turn, the adequacy of available legal mechanisms to cope with the dynamics of international child custody disputes can shape the way a parent uses the law, resorts to other action (such as abduction or re-abduction), or turns to other outlets, most notably media, to advance their case. Indeed, many regard parental child abduction as an unfortunate by-product of an adversarial family law system stretched to its limits, where parents faced with the pressure of a win/lose situation are driven to abduct (Family Law Council 1997, 2).

I consider that parental child abduction involves three interrelated strands of psychological reaction. The first is the psychological reaction of the child. Generally speaking, the practical implications of removing a child from their usual place of residence and depriving them of the nurturing relationship with the left-behind parent are numerous and can lead to myriad psychological and emotional consequences for the child that can be dramatic and long-lasting. In addition to the forced break in contact with the left-behind parent, abducted children may be separated from siblings, grandparents and extended family, their education and social life is disrupted and they lose connection to surroundings which may have been familiar to them from birth, including their native language in some cases, which can lead to a loss of the child’s feeling of identity (International Social Service Australian Branch 2005, 28). The uprooting of the abducted child can lead to feelings of insecurity, depression, stress and nervousness, and a sense of isolation, powerlessness and intense loneliness (International Social Service Australian Branch 2005, 28). Children may feel confused as to the sudden disappearance of the left-behind parent from their life, may feel resentment towards the
left-behind parent for allowing the abduction to occur or feel responsible themselves for the abduction (International Social Service Australian Branch 2005, 28–9). Indeed, the desire to protect children from the harm of removal or retention is one of the goals of the Hague Convention (preamble).

The second strand is the *psychological reaction of parents*. Research to date has primarily focussed on the impact on the child, but the act of parental child abduction can result in adverse psychological consequences for abducting parents. Furthermore, there is a body of literature that examines situations of family violence and other dangers that can prompt a parent to flee with their child (see, for example, Kaye 1999; Weiner 2000; Schuz 2003; Shetty and Edleson 2005). Apart from the distressing effects of situations which can precipitate parental abduction, one can surmise that abducting parents could find themselves under immense psychological pressure having committed an abduction, arising from factors ranging from practical considerations about living arrangements and their children’s schooling to fear of a potential re-abduction by the left-behind parent. Persia Woolley, author of the 1979 work, *The Custody Handbook*, describes how ‘nightmares, recurrent terrors, and general trauma run through the stories of both the snatched and the snatchers’ (216–17). This can significantly compromise their capacity to care and provide for their children.

As noted by Pascarl above, the forced break in the parent–child relationship caused by these types of abductions also exerts an enormous psychological toll on left-behind parents, as they struggle to come to grips with the loss of the relationship with their child and attempt to navigate complex international and domestic legal systems in the hope of re-establishing some contact. In extreme cases, there are reports of parents committing suicide after being denied a substantive relationship with their children. In
2010, the French national media picked up the stories of two French men, Arnaud Simon and Christophe Guillermin, who committed suicide in Japan only months apart after being denied access to their children by their Japanese ex-partners (Arnaud 2010; Lesdain 2010). Another such tragic case in the domestic context is that of Japanese national Akio Yokota, who committed suicide on 11 September 2011 (Scott 2012). Yokota’s wife had left him in 2012 and refused to allow him contact with their one-year-old son, Kaede, for six months afterwards (Scott 2012). A visitation arrangement was subsequently implemented allowing Yokota contact with Kaede for one hour per month (Scott 2012). It is clear from Yokota’s diary entries in the months leading up to his suicide that the forced separation from his son and heavily restricted visitation time loomed large in his decision to take his own life (Children’s Rights Council of Japan [CRC Japan] 2011). In his final entry on the date of his death, entitled ‘Sayōnara’, he describes a meeting that day with Kaede, who had turned away when asked who his father was (CRC Japan 2011). The negative psychological effects of parental child abduction can also reverberate through an abducted child’s extended family, severing, as it often does, ties with the child’s grandparents, uncles, aunts, cousins and other family and friends, some of whom may even have legal custody or visitation rights in relation to the child, which are infringed by the abduction.

Stress may have a significant effect on how parents involved in international custody disputes make decisions and engage, or not, with the applicable legal system or systems. The effect of stress on cognition is well documented in neuropsychological literature (see Conrad 2011). There is also an established link between uncertainty and increased anxiety (see, for example, Grupe and Nitschke 2013). This means that shifting and uncertain legal boundaries, moving through jurisdictions and trying to navigate through the web of international law, exacerbate an already stressful situation for left-behind
parents. Furthermore, research has found that stress responses affect learning associations between decisions and outcomes, leading to an emphasis on the potential advantages of an action, to the detriment of learning about the negative ones (Mather and Lighthall 2012). This could mean that an inherently risky action, such as abduction or re-abduction, could appeal to parents under extreme stress in international custody disputes, and otherwise affect their legal decision-making capacity.

While this thesis is focussed on the sociological aspects of international parental child abduction, I cannot, as saliently highlighted by Pascarl, comprehensively examine the issues involved in parental child abduction without examining the human element, for it is this element which sheds light on the motivations of the individuals involved in these cases and the personal impact of the highly complex legal, social and cultural issues that lie at the heart of international parental child abduction. These legal, social and cultural factors also play out in the third strand, the psychological reaction of the public and judges and other officials. The way the public reacts to a case of parental child abduction, and with whom they side, is driven by cultural and social values, as well as the influence of the media. Similarly, despite the notion that ‘justice is blind’, cultural and social values cannot be entirely extricated from judicial and official decision-making; these decision-makers are human after all.

In the case studies I present in Chapters 4, 5 and 6, I summarise events both in and outside the courtroom to create a timeline of social action, legal action and judgment. However, as we read these stories, we must contextualise them in the three strands of the emotional landscape. The examination of the case studies in this thesis can contribute to our understanding of the way society and the law, in its various forms, interact in these cases, from creating the conditions conducive to international parental
child abduction to providing avenues for left-behind parents to pursue their parenting rights.

2.5 Conclusion

The development of a body of international law to manage families across borders, coordinate domestic legal systems and ensure standards of human rights are met is a complex and ambitious endeavour. The rise of the transnational family in an increasingly connected international community has thrown up challenges that could not have been envisioned at the inception of international family and human rights law. The high-level political and diplomatic disputes created by international parental abduction find personal expression in the pain and confusion these cases cause to the individuals concerned. Technological advances, such as social media, offer alternate avenues for parties to advance their cases in an environment where the law may not assist. Technology also offers a viable alternate for transnational families in breakdown to stay connected.

The issue of international parental child abduction raises a diverse but interrelated set of problems which are imbued with a sense of urgency, given the often short timeframes relating to child custody, both in a legal (such as statutes of limitation for pursuing claims) and social sense (children get older). It is natural for people to turn to the law to make sense of this chaotic scenario, but I contend that the law in the Japanese context is not appropriately equipped to manage these issues. In Chapter 3, I explore the Japanese domestic legal system as it relates to the creation and dissolution of families, to provide further context for the case studies in Chapters 4, 5 and 6.
Chapter 3
Japanese Law and the Family

3.1 Introduction
This section will examine the development of law in Japan as it relates to the regulation of the family and the integration of international law. Prior to the Second World War, the household system (ie seido) was enshrined in law to ensure patrilineal lineage and the paramountcy of the stem-family structure (also known as a generational family structure, consisting of several generations living together in the same household [Kumagai 2008, 13]). Postwar amendments to Japan’s Civil Code and its regulation of the family structure formally discarded the ie seido, but it is arguable that it still remains a powerful normative concept in Japanese families and society today. The purpose of this literature review is to explain both the history and contemporary applications of Japanese family law to contextualise the case studies. Japan has adopted a code law system which, perhaps by virtue of the nation’s history, has generated a sizeable body of comparative legal scholarship. It is generally classified according to the following frameworks: as a civil law system based on German law; as part of the ‘Far Eastern’ legal family; and as a unique hybrid of different legal systems (see Marfording [1997] for further discussion on the classification of the Japanese legal system).

Kawashima (1983) also highlights the influence of the American legal system on Japan in the postwar period.

Japanese family law is contained in Book 4 (Relatives) and Book 5 (Inheritance) of the Civil Code. While the family law provisions of Japan’s Civil Code are predominantly modelled on French law, the historical legal system known as ritsuryō in Japan, which has its roots in Chinese legalism and Confucian ideals, has also been highly influential
in the Japanese understanding of the function of law (Mizuno 2014, 254). Under the ritsuryō system, the law’s function is to facilitate administrative policy, rather than to delineate the limits of authority; that is, it provides a less prescriptive system of law than is seen in the West, which limits the rights and obligations that may be imposed on citizens (Mizuno 2014, 254). In family law, the ritsuryō concept may be seen in the ability of citizens to execute personal changes in status administratively, through such mechanisms as consensual divorce and also through the administrative household registration system (Mizuno 2014, 259).

3.2 Law and the Family during the Meiji Era

The Civil Code of Japan (minpō), Japan’s primary body of private law, was enacted in 1896 and 1898 during the Meiji era (1868–1912). This was a period of dramatic modernisation following the fall of the Tokugawa Shogunate in 1867 and the restoration of imperial rule. The Civil Code systematised the household system, which is widely considered to have its origins in feudal traditions and Confucian values of filial piety, characterised by stem-family relations and paramountcy of lineage (Ronald and Alexy 2011, 1, 3). Hendry notes that the raison d’être of the household (ie) is continuity; it is an entity which endures beyond its individual members, who are mere travellers through it, responsible for honouring ancestors and decedents (1981, 15; see also Goodman 2001, 145). The household as enshrined in Meiji-era law was a male-dominated structure; the father was considered superior to the other members and had the power to choose their marriage partners, place of residence and even expel them from the family (Oda 2009, 201). The eldest son was the sole heir, females were otherwise considered inferior to the males, and the wife was not assigned any legal capacity whatsoever (Oda 2009, 201).

---

33 For discussion on where Japan sits on the comparative legal scale of state intervention in family law matters, see Blair and Weiner 2005.
Oda notes that the male-dominated household was considered to be the basic unit of the state system and a microcosm of the entire social system, at the top of which the emperor reigned as the father figure reigning over the ‘Japanese family’ (Oda 2009, 201). This concept was important to promoting national unity at a time when Japan was undergoing significant social change (Oda 2009, 201). In 1889, the Constitution of the Empire of Japan (dainihon teikoku kenpō), also known as the Meiji Constitution, was enacted. The Meiji Constitution established a limited constitutional monarchy. Sovereignty resided in the emperor (art. 4), who was proclaimed as sacred and inviolable (art. 3), enshrining his position as the head of the Japanese nation-state. The emperor exercised a great deal of power under the Meiji Constitution, including selecting Cabinet members, approving laws, issuing imperial edicts and, later, being considered to have unfettered control over the armed forces (Oda 2009, 16). Chapter 2 of the Meiji Constitution contained a limited number of ‘rights and duties of subjects’, all of which were subject to restriction by legislative acts of government (Yamagami and Suketake 1994, 8; Oda 2009, 16). Freedom of religion assumed the supremacy of Shintoism, and many other rights were severely restricted, particularly as a consequence of emerging militarism, which eventually drove Japan to war (Yamagami and Suketake 1994, 8; Oda 2009 16).

3.3 Reform of Family Law under the Allied Occupation

Japanese law underwent dramatic reform after the Second World War. Under the Potsdam Declaration, which established the terms of Japan’s surrender, Japan was required to ‘remove all obstacles to the revival and strengthening of democratic tendencies’ among its people and establish respect for fundamental human rights (par. 10; see also Kawashima 1983, 54). Family law in particular was ripe for legal reform as
the *ie seido* was considered to be a pillar of the powerful emperor-led political structure (Oda 2009, 202).

The current Constitution of Japan (*nihonkoku kenpō*) was adopted on 3 November 1946 and replaced the Meiji Constitution (Tanaka 1976, 55). The new constitution was drafted to reflect Japan’s obligation to implement democratic principles under the terms of its surrender (Kawashima 1983, 54). The constitution was remarkable from a family law perspective, as it provided for marriage by mutual consent of both parties and equality between husband and wife; it also required that laws enacted in relation to marriage and family matters respect the ‘essential equality of the sexes’ (art. 24). This had the effect of tethering the family unit to the married couple, rather than the *ie* (Fuess 2004, 146).

The Civil Code of Japan underwent major reform in 1947, one year after the enactment of the new constitution. The *ie seido*, previously the cornerstone of the Japanese family law system, had been rendered unconstitutional by the new constitutional guarantee of equality between the sexes and was dismantled by reforms to the Civil Code (Okabe 2012; Fuess 2004, 146–8). Dramatic changes were consequently made to parenting and property rights within the family. Parental authority was redefined to become guardianship to be held by both parents jointly and exercised in the best interests of the child. This represented a significant split from the previous incarnation of parental authority, which was almost exclusively exercised by the father alone (Kawashima 1983, 56). Individual ownership of property by spouses and division of property upon divorce (*zaisan bunyo*) was provided for, married women were given full legal capacity, and children within a family were made equal with respect to filial responsibilities and succession (Kawashima 1983, 55–6). These reforms to the Civil Code affecting property
and parenting rights boosted the viability of women pursuing a divorce (Kawashima 1983, 56). Prior to these reforms, the only realistic choice for a divorced woman in the Meiji period was to return to her natal home or remarry (Fuess 2004, 96).

3.4 The Household System as an Enduring Force and the Koseki

The abolition of the traditional ie seido met with bitter opposition during the drafting of the new Civil Code (Okabe 2012; Kawashima 1983, 55). However, as Kawashima notes, it is questionable as to what degree the revised Civil Code really represented a significant departure from old ideas, given that new lifestyles and ideas about the family had already begun to be generated as a result of economic development, increased migration to urban areas and the proliferation of liberal thought in the early twentieth century in Japan (1983, 56–7). On the other hand, Okabe (2012) and Ronald and Alexy (2011) assert that despite the formal dismantling of the household system, it has continued to have an influence on Japanese society. In particular, Ronald and Alexy show how the ie seido looms large as a ‘normative force’ in social and family matters, whereupon the postwar paragon of the family represented ‘an urbanized and nucleated form of ie’, with the members playing their traditional roles of breadwinner, housewife and diligent child (2011, 1). Ronald and Alexy also note the resilience of the stem-family structure in Japanese society, as it has continued to be visible in aspects of intergenerational care and inheritance, albeit in a more diluted form (Ronald and Alexy 2011, 1). Kumagai argues that as many elements of the ie seido still prevail in Japanese society, revisions to the Civil Code in the postwar period that sought to establish equality and independence within the family have never been fully realised (2008, 11). She characterises the Japanese family system today as a hybrid of both modern and traditional elements: externally it contains many characteristics of modernity, such as the prevalence of the nuclear family, but it retains aspects of the traditional system – for
example, the continued focus on the stem-family and generational ties (2008, 11, 26). The endurance of the *ie seido* is also due to its strong conceptual connections to the practice of *sosen sūhai*, tending or worship of the dead. *Sosen sūhai* is intrinsically linked to Buddhism and, to a lesser extent, Shintoism (R. Smith 1974, 12, 73–4; Valentine 2009, 46–7), Japan’s two predominant religions. Lebra observes similarities between the appearance of the *ie* and the nuclear family, noting that the designation of only one heir in the *ie seido* contributed to the smooth transition between generations and kept the family size small, giving it the apparent shape of a nuclear family (1989, 189).

The key to embedding the *ie seido* into law and society was the administrative household registration system (*koseki seido*) (White 2002, 68–9). The *koseki seido* is an ancient household-registration system, which was harnessed by law-makers in the Meiji period to solidify the *ie seido* in the nation’s consciousness (Krogness 2011, 65–6). The *koseki seido* recorded the population in household units, with each citizen a head of household or member thereof, with the overlying philosophy that the system united the nation together as one (Krogness 2011, 66). By recognising that the *koseki seido* provided the ‘key administrative nexus between family and state’, Allied Occupation policy set about creating a system whereby individuals, not households, would be registered, individuals could set up their own family register (*koseki*) and the nuclear family could act as a freestanding entity (White 2002, 69). With the dismantling of the *ie seido* in the postwar period, the law regulating the *koseki seido*, the *Family Registration Act* (*koseki hō*), was revised so that the household or family unit (*ko*) only goes back two generations (art. 6; Krogness 2011, 66). Nonetheless, Mackie has observed that Japan’s legal system, social policy and institutions, including the revised *koseki seido*, still operate on the premise that the majority of people will organise their lives as members.
of a ‘heteronormative nuclear family unit’ (Mackie 2009, 645). Stevens and Lee agree that the koseki sets out an ideological template in the form of the patrilineal family to which citizens are expected to adhere (2002, 92). Those who stray from the prescribed pattern – including unmarried people, single parents, non-citizens and people in same-sex relationships – suffer social, legal and material penalties, including less access to welfare benefits (Mackie 2009, 645). Some people, who, for various reasons, are never legally registered in Japan (mukosekisha) have no legal connection to family or state, and their ability to access education, medical care and welfare benefits is significantly compromised, as is their capacity to obtain identification documents such as a driver’s licence or passport (Chapman 2017).

The koseki seido provides the mechanism for establishing one’s legal relationship to a family and accessing the rights and obligations that this relationship entails. The koseki seido is also powerful for its role in defining oneself as Japanese. It was a precursor to the modern legal definition of nationality and was the sole mechanism of establishing legal status as Japanese until the introduction of the Nationality Act (kokuseki hō) in 1899 (Chapman 2011). Today, in the majority of cases, it is still not possible to establish Japanese nationality without registration in a koseki (Chapman 2011). Furthermore, non-Japanese citizens cannot register their own koseki (Jones 2015, 151).

Despite the dislocation that can exist between the dynamics of the administratively sanctioned family and its social reality, it has been noted that Japanese registrants tend to have a subjective attachment to the formalised administrative family set out in their koseki (Krogness 2011, 65). This is an important consideration when analysing the issue of international parental child abduction in Japan from a social, political and legal perspective: children of Japanese citizens are viewed as ‘belonging’ to a Japanese
family’s koseki. Divorce means an administrative split for husband and wife, with the wife moving back to her maternal koseki or establishing her own (Hiruta 2014, 92–3). The parent who retains shinken (parental authority/power) with respect to the child after divorce – regardless of whether it is inclusive of kangoken (physical custody) – retains the right to include the child in their koseki (Hiruta 2014, 104–5). (See 3.6 below for a detailed discussion of shinken and kangoken). The fact that non-citizens are not eligible to make their own koseki might provide an ideological barrier to the idea of shared custody or custody by the non-Japanese spouse in the case of a breakdown in an international marriage, when reference to the non-Japanese spouse will be removed from the family koseki and the koseki seido entirely, disappearing from the wider administrative and ideological ‘Japanese family’ too. The Japanese system of family law, which designates sole parental authority to one parent or the other upon divorce, can be viewed as intrinsically tied to the koseki seido; it is a ‘clean’ administrative solution to a messy reality. One may also hypothesise that the mentality regarding the importance of proper formal registration drives the prevailing view in Japan regarding what arrangements are in the best interests of the child when international relationships break down.

3.5 Marriage within a Japanese Context

Prior to the modernisation of Japan during the Meiji period, there was a wide range of markers to recognise when the relationship between a man and a woman counted as marriage, and these differed between social groups and regions (Fuess 2004, 11). Such markers included formal written contracts between families, sake-drinking ceremonies, and ‘visual marks of wifely status’, such as certain hairstyles or blackened teeth, cohabitation and/or the birth of the couple’s first child (Fuess 2004, 11). Historian Harald Fuess, in his comprehensive historical survey of marriage and divorce in Japan
from 1600 to 2000, notes evidence dating back to the Edo period (1603–1868) of an expectation for families and communities in Japan to control the selection of partners, particularly among the nobility (Fuess 2004, 12). This practice is reflective of the feudal family structure, which became prevalent among the samurai warrior class (shi) during the Edo period (Kumagai 2008, 8). Concern about mate selection stemmed from the household system, which, during that period, prohibited interclass marriage and perpetuated a patriarchal system of household ownership, which proceeded on a patrilineal basis (Kumagai 2008, 8–9).

On the other hand, the lower strata of society in Japan, namely the peasants (nō), artisans (ko), merchants (shō) and the ‘untouchables’, or underclass (eta), were not influenced by the household system in their approach to marriage (Kumagai 2008, 9). Kumagai notes that family for these groups was focussed on functionality and economic activity, and membership was extended to tenants and servants (Kumagai 2008, 9). The focus on economic activity meant that family members were valued as individual contributors, leading to greater equality among them; there was also less rigidity in who could succeed as head of the household (Kumagai 2008, 9). Japanese sociologist and feminist theorist Chizuko Ueno estimates that 90% of the population in the Edo period had family structures which deviated from the household system, such as matrilineal inheritance (ane-katoku) and ultimogeniture (inheritance by the last-born child [masshi sōzoku]) (2009, 63). Ueno also points to the work that the farming or merchant family did as a ‘management body’, whose priority was to secure reliable human resources for the family, rather than paying heed to any strict rules of inheritance (Ueno 2009, 63–4).

As discussed above, the Meiji Restoration in 1868 ended feudal rule in Japan, and the Civil Code implemented by the Meiji Government in 1896 and 1898 united the Japanese
people as subordinates under the emperor. According to Kumagai, the Civil Code extended the household system observed by samurai warrior families, characterised by patrilineal inheritance and stem-family structure, to all classes (Kumagai 2008, 10). Ueno denies this is the case, and regards the ie seido as an invention of the Meiji Government for the advancement of a modern nation-state, in particular by binding national loyalty with filial piety, making the values of the family unit align with those of the nation-state (Ueno 2009, 63, 67; Ryang [2009] also discusses the melding of nation-state and the family).

The Civil Code implemented by the Meiji Government in 1898 represented the first uniform law on marriage (Fuess 2004, 11). Three kinds of marriage were recognised under the Civil Code: namely, the ‘regular’ arrangement whereby the wife would marry into the groom’s family (futsū), the arrangement of a male marrying a female head of a household (nyūfu), and the arrangement of a husband also being adopted as a son by his wife’s parents (muko yōshi) (Kinjō 1994, 33). In the latter two, the groom joins his bride’s family to provide a male successor through what is known as adoptive marriage (yōshi engumi) (Kitaoji 1971, 1045–6). Common to all was an assumption that the family line was preserved through marriage, rather than the creation of any new independent legal entity between partners (Fuess 2004, 13). Despite the Meiji Government’s definition of marriage based on notification and registration, Fuess notes that families in the Meiji and Taisho periods (1912–1926) often put off reporting a union as a marriage until it had proven to be viable and/or produced a child (2004, 12; see also Hendry 1981, 22). This practice reflects the very functional role of marriage as a cog in the operational wheel of the household in the prewar period.
Further changes to the way marriage was defined in Japan came in the postwar period, ushered in by the 1946 constitution, which signalled a departure from the *ie seido*. In determining that marriage should be based only on the mutual consent of both sexes, the postwar Constitution of Japan removed the special power of the head of the house, which was characteristic of the *ie seido* (Steiner 1950, 179). Fuess notes that popular contemporary expressions for marriage, such as *kekkon* or *kon’in*, are free from any family connotation, although older Japanese people sometimes use expressions which hark back to the *ie seido*, such as *yome ni iku* (to go as a bride) and *yometori* (to take a bride) (Fuess 2004, 13).

While the overall marriage rate in Japan has declined and the average age of marriage has risen in Japan (MHLW 2018a [see subcategory *kekkon*, 2017, tables 9-2 and 9-11]), Japan is regarded as a *kaikon shakai*: that is, a society in which it is the norm for couples to be in a formal legal or *de jure* marriage, established by registration and commonly referred to as *kekkon* (Tokuhiro 2010, 2). Common law marriages or de facto relationships (*nai’en*) are rare, constituting only a very small proportion of all unions in Japan, estimated at about 1%, although there has been no formal consensus of common-law marriages since 1940 (Fuess 2004, 11–12, 53; see also Piotrowski et al. 2015, 1042). Ueno describes couples who have chosen not to formally register their union as conventional in their form but unconventional in their perspective (Ueno 2009, 23).

De facto unions have enjoyed some legal protection by Japanese courts since 1914 (Akiba and Ishikawa 1996, 591), but legal marriage confers broader legal entitlements and greater social recognition, which can be seen in how relationships and the birth of children are recorded under the *koseki seido*. De facto couples are not able to register their union as a stand-alone family unit under the *koseki seido*, and the birth of a child
out of wedlock is obvious from the manner in which their birth is recorded in the registry unless a ‘paper marriage’ is entered into by the mother or the child’s registration is subsumed by the family register of the mother or father’s natal family. While these may seem like mere administrative concerns, the ‘staggering mind-control’ (Fukushima 1995; quoted and translated by Krogness [2011, 81]) regarding the maintenance of the purity, that is to say concern with the formal and administrative order, of one’s family registry cannot be underestimated among the general Japanese population (Krogness 2011). This anxiety translates into real-life issues for families in which children are born out of wedlock. The Civil Code, reflecting the requirements of the koseki, is construed in such a way as to attribute parental authority solely to the mother where the parents are not married (Haraguchi 2018). A child born out of wedlock is required to have their mother’s surname (art. 790[2]). Fathers may acknowledge a child born out of wedlock as their own through a notification process and may exercise parental authority if the mother agrees (arts. 779, 781[1] and 819[4]). The child is, however, only recognised as legitimate through the marriage of their father and mother (art.789[1]), at which time they will be entered together in the same koseki. Further, until a landmark 2013 decision by the Grand Bench of the Supreme Court of Japan, which found it unconstitutional, article 900 of the Civil Code stipulated that the statutory inheritance share of children born out of wedlock, as per their koseki, was half the share of children born within a marriage (isanbunkatsu shinpan ni taisuru kōkoku kikyaku kettei ni taisuru tokubetsu kōkoku jiken).

There is also a considerable social stigma attached to unwed mothers in Japan despite rising divorce rates and changes in the structure of the family (see Hertog 2009; Hertog

---

34 The subsequent revision to the Civil Code, which removed the proviso regarding out-of-wedlock children, operated retroactively from 25 September 2013 (MOJ n.d.a).
2011). The rate of births out of wedlock represented only 2.3% of the total of live births in Japan in 2016 (MHLW 2018b, 33). This is similar to the rate in South Korea for 2016 (1.9%; MHLW 2018b, 33), but extremely low compared to 39.8% and 33.9% in the United States and Australia respectively in the same year (Martin et al. 2018, 6; Australian Bureau of Statistics 2017 [see subcategory Births, summary, by state]). The rate in the Philippines was also much higher than Japan in the same period, at 49.2% (Philippine Statistics Authority 2018, 4). This means the laws regulating child custody after divorce (which differ from laws regulating child custody for unmarried parents) apply to almost all children born in Japan and are highly relevant to the discussion with respect to international parental child abduction involving Japan.

As I discuss in 3.6, mothers are far more likely to obtain custody of children than fathers; but government assistance for single parents is limited (Semuels 2017) and payment of child support by the non-custodial parent after divorce is not common.35 Moreover, enforcement of child support and other payments after divorce is weak and often involves lengthy court procedures (Fuess 2014, 159). Property settlements after divorce in Japan are relatively meagre for the financially weaker spouse, who is usually the wife and the holder of sole parental authority; in mediations and adjudications in which property division was ordered in 2017, 62.7% involved a payment of three million yen (approximately AU$36,000) or less, and only 4.7% involved payments of 20 million yen (approximately AU$240,000) or more (Supreme Court of Japan 2018a, 47 [see table 28]). Settlements in consensual divorces are even lower (Fuess 2004, 158).

35 A 2016 survey of 1,187 single mothers by the Ministry of Health, Labour and Welfare in Japan found that only 24.3% were in receipt of a child support allowance (MHLW 2016, 56 [see table 17-(3)-1]).
3.6 Divisions within Divisions: Japanese Law on Child Custody

Japanese family law imposes boundaries or divisions after family breakdowns which often exclude the parent not residing with the child. Japanese and non-Japanese parents alike have struggled with the constraints of the domestic Japanese family law when trying to regain contact with their children and establish custodial and visitation arrangements after their children have been taken by the other parent. These constraints relate most prominently to the absolute nature of parental authority after divorce and the conceptualisation of visitation under Japanese law.

As discussed in Chapter 1, Japanese law does not recognise the concept of shared parental authority. Under its Civil Code, both parents are deemed to have parental authority, or shinken, over a child of the marriage until divorce, at which point it requires that either one parent or the other be designated parental authority (art. 819). Within this framework, shinken can be further narrowed to determine legal custody, which entails the power to enter into contracts, manage inheritances and dispose of real property in the child’s name. This is then distinguished from kangoken, or physical custody, which refers to the power to make decisions regarding the child’s care, residence and education (arts. 820, 821 and 824). In this way, upon divorce, each parent can, theoretically, be vested with one of these two types of custodial authority (Bengoshi Hōjin Mai Taun Hōritsujimusho [Bengoshi Hōjin] 2014, 174). Yet actual cases where custody is split in this way are rare in Japan. According to annual statistics compiled by the Supreme Court of Japan, out of the 20,588 cases in which the mother was allocated shinken by way of mediation in 2017, only 31 cases also involved a designation of kangoken to the father; out of the 1,959 cases in which the father was allocated shinken that year, only 99 also involved a designation of kangoken to the mother (Supreme Court of Japan 2018a, 43 [see table 23]). The mechanism of splitting kangoken from the
broader pool of *shinken* powers may be regarded as a function of prewar law, under which it was sometimes considered appropriate to allow mothers to continue to physically provide care for children after divorce, even though there was a preference for granting legal custody to fathers and continuing the formal patrilineal relationship (Jones 2007a, 216). There is a clear gender divide involved in the allocation of *shinken* after divorce in Japan. There is a well-entrenched trend for the mother to take *shinken* after divorce in Japan (Fuess, 156–8; Costa 2010, 378), reflecting a transition from concern with patrilineal integrity to a focus on the welfare or interests of the child. In practice, this maternal preference considers the ‘maternal’ nature of the parents, regardless of their sex. A father ‘performing the role of a mother’, or circumstances where there is someone else in the father’s support network who can step into the role of the mother, such as a grandmother, may be given maternal preference (Baba Sawada Höritsu Hōritsu Jimusho 2008, 42). Proper parenting in the eyes of the Japanese family law system presumes a certain gendered division of labour.

The predominance of sole parental authority after divorce in Japan brings the issue of visitation into stark relief. While some divorce handbooks\(^{37}\) published in Japan describe

\(^{36}\) Mothers were granted custody in 93% of cases handled by family courts in Japan in 2017 (Supreme Court 2018, 43 [see table 23]); this figure is indicative of how custody has been awarded in divorce cases over the past 50 years, as the rate of paternal custody has not altered significantly during that time (*Bengoshi Hōjin* 2014, 177).

\(^{37}\) Divorce handbooks are self-help guides that are generally written by lawyers or legal scholars for popular consumption and sold in major bookshops. They typically contain basic explanations of laws relating to divorce, asset division and custody, practical information regarding the divorce process, advice on post-divorce life and information regarding the impact of divorce on the parties’ koseki. Example titles of these types of handbooks are ‘*Yoku wakaru! Rikon no tetsuzuki to susumekata*’ (*Easy to Understand! Divorce Procedure and Process*) (Hiruta 2012) and ‘*Kurashi no hōritsu mondai shirizu: bengoshi ni kikitai! Rikon to kodomo no mondai Q&A*’ (*Life’s Legal Issues Series: I Want to Ask a Lawyer! Divorce and Children’s Issues*...
the non-custodial parent as having a ‘visitation right’ (メンカイレギュル ken) (see, for example, Baba Sawada 2008, 61; Hiruta 2012, 92; Hiruta 2014, 106), whether the concept holds any legal weight has been a matter of debate for many years (Jones 2007a, 240–5; Kojima 2011, 90–102; Suzuki et al. 2013, 57–8; Yoshioka 2017). Visitation was first recognised in Japan by the Tokyo Family Court in 1964 (14 December 1964; cited in Tanase 2010, 63) and the question of its nature as a right has since come before the Supreme Court on one occasion only, in 1984 (メンカイレジュルモシタケイクウリュニタースコミュニケーションキククウノケッテイニタースイフシクニタス [Appeal of decision to deny petition for visitation]; cited in Tanase 2010, 63). In that case, in which a father appealed a decision to deny him two visits with his daughter per year, the Supreme Court concluded that visitation rights must be respected as a fundamental human right, but arrangements for visitation must be informed by the welfare of the child (Tanase 2010, 65). Japanese statute does not explicitly recognise visitation as a legal right (Jones 2007a, 228–9). This means that the legal position of visitations in Japan is as a ‘weak’ right, as opposed to a ‘strict’ right: that is, visitation rights are not constitutionally protected and are treated as a competing interest to be balanced against the welfare of the child (Tanase 2010, 71).

There is a common attitude among custodial parents in Japan that visitation is a disruption to their children’s lives, as encapsulated in a manga taken from a handbook written by a Japanese lawyer (figure 1). The mother in the picture tells her lawyer that she doesn’t want her husband in her children’s lives and that his only responsibility is the payment of money. After learning from her lawyer about the importance of children maintaining a bond with their father, the woman tearfully admits that she, too, did not

---

Q&A (Baba Sawada 2008).
A 2016 survey by the Ministry of Health, Labour and Welfare found that of a sample of 1,817 single-mother households, the mother had agreed to visitation in only 24.1% of cases (MHLW 2016, 63 [see table 18-(2)-1]). A sample of 308 single-father households revealed the fathers had agreed to visitation in only 27.3% of cases (MHLW 2016, 64 [see table 18-(2)-3]). Furthermore, visitation, when ordered or agreed upon in Japan, tends to be ‘minimalist’: that is, of relatively short duration (no more than two or three hours) and limited in frequency (typically once every one or two months) and, in contentious cases, may involve only a formal meeting at a designated family centre (Tanase 2011, 579–80). In the 13,649 divorce cases determined in 2017 by family courts in Japan (by way of mediation or adjudication) which involved an order for visitation, weekly and fortnightly visitation was provided for in approximately 2.1% and 7.7% of cases respectively; monthly visitation was provided for in approximately 43.6% of cases (Supreme Court of Japan 2018a, 43 [see table 24]).

Overnight visitation was agreed

38 By way of comparison, the latest survey of visitation arrangements by the Australia Bureau of Statistics found that in Australia, 29% of children with non-resident parents were reported to have met with that
upon or ordered in approximately 8.4% of cases (Supreme Court of Japan 2018a, 43 [see table 24]). The nature of visitation in Japan is such that even parents granted time with their children have no meaningful input into their children’s upbringing (Tanase 2010, 80–4).

Furthermore, the fact that visitation was ordered is not any guarantee that it actually eventuates. While the custodial parent is not meant to deny the non-custodial parent visitation without reason, the reasons for validly doing so are broad and highly discretionary, such as a determination that visitation is damaging to the child’s interests (Hiruta 2012, 92). This can encompass situations where the non-custodial parent has not paid child support allowance or speaks badly about the other parent, or where the child expresses a dislike of visitation (Hiruta 2012, 92). The absence of any explicit recognition in Japanese law of visitation as a legal right means that non-custodial parents can be effectively excluded from their children’s lives (Jones 2007a).

There have, however, been some small shifts in policy and case law towards supporting post-separation contact between non-residential parents and their children in recent years. Firstly, from 1 April 2012, an amendment to article 766 of the Civil Code took effect which requires couples divorcing by kyōgi rikon (consensual divorce) to state their agreement on visitation and other contact, child support payments and other matters concerning the care of any child on their divorce notification. This amendment represents the first time that post-divorce visitation or other interaction between a child parent either daily or weekly and 17% were reported to have met with that parent fortnightly in the 2012–13 financial year, while 43% of children were reported to have some degree of overnight contact with the non-resident parent in the same period (Australian Bureau of Statistics 2015, Table 10 [children aged 0-17 years with a natural parent living elsewhere, contact arrangement by age of child]). These are aggregate figures and relate to both litigated and non-litigated matters.
and their non-custodial parent has been referred to in Japanese statute (Jones 2011b). Its effect has been limited, however, as failure to comply with the requirements set out in article 766 does not attract any penalty, nor is it a barrier to obtaining a divorce (Hiruta 2014, 106).³⁹

The amendment to article 766 of the Civil Code was part of a raft of amendments designed to strengthen the emphasis on children’s’ interests (ko no rieki). For example, an amendment which took effect at the same time directs that those with parental authority have not only a right and duty to provide care and education to their child, but they also must do so in a way that is in the interests of the child (art. 820). By giving precedence to the interests of the child, the amendments were aimed at deterring child abuse arising from an outdated notion of children as the chattels of their custodians and formed part of a broader restructure of the legal system aimed at protecting children from abuse (MOJ n.d.b). Discussions in Japan’s National Diet also reveal that the revision to article 766 was perhaps intended to have a more significant effect on the way custody is determined in Japan than would appear at first blush. The then Minister of Justice Satsuki Eda was reported as saying that he had hoped the amendment would lead to greater visitation rights and, eventually, consideration of joint custody, but conceded that judges remained reluctant to change their minds (Economist 2012). Eda stated that it was important for the parent and child bond to be preserved and that the

³⁹ The non-government organisation Kizuna Child-Parent Reunion reports that compliance with article 766 is as low as 50% (Kitagawa 2014). In December 2017, the Ministry of Justice produced a pamphlet aimed at divorcing parents with advice on how to come to agreement on visitation, as well as child support payments, which may have been aimed at increasing compliance with article 766 (MOJ 2017, 5). The pamphlet promoted the positive effect that visitation can have on children’s security and confidence, although it makes it clear that it is not a required part of a divorce and that it is to be approached from the interests of the child, so as not to overburden them (MOJ 2017, 5, 13).
The aim of the revision was to create a new way for families, including post-divorce families, to exist (National Diet of Japan 2011a, 4–6). This ideal of post-divorce family unity has not, however, found its way into the black letter law of Japan or its practice.

A further shift in the official stance on visitation took place in March 2013, when the Japanese Supreme Court found that a court could impose a fine on a custodial parent who failed to facilitate visitation when required to do so by a court order (Kansetsu kyōsei ni taishuru shikkō kōkoku kikyaku kettei ni taishuru kyoka kōkokujiken). The type of fine for this kind of case is relatively small: ¥50,000 (approximately A$500) per failure to facilitate visitation (Kansetsu kyōsei, 2–3). While this may be a sign of progress for non-custodial parents involved in the small percentage of adjudicated cases, it is nonetheless only an indirect form of enforcement of visitation determinations, and noncompliant parents may simply pay the fine as a form of ‘efficient breach’ (Goetz and Scott 1977) to maintain distance from the other parent. Alternatively, the custodial parent may pay nothing at all, and it would be up to the non-custodial parent to initiate a separate petition for the debt’s enforcement pursuant to the Civil Execution Act (minji shikkō hō), consuming more of their money and time. Further, the judgment confirmed that a child’s refusal to meet or interact with a non-custodial parent could be grounds for a challenge to any order requiring visitation take place, although it was no hurdle for an order for indirect enforcement via monetary penalty while the visitation order was still current. In this way, the judgment is more of a bolster to the mechanism of indirect enforcement in contractual terms rather than any show of judicial support for the visitation rights of parents.

Despite these legal shifts in the context of visitation, the reality for the majority of parents in Japan without shinkaen is that the law effectively prevents them from having
a major presence in their children’s lives; they become an ‘optional part’ of their family (Jones 2007a, 221). This plays out in reality as a ‘clean break’ (kippari to wakare), where a child and their custodial parent have no contact with the non-resident parent. The legal culture in Japan creates an environment where parents who continue to have a close relationship with their children after divorce, or seek such a relationship, are going against the grain. This means it is fathers who most often lose all rights of custody upon divorce. This social norm in Japan stands in marked contrast to the family law systems of many other countries around the world in which the concepts of shared parental authority and the nurturing of the parent–child bond in the event of a family breakdown have emerged as vital tenets. These countries include some of Japan’s treaty partners under the Hague Convention, such as the United States of America, Australia, the United Kingdom, Canada, the Scandinavian countries and Germany (see Rhoades 2002; Ryrstedt 2003; Tanase 2011).

These elements of the Japanese domestic law combine to create an environment in which some parents feel like they have no other option but to turn to abduction.40 Parents with full custody of their child under a foreign law may have little or no parenting authority under Japanese family law after their child has been taken to Japan by the other parent (Jones 2007a, 256–7).41 While Japanese law provides for

---

40 There are no statistics on the number of domestic parental child abductions in Japan. The Supreme Court of Japan acknowledges that a portion of the applications made in Japanese family courts each year for the handover (hikiwatashi) of children are cases of parental abduction (Supreme Court of Japan 2005; see also Jones [2011a]). In 2017, the Japanese family courts handled a total of 2,590 applications relating to hikiwatashi (Supreme Court of Japan 2018a, 57 [see table 41]). Jones observes that the hand-over disputes which reach court represent only a small number of the overall disputes each year (2011a, 51).

41 This situation does not only apply to cases where there is a non-Japanese parent; it can also arise where there is a foreign court order relating to parents who are both Japanese (see the case of Masako Suzuki
recognition of foreign court orders and Japanese courts can and have recognised foreign custody orders, they are often not enforced (Jones 2007a, 256–7), reflecting the lack of legal measures available against non-compliant parties (Jones 2007a, 256–7). Very little incentive is provided under the law for custodial parents to encourage or facilitate contact with the non-custodial parent. By disproportionately and absolutely favouring those parents with residence of their children, regardless of how those living arrangements came about, the Japanese legal system is open to being criticised for allowing custody disputes to become a ‘zero sum game’ (Jones 2014b) or a case of ‘saki ni tsureteitta mono kachi’ (whoever abducts first wins) (Bengoshi Hōjin 2014, 177). In such an environment, it seems only natural that the ‘losing’ party will seek some form of redress through extralegal forums when their legal avenues have been exhausted.

3.7 The Hague Convention in Japan

Until recently, the difficulties faced by many non-custodial and left-behind parents within the Japanese legal system were compounded by the fact that Japan was not a party to the Hague Convention. The Hague Convention was first drafted by the Hague Conference on Private International Law on 24 October 1980 and put out for ratification over 30 years ago.

Akeo, discussed in Chapter 5).

42 Article 118 of the Civil Code of Procedure [minji soshō hō] provides that a final and binding judgement rendered by a foreign court is valid if the jurisdiction of the foreign court is recognised pursuant to laws and regulations, conventions, or treaties, the defeated defendant has been appropriately served with the requisite summons or order for the commencement of litigation or has otherwise appeared, the content of the judgement and the litigation proceedings are not contrary to public policy in Japan, and a guarantee of reciprocity is in place.
All Group of Seven (G7) nations, with the exception of Japan, had ratified the Hague Convention by 1995 (Hague Conference 2018b). Further, after Russia acceded to the treaty in 2011, Japan was the only Group of Eight nation not to have become party to it. This omission on the part of Japan from an international perspective was widely reported in the English-language media both inside and outside of Japan (see, for example, McCurry 2008; Mainichi Daily News 2013; Sekine 2013). Japan’s neighbours, Thailand, Singapore and South Korea, ratified the Hague Convention in 2002, 2010 and 2012 respectively (Hague Conference 2018b). As discussed in Chapter 1, however, many Asian countries have not joined the Hague Convention, including the People’s Republic of China (excluding Hong Kong and Macau), Vietnam, Malaysia and Indonesia. These are critical exclusions in the Japanese context, given the high number of marriages between Japanese citizens and citizens of non-Hague countries such as China, also discussed in Chapter 1.

Without the Hague Convention, and in the absence of any other international agreement on child abduction recovery, left-behind parents can only try to assert their right of custody through the domestic legal system of the country to which their child has been taken. Left-behind parents of children residing in Japan have often faced insurmountable difficulties when trying to assert rights of custody, including visitation, under the domestic legal system.

In May 2011, the government of Japan announced its intention to join the Hague Convention and signed and ratified the treaty on 24 January 2014. The Hague Convention entered into force in Japan on 1 April 2014, and legislation governing its implementation took effect the same day in the form an act known as Kokusaiteki na ko

43 Current as of 1 October 2018.
no dasshu no minjijō no sokumen ni kansuru jōyaku no jisshi ni kansuru hōritsu (Act for Implementation of the Convention on the Civil Aspects of International Child Abduction. Hereafter, the Implementing Act). The Hague Convention automatically came into force between Japan and other member states. In order for the treaty to come into force between Japan and non-member states, it had to accept their accession to it. Japan has accepted all accessions with the exception of Bolivia, Pakistan, Tunisia and Cuba (Hague Conference 2019). In adopting the Hague Convention into its domestic law, Japan stepped across the legal boundary that had separated it from most developed countries in the world in its handling of cases of international parental child abduction. It is also a sign that Japan is now prepared to create legal boundaries within its jurisdictional borders to constrain the actions of its citizens in the interest of creating more equitable outcomes for families in the case of international parental child abduction. This indicates a willingness to deal with the everyday, practical problems that can arise from the growing movement of people across its national borders.

According to prominent Japanese family lawyer Kensuke Ōnuki, the Hague Convention had proven to be a deterrent for many women seeking to return to Japan with their children within only a few months of its ratification (Yomiuri Shimbun 2014a). This is an important point as it indicates how the treaty may influence a shift in social norms and behaviour without being formally invoked.

The Hague Convention calls for the restoration of the pre-abduction status of the child, with a view to having the issues of any substantive custody dispute determined by a court in the child's place of habitual residence and in accordance with its local laws. Habitual residence is a legal concept determined by reference to indicia such as shared parental intent and the experiences of the child up to the point of the abduction (see

---

44 Current as of 25 February 2019.
Vivatvaraphol 2009). The Hague Convention sets up a legal and administrative framework to encourage cooperation between states in supporting the prompt return of children who have been wrongfully removed or retained back to the place of their habitual residence. The Hague Convention applies to children under 16 years of age (art. 4). A child’s removal or retention is considered to be wrongful if it breaches a person’s rights of custody under the law of the state where the child was habitually resident immediately before they were removed or retained (art. 3[a]), and those rights of custody were actually being exercised or would have been exercised at the time of the removal or retention (art. 3[b]). The Hague Convention defines ‘rights of custody’ as including rights relating to the care of the child and, in particular, the right to determine the child’s place of residence (art. 59[a]). Rights of custody may be joint or sole rights and may be derived from the operation of law, a judicial or administrative decision, or an agreement having legal force in the child’s state of habitual residence (art. 3).

The Hague Convention is administered in each contracting state by one or more designated agencies called Central Authorities, which manage return applications and undertake actions such as locating abducted children, negotiating their return and issuing judicial or administrative proceedings where necessary (Hague Convention, art. 7). The Central Authority in Japan is the Ministry of Foreign Affairs. The underlying principle of the Hague Convention is that the judicial or administrative authorities in contracting states will order the return of a child who has been wrongfully removed or retained there when proceedings for the child’s return have been commenced within one year of their removal or retention, or more than one year after the removal or retention unless it is established that the child is now settled in their new environment (art. 12).

45 For further discussion on the assessment of ‘rights of custody’ under the Hague Convention, see the decision of the US Supreme Court on 17 May 2010 in Abbott v. Abbott, 130 S.Ct. 1983 (2010).
The Hague Convention framework is also designed to protect rights of access. ‘Rights of access’ are defined in the treaty as including the right to take the child away for a limited time to a place other than their habitual residence (art. 5[b]). Parents may make application to the Central Authority to arrange access visits in the place their child is. The Central Authority is required to remove obstacles to the exercise of access rights and ‘secure respect’ for the conditions in which the rights may be exercised, extending to the issue of proceedings (art. 21). There is no time limit on access application under the Hague Convention, so, unlike return applications, they may be made retroactive to the commencement of the treaty in a given state. Also, in 2017, a Special Commission of the Hague Conference affirmed that an application may be made to a Central Authority for assistance in arranging and enforcing access rights even where there is no international child abduction situation on foot (Hague Conference 2017, 3).

The Hague Convention framework also provides for a number of grounds to refuse an application by a left-behind parent for the return of their child, including the existence of a grave risk that the child’s return would expose them to physical or psychological harm or otherwise place them in an intolerable situation (art. 13[b]). This ground is transplanted into the Implementing Act as article 28(1)(iv) and is substantively unchanged. The Implementing Act does, however, go a step further by identifying factors which Japanese courts are to consider in determining whether a grave risk to the child exists if they were to be returned (art. 28[2]). These factors include the following:

- whether there is a risk that the respondent (who is most likely the abducting parent) would be subject to violence by the applicant (who is most likely the left-behind parent) in such a manner as to cause psychological harm to the child if the child and the respondent returned (article 28[2][ii]); and
whether there are circumstances in the child’s place of habitual residence that make it difficult for the applicant or respondent to provide care for the child (article 28(2)(iii)).

Article 28(2) also states that Japanese courts shall consider all other factors (sono hoka no issai jijō) in determining the existence of a grave risk of harm to a child if they were to be returned to their place of habitual residence.

In codifying the grounds to refuse a return application in this way, the Japanese legislators are encouraging a liberal reading of the Hague Convention's article 13(b) defence to a return application. Article 28(2)(iii) of the Implementing Act, which requires Japanese courts to consider whether there are circumstances which make it difficult for the applicant or respondent to care for the child in his or her place of habitual residence, is particularly contentious. If interpreted broadly, it opens the door for judges to consider a whole range of economic, social and cultural factors that are far removed from the purpose of the Hague Convention by inviting them to consider a nebulous category of ‘difficult’ situations.

Also of particular note is that article 28(2)(ii) of the Implementing Act makes violence to the abducting parent an explicit consideration for Japanese judges in deciding whether to return a child under the Hague Convention. At the time of its drafting, the Hague Convention relied on a ‘conventional paradigm’ along gendered lines which cast the typical parental ‘abductor’ as the non-resident parent, usually a father who may be disgruntled after a relationship breakdown and family law proceedings, and the left-behind parent as the primary carer, usually the mother (Hale 2017, 4). This paradigm has not been borne out in the statistics, which reflect the contemporary reality of
international parental child abduction: in 2015, 73% of the taking parents were mothers, up from 69% and 68% in 2008 and 2003 respectively (Lowe and Stephens 2018, 7). Further, based on the statistics available to the Hague Conference from 976 applications in 2015, 80% of taking parents were the primary carer or joint-primary carer, up from 72% and 68% in 2008 and 2003 respectively (Lowe and Stephens 2018, 8). It is not so surprising, then, that article 28(2)(ii) of the Implementing Act has been drafted in this way, given the public discourse in Japan about whether or not it should ratify the Hague Convention centred on concern for parents and children fleeing family violence (see, for example, M. Ito 2010; Minamida 2011; Hagiwara, Inagaki and Kosaka 2012). For example, the ‘Safety Network for Guardians and Children’ (Hāgu jōyaku kamei ni hantai suru kai, directly translated as ‘the group against joining the Hague Convention’), was established in 2011 by mothers who had brought their children back to Japan from overseas and opposed the Japanese government’s move towards signing the Hague Convention on the basis that it would prevent women in international marriages fleeing violence.46

The Implementing Act also digresses from the text of the Hague Convention by rendering the existence of a grave risk of harm as an absolute defence to the return of a child, giving it greater force than it holds under the Hague Convention (Renwick 2015, 2). In particular, article 28 of the Implementing Act provides that the court ‘shall not order the return of the child’ (ko no henkan wo meiji shite wa naranai) if it finds the existence of a grave risk of harm, as opposed to the discretionary language of article 13(b) of the Hague Abduction Convention, which states that ‘the judicial or administrative authority of the requested State is not bound to order the return of the child’ where the party opposing the return establishes the existence of a grave risk of

harm. The discretion of the Japanese courts has been constrained by the legislature; they are not granted discretion where a grave risk of harm is established and must deny any application for the child’s return (Renwick 2015, 2).

Prominent international family lawyer Jeremy Morley has also brought attention to the way in which rights of access or visitation are treated under the Implementing Act (Morley 2015). Article 16(1) of the Implementing Act provides that a parent who believes visitation or contact with their child has been interfered with may make an application for assistance to the Japanese Central Authority if the child is in Japan, the child was habitually resident in a contracting state immediately before the interference, and the parent is entitled to access or visitation under the laws of that state (limited to people with a domicile or residence in a state other than Japan). Morley points out that the effect of legislating in this way means that access applications cannot be made by parents whose child has been taken to Japan and has become habitually resident there before contact with them dropped off (2015). This creates a ‘carve out’ of the Hague Convention’s provision for access; parents whose children have relocated to Japan by agreement of the parents with an understanding that access will be provided are almost certainly to be excluded and will be forced to issue proceedings in the family court in Japan for access. This is a striking example of the dislocation between domestic and international law; given the insubstantial quality of the right to visitation or access in Japan, the legislation has been drafted to avoid any implication that there are such rights under Japanese domestic law.

Japan may be seen to be ‘watering down’ its obligations under the Hague Convention by legislating in this way, particularly with respect to the defences available to Japanese judges determining return applications (see, for example, A. J. Savoie 2012; Morley
Certainly, the implementing law is broad enough to encourage judges to consider and determine the substantive issues in a custody dispute (in other words, where the child should live and with whom), which goes far beyond the purpose of the Hague Convention to restore the pre-abduction status quo and uphold rights of custody and access. This issue is discussed further in Chapter 6, which examines the case study of James Cook and Hitomi Arimitsu.

The treatment of the ‘grave risk defence’ in the implementing legislation in particular demonstrates a tension between Japan’s ratification of the Hague Convention and the content of its implementing law. In legislating in a way that provides an explicit mandate for a wide interpretation of article 13(b) of the Hague Convention, Japanese law-makers seem to be placing an emphasis on the need to mitigate not only the risk of harm to the child, but also to the abducting parent, potentially at the expense of the rights of custody and access of the left-behind parent and the object of the treaty: namely, the prompt return of children who have been wrongfully removed or retained. Acknowledging the importance of establishing a cohesive approach to the interpretation of the grave risk defence, the Permanent Bureau of the Hague Conference has convened a Working Group to establish a guide to good practice on article 13(b) of the Hague Convention, the success of which is regarded as critical to the ongoing operation of the treaty. A draft of the guide was publicly released in September 2017 and the Working Group anticipates that the guide will be finalised in March 2019 (Hague Conference 2018a). The Working Group, in which Japan is a participant, is chaired by Chief Justice Diana Bryant of the Family Court of Australia. In an address at the symposium of the International Academy of Matrimonial Lawyers in May 2014, Chief Justice Bryant indicated the importance of the effective use of the article 13(b) defence, stating that a
failure to fit the member states into a workable framework had the potential to derail the work of the Hague Convention (D. Bryant 2014).

Japan is not the only state to have legislated in a way that encourages a broad interpretation of the article 13(b) defence. Professor Merle Weiner of the University of Oregon School of Law argues that the concept of ‘intolerable situation’ has been mistakenly conflated with that of ‘grave risk’, and that it ought to be employed as a flexible concept to protect children from situations that are clearly intolerable for a child, although may not involve grave physical or psychological harm, such as the separation of siblings (2008). In particular, Weiner points to a law passed by the parliament of Switzerland in December 2007, Loi fédérale sur l’enlèvement international d’enfants et les Conventions de La Haye sur la protection des enfants et des adultes, identifying three non-exhaustive situations in which an ‘intolerable situation’ exists for the purpose of article 13(b), including where the abducting parent is not in a position to take care of the child in the state of habitual residence or placement with that parent is manifestly not in the child’s best interests (2008). Japanese courts would not be outliers in avoiding a narrow reading of the article 13(b) defence. Indeed, in recent years the courts of some Hague Convention states, including the United States (see Quillen 2014) and Australia, have shifted away from applying the grave risk defence except in very limited circumstances towards a more holistic consideration of the risk to the child and the wellbeing of the abducting parent. In Australia, the 2010 decision of the Full Court of the Family Court in Harris & Harris is perhaps representative of the high water-mark in terms of willingness to consider the grave risk defence in broad terms, and it remains good law today. In that case, the Full Court upheld the decision of the trial judge to deny a Norwegian father’s application for the return of his infant child to Norway on the basis that there was a grave risk of physical and psychological harm to the child, and that the
child would otherwise be placed in an intolerable situation should a return to Norway be ordered. The trial judge had found the father had psychologically abused the child by inflicting serious injury on the child’s mother, his primary carer, on several occasion in the child’s presence, and that the mother would be placed in a vulnerable social and financial position if she had to return to Norway. While the Full Court found that the trial judge had erred in the assessment of the risk of grave harm to the child by conflating the physical and psychological risks, it accepted her analysis that the child would be placed in an intolerable situation if returned to Norway, as he would lack the provision of basic essentials, and be reliant upon a primary carer who was isolated and terrified. This case highlights the different set of considerations which can present themselves to a court where the abducting party is the primary caregiver, which was not necessarily contemplated in the inception of the Hague Convention.

Despite examples worldwide of legislative implementation and judicial interpretation creating a broad article 13(b) defence, Japan’s approach in particular has drawn cautionary remarks from the highest levels of the international law field, perhaps due to the state of domestic law with respect to child custody after the breakdown of a relationship and the often insurmountable problems faced by left-behind parents trying to recover children wrongfully taken to or retained in Japan prior to it joining the Hague Convention. Secretary General of the Hague Conference on Private International Law Christophe Bernasconi has warned of the need to keep a close eye on Japan’s approach to the implementation of the grave risk defence (Bernasconi 2014). Professor Takao Tanase, one of Japan’s leading legal scholars, has expressed concern that the Implementing Act could facilitate a departure from the purpose of the Hague Convention (Matsutani 2012; McCurry 2013).
Such concerns reflect the clash of international and domestic concerns, particularly when the legal instruments in a local context affect the operation of human rights protections. As discussed above, the Hague Convention is a private international law treaty primarily aimed at determining jurisdictional issues in private custody and access disputes. The intended effect of the Hague Convention therefore is that the substantive issues of child custody are dealt with under the domestic law of the state in which the abducted child is habitually resident prior to their wrongful removal or retention, not by the judicial or administrative authorities in the state in which the child is wrongfully retained. The treaty does not provide jurisdiction for a court hearing a return or access application to determine the merits of the substantive custody and/or access issues in dispute, or what is considered ‘best’ for the child in question, merely the proper forum for the dispute to be heard. The key issue for the application of international law in the context of international child abduction is therefore the extent to which the state where a child has been taken or wrongfully retained recognises and enacts the principles of the Hague Convention in its domestic law. Trust between contracting states is therefore essential to the smooth operation of the Hague Convention. It has been argued that there is a tension between the judicial, political and diplomatic comity required for the Hague Convention to operate properly on the one hand, and domestic legal doctrine requiring that the best interests of the child be protected on the other (see International Social Service Australian Branch [2005, 17] for discussion of the Australian domestic law in which the best interests of the child are the paramount consideration in child welfare cases).

47 Even though individual citizens’ attachment to national traditions concerning the family may be becoming increasingly

47 There is a line of argument that the Hague Convention can be regarded as indirectly holding up the principle of the best interests of the child by providing a mechanism for securing the prompt return of abducted children to their home country (Nishitani 2012).
weakened by globalisation, leaders locally may promote even stronger ties and adherence to local customs as a buffer against international norms which threaten to undermine their authority (Stark 2005, 1). By way of example, Stark notes that family law is predominantly the ambit of religious authorities in some states, such as Saudi Arabia, which reflects its low status at a governmental level but high importance to others who seek to shape and control community and local identity (2005, 1–2).

The clash of the private and the public in the operation of international family law also raises the issue of cultural variations and whether any norm stipulated by international rights law could ever be considered and applied as universal. This debate between universalists and cultural relativists has been described by Stark as ‘a major faultline in international human rights’ at whose centre lies the family, deemed as the natural and fundamental group unit of society by the Universal Declaration of Human Rights (UDHR) (Stark 2005, 251). Stark explains that the family occupies a special place in this debate given the frequent and close connection between marriage and divorce on the one hand and religion on the other, as well as the hefty normative authority conveyed by family law. The problematic relationship between cultural relativism and international human rights law is a longstanding one and was acknowledged at the time of the drafting of the UDHR in 1947. In particular, it was argued that, as a statement of human rights, the UDHR had to account for the individual as a member of a social group ‘whose sanctioned modes of life shape his behaviour, and with whose fate his own is inextricably bound’, which essentially meant it had to provide a statement of universal application, not a rehash of the predominant values of Western Europe and America (American Anthropological Association 1947, 539; see also Buck 2011, 40). Buck identifies a risk that international human rights instruments, such as the United Nations Convention on the Rights of the Child, could be perceived as bearers of the
social and cultural values of a monopoly of nations in charge of their creation and management, which would significantly weaken their effect as statements of universal standards (Buck 2011, 40). Buck also makes the salient observation that the specific political and economic situations of states contracting to international human rights instruments influence their construction of the assumptions and concepts which underpin international human rights standards (Buck 2011, 41).

The disharmony between the project to implement international family norms worldwide and the reality of cultural variations is somewhat accommodated in the reservation process permitted in some treaties which allow contracting states to preserve the way in which certain articles are implemented and interpreted in their respective cultures and societies. Some commentators have asserted, however, that the recognition of cultural diversity in international human rights law ought not to be used to provide cover for practices which are widely regarded as unacceptable (Buck 2011, 40; see also Harris-Short [2001] for further discussion of culturally based exceptions to international rights standards).

3.8 Japan’s Adoption of the Hague Convention: Drivers for Reform

As noted in Chapter 1, Japan’s ratification of the Hague Convention represented a culmination of internal and external pressure. Japan resisted joining the Hague Convention for decades, so the reasons for this resistance and the drivers for its ultimate acceptance are important to comprehending how the law may be implemented, as well as legal and social change in Japan more broadly.

Certainly, the pre-Hague Convention state of domestic Japanese family law held Japan back from joining the Hague Convention. As discussed above, the Japanese system of
law designates sole parental authority to one parent or the other upon divorce and provides only limited positive validation of the visitation concept, which can be viewed as intrinsically tied to its administrative household registration system (*koseki seido*), a relic of its prewar household system (*ie seido*). The *koseki seido* remains a powerful psychological force in Japanese society with which the Hague Convention does not sit comfortably. Shared custody rights between parents in different countries and the acceptance of the concept of visitation are almost so intrinsic as to be unspoken tenets of the Hague Convention, but these do not slot neatly into the Japanese domestic legal system.

The preamble to the Hague Convention states that the signatory states are ‘firmly convinced that the interests of children are of paramount importance in matters relating to their custody’. While Japanese courts apply a standard of the ‘best interests of the child’ or ‘welfare of the child’ in determining family law matters (Jones 2007a), what this concept entails in Japan also does not necessarily correspond neatly with the objects of the Hague Convention (Costa 2010). For example, key concepts in Japanese family law cases – such as respect for the custodial household (including the stability of the child and facilitating the formation of new families) and the avoidance of major conflicts between the parents (Tanase 2011, 568–75) – are not necessarily criteria that are compatible with the swift return of an abducted child or arrangements for international access.

Recognition of the need for protection of victims of domestic violence also posed a challenge to Japan’s participation in the Hague Convention. Domestic violence was recognised legally for the first time in 2001 in Japan, with the passing of the *Act on Prevention of Spousal Violence and the Protection of Victims* (*Haigūsha kara bōryoku no*
bōshi oyobi higaisha no hogo ni kansuru hōritsu). The first arrest for domestic violence in Japan was recorded shortly after the law's enactment (Rice 2001). The law was regarded as a significant step for abused spouses as domestic violence had previously been treated as a private concern (Rice 2001). Many other Asian countries, including South Korea, the People’s Republic of China and Vietnam, have historically regarded domestic issues in a similar way and have also been relatively late to take legal measures to address the issue (see, for example, Kim et al. 2013; Vu et al. 2014; Zhang and Zhao 2018). The reason for these similarities may be linked, in part, to the influence of patriarchal Confucian values and the legitimisation of domestic violence as a tool to maintain family harmony and order (see Kim, Oh and Nam 2016, 1555). Domestic violence has, however, emerged as an important social and political issue in Japan over the past two decades, and many members of Japanese society demonstrated sensitivity to joining the Hague Convention due to concerns with how victims of domestic violence would be treated under it (Yamaguchi and Lindhorst 2016). One former Japanese judge has made a direct link between the advent of the domestic violence law in Japan and feminist factions of the bureaucracy which advocated for it, and the lack of political appetite within Japan for addressing child abduction in any meaningful way (Watanabe and Smith 2011). It should also be noted that there is a substantial body of work which criticises the Hague Convention for not taking due account of the risks posed to abused spouses (see, for example, Kaye 1999; Weiner 2004; and Shetty and Edleson 2005).

Despite these concerns, a number of factors have combined to create the circumstances conducive to Japan joining the Hague Convention. First, domestic developments created a sense of naiatsu or internal pressure for Japanese leaders. Although not as widely reported, ‘outbound’ international parental child abductions where Japanese parents are the left-behind party are not uncommon, although their precise frequency is unknown.
In 2005, Professor of International Law at Hitotsubashi University Jun Yokoyama reported that more children were abducted from Japan than to Japan, although the cases were not publicly visible as they were matters which had to be resolved in the destination country (M. Ito 2005). Such Japanese parents have found themselves without contact with their children and limited avenue for recourse after their children were abducted from Japan by the other parent (see, for example, Sasaki 2012). The ratification of the Hague Convention by Japan was sought after by this cohort. Further, Japan’s exclusion from the Hague Convention led to greater scrutiny overseas of expatriate Japanese parents making application to travel back to Japan with their children. In some cases, expatriate Japanese parents have been required to pay a bond prior to taking the child overseas (see, for example, the decision of the Family Court of Australia in Tanner and Shimizu in 2010). Rising numbers of international marriages and divorces in Japan have increased the amount of attention paid to these issues as more people come to have an emotional investment in how these cases are dealt with and turn to their governments for assistance.

At a deeper societal level, there are currents of change creating pressure for new approaches to family law in Japan. There is an increasing re-characterisation of the role of fathers in Japan, which is driving a demand for a more equal share of parenting responsibility. The image of fatherhood is getting a makeover in Japan. The ideal of fatherhood in twenty-first century Japan is captured by the concept of ‘papanitī’ (rendered in English as ‘papanity’ and meaning ‘cool paternity’) (Hoffman 2012). Papanitī gives greater recognition to the father–child bond. This relatively new concept can be seen in the magazine FQ Japan, which launched in 2005, and is aimed at men who are new to fatherhood or raising children alone. Featuring interviews with celebrity fathers such as footballer David Beckham, the magazine portrays fatherhood as a
desirable and stylish lifestyle. In 2010, the Ministry of Health, Labour and Welfare launched the *ikumen* project (a portmanteau of the Japanese word for child rearing, *ikuji*, and the English ‘men’) to create policies for family-friendly workplaces and encourage the active participation of men in raising their children, with a view to stimulating greater participation in the workforce by women and increasing the nation’s birth rate (see MHLW 2018c; Yamazaki and M. Ito 2014; Westervelt 2018). The *ikubosu* program was launched in 2015 to complement the *ikumen* project, aimed at educating executives and bosses (hence the appendage *bosu*, a Japanese rendering of the English word ‘boss’, in the title) about family-friendly workplaces and work–life balance (Westervelt 2018). Large companies such as Shiseido and the J League (the Japanese national soccer league) have signed up to the program, meaning smaller businesses are likely to follow suit in time (Westervelt 2018). The gap between the *ikumen* campaign ideal and reality is significant; while approximately a third of men reported that they wanted to take childcare leave in 2017, only 5.14% actually did so (MHLW 2018c). It does, however, seem that essential underpinnings of Japanese society are undergoing a shift and it will be less likely that Japanese men will accept the idea of a ‘clean break’ from their children in the event of a relationship breakdown in the future.

Domestic groups in Japan have also become active in recent years to push for greater parenting rights for non-custodial parents (for example, *Kyōdō shiken undō netowāku* [K Netto], Fathers’ Rights in Japan, and Japan Children’s Rights Network). The changing social sentiment is reflected in the rise of single-father households in Japan, which rose 18.1% from 77,000 households to 91,000 between 2010 and 2016, compared

---

48 See http://fqmagazine.jp/.

49 See: http://kyodosinken.com/ (K Netto); http://www.frij.net/m/index.asp (Father’s Rights in Japan); and http://www.crnjapan.net/The_Japan_Childrens_Rights_Network/Welcome.html (Japan Children’s Rights Network).
to a rise of only 0.5% in the number of single-mother households for the same period (MHLW 2017 [see subcategory dai ippen, setai, table 1-50]).

Further, there is an awareness of the strains faced by the growing number of single-mother households associated with higher divorce rates and, in turn, the sole parental authority system (see, for example, Raymo et al. 2014). As of 2017, Japan has the highest rate of single mothers in the workforce out of all the members of the OECD, with a participation rate of 85% (Semuels 2017). As women have come to play a greater role in the workforce in Japan, their capacity for self-sufficiency after divorce has increased, but the social and economic realities of single motherhood in Japan are harsh. Japan has the highest poverty rate in the OECD of single-parent families where the parent works, at 56% (Semuels 2017), perhaps reflecting the inadequate property settlements upon divorce and lack of government assistance discussed above. It is estimated that approximately 62% of women leave the workforce upon having their first child and this time out of the workforce means low-paid and irregular employment is often the only option when trying to regain work after divorce (Semuels 2017). Returning to one’s natal home can sometimes still be the most pragmatic option for Japanese women and it carries long customary precedent. Satogaeri is a long-practiced tradition whereby a wife returns to her natal home at critical points in her life (Ohnuki-Tierney 2002).

The effect of gaiatsu (external pressure) has also provided drivers for reform in Japan’s approach to cases of international child abduction. Despite the lack of certainty with respect to the exact numbers of children parentally abducted to Japan prior to 2014, there were reports that these abductions were becoming more frequent. The US Embassy in Japan reported in the Winter 2010 edition of American View, its quarterly
online magazine, that the recorded number of parental child abductions to Japan from the United States, the United Kingdom, Australia, Canada and France had almost doubled in the previous two years and more than quadrupled in the previous four years (2010). International criticism of Japan’s management of abduction cases reached critical mass after the Savoie case, which is discussed in detail in Chapter 4. That case, in which the father was jailed in Japan for attempting to take his children from his ex-wife and back to the United States, garnered international media attention which translated into diplomatic and political action. The day after Christopher’s release from custody in Japan, ministers from the United States, Australia, Britain, Canada, France, Italy, New Zealand and Spain met with the Japanese Justice Minister to address the growing number of international child custody disputes (Warner 2010, 50; NewsChannel 5 2012). On 25 January 2011, the French Senate passed two resolutions criticising Japan’s record on parental child abduction involving French citizens and calling on Japan to sign the Hague Convention and define its position with respect to children of dual nationality deprived of links to their non-Japanese parent (Senate of France 2011, see item 18). Japan was also named three times in a resolution condemning ongoing international child abduction passed by the US Senate on 4 December 2012 (US Congress 2012). International criticism of Japan as a ‘kidnapping superpower’ was also reported in the national media in Japan (for example, Minamida 2011). Japan’s outlier stance was also recognised at the first meeting of the Ministry of Justice’s legislative advisory subcommittee on the Hague Convention. In his address to the subcommittee, and in the context of Cabinet approval being given in May 2011 for Japan to make preparations to ratify the Hague Convention, member Masaru Hara referred to the much-noted yardstick of good world citizenship. At that time, 85 countries were a party to the Hague Convention and Japan was one of only two G8 countries not to have joined (MOJ 2011c, 1).
3.9 Conclusion

While in a perfect world, international law would be a pure and transcendent body of rules to solve the complications of inter-state transactions, it is necessarily coloured by the legal, cultural, social and political context in which it is applied. At this moment in time, Japan is seeking to find a place for itself and its legal system in the web of international laws to better address the issue of international parental child abduction. This provides us with a good vantage point to observe the continuities and dislocations present in the legal systems, both international and domestic, which manage international families. Coherence is present when laws work together, as in the Hague Convention. Dislocations arise when the laws fail to connect, either with each other or the society in which they operate. The following chapters will examine case studies of parental child abductions involving Japan and provide a localised context in which to identify some of these connections and disjunctures.
Chapter 4

Point: Savoie v. Savoie

4.1 Introduction

This chapter introduces the case study of Christopher and Noriko Savoie. Christopher Savoie was arrested in Japan in 2009 after attempting to retrieve his two children from his ex-wife, Noriko, who had taken them there a few months earlier in breach of custody orders made in the United States. The couple are referred to here by their first names for the sake of clarity. The Savoie case warrants a close reading for a number of reasons. It has been widely cited in the media (see, for example, Kambayashi 2009; Birmingham 2011; Toland 2011) and academic work (see, for example, Filisko 2010; Warner 2010; McDonald 2010, 221–2) that discusses cross-border custody disputes and parental child abduction. While Christopher was not the first parent to be arrested for trying to remove their child from Japan, the level of media coverage of his case was unprecedented. In the United States, the story was followed on several national networks including CNN, NBC and CBS (see, for example, Lah 2009a and 2009c; Saltzman 2009a and 2009b; Vieira 2010) and has also garnered media attention in the United Kingdom, Japan and Australia (see, for example, Daily Mail 2011; Reizei 2009; Yomiuri Shimbun 2009a; and Campion 2009). This has afforded it status as a landmark case in the field of international parental child abduction, particularly with regard to international custody disputes involving Japan (see M. Ito 2010; Onishi 2011; McDonald 2010; Birmingham 2011).

50 In 2000, Dutchman Engel Nieman was indicted in Japan on a charge of attempting to abduct his two-year-old daughter by boat from Osaka to the Netherlands and sentenced to several months’ imprisonment (Gilhooly 2000; CRC Japan 2009). The Supreme Court dismissed an appeal by Nieman from the Tokyo High Court in March 2003 (Kokugai isō ryakushu, kibutsu sonkei hikoku jiken; see also Kajimura 2015, 320).
Christopher’s plight and the attention it attracted is credited with raising public awareness of the parental abduction issue and creating new diplomatic pressure on Japan from several countries to sign the Hague Convention and better address cases of international parental abduction (see, for example, Warner 2010, 50; Saltzman 2009b; Toland 2011). The stand-off over Christopher’s incarceration in Japan has been described as an ‘international incident’ (P. Williams 2016) and a ‘bilateral diplomatic headache’ (M. Ito 2011), and gave Japan ‘a worldwide reputation as a safe haven for abductions’ (Arudou 2009; see also McDonald 2010, 221). While it is not possible to say that Japan’s signing the Hague Convention was a direct result of the Savoie case, as suggested by some in the media (see, for example, P. Williams 2016), it can be seen as having had an influence on high-level diplomatic discussions about the international parental child abduction issue between Japan and other countries. The case has, for instance, underscored widely divergent views in the United States and Japan with regard to parental rights and child-rearing (Kambayashi, 2009). It is also credited with inspiring Japanese fathers to increase their demand for equal parenting rights within the domestic legal system (Matsutani 2010).

The case gave rise to several instances of litigation and there is a large amount of information relating to these court proceedings, including publicly available transcripts and judgments, which is unusual in these types of cases and perhaps both indicative and causative of its high profile. In particular, a 130-page transcript of a hearing on 30 March 2009 (prior to the abduction) recording Christopher’s application to restrain Noriko from taking the children to the United States is a valuable source of information about this case and the feelings and motivations of the parties. It is also the only time we get to hear Noriko’s story in her own words.
Despite its status as a seminal case, the facts of the Savoie case, as pieced together through court documents and media reports, are highly unusual. In this way, the case provides a counterpoint to the other case studies in this thesis, which do not have the same wide reach into the public consciousness. It also allows us to identify a number of common threads running through abduction cases involving Japan. This feeds into the overarching assessment of the adequacy of the legal regime in place to manage cases of international parental child abduction.

4.2 Christopher Savoie: The Face of the Left-Behind Parent

The Savoie case came to public attention when Christopher attempted to reclaim his children from his ex-wife, Japanese national Noriko Savoie (also known as Noriko Esaki or Noriko Esaki Savoie [Barrouquere 2012]), after she had fled with them to Japan from their home in Tennessee without his consent. Christopher’s short imprisonment in Japan in 2009 on suspicion of attempted kidnapping highlighted the difficulties faced by individual parents trying to access their children parentally abducted to Japan. Intense media interest in the case has led to public familiarity with the Savoie story. In turn,
Christopher has taken on an identity as ‘the face’ of left-behind fathers, particularly in the United States and throughout its news discourse. The Savoie case serves as a type of warning for parents, specifically those in an international relationship, regarding the types of scenarios they could come up against in the context of a child custody dispute; and Christopher and his new wife, Amy Savoie, may be seen to have adopted the role of spokespeople and advocates for parents whose children have been abducted to Japan from other countries (see Lah 2009a; NewsChannel 5 2009a and 2009d).

The narrative of this story raises issues involving the use of the legal system in preventing international parental child abduction and seeking its redress, the clash of enforcement cultures between Japan and the United States, the importance of passports and who takes custody of them, the effect of legal literacy and social capital, the significance of gender, the blurring of national identities, and the predominance of a ‘cultural clash’ discourse in international parental child abduction cases.

The widespread reporting of the Savoie case in the American and other English language media tended to frame it in terms of an American father battling his Japanese ex-wife in a clash between her native legal system and the tried and established legal principles of American family law. At one point in the reportage of the case, news broadcaster CNN conducted an interview in front of a graphic in which Noriko’s face appears as the centre of a red circle surrounded by rays, in an arrangement which could be interpreted (and was interpreted by some, see Mutantfrog Travelogue 2009 [comment by ‘M-Bone’ at 9.53 pm on 16 October 2009]; Japan Probe 2009) as reminiscent of the rising sun flag (kyokujitsu-ki), the old imperial military flag and the current ensign of Japanese Maritime Self-Defence Force, which is often associated with Japanese wartime aggression (see, for example, Okamura 2008; Jong-Chan 2012).
In fact, the identities of those involved in the Savoie case are more complex. Christopher took Japanese citizenship in March 2005 (Matsutani 2009) and, by his own account, also retained his American citizenship in consideration of US tax laws (Hoofin 2011). Under Japan’s Nationality Act (kokuseki hō), dual citizenship is not permitted for adult naturalised Japanese citizens (art. 5). However, as Christopher explained via a WordPress blog in 2011 (Hoofin 2011), at the time of obtaining Japanese citizenship, he fell under article 877 of the US Internal Revenue Code (‘IRC’), which imposes an alternative taxation regime for US nationals who renounce their citizenship, making it more difficult for certain high-income tax-paying or high net-worth individuals to avoid tax by way of abandonment of citizenship (see Haun & Ensminger [2008] for further information on article 877 of the IRC). Christopher claims the Japanese government was aware of his US nationality and the complications posed by application of the IRC, and that he was explicitly advised that the Ministry of Justice (MOJ) would not be concerned if he did not renounce his US citizenship, as is normally required (Hoofin 2011). It is unclear whether the MOJ routinely affords this sort of treatment to people who naturalise as Japanese and earn high incomes.

Christopher and Noriko met in Fukuoka, where Christopher was studying, were married in Japan in 1995 and lived there together from 2001 to 2007, when they separated (Inbar 2009). While in Japan, Christopher earned an MD and Ph. D from Kyushu University (Bloomberg 2018). He has created and sold several bio and tech companies in the United States and Japan (Capps 2009), and has been acknowledged as a ‘world recognised technology luminary’ in the field of global biotechnology (Bloomberg

51 Generally, under Japanese law children are permitted to maintain dual citizenship until the age of 22, when they are required to select one of the nationalities, with the effect of renouncing the other (see Nationality Act, art. 14).
He is also fluent in Japanese (Capps 2009). Noriko has a much lower public profile and little is known about her outside the details elucidated from court documents and media reports. Christopher has claimed that she comes from a wealthy family, referring to them on one occasion as ‘Japanese millionaires’ (C. Savoie 2012).

The couple had a son, Isaac, in September 2000 and a daughter, Rebecca, in July 2002 (Christopher Savoie v. Noriko Savoie [Petition for Modification and for Enforcement of Parenting Plan and for Contempt]; hereafter ‘Savoie Petition’). Isaac was born in California\(^{52}\) and both children hold dual Japanese and American nationality (Kambayashi 2009; Wood 2010). Given Christopher’s naturalisation as a Japanese citizen, it seems the couple were able to establish their own koseki under the Savoie name. Part of what appears to be an extract from the Savoie koseki was posted by Christopher in a WordPress blog in 2012 (C. Savoie 2012).

In a further blurring of national identities in the case, Noriko held permanent residency of the United States at the time she wrongfully removed the children to Japan (Christopher Savoie vs. Noriko Savoie [Transcript of Hearing on Temporary Restraining Order], 86; hereafter, Savoie Transcript). The fluidity of what passes as nationality was clear in the evidence Noriko gave in a hearing prior to the abduction about how she could enter university in America. She noted that she had visited Belmont University twice to ask to take the Test of English as a Foreign Language (TOEFL) because she had never studied for the standardised college tests (SATs and ACTs) as they were ‘for American people’ (Savoie Transcript, 85). She later agreed with the proposition that as a

\(^{52}\) See comment by ‘amy savoie’ on 22 September 2009 (post #29) in response to online article, ‘Ex-wife abducts two children, disappears to Japan’ (NewsChannel 5 2009f).
permanent resident of the United States she was considered American, but later said she had approached Vanderbilt University and Middle Tennessee State University to enquire about applying as a foreigner (*Savoie Transcript*, 85).

### 4.3 The Savoie Divorce

Christopher moved back to the United States in 2008 to take up a job and Noriko followed approximately one year later in order for the children to spend more time with both of them (Inbar 2009). According to a friend of Noriko’s, Miiko Crafton, Noriko attempted to divorce Christopher while they both still lived in Japan, but he had refused to consent to the divorce and instead persuaded her to move to Tennessee with the children (Loller and Schelzig 2009). It is clear from subsequent court documents relating to the couple’s eventual divorce and custody arrangements for the children that Christopher had commenced a relationship with an American woman (Amy, whom he was later to marry) prior to the end of his marriage with Noriko and that Noriko was aware of this at the time she moved with the children to the United States. While only the parties themselves can disclose the motivations for this arrangement, one may surmise that Christopher’s legal position with respect to the custody of his children was much stronger in the United States as the non-resident parent, as was Noriko’s legal position with respect to property division (see Chapter 3 for a discussion of property division upon divorce in Japan).

Shortly after Noriko had moved from Japan to the United States with the children, Christopher filed for divorce in the Chancery Court of Williamson County in Tennessee (*Savoie Transcript*, 121). A number of temporary injunctions apply to the parties to a divorce in Tennessee upon the filing and service of a petition for divorce.53 This means

---

53 Tennessee Code Annotated, §36-4-106(d).
that upon service of the divorce papers, Noriko would have been temporarily restrained from removing the children outside the state of Tennessee or more than 100 miles from her home without the permission of Christopher or the court.\textsuperscript{54} Christopher seemed well aware of this mechanism of the divorce process when questioned under cross-examination as to why Noriko could not simply have left for Japan soon after arriving, given she was in possession of the children’s passports: ‘Once she was served, she was under a temporary restraining order not to move’ (Savoie Transcript, 121, 48).

The couple were divorced by final decree on 6 January 2009 (Savoie Petition, 1). The divorce followed multiple statutorily-mandated mediation sessions by the couple (Christopher John Savoie v. John James G. Martin III, Stites & Harbison, PLLC and Celia Woolverton [Memorandum], 2; hereafter, Savoie Memorandum; and Christopher John Savoie v. John James G. Martin III and Stites & Harbison, PLLC [Opinion], 2; hereafter, Savoie Opinion. Each of these proceedings was brought by Christopher after the abduction of the children to Japan against, among others, one of the judges involved in the custody dispute. These proceedings are discussed in section 4.10). While there were reports in the media that the marriage was never formally dissolved in Japan (see, for example, Kamabayashi 2009), it appears that the divorce was registered in Japan sometime later (possibly by Noriko), on 28 October 2010, as it appears in the document apparently extracting the Savoie family koseki (C. Savoie 2012).

Under Tennessee law, a final decree in an action for absolute divorce involving a minor child must incorporate a permanent parenting plan.\textsuperscript{55} Among other things, the permanent parenting plan is to establish the authority and responsibility of each

\textsuperscript{54} Tennessee Code Annotated, § 36-4-106(d)(5).

\textsuperscript{55} Tennessee Annotated Code §36-6-404(a).
parent\textsuperscript{56} and minimise the child’s exposure to harmful parental conflict.\textsuperscript{57} Accordingly, as part of their divorce settlement, Noriko and Christopher incorporated a parenting plan, filed on 8 December 2008, under which Noriko had primary residential care of the children, with Christopher to have alternate residential time every other Thursday after school through Sunday, and Thursday evenings in the off week, as well as alternating holidays, school breaks and four weeks during the summer holiday (\textit{Savoie Petition}, 1). The parenting agreement provided for Noriko to take the children, then aged nine and seven, to Japan for summer vacations, but required her to maintain residence in Tennessee and live within 100 miles of Christopher (NewsChannel 5 2012; \textit{Savoie Opinion}, 2). The parenting plan entered into by the couple also contemplated Christopher’s cooperation in allowing Noriko to take the children to Japan at other times with no less than 30 days’ notice, and with Noriko to cooperate in scheduling parenting time for Christopher around the interrupted period (\textit{Savoie Transcript}, 44). Christopher was to have four weeks of uninterrupted parenting time over the summer vacation, and Noriko was to have six weeks (\textit{Savoie Transcript}, 44).

At the time they entered the parenting plan, Noriko and Christopher agreed that their respective divorce counsellors, Celia Woolverton and Diane Marshall, would serve as parenting coordinators to assist the parties in resolving any parenting issues arising under the parenting plan (\textit{Savoie Petition}, 1). Woolverton was a licensed clinical social worker at the time (it is not known about Marshall) (\textit{Savoie Transcript}, 103). Parenting coordinators are appointed in some American states to assist divorced and divorcing parents with day-to-day parenting issues in high-conflict situations (Moses and Townsend 2012). The parenting plan, apparently concluded during the mediation

\textsuperscript{56} Tennessee Annotated Code §36-6-404(a)(1).

\textsuperscript{57} Tennessee Annotated Code §36-6-404(a)(3).
sessions prior to the finalisation of the divorce, required Noriko and Christopher to attend meetings with the parenting coordinators on such a schedule as the coordinators deemed appropriate, starting from 1 November 2008 (*Savoie Petition*, 1).

As a permanent resident in the United States, Noriko was able to remain in Tennessee despite the divorce. Although the timing of the permanent residency visa application and approval is not clear, Christopher may have been the petitioner in her visa application, as a US citizen under the US provisions for spousal visas (see United States Department of Homeland Security 2013). During the mediation process, Noriko had stated that she was planning to stay in the United States and the children’s passports were put on deposit with the Clerk and Master of the Court’s office (*Savoie Petition*, 3).

According to court documents in later proceedings, Noriko received approximately $700,000 in cash as part of the property settlement between the couple, as well as ownership of the children’s 529 plans (college investment funds) (*Savoie Transcript*, 17). Noriko, however, gave evidence in later proceedings that the total amount she had received as a result of the settlement was closer to $680,000 after deducting her attorney’s fees (*Savoie Transcript*, 95). She also noted that the 529 plans (originally worth a total of approximately $60,000) had dropped in value by 30% as a result of stock market deterioration (*Savoie Transcript*, 95–6).

### 4.4 Post-Divorce Relationship

Without her divulging such information, it is impossible to know at what point before or after her divorce from Christopher that Noriko determined to abduct her children to Japan. According to her friend Crafton, Noriko struggled with her new situation in the
United States, despite being financially stable after the divorce settlement and making attempts to settle in (Loller and Schelzig 2009).

In particular, it appears that Noriko had made some effort to stay and pursue study in the United States, despite being unable to apply to university as a foreigner via the TOEFL and having to attend community college and sit for the standardised college entrance tests, SATs and ACTs, as an American citizen (Savoie Transcript, 42, 65, 86). In court proceedings prior to the abduction, Noriko gave evidence that she had engaged a tutor for the ACTs and was attending an adult education course four half-days per week to help her, although she noted she just walked into these sessions even though it was not allowed: ‘I needed someone to help me, so that’s what I’m doing’ (Savoie Transcript, 86). She agreed with her lawyer in direct examination that she was taking measures to improve her own life and those of her children in the United States and had not made any arrangements to move permanently back to Japan (Savoie Transcript, 86).

Perhaps more important to the timeline of this case than Noriko’s difficulties acclimatising to life in the United States is the evidence that the relationship between Christopher and Noriko was quite acrimonious after the divorce, as indicated by a number of primary and secondary sources. It is clear that Christopher and Noriko had difficulty maintaining an amicable relationship after the divorce. Christopher remarried in February 2009, one month after his divorce from Noriko was finalised (Lah 2009a). According to Christopher, the arrangement whereby Noriko lived in the United States in order for the family to stay close together, despite the divorce, did not work well as Noriko was antagonistic towards his new wife and often alluded that she would to take the children back to Japan (Inbar 2009). Such threats prompted Christopher to issue a
petition in March 2009 for modification of the parenting order and for an order 
restraining Noriko from taking the children to Japan, discussed in section 4.7.1.

Noriko is reported to have felt emotionally abused by Christopher and mistreated by the 
US legal system. Her friend Crafton said that Noriko felt trapped in the United States, 
where she had been totally dependent on Christopher when she arrived (even though by 
that stage he was involved with another woman), and despite her unhappiness she was 
not free to return to live in Japan pursuant to the terms of the divorce settlement (Loller 
and Schelzig 2009). Noriko’s distress about the couple’s divorce is evident in subsequent 
court documents, with her stating to the court that it was hard to read emails from 
Christopher after the divorce: ‘It’s just heart breaking. The memory of our marriage – 
we have been married for 14 years, we knew each other for 18 years, we had a very good 
time most of the time for most of the years’ (Savoie Transcript, 78–9). She also spoke of 
her anguish at Christopher remarrying so soon after their divorce and the anger she felt 
about the situation (Savoie Transcript, 98–9). In court proceedings on 30 March 2009 
involving the restraining order – after the divorce and prior to the abduction – Judge 
James G. Martin III confirmed that Noriko came to the United States with the 
knowledge that Christopher was involved with another woman and wanted a divorce, 
with the divorce papers apparently being served the day after she arrived in the United 
States (Savoie Transcript, 121). Judge Martin also commented, however, that while the 
circumstances were such that Noriko could not have been expecting to reconcile with 
Christopher, she may not have necessarily been accepting of that fact from an emotional 
perspective, and the finality of the couple’s divorce and Christopher’s subsequent 
remarriage may, consequently, have hit her hard (Savoie Transcript, 122). While Judge 
Martin indicated the legal issue was whether the restraining order should remain in 
place, he considered that the practical issue was whether the parties were ‘emotionally
divorced’ or not (*Savoie Transcript*, 79). He observed that Christopher had moved on, but Noriko still carried an emotional attachment and memories of their relationship, and reading Christopher’s harsh emails created problems for her (*Savoie Transcript*, 80, 122). Noriko gave evidence that prior to leaving Japan to move to the United States, some of her friends had encouraged her with words such as ‘God doesn’t give us tasks that someone cannot handle’ (*Savoie Transcript*, 87), perhaps hinting at the desperate situation she found herself in at the time.

The acrimony between the couple is clear in the record of these court proceedings. Noriko’s attorney produced an email written to Noriko by Christopher in December 2008 prior to the divorce decree in which he apparently mocked her Japanese language ability, called her selfish and an idiot, and told her that he refused to tolerate complaining from someone who ‘doesn’t work, doesn’t study and doesn’t move’, particularly when he had ‘studied difficult medical study in Japan by the age of 21, and studied Japanese at the same time’ (*Savoie Transcript*, 34; apparent translation from the original Japanese adduced into evidence by Noriko’s attorney, Marlene Eskind Moses).

Parenting coordinator Marshall, who gave evidence in the hearing on 30 March 2009, agreed with Noriko’s lawyer under recross-examination that some of the emails between Noriko and Christopher had been ‘pretty ugly’ and ‘difficult and uncomfortable’, mixing in issues about the divorce, the affair, Christopher’s relationship with Amy and arguments about money (*Savoie Transcript*, 71). Parenting coordinator Woolverton also gave evidence and admitted that while it was not unusual for there to be some trauma between parties to a divorce, there was a lot of anger and distrust between Noriko and Christopher, and she and Marshall had had to take the paradoxical step of limiting the communication between them, in order to improve it: ‘[I]t’s been a struggle for everybody
concerned’ (Savoie Transcript, 104–5). In direct examination in the same proceeding, Noriko gave evidence of an email exchange where she and Christopher had argued about him selling their BMW-5 in Japan to a friend for $1,000, a price Noriko considered to be too low (Savoie Transcript, 78). Noriko said Christopher had threatened to go to her father’s house in Japan with his friend and the police and have her father imprisoned if she did not agree to the price (Savoie Transcript, 78). Marshall and Woolverton eventually determined that Christopher and Noriko should communicate via them regarding parenting issues instead of directly with each other, with Marshall noting that both parties wished for the ‘accusatory emails’ from the other to stop. (Savoie Transcript, 71).

Marshall noted under recross-examination that addressing the parenting issues was difficult due to the encroachment of other problems related to the divorce. She noted that in one session, Noriko bought along some paintings which she wanted to divvy up in the parking lot (Savoie Transcript, 72). Another divorce-related issue which Noriko attempted to raise at the parenting coordination meetings was the $50,000 fund which Christopher was to set up for her education. Christopher claimed that he had set the fund up but was unable to recall in which bank or when he had advised Noriko of it (Savoie Transcript, 41). Noriko gave evidence that she had no knowledge of the fund being set up (Savoie Transcript, 85). Marshall gave evidence that at the second or third session, she and Woolverton had to tell Christopher and Noriko that the matters such as property were no longer to be discussed at the parenting sessions (Savoie Transcript, 72–3).

It is clear that Noriko struggled to cope with the situation whereby Christopher continued to be in her day-to-day life after the divorce. Christopher complained that
while Noriko attended meetings with the parenting coordinators, she refused or otherwise failed to abide by their recommendations, including ‘very specific directions ... to address serious issues’, and ignored the best interests of the children in doing so (Savoie Petition, 1–2). In his petition in relation to the modification of the parenting plan and restraining order, Christopher said he had learned that Noriko would ‘cry inconsolably’ in front of the children, causing them to ‘feel sorry’ for her (Savoie Petition, 3). He considered the enmeshment of her emotional state and her parenting duties was unhealthy for the children and contrary to her duties under the parenting plan to promote a ‘loving, stable, consistent and nurturing relationship with the child and the other parent’ (Savoie Petition, 3). As discussed in Chapter 3, the ‘clean break’ approach is predominant in post-divorce relationships in Japan, and shared parental authority is uncommon. This is an attitude supported by historical custom and legal and administrative mechanisms. There may therefore have been an expectation on the part of Noriko that her and Christopher would not be required to have such a close relationship once they divorced, compounding the difficulty of the situation for her. The requirement, however, to maintain a loving relationship with an ex-partner, particularly in the context of infidelity, would appear an unreasonably high bar for anyone to meet. In the response she later filed in these proceedings in May 2009, Noriko stated she had her own concerns about Christopher’s stability, including his ‘extreme antagonism’ towards her and its effect on the children (Response to Petition for Modification and for Enforcement of Parenting Plan and for Contempt; hereafter, Savoie Response). She admitted that his ‘continual harassment’ had reduced her to tears, but that the children had only caught her crying once when they had returned to the house unexpectedly to retrieve something they had forgotten (Savoie Response, 4).

A term of the couple’s Marital Dissolution Agreement (MDA) was that the parties were to refer to the parenting coordinators in the event they could not agree about a major
decision, with Noriko retaining the ultimate decision-making authority, including with regard to the extra-curricular activities pursued by the children (Savoie Transcript, 31–2; Savoie Response, 1). Christopher protested after signing the MDA that the term had ‘slipped in to the final draft’, escaping the attention of his lawyer and the mediator, and that he had vehemently opposed such a provision (Savoie Transcript, 32). In Christopher’s opinion, Noriko tended not to listen to the recommendations made by the parenting coordinators as a consequence of this disputed term of their divorce (Savoie Transcript, 33).

Parenting coordinator Woolverton gave evidence in the hearing relating to the restraining order in March 2009 that Noriko had always cooperated with what had been discussed about the children and Noriko had not ‘stomped her hand’, so to speak, in refraining from using her power of veto (Savoie Transcript, 105, 108). On the other hand, parenting coordinator Marshall felt that Noriko asserted her ultimate decision-making power in their sessions with her: ‘that has come out several times in our session where “but I get to decide” [sic]’ (Savoie Transcript, 66). Marshall also noted that Noriko had disobeyed instructions given to her by the parenting coordinators regarding the parenting schedule, although she attributed that to confusion on the part of Noriko as to the scope of her own rights and the parenting coordinator’s authority, and her tendency to prioritise the wishes of her children over the parenting coordinator’s orders, rather than a deliberate rejection of their recommendations (Savoie Transcript, 59, 62–3); ‘We’ll decide something in a mediation that I think Mrs Savoie [sic] thinks is negotiable afterwards’ (Savoie Transcript, 62). Although Marshall felt Noriko’s ultimate decision-making power made the parenting sessions somewhat redundant and meant there was no motivation for Noriko to agree with their recommendations, she conceded Noriko had been somewhat influenced by their recommendations at times:
Q. [by Moses]: And she’s now taking – or agreed to take Isaac to baseball; right?

A. [by Marshall]: Yes. That was a rocky road, but yes. (Savoie Transcript, 67)

4.5 Perceptions of Parenting and the Clash of Cultures

Cultural differences between the United States and Japan were invoked in court proceedings prior to the abduction to both attack and defend Noriko’s conduct in the restraining order proceedings prior to the abduction. Noriko’s lawyer used Noriko’s culture as a way of explaining why it was to be expected that she would be struggling to settle into her life in Tennessee:

Q. [by Moses]: So when [Noriko] reveals to you that she’s having difficulty, that’s not a surprise to you; is it, that there’s cultural differences and that she would have difficulty adjusting in Williamson County compared to having been in Japan under these circumstances?

A. [by Marshall]: Certainly there’s some adjustments. (Savoie Transcript, 64)

Moses then adduced evidence from Marshall that, despite her difficulties, Noriko had discussed her plans to return to school in the United States and tried to arrange for Christopher to put money in an account for that purpose (Savoie Transcript, 65).

Parenting coordinator Woolverton said that she had perceived any reluctance by Noriko in following the parenting coordinators’ recommendations to be a reflection of a difference in perception of how children ought to be raised in the United States compared with Japan (Savoie Transcript, 113). While Woolverton gave evidence that Noriko had made progress in her understanding of what was expected of her in the parenting coordination sessions and was eventually amenable to accepting other
parenting methods after she had discussed them with her, she agreed that Noriko’s
culture was initially an ‘overwhelming driving force’ in Woolverton’s discussions with
her (Savoie Transcript, 113–14). Both coordinators presented evidence that Noriko
believed the children would find it hard in Japan because of their biracial heritage, but
had equally expressed concern that they were not fitting in and adjusting to American
life (Savoie Transcript, 68).

Noriko herself gave evidence in the same proceedings as to what she perceived to be
cultural differences in parenting in the United States and Japan and how that may have
added to tensions between her and Christopher: ‘[I]t seems like there’s a gap between
American way of thinking and Japanese way of thinking’ (Savoie Transcript, 83). She
described a situation where Christopher came to pick up Isaac from his Japanese
supplemental school to take him to baseball training. Noriko happened to be there by
chance at a party; she said the atmosphere was very tense, Christopher started to yell
and Isaac has started to cry. Noriko told Christopher that Isaac did not have to go to
baseball after all (Savoie Transcript, 83). In court, she said that as Isaac had only been
signed up to trial baseball, she didn’t think it necessary to force the child to continue to
go, and she was surprised later on when ‘accused of wrong parenting’ by Marshall and
Woolverton, as she had previously come to an agreement with Christopher that Isaac
should attend baseball: ‘[I]t … seems like my common sense are probably different from
common sense here’ (Savoie Transcript, 84). Noriko viewed the baseball attendance
issue as a problem of cultural difference: ‘[I]n Japan, if the kids are crying and no, I
don’t go [sic], then it’s pretty common that he doesn’t go to trial [sic] … I just thought it’s
no big deal. It’s baseball; he doesn’t have to sign up this time’ (Savoie Transcript, 84).
For his part, Christopher characterised Isaac’s reaction to going to baseball as ‘whining’
(Savoie Transcript, 84, 29), rather than crying, and felt Isaac’s reluctance to go to
baseball stemmed merely from shyness (Savoie Transcript, 30). Christopher construed the incident as an obstruction of the parenting agreement and evidence that Noriko could not be relied upon to cooperate with the agreement in future (Savoie Transcript, 27–32). Noriko’s acceptance of Isaac’s refusal to go to baseball and Christopher’s frustration with it may be analysed as representing a cultural difference between US and Japanese parenting styles; the seminal work of Takeo Doi, The Anatomy of Dependence ([1973] 2001), comes immediately to mind. In that book, Doi pinpointed the concept of *amae*, the expectation of indulgence on one hand, and the accommodation of such indulgence on the other, as a defining motivation of the Japanese psyche, best encapsulated in the relationship between a mother and a young child. The word *amae* is derived from the Japanese verb *amaeru*, which Doi explains as describing the behaviour of a child who craves the indulgent love of its mother ([1973] 2001, 8). It extends to the same behaviour by and between adults ([1973] 2001, 8). *Amae* has provided a conceptual framework for subsequent studies to explore differences between Japanese and US parents’ perceptions of their children’s behaviour and motivations (see, for example, Rothbaum et al. 2007). Doi’s *amae* could therefore be employed to speculate upon the difference between Noriko’s and Christopher’s perception of Isaac’s behaviour; equally, there may be individual reasons for the difference as Noriko may not have placed as much value on baseball as a pastime for her son. Further, the veto power which was provided to Noriko under the parenting agreement may have provided a legal reason for her conduct in changing the arrangements she had previously made with Christopher.

Other differences in the US and Japanese perceptions of parenting were visible in the Savoie case. In his petition in March 2009 to modify the parenting plan and restrain Noriko from taking the children to Japan, Christopher indicated that he had recently learned that Isaac was co-sleeping with Noriko and had become distraught one night
when sleeping alone at Christopher’s residence, saying he was unable to go to sleep without his mother (Savoie Petition, 3). During the related hearing on 30 March 2009, Christopher’s lawyer, Virginia Story, indicated that the two parenting coordinators had discussed Noriko’s sleeping arrangements with her, in particular that her co-sleeping with Isaac was engendering a feeling of detachment for him when he went to stay at Christopher’s house (Savoie Petition, 112–13). Noriko admitted in a later court document that Isaac had temporarily slept in her bed, but the situation had been rectified (Savoie Response, 4). She also noted that Isaac’s distress was not attributable to any defect in her parenting, but did not elaborate (Savoie Response, 4). It is not uncommon in Japan for a mother to sleep together with her child for an extended period, often up until they are aged five or six (Caudill and Plath 1966; Vogel 1971, 231). Co-sleeping within Japanese families is often clustered together with other traditional child-rearing practices to demonstrate the prevalence of intimacy and mutual dependency within the Japanese family structure (Vogel 1971: 229–31; Nomura et al. 1994; Adler 1998, 41–2), a concept most famously identified and propagated by Doi.

The lure of the home culture featured heavily in Ms Storey’s line of questioning in proceedings related to the restraining order sought by Christopher on Noriko. It seems clear that Ms Story attempted to build a picture of Noriko ‘allowing her culture to rule’ (Savoie Transcript, 113). She expressed fear that when back in Japan, Noriko would be more inclined to be pressured by family and friends to keep the children with her maternal family in a familiar culture, especially in circumstances where life was difficult for her in the United States, than to obey the orders of an American court (Savoie Transcript, 86–7, 114). For her part, Noriko gave evidence in the hearing about her restraining order that she wished to visit Japan to see her friends and family and allay their concerns for her and her situation in the United States: ‘When we came,
many of them came to the airport. And it just – it was – many of them said “Why are you going?” (Savoie Transcript, 87). Noriko noted that her parents in particular were worried and they did not want her to stay in the United States (Savoie Transcript, 87). This suspicion that Noriko would flee back to Japan could be culturally analysed as linked to the practice of satogaeri, as discussed in Chapter 3. Indeed, there is a contemporary view that Japanese women who divorce overseas are particularly prone to running back to Japan (see, for example, CRN Japan n.d.f). Concern that the Hague Convention would stop Japanese women returning home, particularly in the context of domestic violence, was part of the public discourse at the time of its ratification (see, for example, M. Ito 2010 and 2011; Mainichi Daily News 2013).

4.6 Threat of Abduction

The possibility that Noriko could take the children back to Japan appears to have loomed large in the mediation between the couple prior to their divorce. This was described by Judge Martin in later proceedings as an ‘overriding fear’ that had existed throughout the pre-divorce mediation process (Savoie Transcript, 98). Judge Martin had a unique vantage point of how the case played out as he acted as both mediator in pre-litigated matters and judge in the court proceedings (discussed in section 4.7.2). The parenting plan entered into at the end of the mediation process purported to settle where Noriko would reside, and the children’s passports were placed on deposit with the Clerk and Master of the Chancery Court for Williamson County at Franklin (Savoie Petition, 1, 3; Savoie Transcript 39–40, 117).

Noriko’s turbulent emotional state in the months leading up to the abduction is noted in the court records of the March 2009 hearing before Judge Martin relating to the restraining order and modification to the parenting plan. Judge Martin heard evidence
that between the finalisation of the divorce on 6 January 2009 and 12 February 2009, Christopher and Noriko had a number of emotionally charged telephone conversations in which Noriko implied that she and the children were not comfortable in the United States (Savoie Transcript, 11–12). In particular, Noriko had told him, ‘If you want me to stay here, you’ll have to behave yourself’ (Savoie Transcript, 13). Christopher believed she was using these threats to eliminate what parenting time had been afforded to him by their parenting agreement and gave evidence that Noriko had threatened to unilaterally remove his Thursday parenting time with Isaac if he did not cooperate with what she wanted (Savoie Transcript, 1, 16). He considered this a portent of the difficulties he would encounter in gaining access to his children if Noriko were to take them to Japan, where he believed he would have fewer legal rights (Savoie Transcript, 14).

Christopher’s attorney also adduced into evidence an email written by Noriko to Christopher on 12 February 2009, soon after his remarriage, stating that she was ‘overwhelmed’, had ‘tremendous fear’ for her and the children, and that she was ‘on the edge of a cliff’ and ‘cannot hold it anymore [sic]’ if he kept bothering her (Savoie Transcript, 15). She said: ‘These things are effecting [sic] my life a lot’ and ‘I need to stay healthy in order to stay here’ (Savoie Transcript, 15). In what became a much-analysed part of the email, Noriko said: ‘Please cooperate with me in order for us to stay here’ (Savoie Transcript, 15). She further warned him: ‘This is serious talk’ (Savoie Transcript, 15).

As a result of these interactions with Noriko after their divorce, Christopher claimed that his concern that she intended to abduct the children to Japan deepened (Savoie Transcript, 11–16; see also Savoie Petition, 2–3). Christopher was particularly concerned
about a portion of the email sent to him on 12 February 2009, in which Noriko suggested that it was difficult to see her children ‘becoming American’ and ‘losing Japanese identity’ (Savoie Transcript, 43). Christopher’s attorney adduced evidence from Noriko that she understood that one of Christopher’s biggest fears was that she would take the children to Japan and he would not see them again. The attorney argued that Christopher had conveyed this fear to her many times and construed the email of 12 February 2009 as a threat designed to play on that fear (Savoie Transcript, 89).

It was this email in particular that prompted Christopher to raise his concerns with the two parenting coordinators about Noriko fleeing to Japan with the children, but he says they were unable to elicit any clear response from Noriko as to whether she intended to go to Japan (Savoie Transcript, 21). Parenting coordinator Marshall gave evidence that she and Woolverton had discussed the issue with Noriko, and Woolverton had questioned her directly as to whether she planned to move to Japan with the children in the summer (Savoie Transcript, 60). According to Marshall, Noriko had paused before responding to Woolverton by saying, ‘I think the children would be happier if the mother was happy’ (Savoie Transcript, 60), although she also expressed concern that the children would be shunned in Japan for being half-American (Savoie Transcript, 60). Marshall also gave evidence that Noriko had expressed concern that the children were not adjusting to life in the United States and living there had not been a good experience for them (Savoie Transcript, 68). Ms Marshall gave evidence that Noriko had entertained the idea of taking the children to Japan and staying there (Savoie Transcript, 62). Woolverton, on the other hand, gave evidence that there had been no indication from Noriko that she had made plans to flee to Japan with the children, and she did not have any concern that Noriko would abscond with the children to Japan (Savoie Transcript, 107, 109). Woolverton believed the implied threats contained in
Noriko’s email to Christopher on 12 February 2009 had stemmed from her feelings of distress due to her isolation, as well as frustration at the slow pace of decision-making through the parenting coordination process (Savoie Transcript, 110).

When asked about what Noriko was referring to in asking for Christopher’s cooperation to stay in the United States, Marshall noted she could not know for sure, but assumed it referred to parts of the divorce agreement which Noriko felt were not being upheld by Christopher. Marshall considered that it was Noriko’s lack of understanding of the legal issues that led to some problems. In particular, she recalled there being a dispute about a school loan which Christopher had taken out and to which Noriko’s father was a co-signer (Savoie Transcript, 74). According to Marshall, there was nothing in the divorce agreement requiring Christopher to do any more than keep servicing the loan, and he had chosen to defer it while he entered law school and was legally entitled to do so (Savoie Transcript, 74). Marshall noted that Noriko was adamant that it should be paid off or her father’s name should be removed from the loan. She noted that Noriko was inconsolable about the loan and did not seem to understand that Christopher was acting legally. She said Noriko continued to indicate that Christopher was dishonest in failing to dispose of the loan after promising to do so, and she should not have to let her children spend time with him when he was not to be trusted (Savoie Transcript, 74).

Noriko defended the content of the email of 12 February 2009, giving evidence in court that she wrote it at the peak of her frustration with her disintegrated marriage, with her divorce having been made final only one month earlier, and with Christopher having remarried only three days prior to its writing to a woman with whom he had had an extramarital affair (Savoie Transcript, 98–9). She admitted to being very depressed and angry at that time (Savoie Transcript, 99) and said her mentions of a return to Japan
had been driven by her frustration, but also her need for rest and to see her family: ‘I thought he might understand my feeling’ (Savoie Transcript, 100). In direct examination on 30 March 2009, Noriko agreed that one of the things she had meant in asking for cooperation was fewer emails from Christopher (Savoie Transcript, 82–3). This aligned with Woolverton’s interpretation of the email not as a threat but as a way of Noriko expressing her significant frustrations with the difficulty she experienced in communicating with Christopher, ‘almost as a throwing up of one’s hands’ (Savoie Transcript, 106–7). She believed the email was an expression of the lack of support and assistance that Noriko felt, and that Noriko’s request for Christopher to cooperate with her to allow her to stay in the United States was simply her asking Christopher to assist her in establishing some sense of stability in a country in which she had lived for only a few months and where she was finding it tough (Savoie Transcript, 107).

While Judge Martin ultimately empathised with the position Noriko found herself in when composing the email, he chided her for the action: ‘It was not smart; you’ve got to be aware that this is your ... former husband’s greatest fear, and for you to send this kind of email does nothing but ... push the one button that is the most sensitive part of his persona as far as your children are concerned’ (Savoie Transcript, 125–6). While Noriko agreed that Christopher’s concerns about her taking the children to Japan and not returning was his ‘hot button’, in the words of his lawyer (Savoie Transcript, 100), she expressed surprise that Christopher’s reaction had been so acute (Savoie Transcript, 100). She reiterated under oath that she had no intention of taking the children from him: ‘I’ve never split children and father. I know how important father is for children, and I am not going to do that. I keep telling him I’m not going to do that’ (Savoie Transcript, 100).
While Noriko was observed by parenting coordinator Marshall during evidence in the March 2009 hearing to have a good understanding of the English language (Savoie Transcript., 63), and although she did not engage an interpreter to assist in giving her evidence, Judge Martin stated during the taking of evidence that he was mindful that there may have been language issues at play in how Noriko’s behaviour was perceived (Savoie Transcript, 81). He highlighted some of the language used by Noriko in her email, which he didn’t think made good sense in English. For example, ‘I have tremendous fear, true to myself, I’m overwhelmed without a problem’ (Savoie Transcript, 81). Judge Martin considered this type of usage was indicative of Noriko’s ‘attempt to use the English language coming from a Japanese background’ (Savoie Transcript, 81). He was therefore open to concluding that Noriko’s asking Christopher to cooperate with her to allow her to stay in the United States was the plea of a woman who was disturbed by the breakdown of her marriage and continued problems with her ex-husband (Savoie Transcript, 81). Noriko herself admitted that she had some difficulty in expressing her thinking during parenting coordinator meetings (Savoie Transcript, 83). In analysing Noriko’s language in this way, Judge Martin ignored the other language the couple had in common, namely Japanese, and conflated cultural differences with linguistic ability. He has imputed a different meaning to her words on the basis that her cultural background is different: a Japanese person who says ‘X’ in English must surely mean ‘Y’. Intercultural communication literature has identified this sort of conflation as a misclassification of language as a subset of culture, rather than a discrete unit of analysis (Peltokorpi and Clausen 2011, 509–10). Interestingly, Christopher’s language ability was not assessed in a similar way. He speaks Japanese and some of the emails between he and Noriko were written in Japanese. What he said in those emails is accepted on face value without interrogation of his language capacity. As a literal and cultural ‘other’, some slippage is afforded to Noriko in the way she expresses herself.
4.7 Use of the Legal System: Preventative

Christopher made extensive use of the legal system in the United States to attempt to create a situation in Tennessee with Noriko and the children with which he could be comfortable. The threat of the children’s abduction to Japan by Noriko was used as his motivation to issue a number of law suits, which can be categorised as use of the legal system for preventative purposes. This section examines those suits.

4.7.1 Petition for Restraining Order and Modification of Parenting Plan

Motivated by Noriko’s declarations of discontent, Christopher filed a petition in the Chancery Court for Williamson County at Franklin on 16 March 2009 to modify the court-approved parenting plan and seek a restraining order to prevent Noriko from travelling to Japan with the children for any reason without approval of the court. In his petition, Christopher claimed there had been a substantial and material change in circumstances since the parenting plan entered into force, which warranted a modification of the divorce decree (Savoie Petition, 1). Christopher relied on Noriko’s alleged failure to follow the expert advice of the parenting coordinators, her threats to take the children to Japan, and concerns about Noriko’s emotional and behavioural stability as grounds for his petition (Savoie Petition, 1).

A temporary restraining order was granted on 16 March 2009 by Judge Jeffrey Bivens and the matter was listed for hearing on 30 March 2009 to determine the permanency of the order (Christopher Savoie vs. Noriko Savoie [Restraining Order]; hereafter, Savoie Restraining Order; Savoie Opinion, 3). Despite the fact that Noriko had deposited the children’s passports with the court, Christopher remained concerned that Noriko would somehow be able to unilaterally obtain passports for the children: ‘I don’t know the details of the law, but there have been cases where Japanese parents – I don’t believe
they require two parents; one parent can unilaterally get a passport’ (*Savoie Transcript*, 39–40). Christopher’s concerns in this respect were well-grounded, as there are cases of Japanese passports being unilaterally obtained by one parent (as discussed further in Chapter 5).

In addition to the restraining order, Christopher sought that the parenting plan be modified to award him primary residential care of the children, or otherwise some sort of assurances that Noriko would not abduct the children (*Savoie Petition*, 3). He also sought that Noriko be required to follow the recommendations of the parenting coordinator (*Savoie Petition*, 2). Christopher also noted his lack of control in respect of the parenting coordinator session for which he bore the cost: when Noriko would not cooperate with the advice provided, there was little recourse than to pay for another session (*Savoie Petition*, 2). He therefore sought that the parenting plan be modified so that Noriko pay for at least half of the parenting coordinator sessions, or alternatively, any party who failed to follow the recommendations of the parenting coordinator pay for the costs of the next two sessions (*Savoie Petition*, 2). Christopher noted in his petition that he had attempted to resolve the parenting issues without litigation and would arrange mediation as soon as possible (which he subsequently did in May 2009). He noted, however, that he had been forced to issue proceedings immediately for a restraining order due to his belief that he would be at a significant disadvantage legally if the children were taken to Japan (*Savoie Petition*, 4). Despite his alleged desire to avoid litigious resolution of his disputes with Noriko, by noting his intention to seek primary residential care of the children in his petition, Christopher was considerably raising the stakes of the dispute.
The petition was heard on 30 March 2009 before Judge James Martin III. At the start of the hearing, Judge Martin indicated a willingness to hear all of the matters or just the restraining order issue (Savoie Transcript, 4–8). Noriko’s lawyer was willing to have the matter proceed in its entirety, despite Noriko not having had time to file a response to the pleadings. Christopher, on the other hand, indicated a reluctance to proceed on all matters at that time, as he was due to travel later in the week and he preferred to try mediation in an attempt to resolve some of the outstanding issues without litigation (Savoie Petition 6–8). The reluctance of Christopher and his legal team to hear the petition in its entirety casts some doubt over the seriousness of the claim for primary residential care of Isaac and Rebecca; one might interpret it as a threat designed to bring Noriko back into line.

At the hearing on 30 March 2009, Christopher argued that the restraining order against Noriko should be left in place until mediation or further orders from the court could be obtained (Savoie Transcript, 17). Alternatively, he sought that Noriko be required to post a bond in the event she travelled to Japan with the children to provide an incentive for her return (Savoie Transcript, 18). Christopher expressed particular concern about the amount of money which had been transferred to Noriko’s control after the divorce, which he considered provided an easy source of capital to fund an abduction (Savoie Transcript, 17, 52–3). Christopher further rationalised the need for a bond on the grounds that the money would assist him to fund legal proceedings in Japan should Noriko take the children there without his permission (Savoie Transcript, 18). He noted that legal fees in Japan were high, based on his own experiences of engaging lawyers in a corporate context in Japan, and those of friends who had used family lawyers there (Savoie Transcript, 18). Christopher also revealed that he had suggested, in the course
of the parental coordination process, that Noriko take only one child at a time to Japan, which she had refused to do (*Savoie Transcript*, 50–1).

Noriko’s lawyer argued that a restraining order was not appropriate, given that Christopher’s fear about Noriko taking the children away predated the parenting agreement and nothing had changed in that time to warrant an order to further restrain Noriko. Moses also attacked Christopher’s petition for a restraining order on the basis that a further layer of legal restriction on Noriko’s actions was unnecessary as the children’s passports were held by the court, making it practically difficult, if not impossible, for them to be taken overseas. Also, somewhat ironically, given her subsequent lack of regard for the court orders regulating the children’s residence and travel, Noriko’s lack of engagement with the legal systems was used by Moses as indicative of Noriko harbouring no desire to move back to Japan. For example in her cross-examination of parenting coordinator Marshall, she posed the following questions:

Q. [Y]ou’re aware that if she wanted to go back to Japan, she could file a petition in this Court and ask the Court for her – to allow her to go back to Japan, couldn’t she now?

A. I don’t think she’s prevented from going back to Japan.

Q. But she could file a petition and ask if she could relocate there, couldn’t she?

A. I don’t understand the question.

Q. But she hasn’t taken any affirmative action to move to Japan and stay there, has she?

A. Oh, I see what you’re asking. None that I know of, no. (*Savoie Transcript*, 75)

Christopher complained that he had signed the MDA under a degree of duress as he felt threatened by the possibility Noriko would take the children from him (*Savoie Transcript*, 75).
Transcript, 32). He revealed that he had been concerned all along about Noriko absconding to Japan with the children and losing his rights to visitation, but he had agreed to the parenting plan, including allowing Noriko to take the children to Japan, as he felt it was the best thing he could do to create a situation where he could continue to see his children (Savoie Transcript, 48, 50). He said that the parenting agreement had been concluded on the assumption that Noriko wanted to stay in United States, but he believed that Noriko did not want to live in the United States (Savoie Transcript, 45). At a later stage, he admitted to uncertainty about Noriko's wishes: 'I don't know what her intentions were. I still do not know what her intentions are' (Savoie Transcript, 50). By arguing in this way, Christopher was attempting to make psychological desperation a defence to a legal action. His line of argument also demonstrates the almost impossible task of fitting ever-changing human emotions, motivations and relationships into a discrete and, for the most part, static legal agreement.

Drawing from this discrepancy between the law and the human experience, Moses also argued that further restraint of Noriko was superfluous because an order – namely, the parenting agreement which guaranteed Christopher time with the children – was already in place and Noriko would be violating it if she removed the children, just as she would violate any additional restraining order. Moses made the point that Noriko could simply have refused to come to the United States to begin with and, if she held a flagrant disregard for the laws of the United States, she had had ample opportunity to remove the children from the United States while still in possession of the passports prior to the mediation. The exchange between the two is illuminating as to the enormous faith placed in the rule of law to regulate behaviour in situations where the risk of abduction is high:
Q. [W]hen she came here, she had the passports; didn’t she, Sir?

A. Yes, she did.

Q. And she could have left then; couldn’t she, Sir?

A. I don’t believe so, because once she was served, she was under a temporary restraining order not to move.

Q. Right. So then a court order had the effect of her not moving?

A. Right.

Q. So when there are court orders, you don’t have to worry about it?

A. I do.

Q. Well, you said you didn’t.

A. If you read the affidavit, which is before the Court, the problem is that I don’t have any rights in Japan even if I had the court order. There have been many cases where people have been issued a court order and since Japan is not part of the Hague Treaty, I cannot enforce that order.

Q. Yes, Sir. So the point is that she had the passports and she could have taken the children up until the time she deposited them with the Circuit Court Clerk’s Office; isn’t that right?

A. No, because once she was served, she wasn’t able to do that legally.

Q. Well, she could have violated the court order; right?

A. I suppose she could have.

Q. And she could violate the court orders now; couldn’t she?

A. Yes, she could.
Q. And she hasn't violated the court orders; has she, Sir?

A. She hasn't gone to Japan. (*Savoie Transcript*, p. 48–9)

This exchange ignores the reality that prior to the parenting agreement entered into after the mediation, Noriko had not received her share of the marital pool, the size of which appears to have been a driving force of Christopher’s concern that she would abduct the children to Japan. As discussed in section 4.5, the potential dominance of the Japanese culture over Noriko’s thinking was another key issue raised in relation to the appropriateness of allowing her to return to Japan with the children.

It was also during this hearing in relation to the restraining order that evidence about the acrimony between Noriko and Christopher after their divorce, as discussed above, was put to the court. Even the tenor of cross-examination of Christopher by Noriko’s lawyer is laden with tension, with Judge Martin at one point threatening to adjourn the matter and jail Christopher for interrupting the lawyers and disobeying court procedure (*Savoie Transcript*, 41–2). Cross-examination was also interrupted at one point by an unidentified person crying, with Moses noting, ‘Your Honour, I'm not sure why this person is crying in the courtroom’, to which Judge Martin replied that he assumed it was a friend of Christopher’s (*Savoie Transcript*, 45).

The arguments about Noriko’s plans for the settlement money, the effect of her culture on her decisions, and her problematic relationship with Christopher were all directed at trying to determine her true ability and willingness to settle permanently in Tennessee, which was really the crux of the hearing on 30 March 2009. Despite her turbulent relationship with Christopher, Noriko gave evidence at the hearing on 30 March 2009 that she thought it was important for the children to see their father and had
encouraged them to do so and had no plans to move permanently to Japan (Savoie Transcript, 77, 89): ‘I have never thought about taking the children away from their father, never’ (Savoie Transcript, 89). She gave evidence under cross-examination in two separate instances that she would be willing to post a bond with the Clerk’s Office as assurance for the return of the children (Savoie Transcript, 92 and 102); this line of questioning was objected to by her lawyer on the basis that Noriko should not have to post money to avail herself of the rights she had already negotiated under the MDA and parenting plan and, that if posting a bind were found to be appropriate, Christopher should equally be required to post a bond for the faithful execution of the MDA (Savoie Transcript, 92–3, 101). Noriko told the court that although she had been extremely frustrated and under stress after the divorce, she had no plans to move to Japan and felt happier and better after ‘the baseball incident’ and after email communication with Christopher had ceased in March 2009 (Savoie Transcript, 77–8). She also gave an indication that she was settling down as a permanent resident of the United States and had engaged a tutor to assist her to study for the ACT with a view to entering college (Savoie Transcript, 86). This was a sentiment echoed by Woolverton, who noted that when she had talked to Noriko recently, she had indicated that she was acclimating to Nashville, enjoying school and doing more things (Savoie Transcript, 109). Woolverton believed that Noriko was glad to be in the United States and considered her life there better than her life in Japan (Savoie Transcript, 114). Further, Noriko told the court that her money from the divorce settlement was all kept in accounts in American banks and that no money was kept in Japan (Savoie Transcript, 86, 89). During a quite invasive patch of cross-examination by Storey, Noriko was interrogated about the interest rate on her American bank deposits and whether she would earn more if the money were invested by the Clerk’s office in a certificate of deposit account (CD;
presumably as part of a proposed bond to be posted as a condition of taking the children to Japan):

Q. So if the Clerk’s Office could put that money in a CD and invest it for more than 2.0 in interest, you actually would earn more on that – interest on that money?

A. All of them? [sic]

Q. $100,000 of it. How much have you got in the bank?

A. Well, do I have to answer? (Savoie Transcript, 93)

Judge Martin found the application for a bond was out of the scope of Christopher’s general prayer for relief, but noted the importance of finding out Noriko’s total amount of assets in CD, money market accounts, bank accounts, stock, bonds and securities (Savoie Transcript, 94–5). He also took interest in Noriko’s attitude towards posting a bond, despite it not being a real prospect: ‘I just wanted to know what she’d say’ (Savoie Transcript, 102). Noriko also faced no less than 17 questions under cross-examination about whether she had looked for a house to purchase in Tennessee, where she intended to purchase property, and how often she inspected houses for sale and spoke to her realtor (Savoie Transcript, 89–92). According to one his US attorneys, Paul J. Bruno, in a later interview, Christopher had ‘assumed that (Noriko) would buy a house here, get a job here, get in school, something along those lines’. Bruno noted that Noriko renting her house in Tennessee instead of buying one, her failure to enrol in school or get a job, as well as her apparent lack of ‘any significant social contacts ... or another boyfriend or prospective husband or anything’ had unnerved Christopher (DadsDivorce 2009).
Judge Martin ultimately lifted the temporary restraining order on Noriko’s travel with the children, confirmed in his judgment entered on 13 April 2009, allowing her to travel to Japan for six weeks over the summer vacation period (Christopher Savoie vs. Noriko Savoie [Order], 2; hereafter, Savoie Order on Restraint). He authorised the court to release the children’s passport numbers to her to allow her to make travel arrangements, although the passports themselves remained in the custody of the court pending further mediation between the couple regarding the custody arrangements (Savoie Transcript, 124–9). Judge Martin fixed the matter for a further hearing on 8 June 2009 in the event that mediation scheduled for 27 May 2009 was not successful in resolving the outstanding matters in Christopher’s petition for modification and enforcement of the parenting plan. In particular, Judge Martin left open the question of how Noriko’s assets ought to be managed for a later determination, noting that her assets were ‘probably the biggest reason she would stay (in Tennessee)’ (Savoie Transcript, 119).

In his judgment, Judge Martin expressed concern about Noriko’s statements regarding her unhappiness in Tennessee and her children losing their Japanese identity, and he explicitly acknowledged Christopher’s concern about the Japanese law and its ability to protect his rights (Savoie Order on Restraint, 1). He also, however, accepted Noriko’s testimony that she intended to remain in Franklin, Tennessee, and concluded that Noriko’s email expressing her dissatisfaction with life in the US was merely a reaction to the situation in which she found herself at the time (Savoie Order on Restraint, 1). He accepted her evidence that she now felt better and was able to handle the communications with Christopher through the appointed parental coordinators (Savoie Order on Restraint, 1–2). In dissolving the temporary restraining order, Judge Martin warned Noriko, both in person and in the written order, that she risked losing her alimony, child support and education fund if she failed to return to the US after the
agreed six-week period (Savoie Transcript), 119–20; Savoie Order on Restraint, 2). He considered that this risk for Noriko provided added assurance for Christopher that she would return with the children (Savoie Order on Restraining, 2). Judge Martin also anticipated that if she took the children in breach of the parenting plan, Noriko would end up fighting Christopher in the courts of Japan and that it would create a ‘terrible mess’ for her and her children (Savoie Transcript, 120).

For her part, Noriko took exception to the argument that Christopher would essentially be legally powerless in Japan if the children were taken there (Savoie Transcript, 96). She told the court that as Christopher was a Japanese citizen, she did not think a discussion about the availability of the Hague Convention to any potential dispute was relevant because the treaty mediated disputes between citizens of different countries (Savoie Transcript, 96). This contention raised the ire of Judge Martin, who said he found this type of statement concerning as it potentially indicated some intent on her part to move to Japan: ‘I really don’t care what his rights are in Japan. What I care about is ensuring that you don’t take these children permanently to Japan’ (Savoie Transcript, 96). He found an internal inconsistency in the position taken by Noriko who, on the one hand, said she had no plans to move to Japan and, on the other, said that Christopher would have full legal rights in relation to the children in Japan if she did (Savoie Transcript, 97). In saying he only cared about Noriko keeping residence in the United States and not what Christopher’s legal position in Japan would be, Judge Martin attempted to quarantine Noriko’s possible intentions and actions from the possible outcomes and realities. This approach is to be contrasted with that often taken in ‘positive’ applications for relocation or travel (as opposed to ‘negative’ applications for restraint), where the law of the destination country is of great importance (see, for example, Morley 2016). In any event, Judge Martin told Noriko that she would never
convince the court that Christopher had the same rights to enforce a foreign court order in Japan as she did and that any attempt to convince him that Christopher had the full ability to enforce a foreign decree in Japan would be futile (*Savoie Transcript* 96–7). In saying this, Judge Martin referred to ‘every bit of the law that (he had) ever seen as mediator’ (*Savoie Transcript*, 96). It is unclear whether the difficulty Judge Martin foresaw for Christopher in enforcing his rights under Japanese law derived from gender (his position as a father), nationality (his position as a foreign-born Japanese citizen or an American citizen under Japanese law), or the more general problems faced by anyone trying to enforce a foreign order in Japan.

In coming to his judgment on the restraining order, Judge Martin made a number of very salient comments which summed up the perils faced by the contemporary family law system in attempting to managing fragmented family relationships across different cultures and national lines. He acknowledged the imperfect situation in which Christopher had found himself after the divorce agreement had been reached, in so far as there was always a risk his children may be taken, but he rationalised the situation by stating that Christopher understood that every circumstance in life carries risk and that he had achieved the best compromise he could under circumstances where Noriko had made a commitment to remain in the United States and raise the children there (*Savoie Transcript*, 116). Judge Martin doubted that Christopher would ever be convinced that Noriko was acting in good faith until time passed and Noriko had made trips to Japan with the children and returned, as agreed, and the children appeared to acclimate to the notion that they had two cultures (*Savoie Transcript*, 120). He made it clear that it was the paramount concern of the court to act in the children’s best interests and that it was in their best interests to have a relationship with their father as well as maintain an understanding of both their Japanese and American cultures and
heritages ‘as part of their makeup’ (Savoie Transcript, 122–3). He also spoke of the importance of the children accepting that they are formed from two cultures and that they were entitled to have contact with both of their cultural heritages and relatives from those heritages (Savoie Transcript, 120). He admitted, however, that it was uncertain how Noriko would respond to possible pressure from her family and friends in Japan to remain there while visiting with the children, although he noted she had withstood the objection of family and friends in moving to the United States in the first place (Savoie Transcript, 120). This ‘imperfect situation’ of trying to balance the desires of the parents as individuals with the competing concern of maintaining contact between children and their parents, along with the uncertainties regarding the way the family dynamics will play out in the future across distances, is surely common to many people facing the breakdown of an international relationship.

Subsequent to the hearing on 30 March 2009, Noriko filed a response to Christopher’s petition for the modification of the parenting plan (Savoie Response). She insisted that Christopher could not establish any substantial and material change of circumstances since the parenting plan came into force, noting that Christopher’s fear that she would abduct the children was not a new one. In this, Noriko relied on Judge Martin’s comments from the hearing that the fear of abduction was an overriding one that had existed throughout the mediation, prior to the divorce taking effect. Noriko also denied that Christopher was owed any further assurance that she would not abduct the children to Japan, noting Judge Martin’s acceptance of her testimony that she intended to remain in Tennessee, that she risked significant financial loss if she absconded, and that she was now better able to handle communication with Christopher through the parenting coordinators and was therefore less stressed (Savoie Response, 3). Noriko also
noted in her Response that parenting coordinators Woolverton and Marshall had resigned from their positions since the hearing on 30 March 2009 (Savoie Response, 1).

4.7.2 Motion to Recuse / Motion to Vacate

Subsequent to Judge Martin entering his judgment on 13 April 2009, Christopher filed a motion to vacate the order and motion to have Judge Martin recuse himself from the case (Christopher Savoie vs. Noriko Savoie [Motion to Recuse]; hereafter, Savoie Motion to Recuse; Christopher Savoie vs. Noriko Savoie [Motion to Vacate the Court’s Order dated April 13, 2009]; hereafter, Savoie Motion to Vacate). The bases for the motions were that

(i) Judge Martin should recuse himself from hearing the case as he had previously acted as a mediator in the case (prior to his judicial appointment) and was excluded from subsequently acting as a judge in the matter in accordance with Tennessee Supreme Court Rules (rule 31, sec. 10[c]); and

(ii) as Judge Martin was so excluded, he did not have jurisdiction to hear the matter and his order should be vacated under rule 60 of the Tennessee Rules of Civil Procedure. Rule 60 provides for the court to relieve a party from the operation of a final order in a number of instances, including mistake, inadvertence or excusable neglect (sec. 1) or any other reason justifying relief from the operation of the judgment (sec. 5).

Judge Martin had disclosed from the outset at the hearing on 30 March 2009 that he had acted a mediator in his capacity as a private legal practitioner for the parties previously (Savoie Transcript, 3–4). He admitted that he did not know what his ethical constraints were as a ‘neutral’ (an impartial person presiding over alternative dispute
resolution; *Tennessee Supreme Court Rules*, rule 31, sec. 2[m]), but indicated his willingness to hear the matter in the absence of any objection (*Savoie Transcript*, 3–4). Lawyers for both Noriko and Christopher indicated that they wished for Judge Martin to hear the matter, with Noriko’s lawyer indicating that she and Christopher’s lawyers considered it would be in their clients’ best interests for him to continue to be involved (*Savoie Transcript*, 4).

On 8 May 2009, Judge Martin considered Christopher’s motion to have him recuse himself and vacate the order dissolving the restraining order. Judge Martin granted the motion to recuse, but denied the motion to vacate the order. Judge Martin revealed that Judge Timothy Easter was originally scheduled to hear the matter on 30 March 2009 but when it became apparent his docket was full, counsel for both Noriko and Christopher had asked Judge Easter to ascertain Judge Martin’s availability and willingness to hear the matter (*Christopher Savoie vs. Noriko Savoie [Order], 2; hereafter, *Savoie Order on Motions*). Judge Martin ruled that the interpretation of the *Tennessee Supreme Court Rules* in Christopher’s petition was miscontrued and that it did not operate to exclude him from hearing a matter where all parties agreed (*Savoie Order on Motions*, 3). Judge Martin concluded that it would be inherently unfair to vacate the order made on 13 April 2009, given that Christopher had not only consented to him hearing the matter, but actually requested it (*Savoie Order on Motions*, 3).

### 4.7.3 Final Mediation

On 27 May 2009, after mediation addressing Christopher’s petition to modify the parenting plan, the couple came to an agreement on the modification, which was memorialised in an agreed order by Judge Easter (*Christopher Savoie vs. Noriko Savoie [Agreed Order]; hereafter, *Savoie Agreed Order*). The parties agreed to select a single
parenting coordinator, whose cost would be borne by Christopher (Savoie Agreed Order, 1). They also agreed to mediate certain issues and decisions through the parenting coordinator, with Noriko retaining the authority to make the final decision if discussions in good faith failed to come to a resolution (Savoie Agreed Order, 1). The parties were also prohibited from making unilateral decisions on certain major matters (Savoie Agreed Order, 1). The parenting plan, as modified, permitted Noriko to travel to Japan with the children for agreed periods (Savoie Opinion, 3; Wood 2010). Christopher’s petition was otherwise dismissed, with him agreeing to parties bearing their own costs of the legal proceedings (Savoie Agreed Order, 2).

In July 2009, Noriko travelled to Japan with the children and brought them back to the United States without incident in accordance with the agreed parenting plan (Wood 2010). On her return, however, it appears that she kept possession of the children’s passports and they were not delivered back to the court’s custody (Wood 2010). Williamson County Clerk and Master Elaine Beeler later stated that there was no court order in place requiring Noriko to return the passports to the court (Saltzman 2009a). It is unclear how Noriko came to have unfettered control of the passports after the heavy scrutiny she faced in defending the restraining order against her. However, her success in having the restraining order dissolved and the passports released to her for the summer vacation period seemed to give her a freedom much greater than perhaps anticipated by the court or Christopher’s legal team.

Passports are discussed in Chapter 2, and the Savoie case is an embodiment of their importance in cases of international parental child abduction. The fact that Noriko was permitted to hold the children’s passports in her custody after taking the children on holiday to Japan in July 2009 is a critical part of this case. The possession of these
travel documents is representative of significant power in parental child abduction cases. Given that an individual’s identity is entwined with and, to an extent, relies on documents such as a passport for validation, the holder of a child’s passport is representative of control over that child. The United States does not have any centralised mechanism in place to monitor the international movement of children involved in custody disputes, such as the Family Law Watchlist in Australia.\(^5\) There are no exit controls, meaning that individuals do not have to clear immigration when they depart the country and two-parent consent is not required for minors travelling across international borders (US Department of State 2018b). As such, the location of the children’s passports in the Savoie case was of immense importance.

According to one of Christopher’s lawyers, after the children returned from Japan, Christopher took them on a holiday to Rhode Island for a week, in accordance with the parenting agreement (DadsDivorce 2009). Christopher returned the children to Noriko on a Tuesday evening, 10 August 2009 (DadsDivorce 2009). The trip taken by Christopher and the children in early August 2009 appears to coincide with a reception held by Christopher and Amy Savoie at a restaurant in East Grenwich, Rhode Island to celebrate their six-month wedding anniversary, as was later reported in a local Rhode Island newspaper (Dujardin 2009).

4.8 The Abduction / Attempted Re-abduction

Sometime between the time Christopher returned the children to Noriko on 10 August 2009 and the morning of 12 August 2009, Noriko left the United States and travelled

\(^5\) The Family Law Watchlist is a register maintained by the Australian Federal Police. A parent or guardian with a court order preventing or limiting overseas travel by a child may apply to have the child’s name placed on the Family Law Watchlist, which is designed to alert police to the unlawful movement of children out of Australia (Australian Federal Police 2018).
with the children to her parents’ home in Fukuoka, Japan without Christopher’s consent, in violation of the custody agreement. While it is impossible to know at which stage Noriko formed the plan to abduct the children without her confirming so, one might surmise that her children being taken to a different state to celebrate Christopher’s new marriage with his new wife and step-children in the days before would have caused her to feel significant isolation and may have played a part in her future actions. It is also possible that the earlier legal proceedings in relation to the restraining order, which had focussed heavily on her unhappiness in the United States, had the effect of crystallising the plan in her mind.

On 12 August 2009, Christopher received a telephone call from Isaac and Rebecca’s school to advise that they had not arrived for classes that morning (Filisko 2010, 58). By that stage, Christopher had not had contact with the children or Noriko for two days, which he found unusual (Filisko 2010, 58). Noriko’s rented house was subsequently searched by the police and no sign of her or the children was found (DadsDivorce 2009). Christopher says his calls to Noriko went unanswered until he dialled from a phone she would not recognise (Filisko 2010, 58). This time, her father in Japan answered and told him, ‘Don’t worry, the kids are here with us’ (Filisko 2010, 58). Christopher was then allowed to speak to Isaac, who confirmed they were in Japan and were safe (DadsDivorce 2009). Noriko subsequently enrolled the children in school in Fukuoka and remained there against Christopher’s wishes (Warner 2010, 50). Amy Savoie told CBS News in America that during that period, Noriko had not allowed the children to talk to Christopher (Saltzman 2009b). Amy herself, however, had at least one telephone conversation with Noriko after the abduction, a transcribed excerpt of which appeared

59 Later court proceedings cited the abduction date as 12 August 2009 (Savoie Memorandum, 2; Savoie Opinion, 3).
in an article published by local Nashville news service NewsChannel 5 in October 2009. The short excerpt may shed some light on the broader relationship between the two women and the oppression Noriko may have felt living in Tennessee. It is also an unequivocal indication of Noriko’s opinion of life in the United States. In that conversation, Noriko tells Amy that the United States is not a very nice country and being in Japan is much healthier for the children (NewsChannel 5 2009). Amy tells Noriko that the children miss playing guitar with Christopher and swimming in the pool. Noriko then questions how Amy would know what Isaac and Rebecca were feeling, and that the children wanted to stay in Fukuoka and were always asking to go back there. Amy then accuses her of lying, ‘That’s a lie and everyone knows it’, to which Noriko simply replies, ‘It’s not [a] lie’ (NewsChannel 5 2009).

Once it became clear that Noriko did not intend to return with the children, Christopher lodged an emergency petition seeking sole custody of the children in the Chancery Court for Williamson County, Tennessee at Franklin. Judge Easter heard the petition on 17 August 2009 and granted sole custody of both children to Christopher and ordered Noriko to return the children to him immediately (Christopher Savoie vs. Noriko Savoie [Order]; hereafter, Savoie Order on Sole Custody). In granting sole custody, Judge Easter accepted that there had been a material change in circumstances between the couple warranting the modification of the custody order, based on Noriko’s taking of the children to an undisclosed location in Japan with the intention of permanently residing there. Judge Easter further noted that it appeared that Noriko was suffering ‘mental instability’ by indicating she was on ‘the edge of a cliff’ and threatening suicide in front of the children, that she had impeded telephone conversations between Christopher and the children while in Japan and had failed to take Isaac to the doctor, which had resulted in him contracting walking pneumonia (Savoie Order on Sole Custody, 1). It is
unclear what evidence the court considered in making these findings. Noriko was also separately charged with felony custodial interference in Tennessee (Savoie Opinion, 3, 11; NewsChannel 5 2012; Edwards 2011).

Christopher subsequently flew to Japan and, on 28 September 2009, he attempted to enforce his right to sole legal custody of the children under US law by taking the children back while they were walking to school with Noriko in the rural town of Yanagawa in Kyushu (NewsChannel 5 2009g; Lah, 2009c). Noriko told Japanese police that she had sustained bruising in the scuffle that ensued when Christopher took the children from her (Inbar 2009). While Christopher admitted that Noriko ‘screamed bloody murder’ (Vieria 2010), he denied that the re-abduction attempt had been a violent act: ‘Hugging your kids and putting them in a car, I hardly think that is a violent act’ (NewsChannel 5 2009e). According to a later report, Christopher had recruited ‘a few friends’ to help him ‘sneak up’ on Noriko while he snatched the children back (Vieria 2010), including Shannon Higgins, who was interviewed later by the media as a ‘witness’ (NewsChannel 5 2009g). Christopher then attempted to drive the children to the US consulate in Fukuoka but was intercepted and arrested by the Japanese police on suspicion of attempted abduction (Netter and Boudreau 2011). He later described running with his children to the gates of the consulate with ‘a whole riot gear [sic] of police’ running after him (NewsChannel 5 2009e). Higgins described how Isaac had frozen in the street as his father ran towards the consulate carrying a crying Rebecca, in a scene which must have been terrifying for both children (NewsChannel 5 2009g). Christopher said he had advised the US consulate ahead of time that he would be arriving with his children, but declined to confirm what his exact intentions were in taking them there (NewsChannel 5 2009g). A US consulate official reported that Christopher had wanted to have the children’s US passports reissued (NewsChannel5
Christopher denied that he was planning to flee Japan with the children, but instead was prepared to have ‘a discussion’ with Japanese police about his custody rights and, if need be, remain in Japan to enforce those rights through a family court (Inbar 2009).

Christopher spent 18 days in jail in Fukuoka before being released in October 2009 (Lah 2009a; NewsChannel 5 2009b). He was released without Japanese prosecutors pressing charges, but according to a police official in Yanagawa, Kiyonori Tanaka, the case was not formally dropped at the time and investigations were continuing upon his release (Martinez 2009). A spokesperson from the US consulate expressed an understanding that Christopher was not to be indicted (Martinez 2009). Christopher confirmed that his release was conditional upon him leaving Japan and not contacting his children, which extended to making telephone calls or sending birthday presents (NewsChannel 5 2009e). He was also reported to have been required to pledge to resolve the custody dispute through dialogue between agents or via ‘proxy’ in Japan, according to a source at the office of the Fukuoka District Prosecutor (Kambayashi 2009, citing an unidentified report in the Yomiuri Shimbun). This included pursuing custody through Japanese courts (NewsChannel 5 2009e), which Christopher has elected not to do (as discussed in section 4.10). As charges were never laid by the Japanese prosecutors, it is unclear which laws he was considered to have broken, but it was most likely kidnapping a minor by force or enticement as codified in article 224 of the Penal Code of Japan. This provision is discussed in further detail in Chapter 5.

In a rare comment to the media around this time, Noriko stated that she and Christopher had agreed to a divorce on the condition that visitation was recognised (Yomiuri Shimbun 2009c). She added, ‘I have the parental authority’ (oyaken wa jibun
This seems to be a statement of custody law through a Japanese lens; that is to say, parental authority is separate from visitation. Given the volume of legal proceedings prior to the abduction, it is difficult to believe that Noriko truly believed that this was the state of the law in America, and that Christopher lost his parental authority at the time of the divorce. In any event, Noriko remained in Japan with the two children and Christopher returned to the United States, since which time he has essentially been denied all contact with his children (Daily Mail 2011; Savoie 2014). Christopher reports that when he tries to call Noriko’s home, he is simply told, ‘The kids are fine’, and hung up on, even during times of natural disaster, such as typhoons, when he calls to check on their welfare (P. Williams 2016).

According to his Facebook posts, Christopher has applied to the Japanese Central Authority under the Hague Convention, implemented in Japan after the abduction of Isaac and Rebecca, to apply for assistance in arranging visitation and contact with them and his application was accepted in September 2014. While the full details of any assistance granted by the Japanese Central Authority is not known, Christopher was told in September 2016 that Noriko had not responded to requests to arrange a telephone call between Christopher and the children. He has been reliant upon the US State Department to keep track of his children and advocate for contact, but was told after Isaac’s sixteenth birthday in 2016 that the State Department would no longer advocate in relation to Isaac as he is now old enough to apply for a passport of his own (P. Williams 2016). While it is expected that negotiations for Christopher to have access to his children have continued largely behind closed doors, true to his pledge to work

---


through a proxy or agent, it seems there has been a slight thaw in relations in recent times. Christopher revealed in 2016 that he had received a letter from Rebecca that autumn (P. Williams 2016). He thanked her via a message on 3 September 2016 on his Facebook page, ‘Bring Isaac and Rebecca Savoie Home’, and told her that he had spoken to Jiji (grandpa), who had agreed that it would be a good idea for them to meet over dinner.\footnote{Posted 2 September 2016. Accessed 2 December 2018. https://www.facebook.com/Bring-Isaac-and-Rebecca-Savoie-Home-269906455066/} He noted that he was in Fukuoka every month and hoped to see her soon.

4.9 Police Action and the Clash of Enforcement Cultures

Christopher’s imprisonment was widely reported in the English language media. While part of the discussion surrounding it centred on the dislocation between the two family legal systems, much of the drama of the story stemmed from the pseudo-criminalisation of Christopher’s actions, represented by his imprisonment without charge. In the American and other English language media, this was portrayed as unduly harsh treatment of a father attempting to enforce his legal parental rights. While the story was picked up by the Japanese media, coverage was not extensive. CNN journalist Kyung Lah expressed surprise at the lack of media interest in Japan, noting she had contacted local press in Fukuoka once the story broke, only to be told that they would not be covering it: ‘This isn’t news’ (Lah 2009b).

During his imprisonment, Christopher was described in the English media as dishevelled and struggling to cope with conditions in jail, including being housed with suspects of violent crimes and suffering sleep deprivation due to the lights being on at all times (NewsChannel 5 2009k and 2009m). He reported that he was growing a beard as he was otherwise required to shave using the same razor blade as other inmates.
Dramatically, at one point it was reported that Christopher was considering a hunger strike in prison (NewsChannel 5 2009h). Again, we see here the psychological toll that a seemingly unfair legal system can take on parents in these situations, motivating them to take desperate actions. That these elements of the story attracted attention and criticism of Japan is also a reflection of the differences in police and custodial systems in the United States and Japan.

These differences in the American and Japanese workings of justice were remarked upon by Amy Savoie when she observed that ‘they [the Japanese police] can, in what we would consider in the United States [sic], basically just make up their own rules as they go along’, stating that the police were able to interrogate Christopher at any time and without a lawyer present (NewsChannel 5 2009h). Christopher reported from jail that he had on one occasion been interrogated from 9.30 am to 9.30 pm (NewsChannel 5 2009o), and his American attorney also confirmed that he had been repeatedly questioned without legal representation and was not able to meet with his lawyer in private (NewsChannel 5 2009m). Upon his release, Christopher publicly criticised the Japanese justice system, stating that ‘everything that you’re not supposed to do to a defendant, especially pre-indictment, they did and a whole lot more’ (NewsChannel 5 2009e). This statement indicates dissonance between the expectations of the American justice system for an individual such as Christopher Savoie – a white, educated and wealthy man – and the realities of the Japanese one.

Richard A. Leo, professor of law at the University of San Francisco, has pointed out the formal similarities between the American and Japanese systems (2002). In particular, the Japanese Constitution and Criminal Code provide that a suspect in custody in Japan must be informed of their right to silence and to designate an attorney, and
torture is prohibited during interrogations (Leo 2002, 206–7). Also, a confession obtained under conditions contrary to these requirements may be excluded from evidence in Japan (Leo 2002, 206–7). However, in practice, suspects in Japan may not refuse interrogation or leave the interrogation room, and their right to counsel does not attach until after indictment (Leo 2002, 207). Under Japanese law, where the police have probable cause, an individual may be arrested and detained without bail for 48 hours on suspicion of having committed a crime before being turned over to the public prosecutor who may hold them for a further 24 hours before requesting a judge authorise a 10-day period of detention (Leo 2002, 207; Code of Criminal Procedure, art. 208[1]). At the end of the initial 10-day period, the prosecutor may apply for a further 10-day extension to the detention period (Leo 2002, 207; Code of Criminal Procedure, art. 208[2]). This means that police and prosecutors in Japan may hold a suspect for questioning in ‘substitute prisons’ (daiyō kangoku; holding cells of police stations) for up to 23 days without communication without the outside world (Leo 2002, 207). Christopher was arrested on 28 September 2009 and his detention was extended after the thirteenth day (NewsChannel 5 2009i). The allowable detention period applies per charge, so interrogators requiring more time with a suspect need only arrest them on another minor charge to apply to have the clock start over on the period of detention (Leo 2002, 207). These long periods of detention, at least by contemporary US standards, are routinely applied for and granted in the Japanese legal system and play a key role in the extraction of detailed confessions and physical evidence from suspects, many of whom will be worn down by the unrelenting nature of the process and the ‘psychologically coercive’ nature of the interrogation (Leo 2002, 208–9). These draconian but established methods of interrogation and custody conceivably overwhelm any formal rights a

---

63 This period may be extended by a judge by five more days in relation to a very small number of crimes, including those relating to foreign aggression and insurrection (Code of Criminal Procedure, art. 208-2).
suspect may have in the Japanese criminal legal system. Further, confessions are rarely suppressed in practice in Japanese courts, regardless of their method of extraction, particularly where it would result in a seemingly guilty suspect being set free (Leo 2002, 208). In turn, these investigation and prosecution methods prop up Japan’s high conviction rate: in 2017, Japanese district courts, which hear criminal matters at first instance involving penalties greater than a fine, recorded a conviction rate of 97.5% (Supreme Court of Japan 2018b, 9 [see table 9]). Further, prolonged detention without charge can also be used as a means of informally punishing a suspect where an official sanction is not appropriate for one or another reason. This may be seen in Christopher’s case, where the diplomatic ramifications of pursuing a prosecution may have outweighed any perceived societal benefit. The lengthy pre-indictment detention period allowed the Japanese authorities to punish him without committing to formal charges.

The custodial system in Japan is not only different from the United States, it is also out of step with current international standards regarding the treatment of individuals suspected of a crime. For example, suspects are generally not permitted to be held without charge for more than 24 hours in the United Kingdom, although the time may be extended up to a limit of 132 hours for more serious offences (Police and Criminal

---

64 Having reviewed the custodial process in Japan, Leo calls for the implementation of mandatory videotaping of all custodial interrogations in Japan as a non-adversarial reform to assist the pursuit of fairness in the Japanese criminal justice system, as opposed to the introduction of a formal warning to suspects about their constitutional rights to silence and counsel, such as that instigated after the landmark 1966 US Supreme Court case, *Miranda v Arizona*, based upon the Fifth Amendment in the US Constitution. The Japanese Diet introduced legal revisions in 2016 to require videotaping of interrogations for some crimes; however, the amendments have been criticised for being too limited as they are estimated to extend to only 3% of criminal matters, meaning that suspects who confess to more serious crimes during interviews for lesser offences will not be covered (*Japan Times* 2016). The revisions also introduced plea bargaining and extended the permissible use of wiretapping (*Japan Times* 2016).
Evidence Act 1984, arts. 41–44), and in the French inquisitorial system, pre-charge detention (garde à vue) is generally allowed for up to 48 hours (Shapiro 2008). In the US, suspects are typically held for up to 48 hours before charges must be laid or the suspect released (Mulroy 2013). Even this relatively short ‘holding’ period has come under attack in judicial and academic quarters (Mulroy 2013). The notion that a US citizen of good standing like Christopher Savoie would be subjected to custodial conditions in Japan so far removed from what is considered just in the US drove much of the sensationalism surrounding the story.

4.10 Use of the Legal System: Punitive / Compensatory
After he returned to the United States, Christopher issued civil proceedings against Noriko, seeking compensation as a result of the abduction. In May 2011, Noriko was ordered to pay US$6.1 million in damages to Christopher by Judge Easter of the Tennessee Circuit Court based on claims of false imprisonment, emotional distress and breach of contract (Asahi Shimbun 2011; Daily Mail 2011; Edwards 2011). There was no appearance entered for Noriko during the hearing (Edwards 2011). At the time of the judgment, Christopher hinted at some further legal action with respect to enforcement of the order, stating, ‘We have a set of lawyers waiting in the wings’ (Daily Mail 2011). Christopher would have to file separate legal proceedings in Japan to collect the damages (Kyodo News 2011b), no easy feat considering the possible objections to the enforcement of the decision on jurisdictional and public policy grounds, given the stark differences in law between the United States and Japan in this case (see Chapter 3 for discussion of enforcement of foreign judgments in Japan). He has, however, stated that the ultimate aim of the lawsuit was to create some leverage to progress negotiations with Noriko in order to reinstate contact with his children (Edwards 2011). Psychology

65 Different provisions for pre-indictment detention apply for suspects in cases of terrorism.
driving legal action is evident here; despite lacking any genuine prospect of successful enforcement as long as Noriko remained in Japan, the litigation was designed to create psychological pressure to influence her behaviour.

On 30 March 2010, Christopher filed another lawsuit in the United States District Court for the Middle District of Tennessee, Nashville Division, on behalf of himself and his children tangential to the custody dispute, against Judge Martin in his individual and official capacity both as a mediator and a judge for the Twenty First Judicial District in Tennessee (Savoie Memorandum). According to subsequent court documents, Christopher's connection with Martin, at least in the context of the custody dispute, dated back to August 2007, when Martin, then a private legal practitioner and partner with Nashville law firm, Stites & Harbison, PLLC (hereafter, Stites), provided advice regarding issuing divorce proceedings in Tennessee (Christopher Savoie v. Stites & Harbisson [sic], PLLC (Complaint), 2, 5; hereafter, Savoie Complaint). Christopher subsequently engaged a different attorney to represent him in the divorce proceedings. On 31 July 2008, Martin came into contact with Christopher again when Christopher entered into a contract with Stites to provide confidential mediation services related to his divorce complaint against Noriko (Savoie Complaint, 1). On 4 September 2011, Martin, as agent and employee of Stites, was ordered by the Chancery Court of Williamson County to provide these services to Christopher in accordance with Tennessee law with regard to family law proceedings relating to parenting (Savoie Complaint, 1).66 The mediation ran over a six-week period at the offices of Stites in

66 Christopher stated in his Complaint that he waived the 'conflict of interest' arising from his prior consultation with Martin in August 2007 in engaging Stites for mediation, and that Noriko also consented to the mediation and was aware of his prior consultation with Martin (Savoie Complaint, 6). He denied, however, that he had waived any attorney-client privilege of confidentiality by engaging Stites for mediation (Savoie Complaint, 6).
Nashville, with the parties in attendance for three full days over the period, and concluded in December 2008 (Savoie Complaint, 1–2). Effective 1 January 2009, Martin was appointed a judge of the Twenty First Judicial District of Tennessee and left his position with Stites (Savoie Complaint, 7; Savoie Opinion, 2), which placed him in the position of hearing the restraining order application on 30 March 2009.

In particular, Christopher alleged that by virtue of serving as a mediator in the earlier divorce proceedings, Judge Martin lacked jurisdiction to act as judge in the case on 30 March 2009 under Tennessee Supreme Court Rules and as a consequence could not be afforded judicial immunity (Savoie Memorandum, 6). Christopher also claimed that Judge Martin’s use of confidential information obtained from the mediation was not a judicial function and by making observations and comments about the parties throughout the trial he had become a witness in the matter, contrary to Tennessee Rules of Evidence, which forbid a presiding judge from also testifying in that trial (Savoie Memorandum, 6–7).

The lawsuit was also filed against Stites in its capacity as employer of Martin at the time of the mediation in 2008, as well as court-ordered parental coordinator Woolverton, in both her official and individual capacity (Savoie Opinion, 2). In particular, Christopher alleged that Noriko had made remarks indicating the possibility that she would abduct the children to Japan in front of Woolverton during court-ordered parental coordination sessions, and that he had also forwarded Woolverton troubling emails from Noriko to further demonstrate the risk of abduction (Savoie Memorandum, 2). He claimed Woolverton had been negligent in her duty as a court-ordered parental coordinator by failing to use this information to act to prevent the abduction of the children to Japan (Savoie Memorandum, 12) and that she had actively assisted the
abduction by failing to report threats made by Noriko regarding leaving the country to Christopher or to the court at the hearing on 30 March 2009 (Savoie Memorandum, 12–13, 15). He also claimed that Woolverton had conferred with Noriko prior to giving evidence on 30 March 2009 and had been ‘coached’ by Noriko’s attorney (Savoie Memorandum, 15–16).

The proceedings consisted of claims under Section 1983 of Title 42 of the Code of Laws of the United States of America (‘the US Code’) as civil actions for the deprivation of rights by actors of the state against all parties, as well as negligence claims under Tennessee law against Martin in his role as mediator, and Stites and Woolverton. Christopher also later amended his pleading to add a breach of contract claim under state law against Stites. He sought monetary damages, and declaratory and injunctive relief (Savoie Memorandum, 2–3).

All defendants to the suit filed motions in early June 2010 to have the matters against them dismissed, and Judge Aleta A. Trauger dismissed the claims against each of the parties in December 2010. Judge Trauger found that Martin had acted with jurisdictional authority and had immunity for statements made while he was presiding as a judge (regardless of whether or not the parties consented to his presiding over the hearing), as well as quasi-judicial immunity for statements made as a mediator engaged in court-mandated mediation (Savoie Memorandum, 8–10, 12). In particular, Judge Trauger found there was no authority to suggest that a judge loses jurisdiction on account of failing to follow a Tennessee Supreme Court Rule (Savoie Memorandum, 8). She concluded that Woolverton was also immune from suit as her actions as a court-ordered parental coordinator were intimately involved with the judicial process and directly related to the court proceedings (Savoie Memorandum, 16). She noted case law
which highlighted the importance of individuals engaged in protecting the health and wellbeing of children in the state being able to perform their roles free from intimidation and harassment from dissatisfied parents (Savoie Memorandum, 14). Judge Trauger also noted that Christopher had not challenged that the State of Tennessee was the ‘true defendant’ in his official capacity suits against Martin and Woolverton and that the state was entitled to sovereign immunity in relation to the claims for monetary damages (Savoie Memorandum, 16). Finally, Judge Trauger ruled that no valid claim had been stated against Stites under Section 1983 of the US Code as no allegation had been made bringing the actions of Stites, a private actor, into the realm of the state (Savoie Memorandum, 20). Furthermore, the court declined to exercise supplemental jurisdiction as a federal court with respect to the claims under Tennessee law (negligence and breach of contract) against Stites, noting that all of the federal claims before it had been dismissed (Savoie Memorandum, 20–1).

The court also specifically addressed Christopher’s claim for injunctive and declaratory relief. Christopher had sought an injunction against judges presiding over any matter in which they had already served as a mediator, and declarations in relation to the operation of the court rules relating to mediators, the waiver of litigants’ rights, the duties of court-ordered parental coordinators to the court and, perhaps, most importantly, that state courts must impose strict conditions to prevent the involuntary removal of children from the United States to Japan (Savoie Memorandum, 17). This final claim can be viewed as an attempt to use the court process as a preventative

---

67 Citing the 1984 decision of the United States Court of Appeals for the Sixth Circuit in Kurzawa v Mueller. Case no. 732 F2d.1456.
measure (albeit, after the fact, for Christopher’s particular case) as well as a promotional mechanism for Christopher’s cause and that of international parental child abduction from the United States generally. The court rejected Christopher’s claims for injunctive and declaratory relief on the basis that they were not appropriate in light of the guidelines for whether a district court should exercise its discretion to declare the rights of litigants. The court also saw a lack of value of any declaratory and injunctive relief, given that the underlying state proceedings had concluded (Savoie Memorandum, 19). It noted that Christopher’s requests had clear problems from a comity perspective, with improper encroachment into the state jurisdiction by that of the federal (Savoie Memorandum, 19). Christopher appealed all of the claims except those against Woolverton to the US Court of Appeals for the Sixth Circuit (Savoie Opinion 2012). The court agreed with the conclusions reached by the trial judge and dismissed the appeal in its decision of 6 March 2012.

In addition to his suits in the US federal courts, Christopher filed proceedings in the Circuit Court of Davidson County, Tennessee, on 30 November 2011 against Stites, 68 The court referred to broad discretion provided in the Declaratory Judgment Act, as well as key criteria in determining whether to exercise declaratory relief as articulated by the United States Court of Appeals for the Sixth Circuit in the 1984 case of Grand Trunk W. R. R. Co. v. Consol Rail Corp (case no. 1746 F.2d 323 at 326): namely, when the judgment would serve a useful purpose in clarifying and settling the legal relations in issue, and when the judgment would terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. The court expounded a five-point test to analyse if the key criteria are met: (i) whether the declaratory relief would settle the controversy; (ii) whether the declaratory relief would serve a useful purpose in clarifying the legal relations issue; (iii) whether the declaratory action is being used merely for the purpose of res judicata: that is, to have the matter determined finally to avoid re-litigation of the same matter in another forum; (iv) whether the use if declaratory action would increase friction between the state and federal courts and improperly encroach upon state jurisdiction; and (iv) whether a better or more effective remedy is available.
seeking determination of state law claims for breach of contract, professional
negligence/legal malpractice, and per se negligence (negligence due to the violation of a
law), noting that the federal court had previously declined to determine his state law
claims (Savoie Complaint). Christopher alleged that Stites had breached its contractual,
fiduciary and statutory duties of loyalty and confidentiality due to the action of its
former agent and employee, Martin. Christopher argued that Judge Martin had
wrongfully disclosed confidential information that he had obtained while overseeing
mediation between Christopher and Noriko, and earlier, when he had advised
Christopher with regard to issuing divorce proceedings (Savoie Complaint, 2).
Christopher also alleged that Judge Martin had misrepresented and inappropriately
relied on information obtained via the mediation in a manner adverse to Christopher in
the hearing on 30 March 2009, leading to him being unable to maintain the restraining
order that had earlier been put in place by Judge Easter and ultimately resulting in the
abduction of his children to Japan (Savoie Complaint, 2, 7–8). The content of the
information allegedly misused by Judge Martin was not identified in the complaint.
Christopher also repeated his claim that Judge Martin had breached his obligation
under Rule 31 of the Supreme Court Rules.

Christopher also claimed that shortly after the commencement of the court-ordered
mediation, then mediator Martin had introduced Noriko to personal friends and former
clients of his to assist her in her personal affairs, without the knowledge or consent of
Christopher, and that he had used this ‘improper undisclosed personal relationship’
with Noriko and confidential information obtained from Stites to erroneously impute
believability into her testimony on 30 March 2009 (Savoie Complaint, 7–8). Christopher
also claimed that he suffered ongoing damage to his reputation due to statements made
about him by Judge Martin during the hearing on 30 March 2009 as a result of the
breach of confidentiality (Savoie Complaint, 8). He claimed that he had suffered severe financial and emotional damage, including ‘severe ongoing mental anguish’ for which treatment was ongoing (Savoie Complaint, 2, 9–11). The heavy psychological toll of the custody dispute and abduction is clearly a recurring theme.

Christopher sought to recover compensatory damages in the sum of US$30 million, being $2 million each for breach of contract, professional negligence/legal malpractice and per se negligence, and $24 million in punitive damages (Savoie Complaint, 12). He also sought an injunction restraining Stites and its present and former attorneys from future breaches of his confidentiality and a declaratory judgment regarding the affirmative duty for judges not to sit in matters in which they have previously mediated (Savoie Complaint, 12). The outcome of this complaint is unclear. The fact it was not reported on in the media, however, may indicate that it was settled out of court or withdrawn. It is worth noting that the United States Court of Appeals for the Sixth Court, in determining the appeal before it in March 2012, noted that it was ‘not aware of any ongoing litigation in any other courts relating to this matter’ (Savoie Opinion, 11), which might confirm that the matter was withdrawn prior to that time as it would have been redundant for the court to rule on the validity of the federal court declining to determine the state claim against Stites had the matter already been determined, and one would imagine any settlement would have involved a release preventing further litigation on the point.

Christopher also reportedly filed a law suit in Chancery Court for Williamson County against the attorney who represented him at the hearing in March 2009, Virginia Story, alleging she had allowed Judge Martin to release the children’s passports to Noriko ‘without objection’ (Wood 2010). There have been no further reports about this case.
Other left-behind parents have accessed the legal system to pursue compensation and other redress for the abduction of their children. One notable avenue of litigation is by suing the air carriers used by parents to abduct their children. There have been a string of such cases in the US, starting with the landmark case of *Pittman v Grayson* in 1994, where a left-behind father sued Icelandair, claiming its officials had ignored several warning signs in the lead-up to the abduction of his daughter by his ex-wife in contravention of court orders.70

In 2008, left-behind father Patrick Braden sued All Nippon Airways (ANA) for negligence and interference with custodial relations after his daughter Melissa was taken to Japan on an ANA flight by her mother, Ryoko Uchiyama, on 16 March 2006 in contravention of Patrick’s rights of custody pursuant to a court order issued a short time earlier on 8 March 2006.71 Braden claimed that ANA were at fault for failing to require proof that he had consented to Melissa travelling, or that Uchiyama had sole custody of her. Braden’s case was dismissed at first instance on 9 February 2009 by the Superior Court of California in the County of Los Angeles, in part, on the basis that his claims were pre-empted by the Airline Deregulation Act (ADA) of 1978, which removed US federal government control over various aspects of the airline industry (Alexander 2014, 264). The California Court of Appeal for the Second District subsequently held that boarding procedures were not pre-empted by the ADA and could be considered by it (Alexander 2014, 264). Nevertheless, it dismissed both causes of action on their merits.

---

69 For a detailed discussion of these cases, see Alexander (2014).

70 The father in this case, Frederick Pittman, was ultimately unsuccessful in his claim for compensation in the US District Court for the Southern District of New York. Case no. 93 Civ. 3974.

71 *Patrick Braden vs All Nippon Airways Co. Ltd.* Case no. BC387313; *Braden v All Nippon Airways Co. Ltd.* Case no. B215440. See also Alexander 2014.
on 15 December 2010. It found that ANA did not owe any duty of care to Braden under California law, which does not recognise a duty of care to control the conduct of a third party or warn those endangered by that conduct in the absence of a special relationship (Alexander 2014, 265). In this case, the court did not consider there to be a special relationship between Braden and ANA to warrant a duty of care. The court also dismissed the claim of intentional interference with custodial relations on the basis that ANA did not know that Braden did not consent to the travel and bore no duty to investigate whether Uchiyama’s conduct violated a court order (Alexander 2014, 265).

The only case in which a left-behind parent has successfully sued an airline in the United States involved the use of a private charter company for a sum of US$160,000 by a father wrongfully to remove his two children to from Connecticut to Cairo in August 2001.72 The children were recovered 22 months later in Cuba. In that case, the Connecticut Superior Court found that it was reasonably foreseeable that the private airline’s conduct could harm the mother and the abduction was within its control. In its judgment on 10 November 2005, the court criticised the charter company for profiting from the sale of its services, which were ‘rendered with a blind eye regarding the totality of all the circumstances surrounding the flight’. The mother in the case was awarded a total of US$27 million for interference with custodial relations, negligence and loss of filial consortium. This case opened up the ambit of entities potentially responsible for an incident of parental child abduction and raises issues of how deep the duty to enquire about passengers and their individual circumstances runs, and indeed, how far the web of international parental child abduction can be regarded as spreading for litigation purposes.

---

While it is not uncommon for parents to resort to litigation in cases of parental child abduction, Christopher's use of the US legal system to pursue his claims, both before and after the abduction, appears to be without precedent in these types of cases. Despite his extensive use of the judicial system to pursue claims against a wide variety of actors in the custody dispute in the United States, Savoie has not pursued his parental rights through the Japanese legal system. While the reasons for this are not clear, it is understood to be because he believed his chances of success were very slim (NewsChannel 5 2009e; Savoie Transcript, 19). Despite his robust usage of litigation in the United States, Christopher has expressed concern about the prohibitively high cost of legal fees in Japan and stated that as his assets were tied up in his house, car and 401(k) plan (retirement savings), he did not have the liquid assets to mount a legal fight in Japan (Savoie Transcript, 19). As discussed above, he is also reported to have agreed to attempt to resolve the custody dispute by agent or proxy in Japan, which may also restrict his close personal participation in the Japanese legal system. His entanglement in the Japanese criminal justice system may have also significantly diminished any prospect of success in a Japanese Family Court. One may also surmise that his complicated citizenship status as a dual citizen may have influenced his decision to avoid the Japanese legal system. Further, given his peculiar position of being an adult with dual Japanese–US citizenship, Christopher's marriage to Amy Savoie in the United States may have raised questions about its legality under Japanese law, bearing in mind the legal recognition implied by notification under the Family Registration Act (Krogness 2014, 595) and the fact that his divorce from Noriko was not subject to notification in Japan for more than 18 months later.73

73 Article 732 of the Civil Code of Japan provides that a person with a spouse shall not enter into another marriage.
4.11 Conclusion

The Savoie case is widely cited and employed to frame narratives about international parental child abduction in both the mass media and in academic scholarship. The awareness raised by the Savoie case has thus translated into increased political and diplomatic pressure on Japan to change the way its government handles cases of international parental child abduction. In this way, the case signifies a turning point in the international history of the parental child abduction issue. As discussed in this chapter, many elements of the Savoie case were extraordinary. In this way, the case is a valuable source of information and can perhaps provide further insight into the legal conditions in Japan, beyond its own specific set of facts (see Flyvbjerg 2006, 229–33). A fascinating element of this case is the shifting tensions between the parents as to what best serves the interests of their children. In the hearing relating to the restraining order sought by Christopher, Judge Martin made it clear that it was the paramount concern of his court to act in the children’s best interests and that it was in their best interests to have a relationship with their father as well as maintain an understanding of both their Japanese and American cultures and heritages ‘as part of their makeup’ (Savoie Transcript, 122–3). This is an encapsulation of the North American view of the best interests of children and it is from this view that Noriko ironically and ultimately benefitted as the court placed a high value on the children having access to both cultures, allowing her to move between the United States and Japan with them. By contrast, Noriko may not have felt particularly fortunate in her position under Tennessee law; as the mother with primary care of her children in Japan she would almost certainly have had sole custody of them and would not have been beholden to any court for permission to move about.
In Chapter 5, I introduce a selection of other international parental child abduction cases with which the Savoie case can be contrasted and compared to distil factors which are common to cases of international parental child abduction, and which are more closely associated with the individual attributes of the parties involved.
Chapter 5

Counterpoint I: Pre-Hague Convention

5.1 Introduction

This chapter will examine a number of other parental abduction cases which involve in some way children of broken marriages or partnerships crossing national, cultural and legal borders. The cases examined here provide a counterpoint to the Savoie case, which specifically arose from the US–Japan relationship. This bilateral relationship is perhaps a special one given the status of the United States in international affairs and that the two countries are closely linked in modern geopolitical history and share close economic, political and cultural bonds. However, not all families experiencing international parental child abduction can be evaluated under the cultural and legal frameworks that characterise the US–Japan bilateral relationship. An array of bilateral relationships contribute to the issue of parental abduction to and from Japan.

Some of these case studies have received little or no media attention and therefore the length and detail provided for these cases are varied and limited, but their inclusion is important because by comparing and contrasting them with the more dominant case study, that of the Savoies, they provide a fuller picture of the international abduction issue, and they also show which aspects of the Savoie case were exceptional, and which are illustrative of larger issues regarding the Japanese family in an international legal context. These cases were chosen to explore how left-behind parents’ circumstances, such as their social and economic standing, influenced the way they have faced the abduction of their children and fought to locate and re-establish their relationship with them. While all of the cases are different, a number of common themes emerge:
• the significance of the gender, national origin and socioeconomic class of the individuals involved;
• the effect of the existence of a ‘traditional’ family unit prior to the abduction;
• the power possessed by the custodial parent (regardless of whether custody is maintained legally or otherwise);
• the dislocation between national legal systems and difficulty enforcing parental rights;
• the varying role of the police; and
• the importance of official documentation, such as passports and residence information, and who controls this.

5.1.1 Social Media as a Tool and Subject of Analysis
As noted above, some of these cases received little or no media coverage and due to this, social media was an important source of data for them. In this section, I discuss the ways in which parties to international parental child abduction cases use social media and the significance of this usage to the progress of their cases and the issue as a whole, before I go on to examine these further case studies.

Social media is used by many individuals affected by international custody disputes to reach out to others and seek assistance, whether as a left-behind parent, an abducting parent or a parent concerned about the potential for abduction in the future. This is important in the case of abductions involving Japan, given the significant dislocation between its family law and the varying expectations held by parents involved in abduction cases as to the way the custody of their children ought to be managed. This dislocation is not limited to international cases, with Japanese parents also expressing disillusionment at the state of the law in Japan governing domestic custody cases. By
connecting these groups, social media facilitates a subtle but substantive form of internationalised communication and acts to galvanise and disseminate public opinion, making an important contribution to the twin forces of gaiatsu (external pressure) and naiatsu (internal pressure) for change. It also is a facilitator, creating a virtual support group for disparate parents whose paths may not otherwise have crossed due to restrictions on time and travel.

One prevalent way that left-behind parents participate in social media is by joining or subscribing to an online group. The Japan Children’s Rights Network (CRN Japan) is an early example of this type of group. Established in 2003, its stated mission is to ‘disseminate information to help change attitudes and laws in Japan in order to assure all children of direct, meaningful and continuing contact with both parents, regardless of citizenship, marital status or gender’ (CRN Japan, n.d.a). The group provides a multitude of online resources for left-behind parents, including information on Japanese family law and the practicalities of pursuing custody rights in Japan (such as assessments of local lawyers), as well as a web-based service to assist children in contacting left-behind parents and a space for online discussion. The group also plays a role in assisting parents who suspect their children are about to be abducted by providing information about travel restraining orders and other preventative measures. While not holding itself out as a legal advisor, in the provision of this type of practical assistance the group offers quasi-legal support to parents who may not be able to afford legal advice or may have run into dead-ends in their cases. In this way, it represents an important extension of the legal process. While CRN Japan has a strong advocacy and legal focus, other groups such as Left Behind Parents Japan, formed via social networking portal Meetup.com, are also social, encouraging parents to meet and cooperate with one another. Left Behind Parents Japan was started by a Japanese
citizen, Masako Akeo (also known as Masako Suzuki Akeo), herself a left-behind parent after her Japanese husband abducted their child from their home in Canada (Akeo 2010). Her case is discussed below. Left Behind Parents Japan arranges social functions in Tokyo, as well as events to lobby for changes to the law in Japan. Left Behind Parents Japan was registered as a general incorporated association (ippan shadan hōjin) in 2011, allowing it to offer opinions to the court, in a similar function to an amicus curiae or friend of the court (Left Behind Parents Japan 2011). At last count in December 2018, the group had 197 members.⁷⁴

There are also groups who publish their sites in Japanese, such as Chūbu kyōdōshinken hôseika undō no kai (also known as Chubu Joint Custody Association for Legislating of Joint Custody and Joint Nurture),⁷⁵ and Kyōdōshinken undō nettowâku (Joint Custody Action Network), which is also known as K Netto. In comparison with the Japan Children’s Rights Network and similar groups with sites in English (and presumably a large member base of non-Japanese parents), these groups focus on advocating for change to domestic custody laws and local law reform activity, rather than detailing individual cases. This could be due to the fact that sole custody and minimal visitation are accepted as the social norm in Japan and reflected in the extant legal system, and case studies may not be as effective in advocating for change. Nevertheless, these sites also represent an attempt to intervene in the social and legal status quo with respect to the child custody system in Japan, of which the Hague Convention is only one part.

Social media sites also have a coercive effect on the parent retaining the child; that is, they provide a kind of virtual bargaining chip for left-behind parents. By posting stories

---


of parental child abduction and pictures of abducted children and their abducting parent, these sites act as an extra-legal form of pressure on abducting parents. CRN Japan details international and domestic abduction cases in which the abducting parent has contacted the organisation to request that information be removed, and where contact has been restored between the left-behind parent and their child on condition that the information is removed from the site (CRN Japan n.d.e). The very nature of these cases means there is a lack of identifying details. This is a clear example of the power of social media to – wrongly or rightly – name and shame, and feeds into its use as a type of virtual scarlet letter. Such usage has come to academic (see, for example, see Solove 2007) and popular (see, for example, Ronson 2015) attention in various other social contexts in recent years.

In addition to social media groups, the online activities of individual left-behind parents and their supporters can also provide an outlet for advocacy and support. Christopher Savoie, for example, is a regular user of Twitter (https://twitter.com/cjsavoie) and uses his account to post articles in English and Japanese about parental child abduction. He also uses it to convey messages to his children and ex-wife in Japan (although whether they ever see them is unknown). In addition to the groups of parents and supporters who call for legal change in Japan, there are were also those who took to social media to protest against Japan joining the Hague Convention. One of these groups is the Safety Network for Guardians and Children, mentioned in Chapter 3, which set up its website in 2011.\(^76\) Another group of this kind is Hāgu ‘ko no dasshu’jōyaku no hijun ni shinchō na kentō o motomeru shimin to hōritsuka no kai (Association of Citizens and Lawyers Requesting Careful Consideration with respect to the Ratification of the Hague ‘Child

Abduction’ Convention). Both groups set out to register their concern regarding the signing of the Hague Convention by Japan, particularly with respect to the treatment of victims of family violence under the treaty. Individual parents who have abducted their children have also used social media to tell their stories and explain their actions. Mika Yamashita is a Japanese citizen who started a blog under the name ‘Marinko’ in 2008 about her marriage to an Australian man in Australia and their divorce and subsequent protracted custody dispute over their three daughters under Australian law. She ultimately abducted the children from Australia to Japan in February 2009. Her blog was eventually published as a book in Japan in 2010, entitled Watashi ga yūkaihan ni narumade (I Was Driven to Abduction) (Yamashita 2010). On the blog, and eventually in her book, Mika wrote of her feelings of isolation while in Australia, her ex-husband’s abusive and threatening behaviour and her frustration with the Australian legal process. Importantly, she also wrote of her shock at the concept of shared parental authority under Australian law, which meant she was essentially tied to ex-husband until the children reached adulthood (Yamashita 2010, 59). The staking out of moral territory on the internet by groups and individuals on both sides of the issue highlights the complexity of this social, legal and political problem and the careful attention required when analysing social media sites with respect to this sensitive issue.

Social media provides a vehicle for communication by parents, and even children, that is worthy of analysis in itself. It allows the parties to tell their stories and have those stories preserved like a time capsule for a later date. Social media also helps to fill a void left by a legal system at odds with a changing and internationalised form of family.


It can provide a light for parents in an otherwise intractable situation. Whether social media will continue to play this role depends in large part on the way in which Japanese law and society responds to new conditions of the family in society. Social media itself could, in turn, contribute to how this response is shaped.

Figure 3. Social media acts as a conduit for information between left-behind parents and their children. This is a Facebook screenshot from left-behind-parent, Masako Akeo, communicating a Christmas message to her son, Kazuya. Akeo's case is discussed below. Source: https://www.facebook.com/BACHome/ (accessed 8 May 2019).

5.2 The Case of Kayako Yamada: Abduction from Japan to the Czech Republic

Kayako Yamada, a Japanese citizen, met her husband, a national of the Czech Republic, while on exchange in Australia and they later married in Japan in approximately 2004 (Kyodo News 2009; Tokyo Shimbun 2010). On 23 August 2009, Kayako’s husband, then 31, took their son Kevin, then aged five, from their home in Yamagata in Gifu Prefecture, telling her they were going to fill up their car with petrol (Kyodo News 2009; Tokyo Shimbun 2010). Kayako remembers that Kevin went willing with his father and was excited because he had been told by his father that he would be bought a toy (Tokyo Shimbun 2010). Kayako, then 40, claimed there was discord in the marriage due to her husband’s tendency to be abusive and violent, and the couple had discussed divorce
Later that evening, Kayako received a message from her husband to the effect that he and Kevin were going travelling (*Japan News* 2010).

Kayako made a report to the Japanese police and went to a nearby airport to search for them (*Japan News* 2010). She received a phone call the next day from her husband, who said he and Kevin were in Frankfurt, Germany (*Japan News* 2010). Kayako has had no contact with them since and believes they may have relocated to Prague, where her parents-in-law lived (*Japan News* 2010; Sugiyama and Enyo 2010). In January 2010, Kayako learned that her husband had told the Czech government that he had no intention of taking their son back to Japan (Sugiyama and Enyo 2010).

Kayako has made a number of efforts to locate Kevin through formal channels. She filed a report with the police in Japan but was told it was not a criminal matter because the child was with his father (*Japan News* 2010; *Tokyo Shimbun* 2010). Her experience in this regard is representative of the position customarily taken by the Japanese authorities that such domestic situations are private affairs which cannot be dealt with through public means, such as the police (see Jones 2007a, 256–7). This may be compared with the Japanese position on domestic violence, which was only recently recognised as a legitimate legal concern, as discussed in Chapter 3. Kayako's attempt to involve the police in the abduction was also compromised by the ambivalent status of the act of parental child abduction in Japan; it is only considered a criminal offence in some circumstances and its prosecution is irregular, as discussed below, as well as in Chapter 7. In practice, parental child abduction is accepted and often used in Japan as a quasi-legitimate legal strategy to secure custody rights.
Kayako also sought advice from the Embassy of the Czech Republic in Japan and they recommended that she go to Czech Republic and file proceedings there (Left Behind Parents Japan n.d.). She also sought help from the Japanese Embassy in the Czech Republic and the Ministry of Foreign Affairs in Japan in searching for her son; the Ministry of Foreign Affairs endeavoured to ascertain whether she could challenge the husband’s actions under Czech domestic law, but no effective avenues emerged (Kyodo News 2009; Yomiuri Shimbun 2010).

Kayako has also taken non-legal and more informal measures in an attempt to find her son. She undertook a leaflet campaign in Shinjuku, Tokyo, for help to find her son in December 2009, and also collected more than 10,000 signatures petitioning the government to join the Hague Convention, with the assistance of Left Behind Parents Japan, of which she is a member (Left Behind Parents Japan 2009; Japan News 2010; Sugiyama and Enyo 2010). She has also expressed a desire to fly to Prague, locate her son and bring him back but fears being charged with abduction if she were caught and is unsure whether the Japanese government would intervene if this happened (Japan News 2010). It is interesting to note that Kayako does not assume that she would have the right to simply take Kevin back to Japan, even though her legal rights of custody were the same as her husband’s at the time of the abduction from Japan, as they had not divorced and neither party had yet assumed sole custody. This goes against the popular media trope of Japanese women as shameless abductors (see, for example, Netter and Boudreau 2011; Itsuko 2014). Kayako’s attitude may be compared with the more aggressive actions of Christopher Savoie, whose children were abducted post-divorce and after custody rights had been demarcated. It is interesting to compare Christopher’s firm belief in the validity of his actions with Kayako’s more tentative approach here. One may surmise that the difference between the two is founded in
varying cultural perspectives on the capacity of the law to deliver just outcomes and how
they understood their respective legal positions.

Kayako also participated in a symposium before members of the House of
Representatives in Tokyo in December 2009, which considered Japan’s participation in
the Hague Convention and the development of new domestic laws (Tokyo Shimbun
2009a). At that symposium, hosted by the Japan Joint Custody Association (kyōdō no
kai), Kayako questioned the physical and mental toll that this type of ‘selfish’ abduction
would have on children (Tokyo Shimbun 2009a). According to a report in the Japan
Times – which did not identify any party by name, but considering the context was
likely to be related to this case – Kayako also apparently attended a high-level
government forum in March 2011 to urge the government to join the Hague Convention,
along with other Japanese mothers who had had their children abducted by foreign
husbands (Fukue 2011). One party, whom I believed to be Kayako, was quoted as saying
she was hopeful of having a greater chance of visitation with her son if Japan joined the
Hague Convention, as the Czech Republic was already a signatory (Fukue 2011). She
also lamented the lack of any official organisation in Japan she could consult about the
abduction (Fukue 2011), a reflection of Japan’s non-participation in the Hague
Convention at the time.

Kayako’s case was reported in the national and regional Japanese media, and it has
been credited with highlighting the problem of international parental child abduction
and rallying support for the Hague Convention within Japan (Kyodo 2009; Sugiyama
and Enyo 2009). Her story also provided exposure for cases of children being removed
from Japan. Such cases rarely surface in the media, in contrast to the many examples of
the social and legal problematisation of Japanese mothers taking their children back to
Japan (Kyodo News 2009). The reasons for the lack of attention to these cases is unclear, but one can surmise that the lack of reporting is due to the personal situations of the left-behind parents and their access to legal assistance and media outlets within Japan and internationally. Further, the lack of ‘newsworthiness’ of this type of abduction within Japan is another possible factor, as noted in Chapter 4 in the context of domestic reporting on the Savoie story. Another case of a non-Japanese father taking his children out of Japan is discussed below, the case of Qin Wiejie; this case also attracted attention within Japan for its ostensible ‘rarity’ (Sugiyama and Yoshida 2009), involving, as it did, an abduction from Japan.

5.3 The Case of Qin Weijie: Abduction from Japan to China

Qin Weijie is a Chinese national who was prosecuted for abducting his two daughters from Japan and taking them to China in 1999. He was sentenced to two years imprisonment suspended for three years on 3 December 2009 (Aoki 2009). According to information provided at his trial before the Tachikawa Branch of the Tokyo District Court, Qin, a company employee, married his Japanese wife in 1988 (Aoki 2009). They lived in Tokyo and had two daughters together but separated in 1998, with Qin’s wife alleging she had been subject to domestic violence (Aoki 2009). She took their two daughters to live in a shelter and made application to the Hachiōji branch of the Tokyo Family Court for mediated divorce (chōtei rikon) that same year (Aoki 2009; Sugiyama and Yoshida 2009; Yomiuri Shimbun 2009b).

On 8 June 1999, Qin intercepted the girls, aged seven and eight at the time, on a street in Akishima, Tokyo, while they walked to the local primary school (Tokyo Shimbun 2009b). Qin had allegedly asked the girls if they would like to spend the day with him before abducting them by car (Tokyo Shimbun 2009b). He then took the girls to Hong
Kong, flying out of Kansai International Airport (Tokyo Shimbun 2009b). At the time, Qin and his wife were still undergoing mediation in regard to their divorce (Tokyo Shimbun 2009b) and both had parental authority over the children.

When she initially reported the abduction to the police, the Japanese mother was told there was nothing they could do as the children were taken by their father who still had legal custody (Sugiyama and Yoshida 2009), echoing the similar predicament faced by Kayako Yamada. In October 1999, Qin’s wife was made physical custodian (kangosha) of the children and an order was made for the return of the children by the Hachiōji branch of the Tokyo Family Court (Yomiuri Shimbun 2009b). The couple’s divorce was finalised in the same court in 2000 and Qin’s now ex-wife was designated parental authority (shiken) over the children (Mainichi Shimbun 2009). In 2004, the Akishima Police Department accepted a criminal complaint against Qin lodged by his ex-wife in relation to the crime of kidnapping the children for transport overseas (Mainichi Shimbun 2009; Yomiuri Shimbun 2009b).

There is a popular conception that parental child abduction is not considered a crime in Japan (see, for example, Lah et al. [2009] citing the US Embassy in Tokyo). This, however, is not strictly true. While there is no offence specifically codified for parental abduction, under article 224 of Japan’s Penal Code, which deals with kidnapping of minors, individuals can face up to seven years imprisonment if they are found to have taken a child,\(^79\) including their own, by force or enticement (Kajimura 2015, 320). Further, article 226 of the Penal Code provides that anyone who kidnaps another by force or enticement for the purpose of transporting them from one country to another faces a minimum term of two years imprisonment. The element distinguishing these

\(^{79}\) In Japan, the age of majority (seinens) is set at 20 by the Civil Code (art. 4).
actions described in articles 224 and 226 as criminal offences, as opposed to merely taking custody of one's own child, appears to be the presence of force or enticement. These actions are also considered to be crimes under Japanese law when committed by Japanese or non-Japanese people alike outside Japanese territory (Penal Code, art. 3[xi] and art. 3-2[v]). Under article 226, involving kidnapping for the purpose of transportation, provision was originally enacted to prevent human trafficking, particularly for prostitution purposes, in prewar Japan, but legal cases involving the provision in postwar Japan have been rare, on account of the criminalisation of prostitution (Jones 2007b, 355). The provision remains in law, however, despite the fact that a specific law addressing trafficking was enacted in the postwar period: namely, the Immigration Control and Refugee Recognition Act (Shutsunyūkoku kanri oyobi nanmin nintei hô). In recent times, article 226 has been repurposed to convict and imprison at least one non-Japanese father for kidnapping (Engel Nieman in 2000, noted in Chapter 4). The details available in Qin’s case suggest that he was also prosecuted under article 226 of the Penal Code. Japan is not alone in dealing with the wrongful removal of one’s child as a crime. What is noteworthy, however, is the inconsistent application of the law and categorising of this behaviour as criminal. In the case of Qin, the retroactive criminalisation of his actions is also interesting; he was only prosecuted once the question of custody between the parents had been determined.

Subsequent to Qin’s case, Nathaneal Teutle Retamoza, a Mexican national, was given a two-year sentence, although his was suspended for four years, by the Niigata District Court in 2011 for kidnapping his daughter (Kyodo News 2011a).

Qin’s ex-wife worried that the children would be mistreated in China and spent the 10 years after their abduction searching for them (Sugiyama and Yoshida 2009). She hired an investigation company to help find the girls and even travelled to China herself on a number of occasions, including under the guise of participating in a language exchange program (Mainichi Shimbun 2009; Sugiyama and Yoshida 2009). She also sought assistance from the Ministry of Foreign Affairs and members of the National Diet in Japan, the Chinese government and a number of lawyers without success (Sugiyama and Yoshida 2009).

Like the Savoie case, the control of the children’s passports is a key part of this story. In January 2004, the Japanese Consulate General in Shanghai renewed the children’s passports without their mother’s permission and despite the fact that she had by that stage lodged a criminal complaint against Qin (Aoki 2009). This was in violation of Japanese policy at the time, which required the signature or other written authority of a party with parental authority over the applicant (Tokyo Metropolitan Government 2004; Aoki 2009). While Qin exercised parental authority at the time of the abduction, the divorce not yet having been finalised, and may very well have been regarded as the children’s legal guardian under the domestic law of China, his ex-wife was the only legal guardian of the children under Japanese law in 2004. This failure on the part of the Consulate General was blamed in the media for delaying the girls’ return home and Qin’s arrest (see, for example, Aoki 2009; Mainichi Daily News 2009). Qin’s ex-wife lamented that she had been forced to wait for five more years to see her children because of Japan’s slip-up and hoped that it would be proactive in protecting the human rights of its children in the future (Aoki 2009). The Japanese Nationals Overseas Safety Division of the Ministry of Foreign Affairs in Japan acknowledged that the passport had been issued without the required written consent but refused to comment on the reason.
for the error (Aoki 2009). In 2010, the Ministry of Foreign Affairs issued a notice providing that in cases where someone with parental authority over a minor has lodged an objection to the child being issued a passport, the written consent of both parents will usually be required before the passport could be issued (MOFA 2010). The notice required such an objection to be submitted personally and in writing to the relevant prefectural passport office in Japan or Japanese embassy or consulate overseas with documents evidencing the parental authority (MOFA 2010). The Ministry also gave notice that embassies and consulates in countries which criminalised the taking of children overseas by one parent in breach of another’s parental authority would be seeking verbal permission from both parents to issue a passport to a minor, even where no objection has been lodged (MOFA 2010).

Passports confer an extraordinary ability on their holders to traverse through places they would not otherwise be allowed, and their power to grant and restrict freedom of movement make them an important part of any discussion of international child abduction or other unlawful transport or flow of people across international borders. While the ‘one passport, one person policy’ adopted by the ICAO in 2002 (discussed in Chapter 2) marked an important milestone for the rights of the child as an individual, from a practical perspective, children are still able to be ‘possessed’ by a parent through custody of their passport. Some left-behind parents have accused their Japanese spouses of fraudulently obtaining Japanese passports to take their children to Japan; some have also accused the Japanese government of lacking proper scrutiny in issuing passports for children at its overseas consulates.82

82 See the case of US father Scott Sawyer, whose Japanese ex-wife reportedly admitted to obtaining a passport for their son from a Japanese consulate in the United States by supplying a false name for him (Netter and Boudreau 2011). See also the comments made by Australian father Matthew Wyman about this
Japan’s Passport Act (Ryoken hō) provides that a passport for a minor is valid for five years only (art. 5[ii]); accordingly, in 2009, the two daughters’ passports were again due for renewal. Qin contacted his ex-wife asking her to sign a form consenting to the renewal, but she replied that she wanted to meet with them directly to confirm what they wanted to do (Aoki 2009). The two girls then returned to Japan temporarily for the purpose of renewing their passports in January 2009 (Mainichi Shimbun 2009). While the youngest daughter subsequently returned to China, the eldest daughter chose to remain in Japan, so Qin flew to Japan in September 2009, apparently to take her back to China (Mainichi Shimbun 2009; Sugiyama and Yoshida 2009). He was intercepted entering the country at Narita International Airport and charged by the Akishima Police Department on suspicion of abducting the girls to a foreign country in 1999 (Yomiuri Shimbun 2009b; Mainichi Shimbun 2009). At that time of their return to Japan, the girls were aged 17 and 18 (Aoki 2009).

At his trial before the Tachikawa Branch of the Tokyo District Court on 17 November 2009, Qin, then aged 55, gave evidence that he thought felt his daughters’ lifestyle with their mother in Japan was unstable, noting that they had changed schools twice in six months (Sugiyama and Yoshida 2009), even though the link between cases of domestic practice (Dingle 2011a). Another striking story of this kind is that of Michael Elias, whose two children were taken to Japan in December 2008 by his estranged wife Mayumi, in breach of his rights of custody (US House Committee 2013, 65). Mayumi had been required by a US court order to surrender the children’s American and Japanese passports in October 2008, which she did (US House Committee 2013, 64–5). At the time of the abduction, Mayumi worked at the Japanese consulate in New York City issuing visas and passports, and Michael believes her position there allowed her to obtain replacement Japanese passports for the children at the Japanese consulate in Chicago and exit the United States (US House Committee 2013, 65). These types of cases also raise questions about the role of third parties, such as consulates and airlines, in identifying possible abductions.
violence and social instability is well established (see, for example, Baker et al. 2010). He said he thought it was appropriate for them to be raised in China and had their best interests in mind when he took them away (Sugiyama and Yoshida 2009; *Mainichi Shimbun* 2009). The prosecution in the case framed the abduction as a calculated act executed in the middle of divorce proceedings and sought a custodial sentence of three years for Qin (*Yomiuri Shimbun* 2009b). His lawyer argued that the incident did not amount to an abduction by force and did not have the quality of a criminal act (*Yomiuri Shimbun* 2009b).

Presiding Judge Manabu Kato criticised Qin for ignoring the law and described the unilateral action he had taken in actions abducting the girls despite the ongoing divorce mediation as selfish (Sugiyama and Yoshida 2009; *Tokyo Shimbun* 2009b). He also condemned Qin for failing to return the girls to their mother for more than 10 years, despite her having custody (*shiken*) of them and in contravention of a court order requiring their return, which was made after the abduction (*Tokyo Shimbun* 2009b). He sympathised with the children’s mother, stating it was hard to imagine the mental anguish she endured in being separated from her daughters for so long (Aoki 2009). Judge Kato did, however, note a number of mitigating factors in this case, being that Qin shared legal custody of the girls at the time of the abduction, that his youngest daughter had chosen to continue living with him in China and that he had raised the girls in a loving manner (Sugiyama and Yoshida 2009). After the judgment, Qin said that his wife and one-year-old son from his second marriage, as well as his youngest daughter, were waiting for him in China and he wanted to return there to resume his role as a father (Sugiyama and Yoshida 2009).
At the time of the trial, Qin’s ex-wife, then aged 44, lived with their eldest daughter (Sugiyama and Yoshida 2009). She said the daughter suffered an eating disorder and panic attacks attributable to Qin’s violent behaviour and the initial abduction (Mainichi Shimbun 2009). She described her daughter as heartbroken and asked how they were meant to make up for ten years of lost time (Mainichi Shimbun 2009). She said her eldest daughter was afraid of Qin and that she broke down crying when she returned to the street from where she had been abducted (Sugiyama & Yoshida, 2009). Qin’s ex-wife also spoke of having to track down her children by herself and said that many times she thought she would die (Mainichi Shimbun 2009). After hearing of the suspended sentence, she was reported to be despondent, observing that the outcome meant the abductor had won (Sugiyama & Yoshida 2009). She made a plea for Japan to sign the Hague Convention to help other victims of abduction living alone while striving to protect women and children fleeing home to Japan to escape domestic violence (Sugiyama and Yoshida 2009).

It is difficult not to notice the difference in the attitude of the presiding judge in this case compared with the official stance taken in Japan in the Savoie case. Noriko Savoie, like Qin, had legal custody of her children but removed and retained them from their country of residence without the other parent’s consent. Also, like Qin, Noriko obstructed the other parent’s custody rights and contravened a foreign court order put into place after the abduction demanding the children’s return. Qin was reprimanded for his actions. However, like Noriko, who faced no public rebuke or legal penalty within Japan, Qin was ultimately allowed to continue his life as before. The status quo was preserved and his ex-wife was left feeling like she had been cheated of a just legal outcome. For her, the inability to enforce the Japanese court order in China for the return of her daughters and the passage of time was where the battle was lost.
The way Qin’s case panned out with an airport arrest bears resemblance to another case only a couple of years later, in the reverse situation of a child being abducted to Japan. In that case, the mother, Emiko Inoue, took her five-year-old daughter, Karina, from their home in Wisconsin back to her homeland of Japan in February 2008, shortly after her husband and Karina’s father, Moises Garcia, filed for divorce (Oberman 2011a; Vielmetti 2011). Over the next three years, Moises, a hepatologist and native of Nicaragua, spent approximately US$350,000 in his efforts to have Karina returned, retaining lawyers in Japan and travelling there nine times, learning Japanese and asking the US and Nicaraguan governments for assistance (Oberman 2011b; Reed 2011). A warrant was also issued in the United States for Emiko’s arrest (Reed 2011). A Japanese court granted Moises visitation rights in 2009, but only three short visits eventuated over the next two years (Oberman 2011a). In April 2011, Emiko travelled to Hawaii to renew her US green card and, after a flag came up on her immigration file, she was arrested and extradited to Wisconsin (Oberman 2011b; Reed 2011). Emiko was imprisoned on custodial interference charges and eventually reached a plea bargain that saw her receive probation instead of a prison sentence on condition that Karina was returned to the United States (Oberman 2011b). Karina returned to Wisconsin in December 2011 and while she was celebrated as the first parentally abducted child to be returned to the United States from Japan on account of the legal system (Oberman 2011b), her return was due to the actions of Emiko, who was probably oblivious to the arrest warrant when she flew to Hawaii, rather than the enormous efforts of Moises to secure redress through the legal system. This raises key questions about how parents in these cases go about securing favourable outcomes (discussed further in Chapter 7)
5.4 The Case of Masako Suzuki Akeo: Abduction from Canada to Japan

While this case is unusual compared to the others, because it does not involve an international marriage, the international residences (and legal systems) involved make it worthy of comparison with the Savoie benchmark case. Masako and Jōtarō Suzuki, both Japanese nationals, were married in Japan in 1982 and moved to Canada in 1992, where they had a son, Kazuya David Suzuki, born on 20 November 1994 (Akeo n.d.; Akeo 2010; Bramham 2013). The family owned a house in Canada, and Kazuya held dual citizenship of both Japan and Canada (Akeo 2010; Bramham 2013). According to Masako (who now goes by the surnames Akeo as well as Suzuki Akeo), she and Jōtarō stayed in Canada on tourist visas (Akeo n.d.). In September 2004, Masako returned to Japan for medical treatment and when she returned, the couple argued about whether they should become Canadian citizens (Akeo n.d.). Masako returned to Japan shortly after to work and study, which she was finding difficulty to do in Canada (Akeo 2010 n.d.). She returned to Canada to see Kazuya in March 2005 and again argued with Jōtarō, who forced her out of their home and filed for divorce (Akeo 2010 n.d.). Jōtarō also refused to allow her to see Kazuya (Akeo 2010). Masako says she did not have enough money to stay in Canada and returned to Japan (Akeo n.d.). In June 2005, a restraining order was made against Masako by a Canadian court forbidding her to enter the family home or remove Kazuya from the jurisdiction without leave of the court (Akeo n.d.). Masako did not attend the hearing and says her lawyer was not armed with any material to refute Jōtarō’s claims at the hearing. An interim order was also made granting Jōtarō sole custody of Kazuya (Akeo n.d.).

83 Masako says she then begged her father for money for a lawyer to appeal the orders but at the time her father was

---

83 The Divorce Act of Canada (Revised Statutes of Canada, 1985, c. 3 [2nd Supp.]) provides a court hearing a divorce application the jurisdiction to grant ‘corollary relief’, including an order respecting the custody of or access to any or all children of the marriage, as part of the divorce hearing (sec. 16).
terminally ill and she was unable to take the matter further (Akeo n.d.). She returned to Canada in January 2006 and says she was threatened by Jōtarō and stayed in transitional housing (Akeo n.d.). The final divorce order was issued by the Supreme Court of British Columbia on 18 March 2006 (Akeo n.d.). Masako was advised by the court that she could obtain a professional psychological assessment in relation to the family dynamics and apply for visitation with Kazuya (Akeo n.d.). According to Masako, the psychological assessment concluded that Kazuya had a great need for his mother due to their initial and important attachment, but that it was impossible to gauge Kazuya’s opinion accurately as he appeared to not want to go against his father (Akeo n.d.).

On 26 June 2006, Jōtarō returned to Japan without notice, taking Kazuya, then 11 years old, with him (Akeo n.d.). A British Columbia court later ruled in October 2006 that both parents were to have joint interim custody and guardianship of their son until a final custody order was made based on the recommendation of a child psychologist (Akeo n.d.; Bramham 2013). The court also prohibited either parent from removing Kazuya from Canada without further court order or the consent of the other parent, but by then it was too late (Akeo n.d.; Bramham 2013). In December 2006, Jōtarō was granted sole custody of Kazuya by a Tokyo family court, in conflict with the Canadian court order (Akeo n.d.; Bramham 2013). There are currently no statutory laws setting out criteria for determining jurisdiction for children’s matters in international family cases in Japan (Ōtani 2013, 80–1; Oda 2014; Otani and Kittaka 2017). A jurisdictional rule developed through case law provides that where a Japanese court has jurisdiction in a divorce matter, it also has jurisdiction over any matters related to a child's custody or care (Ōtani 2013, 80–1; Otani and Kittaka 2017). For cases where child custody proceedings are brought separately to a divorce application, the court in the country of
the child’s domicile is regarded as having jurisdiction, having regard to the interest of the child (Ōtani 2013, 80; Otani and Kittaka 2017). Otani and Kittaka note that domicile is defined in the Civil Code as being the principal place where a person lives and that while this is meant to be substantively determined in a jurisdictional determination, in practice domicile tends to be determined based on the fact of physical residence (2017). The latter interpretation would appear to have been adopted in Kazuya’s case. Amendments to the Civil Code of Procedure set to take effect on 1 April 2019 will clarify that Japanese courts can exercise jurisdiction in international family law matters where (i) the respondent has domicile (or residence where there is no domicile or it is unknown) in Japan; (ii) the couple are both of Japanese nationality; (iii) the last domicile of the couple together was in Japan and the petitioner has domicile in Japan; or (iv) the petitioner has domicile in Japan and there are special circumstances, such as the whereabouts of the respondent being unknown, which means that the trial of the matter by a Japanese court is in the interests of equity between the parties or the appropriate and efficient hearing of the matter.

Masako returned to Japan and said she took the Canadian court order to the Nerima Ward Office in February 2007, where it was accepted and she ‘also got joint custody in Japan’ (Akeo n.d.). It is unclear what mechanism Masako is referring to here as ward offices have no legal power to designate custody. It may be that a note was made in Kazuya’s koseki entry designating Masako as holding legal custody or shinken (as opposed to the broader incarnation of shinken as parental authority, as discussed in

84 Some legal scholarship disputes this interpretation and considers that the court in the country of the child’s domicile has jurisdiction in matters relating to the custody and care of the child, regardless of whether the proceeding is attached to a divorce proceeding (Ōtani 2013, 81; Otani and Kittaka 2017).

85 Jiji soshō hā tō no ichibu wo kaisei suru hōritsu (Act to Partially Amend the Code of Civil Procedure and Other Laws), act no. 20 of 2018.
Chapter 3) with respect to Kazuya, but this would be unusual and of limited import, given the incompatibility of the Canadian order with the subsequent Japanese court order. Not knowing where Jōtarō lived, Masako filed for mediation through the family court (Akeo 2010). She was eventually able to secure visitation rights to meet with Kazuya at the court on a trial basis in March 2008 (Akeo 2010). She was told by the court investigator not to ask her son for his telephone number, address or the name of his school (Akeo 2010). According to Masako, at their first meeting on 5 March 2008, Kazuya had said to her, ‘I am so happy to see my mom and I want to see her again’ (Akeo n.d.). At their second trial meeting, the mediator showed her a letter from Kazuya which read that he was busy preparing for school entrance exams and it was difficult to meet with her (Akeo 2010). Masako said that at their second meeting on 30 April 2009, she had played computer games with Kazuya for 45 minutes and he wanted to take a picture with her (Akeo n.d.). Sometime during this mediation process, Masako believed she had reached an agreement with Jōtarō that she could meet with Kazuya every two months at Jōtarō’s lawyer’s office, where she could have lunch with Kazuya (Akeo n.d.). At the final mediation in September 2009, the mediators gave Masako a letter apparently written by Kazuya, in which he told her he was too busy with his studies to meet with her (Akeo n.d.). Her request for a third meeting at the court was denied by the court (Akeo 2010).

Masako last saw her son in October 2009, when she attended his junior high school choir concert in Tokyo. She had been discouraged from attending the concert by the school principal, who had advised her that ‘parents only can attend’ (Akeo n.d.). This is an indicator of how people without parental authority or shinnen with respect to their children are treated as a class of ‘non-parent’ in Japanese society. When she attempted to speak to her son after the concert, she was intercepted by the school principal and
told she had to leave if she did not have Jōtarō’s permission to be there (Bramham 2013). She said that she waited by the school gate until 6 pm, but Kazuya did not exit (Akeo n.d.). Masako believes that Kazuya did not return to the junior high school after his last encounter with her; she attended the graduation ceremony in October 2009 in the hope of seeing him again, but he was not there (Bramham 2013; Akeo n.d.). She lost contact with her son thereafter and Jōtarō’s family have refused to say where the two are now living (Bramham 2013). In order to apply for further visitation rights, she was required to supply Kazuya’s address as per his official certificate of residence (jūminhyō) and the basic resident register (jūmin kihon daichō), but she said that this represented a significant barrier for her as she did not know where he was living on account of the volatile family situation (Kitagawa 2014). Along with the koseki, the basic resident register is a mechanism for recording the permanent domicile (honseki) details of citizens and other residents and, like the koseki, it is another administrative site of contention for parents involved in custody disputes over a child. A taking parent can alter a child’s entry in the basic resident register without the other parent’s consent (Nagoyaeki Girasol Law Offices 2014). Details deleted from the basic resident register are kept for five years as per the Ordinance for the Enforcement of the Basic Resident Register Act (jūmin kihon daichō hō shikōrei; art. 34). If a child is taken by one parent, the other parent is able to apply for access to a certificate of residence for the child, or jūminhyō, if they have an address for the child within the last five years (Basic Resident Register Act, art. 12-3[4][iii]). Access to a child’s jūminhyō is not possible if the applicant does not have an address for the person they are searching for, or the address is out of date by five years; this may have been Masako’s problem. Victims of offences

86 The Japanese Ministry of Internal Affairs and Communications (sōmushō) announced in August 2018 that it would be submitting bills to the Diet in 2019 to extend the retention time of information in the basic resident register from five to 150 years, in line with the koseki (Ikuta 2018). It is unclear at this stage how this change would affect disclosure of information from the basic resident register.
such as domestic violence and stalking are also able to apply to have access to their jūminhyō restricted (MIAC n.d.). The ability of a left-behind parent to locate, within certain parameters, the current address of their child means parents in Japan who have taken their children are advised to consider carefully the ramifications of waiting to change one’s jūminhyō until after divorce, and therefore the question of custody, is finalised (see for example, see Nagoyaeki Girasol Law Offices 2014). The implication is that the harder the taking parent makes it for the left-behind parent to locate the child, the greater the chances are of retaining custody.

Proceedings between Masako and Jōtarō eventually came before the Tokyo Family Court (although it is unclear which party instigated proceedings). The Tokyo Family Court ruled in May 2010 that Masako was not to have to any visitation with Kazuya (Akeo n.d.). According to Masako, the court found that Jōtarō had been concerned about her kidnapping him so he did not return to school (Akeo n.d.). She was ordered to pay child support to Jōtarō in July 2010 (Akeo n.d.). In the course of these proceedings, Jōtarō confirmed that Kazuya had not gone on to high school (Akeo 2010). Kazuya had been diagnosed with a reading disability while attending school in Canada and that disability, coupled with limited Japanese tutoring while growing up in Canada, meant he did not score well when sitting school placement tests in Japan (Bramham 2013). He was therefore placed in a special class for mentally disabled children and Masako believes that Jōtarō exploited this situation to bolster his case for custody in the Family Court in Tokyo (Bramham 2013).

Masako, a textile designer, is reported to have spent close to Can$100,000 on lawyers in Japan and Canada, including taking her case to the Supreme Court of British Columbia, trying to secure and enforce access to her son (Bramham 2013; Kitagawa 2014). She
remains, however, without access to Kazuya, regardless of an order granting her parenting rights in Canada. Canadian embassy officials have been powerless to assist her and she says Japanese police are unwilling to become involved (Bramham 2013; Suzuki Akeo, Mayama and Tanase 2013). In a press conference at the Foreign Correspondents’ Club of Japan in May 2013, Masako expressed concern about the operation of the Hague Convention in the context of the Japanese domestic family law structure, which isolates non-custodial parents from their children (Suzuki Akeo, Mayama and Tanase 2013). In July 2009, Masako established Left Behind Parents Japan, a group which provides support for parents whose children have been parentally abducted. She has become an advocate for left-behind parents, leading marches in Japan, speaking to the media and lobbying politicians about the issue.87

Figure 4. Masako Akeo is the most high-profile of the people involved in the case studies examined in this chapter, thanks to her use of social media and social activism. Her story carries with it an added layer of complexity in that all parties were Japanese but it involved a foreign jurisdiction. Source: France 2011.

Masako’s case is unusual in that the parents share the same nationality and the custody dispute has been fought under the law of that country, Japan, despite the connection to

---

87 For examples of Masako’s advocacy and activism work, see https://www.meetup.com/Left-Behind-Parents-Japan/events/past/. Last accessed 4 January 2019.
Canada through the family’s long-term residency there and Kazuya’s citizenship of Canada. That Masako remains isolated from her son, despite being granted custody rights in Canada, brings into stark relief the effect of the domestic legal system in Japan on both Japanese and transnational couples and raises questions regarding the capacity for that system to absorb the operation of an international instrument such as the Hague Convention and the global standards that accompany it.

5.5 The Internal Outliers: Abduction Cases within Japan

The Hague Convention applies strict parameters to the types of relationship and nationalities for which it has use. The treaty only applies to children removed from one contracting state and wrongfully taken to or retained in another contracting state. In order for a removal or retention to be wrongful, it must be in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention (art. 3). The question of whether or not the Hague Convention is applicable is inextricably bound to the geographical facts of the case. This means that parents of children taken from their habitual residence in a non-contracting state or taken to or retained in a non-contracting state are excluded from the operation of the Hague Convention, regardless of the nationality of the parents or the child in question.

A scan of the social networking websites of the support groups for left-behind parents, some of which are discussed above, demonstrates that the spectrum of parental child abduction covers a wide cross-section of relationships and nationalities. Some are clear-cut cases of abduction under international law, while others are less clearly defined. This lack of clarity demonstrates the varying degrees of anxiety connected to the breakdown of an international relationship where the custody of a child is involved. This contrasts starkly with the narrow scope for application of the Hague Convention, whose
strict parameters mean that many of the combinations and variations of international relationships are excluded from the legal relief offered under the Hague Convention.

A case in point from the Left Behind Parents Japan website is include the story of Daniel Smith, an American living in Tokyo since 1990. Smith was married to a Japanese national and states that he is struggling to maintain regular visitation with his son in Japan after a divorce. Other cases involve American David Scripps, and ‘Ren’, an Italian, both of whom had separated in Tokyo but remained married to their Japanese wives. On this website, they both expressed concern about the lack of access provided to them to their young sons who are both in Japan. Children in these types of cases may be considered to be wrongfully retained, particularly in the cases where the parents remain married and therefore both retain legal custody of their children. While these sorts of cases involve the breakdown of international marriages, no international borders have been crossed and therefore the Hague Convention does not apply.

Similarly, David Brian Thomas (also known as Brian Thomas), a Welshman and British citizen, has been prevented from seeing his son, Graham Hajime Takezawa Thomas, by his former Japanese family-in-law since 1993. After marrying in London in August 1987, Brian and his Japanese wife, Mikako Takezawa, moved to Saitama, Japan, in early 1988 and lived in a house next door to Mikako’s parents (Parry 1996). Graham Hajime was born in January 1990 (Ryall 2008), but the marriage became troubled soon.

---

Many parents on the Left Behind Parents Japan Meetup website use pseudonyms or shortened versions of their names, most likely to protect their anonymity and that of their children given the sensitivity of their situations.
thereafter, and Mikako left the couple’s home with Graham Hajime in November 1992 (Parry 1996). It then transpired that Mikako’s father had falsified a document granting guardianship of Graham Hajime to Mikako’s parents; Mikako had earlier indicated to Brian that her parents wished to adopt Graham Hajime for inheritance taxation purposes, but Brian had opposed (Parry 1996; Jeffs, 2000). Brian was initially able to negotiate visitation arrangements, but the Takezawa family refused to comply with the agreement any further after only three visits and Brian was eventually driven from the home owned by the family (Parry 1996). While he was able to have the adoption document annulled by a Japanese court in approximately 1995, he was never able to regain contact with Graham Hajime, now 29 years of age, despite persuading the Supreme Court of Japan in 1998 to revoke a divorce granted to Mikako in the Urawa District Court in Saitama two years earlier, thereby maintaining his status as joint legal custodian of Graham Hajime (Parry 1996; Jeffs 2000).

Brian Thomas’s case represents an international custody case that has run its course, from the initial abduction to the child attaining adulthood, out of striking range of international legal protection. At the very opposite end of the abduction spectrum, Curt Fiedler, an American father in Guam, relates his anxiety on the Left Behind Parents Japan website about his ‘increasingly unstable’ Japanese wife living in Kanagawa with their three children and her threats to separate from him, and what this could mean for his relationship with the children. Again, Fiedler would not be able to access relief under the Hague Convention in the event of abduction if his wife left him and took the children but remained within Japanese borders, or otherwise took them to a country which is not a signatory to the Hague Convention.

5.5.1 The Case of Toshiro and April Sugimoto

The case of Toshiro and April Sugimoto, involving two non-Japanese citizens living in Japan, adds another layer of complexity to these ‘outlier’ stories. Toshiro, a citizen of the United States, and April, a citizen of the United Kingdom, had their first child, Sasuke, in the United Kingdom on 12 January 2004 (Toshiro Sugimoto v April Louise Sugimoto [Disposition of Petition for Child Custody], 2; hereafter, Sugimoto Disposition). Sasuke holds both UK and US citizenship (Sugimoto Disposition, 2). The couple were married shortly thereafter in the United Kingdom on 23 January 2004, and Toshiro moved to Japan in November 2004 to secure housing after being employed with a financial corporation. April and Sasuke joined him in February 2005 (Sugimoto Disposition, 2).

The couple’s second child, Saizo Sugimoto, also holding dual US and UK citizenship, was born in Japan on 20 January 2007 (Sugimoto Disposition, 2).

The marriage experienced problems from approximately April 2011 and the couple separated in May 2011, with April leaving the marital home (Sugimoto Disposition, 2). Toshiro moved to Shinagawa Ward in June 2011, and he and April shared custody with the children splitting the week between their parents’ houses (Sugimoto Disposition, 2).

In April 2013, a disagreement arose between the couple after Toshiro enrolled Saizo at an elementary school near his home (Sugimoto Disposition, 3). April had initially agreed to the enrolment but withdrew her consent prior to the entrance ceremony on 8 April 2013 (Sugimoto Disposition, 3). In reaction, Toshiro did not deliver the children to April as agreed on the Saturday evening prior to the start of the school term, although he did deliver them to her shortly afterwards (Sugimoto Disposition, 3). April eventually

---

92 While the Japanese judgement was not published, the English translation of the Japanese judgement was posted on the website http://sasukeandsaizo.com and retrieved on 20 July 2015. The webpage is no longer available but the author holds a copy of this translated judgement.
agreed to the enrolment of Saizo at the elementary school in Shinagawa in text messages with Toshiro on 18 April 2013, but, after taking custody of the children on 20 April 2013, she failed to deliver the children back to Toshiro as agreed on 22 April 2013 and moved from her residence with the children (*Sugimoto Disposition*, 3–4). Both Toshiro and April then obtained legal representation and discussed the children’s custody through their respective attorneys until 26 July 2013, when April’s attorney stopped responding (*Sugimoto Disposition*, 4). Toshiro filed for custody of the children on the same day with the Tokyo Family Court, and an application for a restraining order against April was made on 17 September 2013, in advance of the custody hearing (*Sugimoto Disposition*, 4). April was served notice of the order, but, while there was no record of her and the children having left Japan, the children stopped attending their respective schools and their location remained unknown (*Sugimoto Disposition*, 4).

In May 2014, Judge Shinohara of the Tokyo Family Court ruled in respect of Toshiro’s custody application, granting him sole physical custody of the children. Judge Shinohara noted that as April, Toshiro and the children were resident in Japan, the Family Court in Japan retained international jurisdiction over the case (*Sugimoto Disposition*, 4).

Japan’s statute on conflict of laws or private international law rules, *Act on the General Rules of Application of Laws* (*Hō no tekiyō ni kansuru tsūsoku hō*), provides that the legal relationship between a parent and a child is to be determined by the child’s national law where that is the same as the national law of either the father or mother’s national law, or, in all other cases, by the law of the child’s habitual residence (art. 32). The Act also provides that where a person has two or more nationalities, his or her national law shall be the country in which the person has habitual residence from among those states of which he or she has nationality, or if there is no such country, the law of the state with which he or she is most closely connected; where one of those
nationalities is Japanese, Japanese law shall be that person’s national law (art. 38).

Judge Shinohara considered it reasonable to regard the laws of the state of California as the children’s home country’s laws, and that those laws were applicable, given that they were also the laws of the Toshiro’s native country (Sugimoto Disposition, 4). Judge Shinohara also noted that under the Family Code of California, both mother and father are recognised as having legal custody and physical custody rights, and both joint custody and sole custody are recognised with respect to each type of custody, with a presumption that joint custody is in the best interests of the child (Sugimoto Disposition, 4). Judge Shinohara also noted that the intentional infringement by the custodial parent of the other parent’s visitation rights was a relevant consideration in judging the suitability of the custodial parent and was a ground for altering custody arrangements (Sugimoto Disposition, 4–5). Judge Shinohara concluded that April’s conduct – in failing to disclose the children’s whereabouts, disrupting their attendance at the schools in which they were previously enrolled, and obstructing Toshiro’s rights of custody – was harmful to the children’s welfare and therefore rendered her unsuitable for custody (Sugimoto Disposition, 5). On the other hand, he could find no fault with Toshiro’s conduct and ordered April to deliver the children to Toshiro in order to give effect to the order as permitted under the Californian law (Sugimoto Disposition, 5). Judge Shinohara also referred to Section 3100(a) of the California State Code, which provides that a court shall grant reasonable visitation rights to the non-custodial parent and ordered that April’s visitation rights be set at a minimum of once per month, with an indication that this may be varied once the children were located (Sugimoto Disposition, 5–6). As at September 2014, April had not responded to the order and Toshiro had not been able to access his sons.93

Given that the Sugimoto case played out within Japanese borders, the Hague Convention would not apply here either. However, what is remarkable about this case is that the involvement of Japanese elements in the Sugimoto case is less pronounced than in the other cases discussed above. Neither the parents nor the children are Japanese citizens and the law applied was American and featured typical tenets of Western family law, such as joint custody and regular visitation. This put Toshiro in a stronger position legally, but in practical terms, he has not gained any advantage, which leads to questions about the broader issues faced by left-behind parents in Japan beyond the way in which determinations of custody are made, such as enforcement of those orders.

5.6 Filipino–Japanese Child Custody in Japan

I did not know I’m half Japanese … Please come and see me. I’ve been dreaming about you dad.\(^\text{94}\)

Bearing in mind the large scope of abduction scenarios, of which the Hague Convention covers only a portion, I wish next to consider custody disputes between Filipino and Japanese nationals. Statistically, this particular pairing is of particular interest as Filipino women constitute a large proportion of foreign brides in Japan. From 1992 to 1996, Filipino women constituted the largest group of foreign wives in Japan (Satake 2004, 446). In 2013, 20.2% of foreign brides were Filipino, second only to China (40.5%) (MHLW 2013). This is remarkable, given the discrepancy between the numbers of Chinese and Filipino entrants to Japan in the same period.\(^\text{95}\)

\(^{94}\) Message from Filipino citizen Ariane Ywayan Boncan Takahashi to the Japanese father she has never met, via the CRN Japan website (CRN Japan n.d.d).

\(^{95}\) Of the total number of foreign citizens entering Japan, Chinese citizens (including those from Taiwan and Hong Kong) made up 40.9% in 2013 (MOJ 2018f [see subset for 2013, table 2]). By comparison, Filipino
Chinese nationals were overwhelmingly the largest national group to be granted visas to enter Japan, making up more than 50% of visa recipients each year.\textsuperscript{96} By comparison, Filipino nationals were the recipients of less than 5% of visas issued each year in the same period, with the exception of 2013 when the rate increased slightly to 5.3%.\textsuperscript{97}

The total Filipino population in Japan grew rapidly from the 1980s onwards (see MOJ 2018\textsuperscript{f} [see subset for 1950–2005, 2]). Immigration patterns of Filipinos to Japan are discussed below. This population growth reflects the stories and life trajectories of hundreds of thousands of people, yet there is a dearth of publicity relating to the children of Japanese–Filipino unions in the abduction context, adding some complexity to our understanding of parental child abduction issues. One abduction case involving a Filipino mother gained brief attention in the Kansai region of Japan in 2011. In that case, Aneda Maibanting Kinoshita, a temporary factory worker living in Higashiomi city in Shiga Prefecture, was arrested on 5 November 2011 by the First Investigation Division of the Shiga Prefectural Police and the local Kōka Police on the charge of abducting a minor (Sankei Shimbun 2011). Aneda, then 40 years old, had taken her seven-year-old son from his primary school in Konan city in Shiga Prefecture the previous afternoon (Sankei Shimbun 2011). According to the Kōka Police, Aneda and the boy’s Japanese father had divorced in February 2011, and the boy had remained in the

\textsuperscript{96} Of visas issued at foreign diplomatic missions for Japan, Chinese nationals received 53.9%, 59.8%, 54.7%, 55.9% and 52.1% in 2009, 2010, 2011, 2012 and 2013 respectively (MOFA 2018 [see subsets for 2009, 2010, 2011, 2012 and 2013]). Some citizens of Hong Kong, Macau and Taiwan are excluded from these figures pursuant to visa exemption arrangements between Japan and these regions.

\textsuperscript{97} Filipinos received 4.4%, 3.5%, 4.1%, 3.7% and 5.3% of visas issued at foreign diplomatic missions for Japan in 2009, 2010, 2011, 2012 and 2013 respectively (MOFA 2018 [see subsets for 2009, 2010, 2011, 2012 and 2013]).
care of his father (Sankei Shimbun 2011). On being informed that Aneda had come to the school, the father became concerned and alerted the police (Sankei Shimbun 2011). According to the Kōka Police, Aneda had admitted to the charge, stating she had wanted to celebrate the child’s birthday, which was on 7 November, with him (Sankei Shimbun 2011). After picking him up from school, she and the child spent the next six hours visiting various places in Shiga Prefecture, including a clothes shop in Hikone city and a hotel in Ōhachiman city, until about 9 pm that evening (Sankei Shimbun 2011). It is unclear whether the charges against Aneda were pursued as no further reports of the incident were made, but according to her Facebook profile, she still lives in Higashiomi city. In this particularly innocuous case of ‘kidnapping’, one would have to question whether the element of force or enticement indeed constituted a criminal act under the Penal Code.

Perhaps the most high-profile case of parental abduction involving the Philippines and Japan involved Japan only indirectly. It concerned the retention of a one-year-old girl in the Philippines by her Filipino mother, Neslyn Mojica, against the wishes of her father, Andrew Laws, a UK citizen (adlaws 2011; Mullen 2011). The couple had met in Holland and settled in the UK prior to the birth of their daughter, Ashleigh (adlaws 2011; Evening Chronicle 2011). Laws suggested that Mojica had been encouraged to abduct Ashleigh to the Philippines by her Japanese friend, Yukiko Tsuba (CRN Japan n.d.b). In March 2012, Tsuba wrote an email to Mojica, advising her to tell Laws that she was making a short visit back to the Philippines with the child to see her family, and then to refuse to go back to the UK (CRN Japan n.d.b). After the couple travelled to the Philippines in May 2011 to visit Mojica’s family, she stayed on with Ashleigh and failed

to return to the UK one week later as agreed; Laws was unable to contact her after that and received just one message from her saying she would not return (adlaws 2011; Evening Chronicle 2011; Proctor 2012). It is likely that the public mention of Yukiko’s involvement was less an accurate reflection of her influence in that situation than a reference to her nationality and the international perceptions of Japan as a country that normalises abduction.99

There are at least two members of Masako Akeo’s Left Behind Parents Japan group who identify themselves as citizens of the Philippines. One is Sophia Alexandrea Black of Saitama prefecture, whose profile states she is a permanent resident in Japan.100 According to her profile, she divorced from her Pakistani husband in approximately 2012, after which he took their daughter to Pakistan to study Muslim culture and denied Sophia access to her. Sophia’s Facebook page indicates that she has since regained custody of her daughter, as she has posted pictures of her daughter and her baby from a new marriage.101 The other case is that of Virginia Beltran,102 who joined the group in July 2011 and whose profile states that her 11-year-old daughter was taken by her Japanese ex-husband. An edition of the Left Behind Parents Japan newsletter tells the story of an unidentified Filipino mother, whose details align with those in

99 In trying to make contact with Mojica, Laws hired a man over the internet claiming to be a private investigator who subsequently defrauded him of £2,500 (Mullen 2011). Laws’s situation highlights the vulnerable position in which desperate left-behind parents are placed in taking extra-legal measures to recover their children, such as engaging child recovery agents, in an industry which is in many ways still regarded as ‘underground’ and falling outside of governmental regulation (see, for example, Callinan 2016b).


Virginia’s profile (C. Smith 2011). According to the newsletter article, that woman, whom I believe to be Virginia, had married a Japanese man and moved to Japan in 1993 and had a daughter in 2000. The couple were divorced in 2007 and they agreed at mediation that the mother should have custody of the daughter. The father was granted regular and, by Japanese standards, very liberal visitation. The mother said the arrangement worked well, until April 2011, when the daughter left their home in Kawaguchi, Saitama Prefecture, to visit her father in Osaka for a five-day holiday but was not returned. The mother contacted the father and, when it became apparent that he was not going to return the child, she contacted her local police station. She said the police were reluctant to assist her and told her to speak to a lawyer instead. She felt that she was not being taken seriously as a foreign mother: ‘Maybe if it were the other way round and a Japanese mother lost her child, they would take action quickly’ (C. Smith 2011, 2). She was shocked to then learn that her daughter had been enrolled in school in Osaka, without her consent as the parent holding parent authority. When she took the matter up with the Kawaguchi School Board, she was told there was nothing they could do as the Osaka School Board had accepted the enrolment. When she queried this action with the latter organisation she was told that everything was ‘official’ (C. Smith 2011, 2). Information regarding these two cases is scarce and restricted to the two women’s involvement in social media.

While the existence of parental abduction cases between Japan and the Philippines is publicly acknowledged (see, for example, Nishinippon Shimbun 2013), such cases are not widely publicised. This is because the custody issues involved have less to do with ‘text-book’ cases of abduction – where one parent removes a child across a national border in violation of the custody rights of the other parent – than the legal status of Japanese–Filipino children, also called ‘JFC’ (Suzuki 2010, 31). The dominant discourse
in relation to these children concerns their legal, social and financial vulnerability, including the nationality status of those born out of wedlock. The term ‘JFC’ can refer to people born either in or out of wedlock (Suzuki 2010, 31) and derives from non-governmental organisations and activists who advocate for, or act in the interests of, this group (Seiger 2017, 207). The term is, however, considered by some to be an undesirable identity because it connotes lower socioeconomic standing and failed relationships (Seiger 2017, 213). For these Japanese–Filipino children, international abduction is less concerning than the prospect of abandonment by their Japanese fathers. One visible case of ‘abandonment’ is that of Maria Clarize Morito. An appeal for assistance was made on behalf of Clarize, now in her twenties, under the title ‘Children Looking for Their Japanese Fathers’ on the CRN Japan website, an organisation which usually petitions for the return of abducted children (CRN Japan n.d.c). According to her profile on the website, Clarize’s father Toshiro Morito is a Japanese national who lived and worked in the Philippines until the early 1990s. He was in a relationship with Clarize’s mother, Asuncion Dacallos Pacle, from the mid-1980s until the early 1990s. Clarize apparently had not seen her father since she was a young child and sought any information about him.

Suzuki also notes that the term shin nikkeijin (new people of Japanese descent), which has a demeaning connotation and commonly denotes children born out of wedlock to Filipino female entertainers and Japanese men, is used uncritically by many individuals and institutions in Japan to refer to JFC (Suzuki 2010, 31). She notes that shin nikkeijin is not used for newcomers of Latino descent, a large population to which it could equally apply, and has the effect of creating a separate category for JFC. She suggests that JFC is considered to be a more neutral term than shin nikkeijin (Suzuki 2010, 31).

Clarize’s profile disappeared from the site sometime after February 2014 and it is unclear whether she reunited with her father or not.
Clarize’s story appeared with those of three other ‘Children Looking for their Japanese Fathers’ on the CRN Japan website, including Ariane Ywayan Boncan Takahashi, who is quoted at the beginning of this section. According to her profile, her mother, Teresita Destacamento Ywayan (also known as Teresita Ywayan Boncan) worked for her father, Takashi Tomasu, as a secretary in the Philippines (CRN Japan n.d.d). The profile also tells the dramatic story of her mother being taken to Japan and held there by men claiming to be associates of Takashi and Takashi coming to her rescue by paying a ransom. Teresita apparently became pregnant with his child shortly thereafter, and Ariane was born in October 1983. Takashi did not see Terasita before Ariane was born, and it is not clear that he knew she was pregnant. In her profile, Ariane says she was unaware that her father was Japanese until she was aged 21, having used her step-father’s surname from birth. She left a message for him on the CRN Japan website, saying her mother had lost his contact details and picture, and asking him to visit her.

In addition to web-based forums such as CRN Japan, non-profit organisations, such as Citizen’s Network for Japanese–Filipino Children (Tokutei heiri katsudō hōjin), have been set up specifically to assist children in locating their Japanese fathers and to provide legal and social support. The stories told by many of these children about the outcome of attempted reunions with their Japanese father echo common themes of those of left-behind parents trying to reunite with their children: many suffer a cruel rejection and are turned away (see, for example, Matsubara 2012; see also Ishikawa 2014).

5.6.1 Japanese–Filipino Children and the Nationality Act Case of 2008

In 2008, the Supreme Court of Japan handed down a decision which made it easier for Japanese–Filipino children to acquire Japanese nationality, in a case commonly known

---

as the *Nationality Act* case (*Kokuseki kakunin seikyū jiken* 2008). A group of Japanese–Filipino children were the plaintiffs at the centre of that case. While space constraints preclude a detailed analysis of this fascinating case, it involved deliberation over article 3(1) of the *Nationality Act* (*kokuseki hō*), which provided that a child under 20 years of age acquires Japanese nationality where their father or mother is a Japanese national, or was a Japanese national at the time of their death, and has married the other parent and acknowledged paternity or maternity respectively. On 4 June 2008, the Grand Bench of the Supreme Court (comprising a panel of 15 judges) handed down a decision that article 3(1) was unconstitutional in its effect.\(^{106}\) The decision of the Grand Bench considered the interaction between the principle of *jus sanguinis* (nationality inherited through one or both parents rather than place of birth) and the operation of article 2(1) of the *Nationality Act*, which provides that a child is a Japanese national when, at the time of birth, it has a Japanese mother or father; the effect of this is that if the mother is non-Japanese, paternity must be expressly recognised by the Japanese father prior to the birth (a process known as *taiji ninchi*) in order to create a legal relationship (as parental authority vests solely in the mother where the parents are not married, as discussed in Chapter 3).

The Grand Bench made the vital recognition that article 3(1) of the *Nationality Act* only had practical application to a specific group of children: those who were born to a non-Japanese mother and a Japanese father with no legal marital relationship and whose paternity was not recognised at the time of their birth (*Kokuseki kakunin seikyū jiken* 2008, 2). This is the category in which many Japanese–Filipino children find themselves. The crux of the Grand Bench’s decision was that the distinction between children who could be granted Japanese nationality under article 3(1) (being those whose Japanese

\(^{106}\) Five of the judges rendered dissenting opinions.
fathers had recognised paternity and had legitimised the relationship through marriage to the mothers) and children who could not (being those whose Japanese fathers recognised paternity but had no marital relationship with the mother) gave rise to an unreasonable discrimination (*Kokuseki kakunin seikyū jiken*, 8–9). In a remarkable passage, the Grand Bench recognised that social and economic changes in Japan since the *Nationality Act* was enacted had brought diversification in views on family life and the parent–child relationship. It conceded that family life and parent–child relationships were in fact changing and diversifying, including a rise in the rate of births out of wedlock, and that these changes had been compounded by the progress of internationalisation and the rise of international interactions (*Kokuseki kakunin seikyū jiken*, 6). The Grand Bench also recognised that births of children to non-Japanese mothers and Japanese fathers were increasing and the realities of family life, including legal marriage and the recognition of a parent–child relationship based on marriage, gave rise to a more complicated situation than for parents who were both Japanese (*Kokuseki kakunin seikyū jiken*, 6). For this reason, the Grand Bench considered that the determination of the closeness of a child’s ties to Japan could not be directly measured by the marital status of that child’s parents (*Kokuseki kakunin seikyū jiken*, 6). The Grand Bench was also troubled by the gender discrimination implied in the fact that a child born of wedlock to a Japanese mother acquired Japanese nationality, but a child born to a Japanese father who acknowledged paternity could not, unless the parents were married (*Kokuseki kakunin seikyū jiken*, 8). The decision led to the amendment of article 3(1) of the *Nationality Act* in 2009 to make children under 20 and born out of wedlock eligible for citizenship if paternity is recognised. The Ministry of Foreign Affairs has confirmed that 483 Japanese–Filipino children subsequently applied for Japanese citizenship between 2009 and 2011 (Matsubara 2012).
In a concurring opinion, Justice Tokuji Izumi referred to Japan’s obligations under international law, including the ICCPR and UNCRC, with respect to the right of a child to acquire a nationality (Kokuseki kakunin seikyū jiken, 15). In its decision in the Nationality Act case, the Supreme Court recognised the importance of nationality from a legal perspective; it offers protection of human rights and allows individuals to obtain public qualifications and benefits (Kokuseki kakunin seikyū jiken, 4). Implicit in Japanese nationality is the right to be registered in a family koseki. In Chapter 3, I discussed the ideological power wielded by the koseki structure in Japanese society. This is considered to be a significant factor in the abandonment of Japanese–Filipino children born out of wedlock by their Japanese fathers; the thought of complicating their koseki, possibly giving rise to issues with their inheritances (both as beneficiary and donor) and potentially giving public recognition to an extra-marital affair, has proven insurmountable for some (S. Ito 2011, 74; Matsubara 2012). The social issue of the absent father in the context of Japanese–Filipino children is the opposite dilemma to international parental child abduction, being a deliberate obstruction of the parent–child bond, and is related to the socioeconomic and historic context of the relationship between the two countries, as well as gendered issues, which I discuss in 5.6.2.

While the change to the Nationality Act to make the situation for children applying for citizenship more equitable was a progressive step by the Supreme Court of Japan, marriage between the parents or formal recognition of paternity is still required. This underlines the conservative view of relationships by the official stratum of Japanese society and the predominant philosophy of the kaikon shakai or marriage society; there is no recognition of extra-legal forms of marriage.107

107 Compare with the Australian situation, where a man is presumed to be a child’s father if he has co-habited with the child’s mother in the 10 months prior to the child’s birth (Family Law Act 1975, sec. 69R).
5.6.2 The Philippines to Japan: Gender and Migration

There is a dearth of publicity relating to the children of Japanese–Filipino unions in the abduction context. Part of the explanation for this silence may lie in the history and pattern of immigration of Filipino nationals to Japan. In this section, I will briefly examine the historical and social history of Filipino migration to Japan in order to situate the international parental child abduction issue within it.

The emergence and growth of migration from citizens of the Philippines to live and work in Japan over the past three decades is a significant social and economic phenomenon and the topic of much popular and academic interest. Suzuki has examined the flow of migrants from the Philippines to Japan, mapping the history of Filipino involvement in the entertainment industry in Japan since the early 1900s, particularly as pioneers in the fields of jazz music and boxing (2008a, table 2). Filipinos have been a consistent feature of Japanese immigration in the postwar period of the twentieth century. By 1960, there were 5,508 recorded, amounting to 3.7% of the total number of entrants (MOJ 2018f [see subset for 1950–2005, table 2]). The number of Filipino nationals entering Japan annually increased significantly toward the end of the twentieth century. The number rose to approximately 20,477 by 1970 and climbed rapidly during the 1980s, rising from 27,902 in 1980 to 88,296 in 1989 (MOJ 2018f [see subset for 1950–2005, 2]). The number of Filipino entrants into Japan continued to grow throughout the 1990s, reaching 169,755 by 2000 (MOJ 2018f [see subset for 1950–2005, table 2]). The number has grown rapidly since that time, peaking at 561,451 in 2017, making up 2.0% of entrants (MOJ 2018f [see subset for 2017, table 2]). The number of registered Filipino nationals (including permanent residents) in Japan also grew steadily in the latter part of the twentieth century, climbing from just 932 in 1970 to 49,092 by 1990; that population came close to tripling by 2000, with 144,871 registered Filipino residents.
recorded (Statistics Bureau of Japan n. d. [see chapter 2, table 12]). The number of registered Filipino residents in Japan has continued to grow in the twenty-first century, reaching a record number of 260,553 in 2017, accounting for 10.1% of all registered foreigners (MOJ 2018g [see subset for December 2017, table 01-1]). The growing Filipino resident population is part of an increasing foreign population in Japan. In 2017, there was a record 2.56 million resident foreigners in Japan (MOJ 2018a). Japan is the second most popular destination for Filipinos moving overseas, behind the United States, and Japan has been the site of one of the fastest growing Filipino diasporas in the world (Anderson 2005, 809). As at 2017, Filipino nationals made up the fourth largest group of foreign nationals resident in Japan, behind only China, South Korea and Vietnam (MOJ 2018a).

Drivers for the rapid increase in Filipino migration have been explained in economic and structural terms, especially the push–pull effect of continuing economic crisis in the Philippines combined with new economic prosperity in Japan (Anderson 2005, 809;

---

108 In accordance with the Immigration Control and Refugee Recognition Act (shutsunyûkoku kanri ayobi nanmin nintei hô), as amended in 2014, resident foreigners are those individuals designated as mid-to-long-term residents (which excludes those permitted to remain in Japan for only three months, or who are designated as temporary visitors, diplomats or officials, or otherwise deemed to be falling within one of these categories [art. 19-3]) and special permanent residents (tokubetsu eijûsha). The category of tokubetsu eijûsha is defined under article 3 of the Special Act on the Immigration Control of, Inter Alia, Those Who Have Lost Japanese Nationality pursuant to the Treaty of Peace with Japan (nihonkoku to no heiwajôyaku ni motoruki nihon no kokuseki wo ridatsushita sha tô no shutsunyû kanri ni kansuru tokureihô). The law acts to confer permanent residency to Korean and Taiwanese people from Japan’s former colonies, and their children, whose Japanese nationality was terminated when colonial rule was abolished at the end of the Second World War (for further discussion see Kondo 2002).
In particular, high unemployment and underemployment generated by an inefficient political and economic system since the 1970s in the Philippines compounded by a high population growth rate encouraged Filipino nationals to move overseas for greater economic opportunities (Anderson 2005, 809). Japan, which by 1976 had begun to experience labour shortages due to rapid economic expansion, provided such opportunities (Anderson 2005, 809). This outbound movement found political endorsement in 1974, when the Philippine government began promoting overseas ‘deployment’ with a view to reducing unemployment and a foreign exchange deficiency, and as a way to help repay debts owed to the International Monetary Fund, the World Bank and other aid agencies (Anderson 2005, 809; Brigham 2013, 103). As outbound migration grew, nationals working overseas were praised at the highest levels in the Philippines, being named ‘modern-day heroes’ of the state in 1988 by former president Corazon Aquino (Guevarra 2014, 137–8). The Philippines is now in the top-10 leading origin countries for migrant flows to Organisation for Economic Development and Cooperation (OECD) member countries, which includes Japan. Despite an 8% drop in overall outbound migration in 2016 compared with 2015, there was a 9% increase in outbound migration from the Philippines to Japan that year (OECD 2018, 43–4). Remittances sent home from migrants constitute an important income source for the Philippines, totalling an estimated US$33.7 billion in 2018, 10.1% of the national gross domestic product for that year (World Bank 2018a [see Annual Remittances Data updated as of December 2018, Inflows]).

Migration shifts from the Philippines also lend themselves to analysis in gendered terms (see, for example, Cuneen and Stubbs 1997; Suzuki 2002; Anderson 2005). Firstly, women in the Philippines in the 1970s wishing to protect the welfare of their families and pursue social mobility faced the twin hurdles of unemployment and/or
underemployment, as well as lower wages than men, making the prospect of work overseas attractive (Suzuki 2008a, 67). Secondly, the weak economic performance of the Philippine economy since the Marcos regime in the 1970s led industry to look to an untapped site of potential profit: namely, women’s sexuality (Suzuki 2008a, 66–7). Suzuki refers to the way women’s sexual services have been ‘massively deployed’ in international tourism, including the advent of ‘sex tours’ to East and Southeast Asia, which became popular with Japanese men from the 1970s (Suzuki 2008a, 66–7).

Protests by action groups in Korea and the Philippines against these tours, combined with state intervention by Japan and a number of criminal acts committed against Japanese citizens in the Philippines in the early 1980s, led to a downturn in the number of Japanese men travelling to the Philippines on these types of tours (Suzuki 2008a, 67). The decline in sex tours by Japanese men to South East Asia led to an upturn in the sex industry in Japan. This shift, combined with increased opportunities for employment overseas, is another variable relied upon to explain the increase in migration of women from the Philippines to Japan in the 1970s (Suzuki 2008a, 67). In particular, 1979 was a watershed year for migration of Filipino women to Japan, being the first time the number exceeded 10,000 (Suzuki 2002, 177). The 1980s and 1990s also saw the rise of commercialised marriage mediation (also referred to ‘mail order brides’) between Japanese men and Southeast Asian women, including Filipinos (Kojima 2001; Bélanger 2010). By 1995, women accounted for over half of all Filipino workers overseas (Suzuki 2008a, 67). The high number of female migrants is reflected in birth statistics compiled in a special report by the Ministry of Health, Labour and Welfare, which found that in Filipino–Japanese unions producing children, Filipinos were the mother in 80% of cases, the highest of any nationality (MHLW 2007 [see chapter 2(1), table 3]).

---

109 The next highest proportion of mothers came from Thailand and Korea (South and North combined), where Thai nationals were the mother in 78.5% of births resulting from Japanese–Thai pairings, and
Demand for cheap migrant labour in Japan has led to the majority of women from the Philippines to take up ‘women’s jobs’, such as domestic helpers, nurses and entertainers, primarily in bars and hotels as hostesses, singers and dancers (Suzuki 2008a, 67). In 1981, an immigration category for ‘entertainment’ (きょうぎょう) was introduced in Japan to meet a surging demand for foreign entertainment workers (Oishi 2005, 35). This move was regarded by some as undermining Japanese law and policy which forbids the issue of work permits for unskilled labour, particularly given the difficulty of establishing a visa applicant’s qualifications as an entertainer under this category (Oishi 2005, 35; Chung 2010, 151). ‘Entertainment’ in this context includes work in Japan’s mizu shobai (the night-time entertainment business; literally ‘water trades’), ranging from hostess bars and clubs to a range of establishments that provide various forms of sexual services (Anderson 1999, 2). Many have found themselves the victims of traffickers (Devine 2007). The quality of a migrant’s entry immigration documentation creates a critical distinction between the work they can expect in Japan, as undocumented workers can be more easily encouraged or forced into work in the sex trade (Anderson 1999, 5).

Stevens undertook fieldwork in the Kotobuki area of Yokohama in the early 1990s, just before the end of the ‘bubble economy’, and observed a pattern of foreign unskilled labourers entering Japan on a temporary visa (under the categories of tourist, student or entertainer) and then ‘over-staying’ (Stevens 1997, 141). Their subsequent absorption into society was permitted, in part, by the malleability afforded by their lack of legal rights as illegal residents, as employers were able to exert a greater amount of control over foreign workers, pay them lower wages or withhold pay, or refuse to pay their benefits and insurance (Stevens 1997, 142, 144). Stevens also observed that female foreign workers were particularly vulnerable to recruitment or being contracted out to

---

Korean nationals were the mother in 59.1% of births resulting from Japanese–Korean pairings (MHLW 2007 [see chapter 2(1), table 3]).
gangsters (yakuza) (Stevens 1997, 142; Rey Ventura’s 1992 work, ‘Underground in Japan’, also provides valuable insight into the Kotobuki area from a Filipino perspective).

In 1985, filmmaker Tetsuo Yamatani coined the phrase the phrase ‘japayuki-san’ to describe Southeast Asian immigrants to Japan (see Yamatani 1985). It has since come into popular parlance; the year 1979, when immigration of Filipino women topped 10,000 as noted above, has been dubbed ‘japayuki Year One’ (japayuki gannen) by immigration authorities (Suzuki 2008a, 67). The term is a combination of a contracted form of Japan (japa-), the Japanese verb meaning ‘to go’ (yuki) and the honorific title (-san) (Mackie 1998, 46). It is a play on the Japanese term ‘karayuki-san’, commonly used to describe Japanese women sent to East and Southeast Asia to work, often as prostitutes, from the late nineteenth century, with ‘kara’ denoting ‘China’ in Japanese (but understood more broadly in the context of karayuki-san as referring to any overseas destination) (Mackie 1998, 46). The term japayuki-san has become a commonly used stereotype, shorthand for any Southeast Asian woman working in the entertainment industry, which has come under scrutiny in more recent times for its pejorative and sexually suggestive implications (Mackie 1998, 46; Anderson 1999, 6). In particular, Suzuki has observed a conceptual linkage between japayukisan and other entertainers in Japan with ‘entertainers’ working in the sex industry in the Philippines, which symbolically corrals all Filipino women in Japan within the sex industry (Suzuki, 2008b, 67). That a ‘sizeable majority’ of unions between Japanese men and Filipino women have sprung from meetings in nightclubs is considered to be a defining characteristic which sets these unions apart from other transnational relationships (Suzuki 2009, 40).
The ‘plight’ of Filipinos in Japanese diaspora is a much-covered trope in popular culture. For example, a series of Japanese dramas by popular Filipino actress Ruby Moreno, in the 1990s, portrayed Filipino women as pitiful, impoverished and desperate, predominantly working in the sex industry or otherwise living as rural brides (see Kaneko 1996; see also Mackie [1998] and Suzuki [2002] for discussion about media representations of Filipino women in Japan). The image of the fallen Filipino woman seeking redemption is still romanticised in public opinion.\footnote{See, for example, this comment by a CEO of an employment service which assists Japanese–Filipino children and their mothers, cited in Matsubara (2012): ‘The mothers are former entertainers, but they have apparently mended their ways through living often in extreme poverty.’} The dominant narrative of struggle and exploitation in relation to Filipino workers in Japan, particularly female workers, is highly suggestive of a First World/Third World pairing, in which the stronger Japanese economic, political, social and labour forces exercise dominance and control over the weaker other (Suzuki 2007).\footnote{Suzuki and Takahata argue that it is not only migrant women’s experiences in Japan that can be explained in gendered terms. Following on from common Orientalist viewpoints which paint the East as feminine in opposition to a masculine West, they argue that Filipino boxers (who were paid to lose against Japanese opponents) and hosuto (homosexual and heterosexual men who perform work normally carried out by women in nightclubs) are emblematic of feminised workers, performing work which is regarded as ‘secondary’ and ‘inferior’ and, in the case of hosuto, hyper-eroticised (Suzuki and Takahata 2007; Suzuki 2008b).} It is undeniable that the majority of Filipinos in Japan face significant social, economic and legal hurdles, but many accounts of their lived experiences operate to temper the perception that that Filipinos are ‘poor in the double sense of the word’ (Suzuki and Takahata 2007). Stevens points out that migrant workers are often educated and skilled workers in their home countries who pursue employment overseas to maintain a high standard of living back home (Stevens 1997, 143–4; see also Suzuki [2005] for discussion on diversity of motives in Filipino
migration). Suzuki has examined the activities of Filipino wives of Japanese men in arranging charity events in Japan and the Philippines as a way to ‘create spaces for negotiation and change’ under the shadow of the japayuki-san stereotype (Suzuki, 2008b, 65). The past decade has seen a shift in the nature of migration from the Philippines to Japan. In 2005, the Japanese government significantly tightened regulations surrounding the issuance of entertainer visas, requiring applicants to demonstrate that they have studied their field of entertainment for two years at an educational institution, or have two years’ work experience within it outside Japan (Fujimoto 2006). Under the Japan–Philippines Economic Partnership Agreement concluded in 2006, Filipino nurses and care workers with formal qualifications and experience are able to work in Japan indefinitely (Senate Economic Planning Office 2007). The Technical Intern Training Program discussed in Chapter 1, while not free of controversy, has already altered the nature of Filipino migration to Japan, and proposed changes to visa categories for ‘blue collar’ workers will drive further change.

Earlier, I examined the stories of some Filipino women and children involved in parental child abduction cases. I have observed that stories of Filipino–Japanese parental child abduction generate very little public interest. Considering the large number of marriages and divorces between Japanese men and Filipino women (as discussed in Chapter 1), it would be reasonable to assume that international child custody would probably be a critical issue, but I have found that there is a gap or silence around these sorts of abductions rather than a visible cohort of left-behind fathers and mothers. It may be possible that there are other nationalities that are just as invisible in the public sphere, but I have chosen to give attention to the Filipino situation for a number of reasons. Firstly, the emergence of the japayuki-san phenomenon, coupled with the influx of foreign workers to Japan in the 1980s, has been identified as a
‘turning point’ or new wave in the history of the immigration and citizenship debate in Japan, which had previously been very focused on the presence of ethnic Koreans living in Japan or *zainichi* (Kobayashi et al. 2014, 3–4). Secondly, the increased presence of Filipino people in Japan – evident through their strong statistical presence in immigration, marriage, divorce and birth figures – indicates that there is a large cohort who has settled in Japan, a proportion of whom inevitably would have child custody issues spanning international borders. Thirdly, the situation of Japanese–Filipino children provides an interesting contrast to the dominant narrative of parental child abduction, that of a child taken. The situation created by Japanese fathers abandoning children from unions with Filipino mothers is very visible in Japan, having been considered by the highest court in the country, the Supreme Court.\(^\text{112}\)

Lack of media attention can be as telling as abundance. The custody issues of Filipino and Japanese couples are mostly absent from the mainstream media, despite the large size of this cohort in Japan. Many of these cases reside in the intersection of the custody Venn diagram; they are neither stable family situations nor the type of ‘text-book’ abductions that can be easily packaged and presented by the traditional media. Further, the history of Filipino migration in Japan, and its social and economic realities and perceptions which have built up over time, mean that Filipinos may struggle to accrue and employ socioeconomic and legal capital (discussed further in Chapter 7) in the same way that someone like Christopher Savoie can. The dominant discourse of Filipino women discussed above in Japan comes into play here, as eloquently expressed by Suzuki: ‘By crossing the prescribed borders of gender, class, and nation, they are seen as

\(^\text{112}\) A fourth, practical reason I have focussed on the Philippines is the fact that English is widespread in the Philippines, giving me greater access to material than I would have had by focussing on another country with a high marriage rate in Japan, such as China or Korea.
sexual and moral transgressors’ who have strayed from their ‘proper place’ (2005, 160).
This perception and the fact that the dominant discourse surrounding Japanese–Filipino children relates to their abandonment by their Japanese fathers and their fight to validate their position as Japanese citizens are key indicators of the unfair and unequal position Filipinos occupy in the public realm.

5.7 Conclusion
The ‘border crossings’ by the families in these case studies demonstrate the wide variety of nationalities, cultures and legal systems that can intersect. The range of variables at play in the relationships described above is quite surprising, perhaps because the Hague Convention has led to the prioritisation of certain categories of custody cases in terms of the social awareness that is raised.

Examination of these lesser known cases is important as they provide more information about how the law is working ‘on the ground’ and how it intersects with family, class, race and gender. These cases affirm the notion that nationality is fluid and opportunistic. Further, they evidence how the ‘family’ is as much a cultural, social and legal creation as a biological one, shaped by the dominant expectations of the environment. In Chapter 4, we saw how Amy and Christopher Savoie subsumed Rebecca and Isaac into their new, blended family in the United States, with Amy taking on the role as their ‘new mum’. In this chapter, we see how parents in Japan, such as Masako Akeo, are simply trimmed from the social fabric of their children’s lives by the law and society around them. How can an international legal system make sense of this in order to dispense just outcomes? Further, these cases tell us something about how Japan engages with the rest of the world via the treatment of international unions. We can see the emergence of a ‘two track system’ of family law, where the handling of a case can
change significantly depending on the degree of ‘internationality’ involved, as seen clearly in the Sugimoto case above and as discussed further in Chapter 7.

The case studies examined in the current chapter are categorised as ‘pre-Hague Convention’ cases, but they could almost equally be called ‘non-Hague Convention’ cases, as Japan ratifying the Hague Convention would not have had any bearing on any of them, save for the case of Kayako Yamada. This highlights how the domestic law, and the administrative, political and judicial structures which support it, remains highly relevant for many international families in and from Japan. Even where the Hague Convention is invoked, the domestic law still plays a defining role, as we will see in Chapter 6.
Chapter 6

Counterpoint II: Post-Hague Convention

6.1 Introduction

This chapter will examine the story of James Cook and Hitomi Arimitsu, continuing the journey through the sociolegal history of international parental child abduction in Japan already presented in Chapters 4 and 5. While Chapter 4 examined the high-profile case study of Christopher Savoie and Chapter 5 provided analysis of other case studies as counterpoints to the Savoie case, this third and final case history provides another counterpoint to the Savoie case and another perspective on the factors at play in international parental child abduction cases involving Japan. Like the Savoie case, the Cook/Arimitsu case involves the parental abduction of children from the United States to Japan, and the left-behind parent is an American-born father and the abducting parent is a Japanese mother. Despite these similarities, the Cook/Arimitsu case bears many interesting differences primarily related to the timing of the incident. A key point of distinction is that the abduction of the children took place in mid-to-late 2014 and James Cook was therefore able to access remedies for the return of the children under the Hague Convention, unlike any of the other parents in my case studies. In order to place the Cook/Arimitsu case study within context in time and legal positioning, I will first provide an overview of the outcomes under the Hague Convention in Japan since its implementation in April 2014.

6.1.1 The Hague Convention in Japan: The Statistics

The Ministry of Foreign Affairs considered the implementation of the Hague Convention in Japan a success after its first year, noting a drop in reported abductions between 2013 and 2014 (Masangkay 2015). While the signing of the treaty was a significant step
for Japan, potentially affecting its legal, cultural and social environment, some commentators have been subdued in their assessment of its impact, including US Congressman Christopher Smith, who is a vocal advocate for American left-behind parents and believes Japan has been too slow in responding to international abduction cases (Slavin 2015).

In the Hague Convention’s first four years of operation in Japan, from 1 April 2014 to 31 March 2018, a total of 86 applications for return from Japan were made (excluding one where the child’s habitual residence was Japan), and 71 applications were made for return to Japan (MOJ and MOFA 2015, 2016, 2017 and 2018). Tracking the data made available by the Ministry of Foreign Affairs and Ministry of Justice for that period, I have found that the top five countries of origin for applications for return from Japan are the United States (24), France (7), Germany (6), Australia (5) and Singapore (5). The top five destination countries involved in return applications to Japan are the United States (13), Thailand (7), Philippines (6), South Korea (6) and Russia (5). It is interesting to note the United States tops both lists, particularly as the public discourse around international parental child abduction is dominated by the narrative that abductions from the United States are the major issue, infrequently addressing the reverse situation. The predominance of Asian countries in the top five countries involved in outgoing abduction is also of note, giving some support to the notion that a high rate of marriage between citizens of Japan and these countries (Thailand, Philippines and South Korea) correlates with a high rate of abduction. Applications for access within Japan have told a similar story in the first four years, with 93 applications made and the highest number of applicants living in the United States (48), the United Kingdom (7), Australia (7), France (6) and Canada (5). There were 28 applications made for access
outside Japan, with the United States (5), Russia (3) and Canada (3) featuring most often as destination countries.

Given the lack of rigour in the reporting of international parental abduction cases, it can be difficult to distil any significance from a comparison of Hague Convention applications involving Japan with figures globally. However, to provide some context, in its most recent statistical analysis of the operation of the Hague Convention, which captured data from 2015, the Hague Conference reported that the number of return applications (a request to have a child returned) registered in 2015 by 76 of its then 93 contracting states was 2,270, involving at least 2,997 children (Lowe and Stephens 2018, 3). This is an average of 29.8 return applications per country for the year; Japan’s average figures are slightly lower, sitting at 21.5 per year.

According to the Ministry of Justice and Ministry of Foreign Affairs statistics cited above, the father was the applicant in a striking majority, 89.5%, of the applications for return of children from Japan (77 applications). The father was also the applicant in the majority of applications, 66.1%, for return of children to Japan (47 applications). These figures echo recent trends in Hague Convention applications generally, which indicate that the mother is more often than not the taking parent, as discussed in Chapter 3.

With respect to access applications, fathers again dominated applications for access, making up 87 of the 93 applicants for access within Japan (93.5%) and 22 out of 28 applicants for access outside Japan (78.5%). The Hague Conference report mentioned above, which analysed statistics for 2015, noted that the number of respondent mothers in applications for return to Japan (94% in the period of analysis) was very high compared with other countries (Lowe and Stephens 2018, 28).
The Hague Conference report noted above also observed that the ratio of access applications to return applications received by Japan was comparatively very high (Lowe and Stephens 2018, 34). This is due to a surge of applications from left-behind parents whose children were taken prior to 1 April 2014 and were therefore not eligible to apply for their return under the Hague Convention, but who were able to make an application for access once the treaty took effect. Almost 60% of the total number of applications for access within Japan were made in the first year of the treaty’s operation from 1 April 2014 to 31 March 2015 (55 out of 93 applications). The visitation process has been used by three left-behind parents in Canada, Singapore and the United States to eventually negotiate the return of their children who were taken to Japan prior to the Hague Convention taking effect there (MOJ and MOFA 2015, 6).

It is clear, as would be expected of a well-established international treaty, that the Hague Convention has been readily adopted by parents seeking the return of or access to their children. What, then, are the outcomes of these applications? Between 1 April 2015 and 31 March 2018, the Japanese Central Authority accepted 55 applications for assistance for the return of children from Japan and during the same period, 21 applications resulted in a return and 23 resulted in the child remaining in Japan, noting that there is some overlapping between years and these figures may include some applications made in 2014 also (MOJ and MOFA 2016, 2017 and 2018). It may be surmised that the other eleven applications were still yet to be finalised at the time of reporting by the Ministry of Justice and the Ministry of Foreign Affairs. For the returns overseas, the mode of resolution was spread between court-based mediation (chōtei) or settlement (wakai) (42.8%), court orders (including appeals and judicial enforcement)

113 The figures provided by Ministry of Justice and Ministry of Foreign Affairs for the twelve months prior are not comprehensive enough to be included in this analysis.
(33.3%), voluntary returns (19.0%) and the death of the respondent (4.7%). For the non-returns, the mode of settlement was court-based mediation or settlement (52.1%), court orders (including an application to alter a final order) (26%), and the decision of the applicant to ultimately not seek the return (21.7%). In the same period, the Japanese Central Authority accepted 48 applications for assistance for return of children to Japan and of those which reached a conclusion in the same period, 20 resulted in a return and 15 did not. For the returns to Japan, half were by foreign court order and half were by agreement of the parties. For the non-returns to Japan, the mode of resolution was by foreign court order (73.3%) and agreement of the parties (26.6%). The MOFA does not provide annual statistics relating to rates of success of applications for access.

On the face of these statistics, it would seem, on the whole, that the Hague Convention is working in Japan, with a healthy ratio of returns being made, amounting to 47.7% of concluded applications for the return of children overseas, and 57.1% of those for return of children to Japan between 1 April 2015 and 31 March 2018. The Japanese courts seem to be making decisions to return children overseas despite initial scepticism that they would not, and the treaty seems to be beneficial for left-behind parents inside and outside Japan alike.

6.1.2 The Hague Convention in Japan: The First Cases

For all of the focus on abductions of children to Japan in the lead-up to the signing of the Hague Convention, it was an interesting twist when the first case decided under the treaty involving Japan was made by a court in the United Kingdom; involved only Japanese parties; and resulted in the child in question being returned to Japan (Re R [A Child] [‘Re R’]). On 22 July 2014, Judge Angela Finnerty, sitting in the High Court of Justice in England, ordered that the child, known as ‘R’, be returned to Japan after his
mother, an academic, had left Japan with him on 31 March 2014, entering the United Kingdom on 1 April 2014, just scraping in to the effective Hague Convention period for Japan (Re R, 5). The couple had separated approximately a year earlier and were discussing filing for divorce (Re R, 2; Aoki 2014). They had agreed on arrangements at mediation giving the father contact with R, including overnight visits (Re R, 2). A disagreement between the couple arose in the latter half of 2013 when the father refused to consent to a UK visa being issued to R so the mother could take him on a sabbatical year to Cambridge (Re R, 3). She applied to the Tokyo Family Court to alter the mediated visitation agreement but left for the United Kingdom with R before the matter was resolved, flying in April 2014 with return tickets to Japan, which she later admitted that she had no intention of using (Re R, 3–4). They were detained at customs in the United Kingdom as R did not have a visa; but when the father was contacted by telephone by the mother and UK immigration authorities, he consented to the provision of a short-term, four-week visa for the boy as an alternative to the child being detained at the airport and immediately sent back to Japan (Re R, 3–4). The father then filed an application for the return of the child under the Hague Convention, and the Central Authority for England and Wales issued proceedings for the summary return of R to Japan on 2 June 2014 (Re R, 6). In turn, the mother filed another proceeding in the Tokyo Family Court seeking sole custody of R, which was listed for hearing on 8 August 2014; the mother says that she intended to return to Tokyo with the child on 30 July 2014 to attend that hearing (Re R, 6).

In hearing the application made by the father under the Hague Convention, Judge Finnerty was satisfied that Japan was R’s habitual place of residence. In particular, she pointed to the fact the mother had issued two sets of family court proceedings in Japan, which demonstrated her understanding that that was their habitual residence. Judge
Finnerty was also unable to establish any intention on the part of the mother to settle in the United Kingdom in the long-term given the length of her sabbatical was only twelve months (Re R, 8). Judge Finnerty was also satisfied that the parents were still married and had joint rights of custody with respect to R and that his removal had been in violation of the father’s rights of custody, including the right to determine R’s place of residence (Re R, 7).

The mother raised a number of defences to the father’s return application, including a defence under article 13(b) of the Hague Convention that the child would be exposed to a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In particular, the mother deposed to psychological instability suffered by the child after weekend visits to the father’s apartment, and also that the child was scared of his paternal grandfather, who was very strict and had a history of exercising physical punishment on the child which had psychologically damaged him (Re R, 11). The mother also contended that there was a risk the father would try to abduct the child if he was returned to Japan and this would lead to deterioration in his care (Re R, 11). Judge Finnerty considered the mother’s submissions under article 13(b) of the Hague Convention in light of prior UK case law\(^{114}\) and reiterated the following salient points:

\begin{itemize}
  \item The burden of proof in making out the defence lies with the mother and the standard of proof is the balance of probabilities. There are limitations posed by
\end{itemize}

the summary nature of Hague Convention cases, which means that oral evidence is not normally heard and tested under cross-examination and this must be kept in mind when determining the applications.

- The risk to the child must be serious enough to be characterised as ‘grave’; it is not enough for it to be real. The word ‘grave’ refers to the risk, rather than the harm, but they are linked. A risk of death might need only be relatively low to be considered grave, whereas the risk for a less serious form of harm would be required to be higher.

- The terms physical or psychological harm are to be weighed up by reference to the third alternative, ‘intolerable situation’. Some level of discomfort and distress is an ordinary part of growing up; the level of harm contemplated by the Hague Convention is one that a child should never be expected to tolerate, including the abuse of one of their parents.

- A return to the child’s habitual place of residence is not necessarily a return to the applicant parent. The type of situation facing the child on their return depends on the protective measures that can be deployed to ensure they are not placed in an intolerable situation (Re R, 12).

Judge Finnerty concluded that even if the mother’s allegations met the appropriate standard of proof, they would not establish any ‘grave risk’ to R under article 13(b) of the Hague Convention and they were instead substantive custody issues to be dealt with by the Tokyo Family Court (Re R, 12). She ordered that the child be returned to Japan on or before 30 July 2014, at which time the custody dispute would be heard (Re R, 12–13). Ironically, the father may have been better off allowing R to stay in London and pursuing his parenting rights through the English courts. As has been discussed throughout this thesis, his prospects of being awarded parental authority in a Japanese
court are 50% at best and any visitation rights to the non-custodial parent are likely to have been far less than that offered under an order from the United Kingdom, where one of the key concepts governing family law is that of shared and ongoing parental responsibility, and case law points to a strong judicial presumption of contact (Hunt and Roberts 2004).

In September 2014, another Japanese child was ordered to be returned to Japan. In that case, a Swiss Court ruled that an eight-year-old boy who had been taken to Switzerland by his American father be returned to his Japanese mother in Japan, where the couple had previously lived (Asahi Shimbun 2014; Yomiuri Shimbun 2014b). This was the first case in which the Ministry of Foreign Affairs had involvement under the official procedures set out in the implementing legislation (Asahi Shimbun 2014). In this case, the child was returned to Japan by October 2014 (Yomiuri Shimbun 2014b).

Japan returned its first child under the Hague Convention in October 2014 (Sugizaki 2014). In that case, the five-year-old boy’s Japanese mother had taken him to Japan from his home in Germany in June 2014 without the consent of his German father (Sugizaki 2014). After the father made an application for the return of the child under the Hague Convention, the Japanese Ministry of Foreign Affairs was able to mediate an agreement between the parents for the child to return to Germany (Sugizaki 2014).

The much-anticipated first ruling by Japanese Court with respect to a return application under the Hague Convention came on 19 November 2014. The case involved a Japanese couple and their four-year-old daughter who had been living in Sri Lanka since February 2013. The mother had taken the child to Japan for a temporary visit in June 2014 and failed to return to Sri Lanka (Abe 2014). The father’s return application
was heard by Chief Justice Shinichi Ōshima of the Osaka Family Court, who ruled that the child be returned to Sri Lanka (Abe 2014). In making his ruling, Chief Justice Ōshima noted that the child had a visa to return to Sri Lanka and that arrangements had been made for her to study at an international school there from September 2014 (Abe 2014; Bengo4.com 2014). Chief Justice Ōshima considered that the mother’s actions in failing to return the child to Sri Lanka had infringed on the father’s right to supervise and protect the child (Abe 2014). The mother appealed the ruling to the Osaka High Court but it upheld the lower court’s decision on 30 January 2015 and the child returned to Sri Lanka in April 2015 (M. Ito 2015).

In March 2015, the first application under the Hague Convention concerning an international union – that is, one involving a non-Japanese parent – came for judicial ruling before a Japanese court. In that case, the Japanese mother had married the Turkish father in Turkey and had continued to live there after the birth of their child. The mother returned to Japan with the child in December 2014, prompting the father to make an application for the child’s return under the Hague Convention. On 20 March 2015, the Tokyo Family Court ordered that the child be returned to Turkey (Mainichi Daily News 2015). These rulings are historically and legally important as they represent the first rulings under the Hague Convention in Japanese courts, including an appellate court. They are also culturally and politically significant as they are the first signs demonstrating that the Hague Convention can be implemented in Japan, and they could be construed as the first steps in dismantling its reputation as a ‘black hole’ for parental abductions.
6.2 The Case of James Cook and Hitomi Arimitsu

The Cook/Arimitsu case is among the first batch of cases under the new legal regime in Japan and involved extensive litigation by both parties, including an appeal to the Supreme Court of Japan, the country’s highest court, in 2016. It has emerged as a key marker in the history of international parental child abduction and Japan. Since 2015, the Cook/Arimitsu case has wound its way through every level of the court system in Japan and made use of a large portion of the new legislation put in place in Japan to implement the Hague Convention. It is a ground-breaking case, notably the first decision of the Supreme Court on the application of the Hague Convention.\(^\text{115}\) The unfolding of the Cook/Arimitsu case allowed us to see the workings of the Hague Convention in Japan to an unprecedented degree of depth and detail. It therefore provided an interesting and timely juxtaposition to the other cases analysed and a valuable opportunity to reflect upon the significance of the changing legal landscape in Japan.

Through the lens of the Cook/Arimitsu case, we can examine how Japan handles cases of international parental child abduction in practice under the new legal regime. It sheds some light on how Japanese courts may interpret the treaty in the future, as well as how rigid and unworkable the outcomes offered under the law can be for parties to international parental child abduction cases. This section will examine the facts and key points arising from the Cook/Arimitsu case with a view to creating a fuller picture of Japan’s approach to the issue of international parental child abduction and ensuring the

\(^{115}\) While Japan has no statutory equivalent of the common law principle of *stare decisis*, which creates binding precedent, in practice, the decisions of higher courts, in particular the Supreme Court, are highly authoritative and tend to be followed (Itoh 2011, 1633–4). Indicative of its status as a source of law, inconsistency with Supreme Court case law is a basis for appeal from a lower court (Iimura, Takabayashi and Rademacher 2015, 4–5).
narrative takes account of contemporary developments. It also gives an indication of how well the Hague Convention is working in contemporary Japan. The operation of the Hague Convention in Japan is supported and facilitated by a series of intertwining legal rules, which, in theory, should build upon and reinforce each other. This includes rules concerning service of documents, time limits for processing applications, the ability for left-behind parents to access their children during the proceedings, the manner in which judicial decisions are executed and enforced, and the appeals process. The Cook/Arimitsu case provides a snapshot of how well this web of rules is operating in reality.

Much of the information in relation to this case study is derived from testimony and prepared statements provided by James to US House of Representatives subcommittee hearings on 14 July 2016, 7 April 2017 and 11 April 2018 (US House Committee 2016, 2017 and 2018a). The majority of his ex-wife Hitomi’s version of events is filtered through the content of court documents and statements made by her attorney. While Hitomi has, for the most part, stayed silent, James has pushed his cause in the media and with the US government. The difference in their actions is perhaps indicative of which party holds the upper hand; Hitomi has had the children the whole time, physically if not legally. As such, it is important to bear in mind that much of the story

116 The hearing on 14 July 2016 was entitled ‘Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children’. The hearing on 7 April 2017 was entitled ‘Enforcement Is Not Optional: The Goldman Act to Return Abducted American Children’. The third hearing was entitled ‘No Abducted Child Left Behind: An Update on the Goldman Act’. All hearings were before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the Committee on Foreign Affairs. Their purpose was to investigate the operation and implementation of the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 6 USC 241, which is further discussed in Chapter 7.
as we know it bears the imprint of James’s perspective, but it is still a timely and important example of how international parental child abduction cases play out in Japan under the new legal regime introduced after the country’s adoption of the Hague Convention in 2014.

6.2.1 Cook v. Arimitsu

Hitomi Arimitsu, a Japanese national from Nara, Japan, and James Cook, a US national, were married in Minnesota in 1998 (Lillie 2017; Morley 2017). They have two sets of twins, all of whom were born and raised in Minnesota (Morley 2017; US House Committee 2016, 59). Hitomi retained the four children in Japan without James’s consent after taking them there for a vacation in July 2014. The timing of Hitomi’s actions meant the case came within the operation of the Hague Convention in Japan, as it entered into force in Japan on 1 April 2014.

Hitomi had taken the four children, then aged six and 11, to Japan with James’s consent for a six-week vacation at her parents’ home in Nara on 14 July 2014 (US House Committee 2016, 61; Lillie 2017; Shūkyoku kettei no henkō kettei ni taisuru kyoka kōkoku jiken [‘Kyoka kōkoku jiken’] 2017, 1). At the time, James and Hitomi were still together and living with their children in St Louis Park, Minnesota, but James described the mood in the home as ‘really, really bad’ and felt that Hitomi would benefit from a holiday visiting her parents in Japan (Lillie 2017). The couple had listed the family home for sale in May 2014 and later events, discussed below, indicate that financial concerns may have been adding strain on the relationship (In re the Marriage of: James Edward Cook, II, petitioner, Respondent, v. Hitomi Arimitsu [‘Cook v. Arimitsu’] 2018, 2). Prior to their departure, Hitomi and James drafted an agreement which confirmed James’s consent to the children’s travel and specified a return date of
29 August 2014 (US House Committee 2016, 61). The agreement was signed by both James and Hitomi and notarised for the purpose of providing, in James’s words, ‘the greatest amount of legality and legitimacy’. According to James, the notarised agreement was used by Hitomi as part of her travel documentation (US House Committee 2016, 61). It is a US Customs and Border Protection recommendation that when a child is travelling with only one parent, the parent should carry a letter from the other parent confirming their consent to the child travelling (or other documentation, such as a court order or death certificate, as appropriate where there is no second parent with legal authority) (US Customs and Border Protection 2017). The fact that James felt that his relationship with Hitomi had become ‘sort of irreconcilable’ prior to her leaving Japan with the children (Lillie 2017) indicates that the agreement may also have been prepared to give James a level of assurance that Hitomi would return to Minnesota with the children.

According to a prepared statement provided by James to the US House of Representatives subcommittee hearing in 2016, he and Hitomi agreed in August 2014 that the children should extend their stay in Japan as he was having some difficulty securing employment in the United States after losing his job (US House Committee 2016, 69; see also Fifield 2017). The children were then enrolled in a private English-speaking school in Japan as James was concerned about educational neglect issues arising in Minnesota if they were not attending school (US House Committee 2016, 69). In September 2014, James emailed Hitomi to advise her of his intention to travel to Japan in December 2014 to pick up the children, but he says that she never agreed to his plans and ‘significantly decreased’ her subsequent communication with him (US House Committee 2016, 69–70).
In October 2014, James travelled to Tokyo and arranged for the children to meet him there for a three-day weekend so they could go to Disneyland and DisneySea together (US House Committee 2016, 70). After that visit, he drew the conclusion that Hitomi was not going to cooperate in the return of the children to the United States and ‘was beginning to act like an abductor’ (US House Committee 2016, 70). It was at this time that James first sought legal advice regarding the return of his children. He also contacted Hitomi’s mother, Hiroko Arimitsu, in Nara and asked her to send Hitomi and the children back to Minnesota, but she did not reply to him (US House Committee 2016, 70). Around the same time, James’s mother visited the children in Japan and reported back to James that the children seemed different and had adopted a negative attitude to him. According to James, his mother regarded Hitomi as having exerted an undue influence over the children at that time (US House Committee 2016, 70).

Figure 5. James Cook and Hitomi Arimitsu. Source: Lillie 2017.

6.2.2 Family Law Proceedings in the United States

In January 2015, James commenced divorce proceedings against Hitomi in the Hennepin County Court in Minnesota (US House Committee 2016, 70). He later told a US House of Representatives subcommittee hearing that the sole purpose of the divorce
proceedings was to force the return of the children to Minnesota (US House Committee 2016, 70). In the United States, divorce proceedings deal with the dissolution of the marriage as well as related issues, such as property division and parenting arrangements, resulting in ‘legal, social and psychological reorganisation’ of the family relationships (Katz 2014, 88). Thus, it appears that James commenced divorce proceedings with a view to the Hennepin County Court assuming jurisdiction over the custody issues in conjunction with the petition for divorce. Even having regard to the broader meaning of divorce in the US legal context, it is interesting to note how James attempted to use the mechanism of divorce for the primary purpose of resolving the custody dispute: that is to say, he was managing the legal relationship between himself and his children as opposed to focussing on the dissolution of his relationship with the other party to the marriage, Hitomi.

This legal avenue was circuitous and ultimately self-defeating. The Hennepin County Court would not assume jurisdiction until service of the divorce petition on Hitomi was proven, as Minnesota is a service-first state (US House Committee 2016, 70). This means the proceeding must be served before it can be validly filed with the court. According to James, the Hennepin County Court refused to hear an emergency application regarding the custody of the children in January 2015, presumably due to a

117 This is markedly different in Australia, where the granting of a divorce by a court is simply legal recognition that the marital relationship has dissolved, and related matters must be determined separately. Compare also the situation in Japan, where divorce is available through a variety of modalities, with varying degrees of official involvement, and the majority of divorces take place by consent with no court involvement or oversight in relation to matters such as parenting or child custody (as discussed in detail in Chapter 3).

118 Chapter 518 of the 2017 Minnesota Statutes sets out the provisions on marital dissolution, including child custody, maintenance and property.
lack of proof of service of process on Hitomi (US House Committee 2016, 70). James says he sent the court documents for the divorce proceeding for translation and submission to the Japanese Central Authority under the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (‘Hague Service Convention’) on 23 January 2015; Hitomi was served in Japan on 27 April 2015 and the Affidavit of Service was submitted to Hennepin County Court dated 11 May 2015 (US House Committee 2016, 70). The four months it took to establish service on Hitomi meant that the same County Court judge who had refused the emergency application in January 2015 for lack of service refused to accept jurisdiction over the custody issues in July 2015 due to the time the service process had taken (US House Committee 2016, 70).

James says he then sought out other legal avenues to recover his children, and it was only at this stage that he became aware of the procedures available under the Hague Convention through a friend working in the legal field, despite engaging legal representation for the custody dispute over six months earlier (US House Committee 2016, 70). This lack of proper legal advice threw a metaphorical spanner in the works for James, above and beyond any difficulties he had with the legal process. It is a type of factor external to the legal process that can affect the success of parents in custody cases, as discussed further in Chapter 7.

6.2.3 Hague Convention Application and Proceedings

On 4 August 2015, James sought the assistance of the US Department of State, being the designated Central Authority under the Hague Convention, to prepare an application for the children’s return. The application was forwarded to the Japanese

---

119 It is standard practice under the Hague Service Convention for documents to be served in a given country to be translated into its official language.
Central Authority on 7 August 2015 and officially accepted on 10 August 2015 (US House Committee 2016, 70). James’s return proceeding commenced on 19 August 2015 when his legal representatives filed his application in the Osaka Family Court. In Japan, the Tokyo Family Court and the Osaka Family Court are the courts assigned jurisdiction to hear Hague Convention cases at first instance under the Implementing Act (art. 32[1]). James also filed a petition to prevent Hitomi from travelling outside Japan for the duration of the hearing of the return application (known as a ne exeat order) and to require her to surrender the children’s passports to the Minister of Foreign Affairs (US House Committee 2016, 71). Ne exeat orders are not generally available in domestic family law proceedings and were introduced by the Implementing Act (Murakami 2018). The prohibition order in relation to the travel and passports was granted by the Osaka Family Court on 2 September 2015. The first hearing in the return application was held at the Osaka Family Court on 4 September 2015 (US House Committee 2016, 71). James was in attendance, but Hitomi did not attend and, according to James, had advised the court that he was dangerous and unpredictable and that additional security would be required. He also noted that he had added two days over a weekend to his time in Japan to see his children, but Hitomi refused to cooperate with his requests for a meeting with the children and told him they were afraid of him (US House Committee 2016, 71).

Prior to the introduction of the Hague Convention in Japan, the Ministry of Justice held a series of panel discussions for legal experts on the nature of the Central Authority under the Hague Convention (hāgu jōyaku no chūō tōkyoku no arikata ni kansuru kondankai). The introduction of ne exeat and passport surrender provisions was debated at length, including the possible conflict of these orders with article 122 of the Japanese Constitution (see, for example, MOJ 2011a). Article 122 of the Constitution of Japan provides for freedom of choice of residence, to the extent that it does not interfere with public welfare, and freedom to move to a foreign country.
On 8 September 2015, the children were interviewed by court officials, described by James as ‘(c)ourt investigators or social workers’ at the Osaka Family Court (US House Committee 2016, 71). He is likely referring here to an interview by katei saibansho chōsakan, which we can translate into English as family court probation officers or family court investigators.\textsuperscript{121} They are comparable in function to family consultants in the Australian family law system or child custody evaluators in the US legal context.\textsuperscript{122}

In their interview with the family court probation officer, the two older children expressed a strong objection to being returned to the United States, and the two younger children also made statements indicating an aversion to being returned. All of the children expressed a desire to stay with their siblings (Kyoka kōkoku jiken 2017, 1).

James noted that the invitation to interview sent to the children provided significant information about the interview process, and James believes this was used by Hitomi to coach the children in the answers they were to provide, including one of the children claiming to recall an incident which had occurred prior to their birth, and another claiming that he had seen James watching them from across the street at their grandparents’ house, echoing a story Hitomi had told him multiple times over the years of being watched in her family’s home by someone in a nearby park (US House Committee 2016, 71). He says that Hitomi tried to withdraw this claim on behalf of the child in a later hearing (US House Committee 2016, 71). According to later court proceedings, James’s situation was also assessed in September 2015 by the family court probation officer from the Osaka Family Court, who found that he did not did not have the financial resources for the children’s appropriate care and upbringing, and no likelihood of receiving any sustained assistance for the children’s care and upbringing.

\textsuperscript{121} They are also referred to, on occasion, as family court research law clerks. The office has its legislative basis in article 61-2 of the Court Act (Saibansho hō).

\textsuperscript{122} For example, California Family Code §3111.
from his family (Kyoka kōkoku jiken 2017, 1–2). On 14 September 2015, Hitomi appealed the order prohibiting her from travelling outside Japan and requiring the surrender of the children’s passports. Her appeal was denied by the Osaka Family Court on 29 October 2015 (US House Committee 2016, 71).

The second hearing in the case was listed for 30 September 2015, which James described as a ‘status update’ for the parties and which neither party attended (US House Committee 2016, 71). A third hearing was listed for 13 October 2015, which James described as a ‘trial’, before a panel of three judges. This date also marked 12 months since James had seen his children. James had again added days to his trip to Japan to spend time with the children, but again, was not permitted by Hitomi to see or talk to them using Facetime or other means of communication (US House Committee 2016, 71). The Osaka Family Court handed down its decision on James’s return application on 30 October 2015, 10 weeks after the proceedings were filed. The court accepted that the Hague Convention applied to James’s case and ordered that the two seven-year-old children be returned to the United States with James (US House Committee 2016, 71). With regard to the two older children, then aged 12, the court ordered that they stay in Japan, based on the children’s objection to returning to the United States. James described this decision as ‘Solomon-esque’ and felt his children had been dealt with as assets to be divided between him and Hitomi (US House Committee 2016, 71–2). James thought that the approach may have appealed to the ‘pragmatically minded court’ (US House Committee 2016, 72), but the decision in fact ran counter to a judicial preference for keeping siblings together (see Minamikata 2005, 500). It appears that what may have been designed as a ‘win–win’ result for Hitomi and James was in fact completely unacceptable for both of them. Hitomi and James both lodged an appeal against the decision of the Osaka Family Court in November 2018 (US
House Committee 2016, 72); from this action it may be deduced that they could agree that no matter where the children were, they should stay together. The *Implementing Act* allows an appeal to be filed against a final decision within two weeks (article 102). The Tokyo High Court and the Osaka High Court have jurisdiction to hear appeals of decisions by the courts of first instance in Hague Convention matters. The High Court and the Osaka High Court have jurisdiction to hear appeals of decisions by the courts of first instance in Hague Convention matters. If the appeal court finds that the appeal is well-grounded, it determines the matter *de novo* (*Implementing Act*, art. 106).

James applied for conciliation on 24 December 2015 to explore alternative avenues for resolution of the dispute with Hitomi (US House Committee 2016, 72). Under article 144 of the *Implementing Act*, a family court or high court may refer the return application for family conciliation (*kaji chōtei*) at any time, with the consent of the parties. The mediation pathway in James’s case, however, was abandoned on 18 January 2016 after Hitomi refused to participate (US House Committee 2016, 72).

On 28 January 2016, the Osaka High Court handed down its decision on appeal. It reaffirmed the decision of the Osaka Family Court to order the return of the two younger children and additionally ordered the return of the two older children, now 13 years old (US House Committee 2016, 72). In making its decision, the Osaka High Court

---

123 See article 16 of the *Court Act* (*saibansho hō*).

124 There is an exception to this rule: if the appeal court reverses a decision of the court of first instance which dismissed the action as unlawful and additional oral arguments are necessary, then the appeal court must remand the matter to the court of first instance (*Implementing Act*, art. 106; *Code of Civil Procedure* [*minji soshō hō*], art. 107). The appeal court may also remand the matter to the court of first instance if it reverses the original decision and additional oral arguments are deemed to be necessary (art. 106, *Implementing Act*; art. 108[1], Code of Civil Procedure).
considered the effect of the two older children’s objections to being returned to the United States. As discussed in Chapter 3, there is provision in both the Hague Convention and the *Implementing Act* for a number of grounds upon which a judicial or administrative authority may refuse to order the return of a child. The Osaka High Court found that, in the case of the two older children, there was a ground to deny the return application based on the children’s objections to returning the United States, but it was also appropriate to find that the return was in the children’s best interests (*Kyoka kōkoku jiken* 2017, 2). According to James, the Osaka High Court was concerned about the possible psychological damage which could be inflicted on the children by splitting them from their siblings, as proposed by the decision of the Osaka Family Court (US House Committee 2016, 72). The court found that there weren’t any grounds to refuse the return of the two younger children as the children did not have an appropriate level of maturity for their views to be given consideration (*Kyoka kōkoku jiken* 2017, 2). It may be that the court’s finding that the younger siblings weren’t considered mature enough to make their own decision about their place of residence worked to win James the appeal, with the four siblings being accepted by the court as necessarily a ‘package deal’ and the younger children’s immaturity influencing the court’s decision to override the elder children’s objections. It may also be, however, that the court felt that a return of the elder children to Minnesota was in their best interests regardless, it being their home for the first eleven years of their lives. The court also considered whether there were grounds to deny the return of the children on the basis that there was a grave risk that the children would be placed in an intolerable situation.

---

125 Article 28(1)(v) of the *Implementing Act* provides that a court must not order the return of a child if the child objects to being returned and it is appropriate to take account of the child’s views in light of his/her age and degree of development; however, a court may still order the return of a child if it serves the interests of the child to be returned to their state of habitual residence after taking into account all the circumstances.
if they were returned to the United States, under article 28(1)(iv) of the *Implementing Act* (which mirrors article 13[b] of the Hague Convention, as discussed above), but concluded that there was not (*Kyoka kōkoku jiken* 2017, 2). It is unclear on what basis that this defence was put to the court in the first place by Hitomi.

On 3 February 2015, Hitomi filed an appeal against the decision of the Osaka Family High Court with the Supreme Court of Japan, the highest court in the Japanese court system (US House Committee 2016, 72). The *Implementing Act* provides that a special appeal may be filed with the Supreme Court against a final order of a high court on the grounds that the order contains a misconstruction of the Constitution of Japan or any other violation of the constitution (article 108[1]), or with the permission of the relevant high court (art. 111[1]).\(^{126}\) Hitomi failed in her appeal to the Supreme Court of Japan later in February 2016 (US House Committee 2016, 72), presumably on the basis that her appeal did not contain the requisite grounds to be heard. With Hitomi having exhausted her appeal rights, the final order of the Osaka High Court became final and binding, and the *ne exeat* order prohibiting her leaving Japan ended and she would have been able to apply to the Minister of Foreign Affairs for the return of the children’s passports (*Implementing Act*, arts. 122[4] and 131[2]). Once the passports are returned there exists the possibility that the taking parent, in spite of the final order, will take the children to a third country. There is also no mechanism to compel the taking parent to give the passports to the other parent, creating an administrative hurdle for the other parent in taking the child back to their habitual residence, as they may then have to

\(^{126}\) The high court in question must permit an appeal against a final order if it contains a determination that is inconsistent with precedents rendered by the Supreme Court (or former Supreme Court, or by high courts as the final appellate court or the court in charge of an appeal if there are no precedents rendered by the Supreme Court) or where the final order is found to involve material matters concerning the construction of laws and regulations (art. 111[2]).
obtain a new passport for the child (see MOFA 2017, 10). Unfortunately for James, this was just a taste of the difficulties to come.

Hitomi failed to comply with the return order and James reports that on 5 February 2016 he applied for a ‘warning’ to be issued to her by the Osaka Family Court for her to comply with the return order (US House Committee 2016, 72). Under the Implementing Act, a family court which has made a final order for the return of a child (or the family court as court of first instance where the return has been subsequently ordered on appeal) may, at the request of the party seeking the return, investigate the status of the return and advise the other party to carry out the return (or have another family court or family court probation officer do this) (arts. 121[1] to [3]). A family court making such an investigation may commission the Minister for Foreign Affairs or other government agency, public office or appropriate person to make necessary enquiries, or request a school, nursery centre or any other appropriate person to submit a report in relation to the living circumstances of the child or other matters (art. 121[4]). The warning referred to by James was issued by the Osaka Family Court, but Hitomi did not comply (US House Committee 2016, 72). Hitomi continued to disregard the return order and James commenced enforcement proceedings.

6.2.4 Enforcement of the Hague Convention in Japan

As the case of James Cook illustrates, an order for the return of a child under the Implementing Act does not of itself compel the return of the child. While in common law countries like Australia, courts (including the Family Court of Australia) are able to exercise the common law mechanism of contempt of court to compel a party to comply with orders handed down that have not been otherwise complied with, Japanese courts (as in many other civil law jurisdictions) do not share this broad power (Haley 1996,
In order for James to have the return order enforced in the face of Hitomi’s refusal to comply with it, he had to apply to another court, an enforcement court, for a disposition of execution. The enforcement court is the local district court; in James’s case, this was the Nara District Court.\footnote{Article 3 of the Civil Execution Act provides that for a disposition of execution made by a court execution officer, the execution court shall be the district court to which the court execution officer belongs.}

Just as the implementation of the Hague Convention in Japan relies on the provision of domestic laws, so too does its enforcement. The Implementing Act provides for enforcement measures where a party fails to comply with a return order (arts. 134–43). It relies heavily on extant legislation governing civil execution procedure in Japan: namely, the Civil Execution Act (Minji shikkō hō). Up until the creation of the Implementing Act, there was some contention as to which procedures of the Civil Execution Act could be used in the handover of children, as opposed to property such as cars or furniture (see Murakami 2014, 48–9). Through the Implementing Act, procedures for the return of a child have been specified for the first time in Japan (Murakami 2014, 48–9). Under article 134(1), the Implementing Act provides parents like James with two mechanisms to enforce a return order against a non-compliant parent, both of which are derived from the Civil Execution Act. The first is indirect compulsory execution (kansetsu kyōsei) of an order in accordance with article 172(1) of the Civil Execution Act. The second mechanism is a direct enforcement process known as compulsory execution (kyōsei shikkō) of the return order, which entails the enforcement court making an order for a third party to execute the return of a child in accordance with article 171(1) of the Civil Execution Act, through a process known as execution by substitute (daitai shikkō).
The *Implementing Act* requires that an order for indirect compulsory execution must be made before a party can file for an order for compulsory execution by substitute (art. 136).\(^{128}\) This meant that when Hitomi failed to comply with the return order made by the Osaka High Court, and after she failed to respond to the warning issued by the Osaka Family Court, James's first step in enforcing the return order was to file for indirect enforcement, which means a financial penalty. Under the *Implementing Act*, the enforcement court can order the obliger (*saimusha*) to pay the obligee (*saikensha*) an amount of money which is appropriate for the performance of an obligation, either within a period of time appropriate to the length of the delay or immediately where theobliger has failed to perform their obligation within a reasonable amount of time (art. 134[1]). Accordingly, in March 2016, Hitomi was ordered to pay James a sum of ¥5,000 per child per day until they were returned to the United States, amounting to ¥20,000 per day (approximately A$200). Hitomi appealed this application.\(^{129}\) She lost the appeal but refused to pay the fine or acknowledge the accruing debt (US House Committee 2016, 72).

When indirect enforcement failed, James was left to pursue an order for compulsory execution by substitute in relation to the return order under article 171(1) of the *Civil Execution Act*, which applies to return applications under the Hague Convention by the operation of the *Implementing Act*, as discussed above. Under that power, the execution court can enforce an order by requiring a third party to perform an obligation at the

\(^{128}\) Article 136 of the *Implementing Act* prevents a party filing an application for execution by substitute until after two weeks have elapsed after the indirect enforcement order became final, or the deadline for the performance of obligations under the indirect enforcement order has expired, whichever is later.

\(^{129}\) Article 172(5) of the *Civil Execution Act* allows an appeal against a judicial decision on a petition for indirect compulsory execution under article 172(1).
expense of the obliger under article 414(2) of the Civil Code. In James’s case, this meant applying to the court to have a third party enforce the return of his children to the United States.

The *Implementing Act* is noteworthy within Japan for establishing systems for substituting an obliger with a third party and for carrying out compulsory execution by substitute in relation to the return or handover of children (Kajimura 2015, 369). Currently, there are no special provisions for the handover or return of children in domestic family law disputes, and these matters are dealt with under the *Civil Execution Act* just like any other civil dispute over personal property. A petition for compulsory execution of the return of the child by substitute under the *Implementing Act* is made by identifying a person, known as the ‘return implementer’ (*henkan jisshisha*), who is to return the child to their habitual place of residence on behalf of theobliger (normally the taking parent) (art. 137). An order for compulsory execution appoints the return implementer and designates a court enforcement officer (*shikō kan*) to take the necessary actions to release the child from the custody of the obliger (art. 138). The court is, however, required to dismiss a petition for compulsory execution under the *Implementing Act* if it assesses that it would be inappropriate, in view of the interests of the child, to appoint the return implementer who has been identified (art. 139).

As at the date of his first appearance at a US House of Representatives subcommittee hearing in July 2016, the 48-week mark of his Hague Convention application, James had applied for direct enforcement of the return order by way of compulsory execution by substitute (US House Committee 2016, 72). He noted that Hitomi had appealed the petition for enforcement by way of compulsory execution by substitute and had lost what
was by now one of multiple appeals throughout the Hague Convention process (US House Committee 2016, 72). At that stage, the enforcement action had yet to be taken, but James’s testimony to the subcommittee hearing made it clear that he considered the compulsory execution by substitute process would be a traumatic exercise that could potentially psychologically damage his children and fail regardless (US House Committee 2016, 73–5). There was, however, no other pathway open to James to pursue the return of his children at that stage.

The Implementing Act specifies certain conditions for such direct enforcement actions. The court enforcement officer can only act to release the child when the obliger (usually the taking parent) is present; this is known as ‘simultaneous existence’ (dōji sonzai) (art. 140[3]). The direct enforcement action is to take place at the obliger’s residence or other property occupied by them (art. 140[1]), although a court execution officer may undertake the enforcement action at another place, with the consent of the occupier of that place, if they find it appropriate having regard to the child’s physical and psychological state, the nature of the place and other factors (art. 140[2]). In carrying out the compulsory execution action by substitute, the court enforcement officer is empowered to enter the obliger’s residence or other building, including taking necessary measures to open any door, and to facilitate the return implementer entering the same property and meeting with the child and/or obliger (art. 140[1]). A court enforcement officer is also empowered to use force or seek assistance from the police if they encounter resistance to their actions to release the child (art. 140[4]), although they must not use force against a child or take similar action against any other person where there is a risk that it would physically or psychologically harm the child (art. 140[5]).

130 Article 171(5) of the Civil Execution Act allows for an appeal against a judicial decision on a petition for compulsory execution under Section 171(1).
In James’s case, the direct enforcement by way of compulsory execution by substitute was attempted at the Arimitsu family home in Nara on the morning of 13 September 2016, 14 months after the children were abducted (Scott 2017). While James and his mother waited with Japanese Central Authority officials in a van across the road, enforcement officials from the Nara District Court approached the home shortly before 7 am and, after confirming that Hitomi and the two sets of twins, then aged nine and 14, were present, entered the residence (Scott 2017). A total of 10 officials then entered and worked to try to release the children from Hitomi: two police officers, James’s two attorneys, a Japanese Central Authority official, two psychologists appointed by the Japanese Central Authority, a court bailiff and two officials from the US Consulate in Osaka, although it is not known which party had been appointed as the return implementer (Scott 2017). With the children’s two maternal grandparents also present (Scott 2017), it is not hard to imagine the emotional and traumatic scenes that played out in the Arimitsu home as the team of officials tried to separate the children from their mother. At about 8 am, James’s attorney advised that the children were upset and did not want to see him (Scott 2017). The children agreed to see James’s mother later in the morning, but around 10 am James was advised by his attorney that the children still did not want to see him and that Nara District Court officers had abandoned the direct enforcement attempt (Scott 2017).

A second attempt at the direct enforcement action was taken at the Arimitsu family home two days later, on 15 September 2016 (Scott 2017). This time, James was allowed to enter the residence so long as he agreed that he would not take the children back to the United States the same day (Scott 2017). The youngest daughter and son were away on a school trip, but James spoke to the older boys, although he could not see them as they were hidden somewhere else in the house (Scott 2017). He recounted that they
called out, ‘You’re not my father anymore’, ‘I don’t want to know you’, and ‘Can’t you see we are happy here and don’t want anything to do with you anymore?’ (Scott 2017). Court enforcement officers are empowered to cancel a direct enforcement attempt in a variety of circumstances, and in this instance the direct enforcement action was concluded after the court enforcement officer determined that it was not possible due to the risk of physical and psychological harm to the two boys if the attempt were to be continued (Kyoka kōkoku jiken 2017, 2).

Back in Minnesota, the Hennepin County Family Court assumed subject matter jurisdiction over the custody dispute, in line with the Osaka Family Court’s decision, and issued a ‘mirror order’ for the return of the children to United States (US House of Representatives 2017, 16). The order was issued a further three times, in December 2012, and January and March 2017, and another order was issued on 4 April 2017. James was also granted interim sole custody of the children (US House Committee 2017, 16). Not surprisingly (given her past approach to litigation in relation to the children), Hitomi defied the Hennepin Family Court and failed to release the children as ordered (Scott 2017; US House of Representatives 2017, 16). In March 2017, Hitomi was found to be in constructive contempt by the Hennepin County Family Court and again ordered to release the children (US House Committee 2017, 16–17), again to no avail.

---

131 These circumstances include (i) where the obliger (normally the taking parent) and the child are not encountered at the address where the enforcement action is to be carried out; (ii) where it is not possible to release the child from the custody of the obliger, and (iii) where there is a risk that the court enforcement officer will not be able to release the child in a harmonious way because the return implementer is unable to carry out the instructions given to them or due to other circumstances (Kokusai teki na ko no dasshu no minji jō no sokumen ni kansuru jōyaku no jisshi ni kansuru hōritsu ni yoru ko no henkan ni kansuru jiken no tetsuzukité ni kansuru kisoku [Rules for Procedures for the Return of a Child under the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction], rule 89).
6.2.5 Supreme Court Appeal and Impeachment Petition

In August 2016, James put up the former Cook/Arimitsu home for auction, where he and Hitomi had lived with their children, and began renting a room in a friend’s home (Kyoka kōkoku jiken 2017, 2). The auction was apparently as a result of foreclosure and the redemption period expiring without James redeeming the property (Cook v. Arimitsu 2018, 4). James claimed that his financial problems had been mainly due to the legal fees, travel expenses and other costs associated with pursuing the return of his children to the United States (Morely 2018). The foreclosure on the former Cook/Arimitsu home had an effect on the proceedings as Hitomi subsequently filed a petition in early 2017 with the Osaka High Court for it to reconsider its final order on the basis that the circumstances of the case had changed (Jones 2017b; Umeda 2018). Article 117(1) of the Implementing Act allows a court which has made a final order for the return of a child (or a court which has dismissed an immediate appeal of a final order to return a child) to modify its final order (kekkyoku kettei no henkō), upon the petition of a party, if it finds that it is no longer appropriate to maintain the order due to a change of circumstances. Such an appeal based on a change in circumstances is not available, however, after the child has already been returned to their place of habitual residence. James’s case was the first time this provision has been invoked. This is a dangerous provision in the Implementing Act for left-behind parents given the problems with enforcement under the Implementing Act. Even with a valid return order, left-behind parents might find themselves stuck in Japan, trying to enforce the order, while being subject to multiple petitions for review of the order by the taking parent based on a ‘change of circumstances’; it is an unfair and expensive predicament for left-behind parents paying legal costs, as they would not have been in such a situation if the enforcement system worked in the first instance.
In James’s case, the Osaka High Court decided Hitomi’s petition for modification of the final order on 17 February 2017, agreeing that the circumstances of the case had changed, reversing the decision and denying James’s application for the return of the children (Jones 2017b; Umeda 2018). James appealed the matter to the Supreme Court. The Supreme Court agreed there had been a change of circumstances in the case and affirmed the decision of the Osaka High Court, dismissing James’s appeal in a decision handed down on 21 December 2017 (Kyoka kōkoku jiken 2017). In a unanimous decision by a panel of five judges, the Supreme Court confirmed that James had been assessed (by a family court probation officer in earlier proceedings) as lacking the financial resources for the children’s appropriate care and upbringing, and had no likelihood of receiving any sustained assistance for the children’s care and upbringing from his family (Kyoka kōkoku jiken 2017, 2–3). It then noted that after the order made by the Osaka High Court to return the four children, James had surrendered possession of the former family home in the United States and since that time was unable to guarantee stable accommodation for the children (Kyoka kōkoku jiken 2017, 3). As a result, the Supreme Court considered that James’s ability to provide for the care and upbringing of the children, were they returned to the United States, had deteriorated to an extent that was impossible to overlook (Kyoka kōkoku jiken 2017, 3). According to James, the court did not pay any regard to the large amount of money owed to him by Hitomi, more than US$84,000, by way of fines ordered by the Osaka High Court, a penalty which, had it been enforced, would have significantly improved his financial standing (US House Committee 2018a).

132 James’s appeal took the form of an appeal with permission (kyoka kōkoku), which is an appeal from a high court, with its permission, to the Supreme Court, where the outcome reflects inconsistency with Supreme Court precedent or important issues of legal interpretation are otherwise in question (Code of Civil Procedure, art. 337).
The Supreme Court noted the two older children’s consistent objections to being returned to the United States and concluded that returning them to the United States despite recognising a ground to deny their return under article 28(1)(v) of the 
*Implementing Act* – namely, a child’s objection to return – could no longer be considered in the two older children’s interests and, as such, the court could not order the return in accordance with the proviso to article 28(1), which would allow the court to override the objections of the children if it served the interests of the child to be returned after taking into account all the circumstances (*Kyoka kōkoku jiken* 2017, 3). With regard to the two younger children, the Supreme Court concluded that it was appropriate to deny their return under article 28(1)(iv) of the *Implementing Act*, as there was a grave risk that the children would be placed in an intolerable situation by returning to the United States, having regard to all of the issues of the case, including the fact that only returning the two younger children would give rise to a situation where the four close siblings were split between the United States and Japan (*Kyoka kōkoku jiken* 2017, 3). Accordingly, the Supreme Court decided that it was no longer appropriate to maintain the (unmodified) final order of the Osaka High Court to return all four children to the United States, on account of there being a change in circumstances since that decision was made final.

While the Supreme Court decision does not address Hitomi’s financial circumstances, her father, Yukinori Arimitsu, is the Chairman and CEO of Osaka-based company Arimitsu Industry (US House Committee 2016, 61), which is a machine manufacturer worth ¥150,000,000 (approximately A$1.83 million).133 Given Hitomi’s continued support by her parents, as evidenced by her prolonged stay at their home in Nara with

---

her four children, one may surmise that her financial situation is vastly more stable than James’s. In his statement to the US House of Representatives subcommittee hearing in 2014, James stated his belief that Hitomi’s parents had been paying her legal bills (US House Committee 2016, 75).

As the last act in the ongoing drama, in a move described by prominent Japanese legal expert Colin Jones as a ‘quixotic quest’, James filed a petition with the Judge Impeachment Committee (saibankan sotsui iinkai) of the National Diet of Japan against the five Supreme Court judges who had decided his appeal in April 2018 (Jones 2018). The mechanism of judicial impeachment is enshrined in the Japanese Constitution (arts. 64 and 78; see Yanase 2014). The Judge Impeachment Committee in Japan received 19,814 petitions between 1948 and 2017 (Jones 2018). During this time, the Judge Impeachment Committee has referred only nine judges for trial by the Judge Impeachment Court (saibankan dangai saibansho), which is made up of members of both houses of the Diet, and suspended prosecution of seven judges (Jones 2018). James’s chances of success in his impeachment petition have been assessed at zero by Jones, who notes, among other things, the close association between judges in the Japanese system and the administrative function of the Diet (including secondment of judges to the Ministry of Justice) (Jones 2018). Aside from this, the political ramifications of formally disciplining five judges sitting in the country’s highest court with respect to such a socially and culturally sensitive topic as regulation of the family, and involving a legal regime still in its relative infancy, would be quite extraordinary; it is almost impossible even to conceive of this happening.

134 According to Jones, the true number of petitions would be much larger as the statistics provided by the Judicial Impeachment Committee treat multiple complaints about the same judge as one incident (2018).
6.3 Key Points

The case of James Cook and Hitomi Arimitsu draws out some important points regarding the processes and practicalities of international custody disputes and the operation of the Hague Convention in Japan. While the Hague Convention propagates high-level concepts about the appropriate management of international custodial disputes, as discussed above, its practical operation at state level is underpinned by a series of intertwining legal rules and processes. In an ideal world, these would work together smoothly to facilitate the efficient processing of applications under the Hague Convention. The points discussed below are important as they highlight the problems involved in implementing the Hague Convention in practice in contemporary Japan.

6.3.1 Family Court Probation Officers

James refers to his children being interviewed by court investigators or social workers in September 2015. As discussed above, he is likely referring here to an interview by family court probation officers or family court investigators (katei saibansho chōsakan). The role these family court probation officers play is crucial to family law proceedings in Japan, including those brought under the Hague Convention, because of the influence they wield in shaping the evidence that goes before the court. Their role also warrants close examination due to the lack of clarity around how the evidence is gathered and to what extent it may be challenged. The Cook/Arimitsu case demonstrates how functions that are installed ostensibly to support the effective participation of parties in the legal process – in this case the role of family court probation officers – have the potential to undermine that participation. The voices of the children, particularly their objections to returning to the United States, were heard through the initial assessment of the family probation officer and proved crucial to the determination of the Supreme Court decision in relation to the two older children. In James’s case, his financial circumstances were
assessed as poor by a family probation officer and this assessment may have contributed to his ultimate and overall lack of success in his application under the Hague Convention in Japan.

The Supreme Court of Japan describes family court probation officers as ‘specialists in the field of behavioral sciences such as psychology, sociology and pedagogy’ (Supreme Court of Japan 2006a, 12). Family court probation officers are employed by the court to conduct investigations of family relationships in domestic family law disputes, personal status cases (such as adoption or guardianship), juvenile criminal matters, and return applications under the Hague Convention (Supreme Court of Japan 2006a, 12). The family court probation officer then submits a report to the judge, who refers to it in the conduct of the hearing (Supreme Court of Japan 2006a, 8). Family court probation officers receive their training over two years at the Training and Research Institute for Court Officials (saibansho shokuin sōgō kenkyūjo) in Tokyo, which is affiliated with the Supreme Court (Ichimiya 2012, 2). Candidates are admitted to the training course by passing an employment examination in human sciences. The course covers the study of relevant laws; human sciences, such as clinical psychology, developmental psychology, family sociology, criminal sociology, pedagogy, social welfare studies and psychiatric medicine; and practical skills, such as investigation practice and interview technique exercises (Supreme Court of Japan 2006b). Jones is critical of the family court probation officer system, noting that probation officers can play a determinative role in family court proceedings, despite there being no requirement for them to hold a tertiary degree in psychology, related fields or otherwise (2007a, 7). The examination is, however, aimed at those who have undertaken undergraduate or graduate studies in the relevant fields (Ichimiya 2012, 2–3). The Supreme Court of Japan requires candidates sitting the exam to have completed an undergraduate or graduate degree, or be expected to do so by
March the following year (Supreme Court of Japan 2017b). Further, selection of candidates for the course is limited, as evidenced by its low pass rate, being 8.6% in 2015, 11.2% in 2016 and 10.1% in 2017 (Supreme Court of Japan 2015, 2016 and 2017a).

Perhaps a more salient criticism of the Japanese family law process and its use of reports from family court probation officers is the significance afforded to these reports. There is no formal mechanism for parties to bring in their own psychological or psychiatric evidence in family court proceedings, and the non-custodial parent may not be able to gain access to the child to have them independently assessed in any event (Jones 2007a, 36 [note 78]). Further, the ability of parties to view and, if need be, dispute the content of a report produced by a family court probation officer is not guaranteed. According to a document produced for an Osaka Family Court committee meeting on 3 May 2005, as a general rule, parties to a proceeding who request to see or copy a report will be permitted to do so, in the interests of full disclosure to parties and to ensure that they have an opportunity to dispute it (Osaka katei saibansho iinkai 2005, 4–5). There is however, a broad discretion for the court to restrict the parties from viewing the report where there is a possibility that the child’s interests, or the personal or business interests of the parties or a third party, could be damaged by the release of the report (Osaka katei saibansho iinkai 2005, 4–5). Similarly, information provided on the Yokohama Family Court website states that parties may make an application to inspect or copy the case record, including reports from family court probation officers, and the judge will then decide on whether inspection is necessary, including determining whether there is anything that would prevent ‘harmonious discussion’

---

135 Conversely, family consultants in Australia are required to hold a tertiary qualification in a social science, usually psychology or social work, but were criticised in a 2017 parliamentary inquiry report for their lack of specialised training, accreditation or evaluation (Australian House of Representatives Standing Committee on Social Policy and Legal Affairs 2017, 273–6).
(enkatsu na hanashiai) (Yokohama Family Court 2017, 2). Again, the rights of inspection of parties are uncertain. The Japan Federation of Bar Associations has recommended that evidence used in conciliation or adjudication (shinpan) procedures that has not had the involvement of the parties, or that the parties have not had a chance to challenge, including the reports of family court probation officers and the findings of mediators, should not be accepted unfiltered in subsequent trial in the family court, nor should such evidence be used after a certain amount of time has passed (Japan Federation of Bar Associations 2001). It specifically recommended that conciliation and trial procedures should be changed so that the findings of family court probation officers are disclosed to all parties as a general rule, except where disclosure would be particularly inappropriate, and the parties have an opportunity to challenge those findings (Japan Federation of Bar Associations 2001).

When the import attributed to reports by family court probation officers is closely examined, it is apparent that the lack of access to a secondary expert or any appeal avenue is detrimental for parties given the stakes for non-custodial parents are so high. For example, a family court probation officer may be asked to undertake an investigation and collect material for the court on ‘whether or not there are grounds for limiting or prohibiting contact’ between a child and their non-custodial parent (Kajimura 2013, 249). These factors include an assessment of the risk of abduction by

136 By contrast, under the Family Law Act 1975 in Australia, parties to a proceeding in which a family consultant has been ordered to generate a family report (similar to that produced by a family court probation officer in the family courts in Japan), the parties and their legal representatives are provided with a copy of the family report and may call the family consultant as a witness and cross-examine them on the content of the family report if any matters are in dispute (Family Court of Australia 2013). Family consultants do, however, have immunity from suit in the performance of their duties in the same manner as a judge of the Family Court of Australia under the Family Law Act 1975 (s. 11D).
the non-custodial parent, risk of abuse of the child by the non-custodial parent, violence by the non-custodial parent towards the custodial parent, and the child’s wishes or objections (Kajimura 2013, 249–58). Further, investigations by family court probation officers are ordered in the majority of cases which reach court, further highlighting the importance of their transparency and integrity. In 2017, investigations were ordered by the court in 79.3% of all visitation cases, 81.1% of cases in relation to the handover of children, and 81.1% of cases involving the designation of physical custody (Supreme Court of Japan 2018a, table 41).

As discussed above, in James’s case, a family court probation officer determined that he was lacking the financial resources for the children’s appropriate care and upbringing, and had no likelihood of receiving any sustained assistance for the children’s care and upbringing from his family. While this evidence was not directly used by the Supreme Court to dismiss his appeal, it was noted by the presiding judges and may have helped to solidify the ultimate conclusion that James was impecunious and his lack of finances posed a grave risk of harm to his children. Leaving aside concerns about how James’s wealth or lack of it is relevant to a Hague Convention return application, it is not clear what evidence was used to form the conclusion made by the family court probation officer about James’s financial position, nor it is clear how this type of assessment fits within the realms of the family court probation officer’s role as a specialist in the field of behavioural sciences, as it seems to be more in consonance with the work of a forensic accountant. It is certainly a piece of evidence which would be robustly challenged in an adversarial setting.
6.3.2 Processing Time for Return Applications

Efficient processing of applications under the Hague Convention supports the treaty’s objective of the prompt return of children who have been wrongfully removed or retained away from their place of habitual residence (art. 1[a]). Again, time is of the essence in all family law cases involving Japan in order to prevent the crystallisation of a new status quo that a Japanese court may be reluctant to disturb.

The second hearing in James’s return application was listed for 30 September 2015, which was six weeks after James filed his return application in the Osaka Family Court. This is significant as article 11 of the Hague Convention requires the judicial or administrative authorities of contracting states to act expeditiously in proceedings for the return of children. Article 11 also provides for the Central Authority of the requested state, either on its own initiative or upon request of the Central Authority of the requesting state, to request a statement of the reasons for delay if the relevant judicial or administrative authority has not reached a decision within six weeks from the date of commencement of the proceedings. Japan’s Implementing Act adopts similar provisions in articles 30 and 151. Article 30 requires that courts shall endeavour to ensure that return application proceedings are carried out fairly and expeditiously. Article 151 allows the party making a return application or the Minister of Foreign Affairs to seek an explanation from the relevant court regarding the status of the proceeding where six weeks have elapsed since filing.

The decision of the Supreme Court of Japan, the final decision in the Cook/Arimitsu case, was handed down more than 30 months after James filed his return application under the Hague Convention. This is far above the average time for final resolution of return applications by member states under the Hague Convention, which, in 2015 was 290
days in cases where the return was judicially refused on appeal (Lowe and Stephens 2018, 25). The number of appeals in a given matter has been, not surprisingly, found to increase the lifespan of an application and in James's matter, as described above, Hitomi appealed almost every decision along the way (Lowe and Stephens 2018, 25).

On the face of the statistics, Japan does not appear to have a particular issue with expediency. The average time between its Central Authority receiving an application and a final decision being reached was 182 days in 2015 (Lowe and Stephens 2018, annex 8, i). This is comparable to Australia, which recorded an average time of 176 in 2015, and is much less than the United States with an average timeframe of 208 days (Lowe and Stephens 2018, annex 8, I and ii). These neat statistics do not, however, realistically capture the conundrum of cases where a final decision has been reached but no return has been achieved due to lack of enforcement options.

6.3.3 Access

James describes being refused access to his children during the time his return application was being processed and as proceedings advanced through the Osaka Family Court and Osaka High Court. Securing visitation time for a left-behind parent who is waiting on a determination of a return application under the Hague Convention is important from the perspective of preserving the relationship between the parent and child. It is also regarded as strategically significant by lawyers practising in these applications (see Renwick 2015, 8; Morley, n.d.). The failure of a custodial parent to make a child available to spend time with a left-behind parent can be regarded as a mechanism to attempt to gain an advantage in legal proceedings by destabilising the relationship between the child and the other parent and attempting to establish a new status quo for the child. This goes to the heart of the issue faced by the Hague
Convention: that in removing their children from their place of habitual residence, parents may seek to establish jurisdictional ties which are essentially artificial, thereby legalising the new factual situation (Pérez-Vera 1982, 429). Having the left-behind parent continue to have contact with the child, or at least make persistent attempts to do so, is a way of disrupting the artificial situation created by the wrongful removal or retention of the child.

One of the Hague Convention’s two stated objects is that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states (art. 1[b]). Under the treaty, Central Authorities are bound to take appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access (art. 7[f]). They must also take appropriate preventative measures to prevent further harm to the child or prejudice to interested parties (art. 7[b]). While Japanese courts are not explicitly required to facilitate visitation during the course of a return application, the Implementing Act allows interlocutory orders to be made (art. 97). An order for visitation would be certainly supportive of the philosophy of the Hague Convention ‘to provide children with family relationships which are as comprehensive as possible’ (Pérez-Vera 1982, 432), although, as discussed in Chapter 7, such an order would contribute to the creation of a ‘two track system’ of family law within Japan. It is not clear whether James made any formal application to the Osaka Family Court for visitation, or if any interim order was made. He concluded that the lack of visitation was a consequence of Hitomi’s recalcitrance: ‘As with all matters, including the court, if Hitomi doesn’t want to do it, she doesn’t’ (US House Committee 2016, 71). Again, this relates to lack of enforcement measures available to parties, as discussed at 6.3.5.
In general, Japan’s track record with respect to access applications under the Hague Convention is questionable. As noted at the start of this chapter, the Ministry of Foreign Affairs does not provide statistics on the outcomes of these applications. According to Jeffery Morehouse, a US left-behind father and executive director of Bring Abducted Children Home (BAC Home), out of 30 cases for access under the Hague Convention which he had been involved in, three parents had reported having one Skype session with their children, another reported three Skype sessions before being cut off again, and none had gained any unfettered access to their children (US House Committee 2018b, 6). It seems the same issues experienced by non-custodial parents in seeking meaningful access under domestic law are now experienced by parents under the Hague Convention too.

6.3.4 Expanded Exceptions to Return under the Implementing Act

As discussed in Chapter 3, many international commentators expressed alarm at Japan’s extension, by way of its domestic law, of the grounds its courts could use to reject an application under the Hague Convention. The Cook/Arimitsu case confirms for the first time at the highest level that Japan’s courts are prepared to use these extended grounds to make quasi-custodial rulings in return applications, outside the ambit of the treaty itself.

In its decision at first instance, the Osaka Family Court refused to order the return of James and Hitomi’s two older children to the United States, based on their objection to returning. The decision is not publicly available so it is not possible to ascertain the nature of the children’s objections, nor the evidence upon which it was determined it was appropriate to take their views into account. In any event, as discussed in Chapter 3, the Hague Convention provides for a number of grounds upon which a judicial or
administrative authority must or may refuse to order the return of a child (art. 13).
These include a provision that a return application may be refused if the child objects to
being returned and has attained an age and degree of maturity at which it is
appropriate to take account of the child’s views, taking into consideration information on
the child’s social background provided by the Central Authority or other competent
authority of the child’s habitual place of residence. Similarly, the Japanese
Implementing Act sets out a number of grounds upon which a court must or may refuse
the return of a child pursuant to an application for return under the Hague Convention.
This includes a provision to the effect that a court must not order the return of a child
when it finds that the child objects to being returned and it is appropriate to take
account of the child’s views in light of his/her age and degree of development (art.
28[1][v]). This creates a prohibition, rather than the discretion found in article 13 of the
Hague Convention. The Implementing Act does, however, create a discretion by adding a
proviso to article 28(1)(v): the court may still order the return of child if it finds that it
serves the interests of the child to have him/her returned to his/her state of habitual
residence after taking into account all the circumstances. While it is a subtle deviation
from the wording of the Hague Convention, the provision in the Implementing Act gives
greater weight to the objections of children to a return; their interests in denying a
return are a discretionary assessment to be made by the court. The wording of the
Hague Convention suggests, however, that a child’s objection is to be assessed
holistically against the purpose of the treaty and the factual context of a given
application.

This is not the only instance in the Cook/Arimitsu case in which the Implementing Act
was used to alter the substantive effect of the Hague Convention. Chapter 3 examined
the expansion under the Implementing Act of what constitutes a ‘grave risk’ of physical
or psychological harm or otherwise intolerable situation for a child upon their return, as
set out in article 13(b) of the Hague Convention. In particular, article 28(2) of the
Implementing Act extends the ‘grave risk’ defence provided in the Hague Convention to
provide a checklist of factors for courts to consider in determining whether a grave risk
to a child exists if they were to be returned to their place of habitual residence (art.
28[2]). In the decision of the Supreme Court of Japan, James Cook appears to have
fallen foul of one of these factors, in particular, ‘whether there are circumstances in the
child’s place of habitual residence that make it difficult for the applicant or respondent
to provide care for the child’ (art. 28[2][iii]). The determination by the Supreme Court of
Japan that the children (or specifically, the two younger children as the legal analysis
went) were to stay in Japan as James lacked the financial means to care for them is
controversial as it represents an expansion of the ‘grave risk’ defence in terms of
jurisprudence at the highest level and demonstrates the willingness of Japanese courts
to impinge upon substantive issues of custody under the guise of a determining a return
application under the Hague Convention.

6.3.5 Lack of Enforcement Measures
The Cook/Arimitsu case also sharply highlights the lack of enforcement capacity of the
courts and other officials in relation to return orders under the Hague Convention in
Japan. For approximately 12 months, James had a valid court order for the return of his
children to the United States that he was unable to enforce, despite exhausting all
available legal avenues. The lack of genuine enforcement options available to parties
under the Implementing Act renders the Hague Convention in Japan a toothless tiger.
To date, there has been no case in Japan whereby a child has been returned to their
state of habitual residence through enforcement of the child’s release pursuant to a final
order (MOFA 2017, 2).
The lack of enforcement of court orders in Japan was flagged as a linchpin problem with the family law system long before the commencement of the Hague Convention in 2014 (see, for example, Jones 2007a; comment by Steve Christie in Lah 2009d). Former Minister for Justice, Satsuki Eda, told the Judicial Affairs Committee of the National Diet in May 2011, in the context of discussing amendments to article 766 of the Civil Code requiring divorcing couples to come to agreement on child care and access, that indirect enforcement methods were not effective (National Diet of Japan 2011b, 12). Furthermore, according to the Ministry of Justice, the Supreme Court of Japan estimates that direct enforcement of judicial decisions under domestic law for the return of children within Japan has only a 30% success rate (MOJ 2019). As noted above, the Implementing Act introduced direct enforcement by way of compulsory execution by substitute for the first time in family law matters as a new system of enforcement. As James’s case highlights, this new system has not worked effectively.

This lack of enforceability of return orders under the Hague Convention has been recognised to a certain degree at the executive level in Japan and abroad. In consecutive annual reports on compliance with the Hague Convention, the US Department of State has recorded concern regarding Japan’s ability to promptly and consistently enforce return orders (US Department of State 2016 and 2017), and this concern escalated in its 2018 report, when it formerly identified Japan as demonstrating a pattern of non-compliance for the first time (US Department of State 2018a; discussed further in Chapter 7). In Japan, a study group was convened by the Ministry of Foreign Affairs in 2017 to review the operation of the Implementing Act, three years from its enactment as required by the Judicial Affairs Committees of both Houses of the National Diet at the time the Implementing Act was approved in 2013 (MOFA 2017, 1). The study group noted the lack of success in enforcing return orders under the Implementing Act and
made a number of recommendations. These included discussion of training of court enforcement officers on the unique nature of the handover of children (MOFA 2017, 7–8); amendments to the provision of the *Implementing Act*, which requires the abducting parent to be present while enforcement action is undertaken by the court enforcement officer (MOFA 2017, 8); and the need to promote flexibility in the locations at which enforcement action is undertaken (MOFA 2017, 8). These recommendations essentially keep the current, and largely fruitless, system of enforcement intact. Despite the complete lack of success in enforcing return orders under the *Implementing Act*, the study group concluded that the number of cases in which enforcement by substitute had been attempted was limited and further monitoring was necessary (MOFA 2017, 5). It should be noted that the legislative advisory committee (*hōsei shingikai*) of the Ministry of Justice convened a subcommittee in November 2016 to consider reform of the Civil Execution Act, including procedures for the handover of children in the wake of the implementation of the Hague Convention in Japan. The subcommittee finalised an outline of its proposed recommendations on 31 August 2018 (MOJ 2018e) and these were adopted by the legislative advisory committee on 4 October 2018 and submitted to the Ministry of Justice (see MOJ 2018b). A cabinet decision has since been made on the proposal, and on 19 February 2019 it was submitted to the House of Representatives for deliberation (MOJ 2019). The subcommittee recommended a number of amendments to the *Implementation Act*, including the following:

Making provision for other circumstances in which an obligee (usually the left-behind parent) can apply for direct enforcement by way of compulsory execution. Currently, the *Implementing Act* requires that an order for indirect compulsory execution (normally a

---

137 This refers to article 140(3), which provides that necessary acts for releasing the child from the care of the obli­ger as defined in the *Implementing Act* may be carried out only when the child is with the obli­ger.
financial penalty) must be made before a party can file for an order for execution by substitute (art. 136). Under the proposed amendments, an application for indirect enforcement could also be made where there is no reasonable prospect of the obliger (usually the taking parent) returning the child to their habitual residence even if an order for indirect enforcement were to be made, or where immediate execution by substitute to return the child is necessary to prevent imminent risk of harm to the child (MOJ 2018e, 12).

Changing the ‘simultaneous existence’ requirement that the obliger is to be with the child at the time of the compulsory enforcement action to require the obligee to be there instead (MOJ 2018e, 12) and empowering the enforcement court to appoint an agent for the obligee, on petition by the obligee if they are not able to attend the place where the enforcement action will take place, having regard to the knowledge and experience of the proposed agent, their relationship with the child and the child’s interests (MOJ 2018e, 13). In turn, enforcement officers would be empowered to facilitate the entry of the obligee (or their agent) to the building in question and their meeting with the child (MOJ 2018e, 13).

Changing the requirement that an occupier (who is someone other than the obliger) must give consent for the enforcement officer to undertake the enforcement action on their property to allow an enforcement court to authorise the entry onto to the property. Creating a new provision that the court must ensure, to the extent possible, that the actions taken in the compulsory execution by substitute of the return of a child does not have any adverse physical or psychological effect on the child (MOJ 2018e, 14).
Interestingly, the subcommittee also made recommendations to clarify the domestic legislation relating to the handover of children in family law disputes within Japan. As noted above, there is currently no legislation specific to the handover of children in domestic disputes. In convening the subcommittee, the legislative advisory committee referred to an increased will to clarify the execution process in relation to the handover of children under the domestic law as a result of rules being established for compulsory execution under the Hague Convention regime (MOJ 2016, 10). Committee member Professor Shinichirō Hayakawa of the University of Tokyo made a strong statement in support of the revision of the law relating to the handover of children, noting that the non-enforcement of court orders had always been problematic, but it had recently escalated to a situation where there seemed to be no respect for orders of the court (MOJ 2016, 13). Although it did not envisage an ‘execution by substitute’ system being put in place domestically, the subcommittee made recommendations to put in place a system of compulsory execution, which, in many ways, parallels that under the Implementing Act. This includes recommendations that legislation for domestic cases contain the same provisions for when a petition for compulsory execution can be made, as under the proposed widened criteria under Implementing Act (MOJ 2018e, 7–8). These criteria are that the powers of enforcement officers be delineated in a similar fashion to those under the Implementing Act (MOJ 2018e, 8–9); that the enforcement court be given the power to authorise entry to properties other than those of the obliger (MOJ 2018e, 9); that there be a provision that the obligee or their agent be in attendance at the time of the enforcement action without requiring the ‘simultaneous existence’ of the obliger and child (MOJ 2018e, 9); and that the court be required to ensure, to the extent possible, the avoidance of harm to the child by the enforcement action (MOJ 2018e, 10).
As noted above, the recommendations of the subcommittee have been submitted to the Ministry of Justice for the relevant bills to be drafted, which will then eventually be presented to both houses of the Japanese Diet. Time will tell how the recommendations of the subcommittee crystallise in actual law. Certainly, the recommendations made seem sensible in the context of the Cook case. In particular, the provision widening the circumstances in which direct enforcement may be ordered would save time for parents like James by dispensing of the requirement for preliminary indirect, and often ineffective, enforcement measures. The provision empowering enforcement courts to authorise entry to properties where the obliger is not the occupier also gives more weight to orders for direct enforcement and lessens the likelihood that a taking parent may decamp with the child to the home of a relative or friend, leaving the enforcement officer in the hopeless position of having to persuade that person to allow them access to their property. The proposed new provision requiring courts to protect the interests of the child does, however, have the scope to dampen the effectiveness of these changes; how this translates in the law and the courts will determine the influence it is permitted to have. One prominent left-behind parent, Walter Benda, has also raised doubt that even with the proposed amendments in place, authorities tasked with enforcing return orders will side with a foreign parent (Ryall 2018).

Further, while the proposed change to the ‘simultaneous existence’ provision in the Implementing Act increases the chances for direct enforcement action to take place, it does not necessarily remove the emotional sting from it. The removal of a child from the custody of a relative, child-care facility or school will be nonetheless traumatic and engenders a sense of fear on the part of the taking parent, who will not want to leave their child’s side. Hence, while the proposed changes are better than the law currently in place, the way the procedures under the Implementing Act play out in real life will
remain problematic, even if they are amended as per the subcommittee’s recommendations.

Murakami highlights a salient point in the context of enforcement that the purpose of a return order under the Hague Convention is not necessarily to compel the handover of a child to the left-behind parent, but to effect the return of the child to the child’s state of habitual residence (2014, 35). It is therefore unfortunate that the direct enforcement procedure under the Implementing Act tends to set up an emotional show-down between the parents, with the child stuck in the middle. The method of direct execution by substitute in place under the Implementing Act seems both ineffective at achieving its intended goal of releasing the child and highly effective at inflicting potential psychological damage on them. A less ‘zero-sum’ approach to the issue of enforcement is desirable; a return order is not, after all, a final custody determination. The Hague Conference makes a number of helpful recommendations in its best practice guidelines on enforcement of return orders. The best practice guidelines recommend that courts should make return orders as detailed and specific as possible, including the practical details of the child’s return and coercive measure to be employed if necessary (Hague Conference 2010, 21). To this end, courts are recommended to invite the input of parties on the practical arrangements to be incorporated in the return order (Hague Conference 2010, 21). Courts are also encouraged to consider a return order with cascading options, starting with the least drastic (and therefore probably the least effective). I refer the reader to the following example in the best practice guides: ‘The Court orders the immediate return of the child to State X and permits the respondent mother to accompany the child. Should the mother fail to return the child before (date), the Court orders the child to be returned to the father’s custody with a view to returning to State X’ (Hague Conference 2010, 23–4). The importance of detailed return orders to the
enforcement process was affirmed by a Special Commission on the practical operation of the Hague Convention in 2017 (Hague Conference 2017, 3). This approach increases the certainty of the return process for all parties and reduces wasted time when one avenue fails and another has to be implemented (Hague Conference 2010, 24). It is conceded, however, that such latitude in tailoring orders as proposed above runs counter to the basis of the Japanese civil law system; unlike common law courts, Japanese courts do not have a broad power to create equitable remedies (Haley 1996, 118).

In any event, for orders made under the Hague Convention to operate efficiently in Japan, they would need to be underpinned by some substantive coercive measures. Significant change to the enforcement regime in Japan would require significant will on the part of the legislature to equip the Implementing Act with the ‘enforcement teeth’ that it needs to be a meaningful piece of law. Bearing in mind that the current enforcement system is derived from the Japanese domestic enforcement system in civil matters, it is difficult to see how substantive change could occur without correlating reform in the domestic sphere; the difference between the two systems would otherwise be too vast for the Japanese government to justify to its people. Australia provides a good example of how a strong domestic enforcement structure can support orders made under the Hague Convention. Under the Family Law (Child Abduction Treaty) Regulations 1986, which give practical effect to the Hague Convention in Australian law, the court has a broad discretion in Hague Convention cases to make any order it considers appropriate to give effect to the treaty (sec. 15[1]), including placing the child in the care of the state pending their return or placing an injunction upon the taking parent restricting their living arrangement prior to the return (see Kirby 2000, 39–41).

Justice Joseph Kay, formerly of the Family Court of Australia, also highlights the importance of detailed return orders in enhancing their potential for compliance (2000).
While these are useful measures to encourage compliance with return and other orders, courts determining matters under the Hague Convention in Australia draw their leverage to enforce orders made under the treaty from domestic law (Kay 2000, 44). Under the *Family Law Act 1975*, courts have the power in domestic cases to deal with parents failing without reasonable excuse to comply with an order affecting a child with penalties ranging from a post-separation parenting program through to imprisonment (div. 13A; sec. 112AD), as well as the power to punish contempt of court (sec. 35 and 112AP) and breaches of its orders more generally (that is, not only parenting orders; sec. 112AD), including imposing a fine, bond or term of imprisonment where there is no reasonable excuse for the contravention. Orders made pursuant to the Hague Convention are regarded as orders made under the *Family Court Act 1975* and, as such, the court can draw on these general enforcement remedies in cases where a return order has been breached (Kay 2000, 44). As is to be expected with a legislative instrument designed to manage human relationships, even strong enforcement measures can fail to ensure the return of children under the Hague Convention, but at least more robust enforcement tools would give more applicants a greater chance of having their hard-fought return orders come to fruition.

139 See, for example, the decision of the Full Court of the Family Court of Australia on 28 July 2006 in *Re F. (Hague Convention: Child’s Objections)* (2006) FamCA 685. In that case, a child was removed to Australia from the United States and an order for his return remained executed over a period of almost 18 months due to a combination of events, including a natural disaster and both parents lacking the money to pay for the travel. After almost three years had elapsed since the child was taken, and in the face of the objections of the child (then 12 years old) to returning, the Full Court found it would not be appropriate to maintain the return order. Two attempts had been made approximately three months earlier to have the child board a plane to the United States, including the use of mild force on the child by the Australian Federal Police at the airport.
It is significant that the legislative advisory committee has proposed amendments to the *Civil Execution Act* that largely mirror the *Implementing Act*; this shows that Japan’s participation in the Hague Convention has had some effect on the way its domestic law operates. Unfortunately, the minor changes to the procedures under the *Implementing Act* and the *Civil Execution Act* will not strengthen the ability of courts to enforce return orders under the Hague Convention in Japan in any way that will alter the practical outcomes of return orders.

### 6.3.6 The Use of Habeas Corpus

In response to the dearth of effective enforcement options under Japanese law, the ancient common law writ of habeas corpus has been employed as a legal mechanism used by left-behind parents to ‘free’ their children from wrongful retention by the other parent. While Japan has been criticised for diminishing the effectiveness of habeas corpus through its domestic laws, the Supreme Court of Japan issued a judgement in March 2018 affirming the application of the writ in Hague Convention matters. In that case, the Japanese father had obtained an order for his child to be returned to the United States under the Hague Convention, but direct enforcement by compulsory  

---

140 The Habeas Corpus Rules (*jinshin hogo kisoku*), established by the Supreme Court in 1948 under its rule-making power conferred by the Constitution of Japan (Jones 2017a, 423), limit the circumstances in which a writ of habeas corpus may be sought to situations where (a) the action, judgement or disposition relating to the restraint is done without authority or (b) the restraint is in gross violation of the methods and procedures specified by laws and regulations (rule 4). This creates a sliding scale of illegality and leaves it open to courts to reject habeas corpus even in matters where illegality is established (see Jones 2017a). The Habeas Corpus Rules also prevent a petition for habeas corpus being made against the freely expressed wishes of the person who is restrained (rule 5). The UN Human Rights Committee has criticised the restrictions on habeas corpus in Japan, in particular rule 4, on the basis that impeding the effectiveness of the remedy to challenge wrongful detention is in violation of Japan’s obligations relating to personal liberty under the ICCPR (1998)
execution by substitute at the mother’s home failed in May 2017; the mother strongly resisted the enforcement action, hiding with the child in a bed (jinshin hogo seikyū jiken 2018, 2). Just as in James’s case, the execution effort was abandoned (jinshin hogo seikyū jiken 2018, 2). The Japanese father then applied for habeas corpus to release his child, and when this was rejected at first instance by the Nagoya High Court, he appealed to the Supreme Court (jinshin hogo seikyū jiken 2018, 3). The Supreme Court overruled the first decision on 15 March 2018 and remitted the matter back to the Nagoya High Court, which granted the writ of habeas corpus in July 2018 (Kyodo News 2018). The Supreme Court’s decision is striking in its empathetic analysis of the effects child abduction has on children’s development. The child in that case strongly rejected returning to the United States and made allegations that his father would drink and become verbally abusive (jinshin hogo seikyū jiken 2018, 2–3). In spite of this, the court recognised that a child’s ability to express their free will on important decisions depends on their capacity to obtain comprehensive and objective information (jinshin hogo seikyū jiken 2018, 4). The court concluded that the mother had unduly influenced the child’s emotions and that her continued custody of the child in Japan could be characterised as restraint (jinshin hogo seikyū jiken 2018, 4). The Supreme Court also found that the continued custody of a child in Japan in violation of a final and binding order to return order under the Implementing Act is conspicuously illegal, in the absence of any circumstances where the return would be extremely unjust (jinshin hogo seikyū jiken 2018, 5–6).

141 Given the Nagoya High Court proceeded to judgement in the matter on the retrial, it would be reasonable to assume the mother and child were present in court and the child was returned to his father at the conclusion, although this is not confirmed. According to Jeffery Morehouse’s testimony at a US House Committee hearing on 10 December 2018, the mother and child immediately fled the court room after the decision and the child’s release is yet to be enforced (US House Committee 2018b, 7).
Under the *Habeas Corpus Act (jinshin hogo hō)*, a person summoned to a hearing on a writ of habeas corpus must produce the restrained person to the court; if they fail to do so, they may be arrested or placed in custody until they obey the order (art. 12). While the fine is low (a maximum of ¥500 per day), the threat of arrest and the immediacy of the requirement to have the child produced in court means that the enforcement remedies available to left-behind parents under the *Habeas Corpus Act* are more robust than those provided by the *Civil Execution Act* and the *Implementing Act*. While outcomes for left-behind parents in domestic parental abduction cases have been equivocal over the past 25 years,¹⁴² the most recent Supreme Court ruling on habeas corpus in March 2018 is a positive sign for left-behind parents and makes for a fascinating juxtaposition with its decision in James’s case. If it weren’t for Hitomi’s application for modification of the final order, James would have been able to apply for a writ of habeas corpus too. The parallels between the cases are clear; in each, the children in question expressed strong objections to being returned under the Hague Convention and there were questions raised about each father’s fitness as a parent. The questions raised about James’s financial capacity were much less serious than the allegations of abuse against the father raised by the child in the Supreme Court decision on habeas corpus. The difference in outcomes, incongruous as they may seem, came down to the different legal test applied.

¹⁴² Professor Taichi Kajimura, a former judge of the Tokyo District Court, has compiled a review of Japanese cases involving custody disputes and this shows 12 cases where a writ of habeas corpus was sought between 1992 and 2012 (2015, 31–43). There was a flurry of appeals to the Supreme Court, eight in total, between 1992 and 1999, of which the Supreme Court dismissed one appeal of a grant of habeas corpus, dismissed one appeal of a refusal of habeas corpus, and reversed three approvals and three dismissals and reverted them back to the courts of first instance. Most recently, four requests for habeas corpus were made to and rejected by district courts between 2001 and 2012.
6.4 Conclusion

I foolishly thought that a justly rendered and affirmed court order was enough to complete my Hague process ... I thought for sure this would be the end and our children were soon to be heading back ... Again, not even close. (statement of James Cook; US House Committee 2016, 72)

The Cook/Arimitsu case documents the workings of the Hague Convention in Japan from beginning to end, and in this way, it is extremely valuable. In signing the Hague Convention, Japan crossed an important boundary and accepted the structure of international law as a means of managing parental abduction cases; it has done so, however, with the open intent of restricting its application by expanding the category of exceptions available to Japanese courts to reject an application for the return of a child. Further, the practical difficulties of having a return order under the Hague Convention actually enforced seem to render it unworkable. Anything built on shaky foundations is bound to end in ruins, after all. Regular commentators on Japanese law have adopted a tone of weary resignation, a kind of ‘we told you so’ attitude when analysing this case. One describes the Supreme Court decision as a ‘roadmap for further abductions to come’ (Jones 2017b), while another said it was ‘completely predictable’ (Morely 2018). The fact that the Implementing Act was largely yoked to Japan’s existent and problematic system of enforcement has, in a way, established the treaty on shaky ground.

A mixture of internal and external forces, representing the ebbing and flowing of social, political and legal boundaries, has led to Japan signing the Hague Convention. These forces continue to impact the domestic and international landscape. How Japan will manage future cases of international child abduction will be watched closely by citizens of Japan and other states alike. The timeframes involved in the case lead one to consider
what the outcome would have been if Hitomi had acted just a couple of months earlier in wrongfully retaining the children in Japan, prior to the Hague Convention coming into force in Japan. James would have been left with the options of obtaining a custody order in the United States and attempting to enforce it in Japan, or attempting to enforce his rights of custody under domestic law in the Japanese courts. James did in fact obtain a US court order for the return of the children to Minnesota, which Hitomi has ignored and James has been unable to enforce while she remains outside the United States. It is not known whether he has pursued any family law proceedings under domestic law in Japan, but his chances of success would have to be assessed at nil, given the finding of the Japanese Supreme Court that he is unable to care for the children. This foray by the court into matters of substantive custody, which, under the Hague Convention, are as a matter of principle to be determined in the child's habitual residence, has a particular sting in the tail given the state of Japanese custody law, where there is very little middle ground, given the almost complete lack of any conceptual or legal framework for shared parenting. James not only lost his Hague Convention application; he also effectively lost his custody rights under Japanese law at one fell swoop. The ultimate outcome for James, combined with the hopeless situation he found himself in while trying to enforce the return order he did have, demonstrates that the Hague Convention, for all its symbolic political power for Japan, is currently extremely limited in its social and legal utility.
Chapter 7

Analysis and Concluding Remarks

7.1 Introduction

In his study of the devastating earthquake and tsunami which hit Japan’s Tōhoku region on 11 March 2011, Richard Lloyd Parry meditated upon the significance of the many stories of tragedy that he encountered:

There is no tidying away of loose ends to be done ... only more stories to be told, and retold in different ways, and tested like radioactive material for the different kinds of meaning they give out. Stories alone show the way. (2017, 257–8)

Left-behind parents also tell stories of immense grief and despair. Some liken the abduction of their child to a kind of death (see, for example, Chiancone, Girdner and Hoff 2001, 1; Inbar 2009). There is also no prospect of neatly wrapping up the many threads of these stories in a resolution. What, then, can these stories of grief and despair tell us? Can they point to a better way of doing things?

International parental child abduction is an issue which concerns a diverse population, regardless of nationality, race or socioeconomic status, as demonstrated in the case studies presented in this thesis. In this chapter, through the prism of my secondary research question and with a view to envisaging a better legal process, I review the key themes that have emerged from the case studies. I look at the effect of personal attributes of the parties on the way these stories play out and examine how these mingle with socioeconomic capacity and what this can tell us about broader notions of justice.
This chapter also contemplates the distinction between the cases from the pre- and post-Hague Convention-era in Japan and questions the significance of the treaty to date, particularly in the context of Japan’s extant domestic family law system. I argue that the implementation of the Hague Convention in Japan has created a ‘two track’ family law system. Overarching all of these factors is how the international parental child abduction issue and Japan’s handling of it has affected its standing as a global power; I argue that this issue has the potential to detract from Japan’s image in the world.

Finally, I draw together the findings of my thesis into macro conclusions, to answer the research questions posed at the outset. I examine the broader concept of the best interests of the child and discuss of the problem of fitting objective legal standards and instruments to the messy and painful situations arising from international parental child abduction, and end by proffering some suggestions for a better legal process.

7.2 The Problem of Socioeconomic Capital

Looking at how the stories in these case studies played out, two closely intertwined themes of legal literacy and media literacy can be seen running through them. The accrual of and ability to exercise these capacities is heavily dependent on individual socioeconomic capital. While the meaning of the term ‘media literacy’ is much debated (Potter 2009, 561–2), it conventionally refers to the capacity of an individual to ‘decode, evaluate, analyze and produce both print and electronic media’ (Aufderheide 1993, 1), including an ability to manage symbolic as well as literal forms (Hobbs 2001). Here, it used in a broad sense to describe the capacity to access avenues of media production and create and control content. ‘Legal literacy’ refers to legal awareness and the extent to which one is equipped to engage fully in the legal process; this incorporates an individual’s ability to understand the law and undertake their own enquiries regarding
their legal options, the ability to engage quality legal representation, and the capacity to oversee the running of their legal matter and extract the best results from their legal representation, or competently represent themselves. Media literacy and legal literacy are intimately connected with the acquisition of socioeconomic capital, which represents the intersection between economic capital (money or assets) and social capital (social networks) (Bourdieu 1986). The synergy between these themes means that analysed together, we see how a high level of wealth, education and access to social connections can enhance one's ability to attract public attention to a personal cause and to pursue this cause to the fullest legal extent.

7.2.1 Media Literacy

Christopher Savoie used traditional media to attract attention to his cause when he spoke to reporter Phil Williams of local Nashville station NewsChannel 5 about the abduction of his children by Noriko, even prior to leaving for Fukuoka in his attempt to return them to the United States (see, for example, NewsChannel 5 2009c, 2009f and 2009n). In those early interviews, Christopher hinted at the dramatic future action that he would take in Fukuoka: he recalled that he told Isaac on the telephone, shortly after he was taken to Japan by Noriko, ‘Get yourself to an embassy some day. Remember these words’ (2009f). Williams subsequently followed the story intensely once Christopher was arrested, publishing no less than 19 articles in 2009. This demonstrates how closely related the media and parents become in high-profile parental child abduction cases and raises queries over how close they ought to be. Should we

143 In his seminal work on the forms of capital, Pierre Bourdieu (1986) posited that measurement of one’s social capital is a two-tiered process: it depends on the size of one’s available network of connections, as well as the amount of economic, cultural or symbolic capital held by each of one’s connections. Also see this work for a further discussion of the different types of capital and their capacity for conversion.
understand family law disputes as entertainment as well as human tragedy?\textsuperscript{144} NewsChannel 5 involvement with Christopher and Amy Savoie was so intensive that Williams took the unusual step of writing an article about why he didn’t tell the story from ‘the other side’ and indicated a degree of subjective support for Christopher’s plight (P. Williams 2009). The comprehensiveness of the coverage prompted one commenter to ask, ‘Does Mr Savoie own news ch. 5 [sic] or something?’\textsuperscript{145} Conversely, Noriko Savoie has a very low public profile. She is the silent actor in this case. The transcript of the hearing in March 2009 regarding the restraining order is one of the rare times her voice is heard and, even then, it is under the stress of examination by lawyers. Williams stated that he had worked closely with CNN’s Tokyo correspondent to get an on-screen interview with Noriko, and that a CBS news producer had also tried, but Noriko had declined (P. Williams 2009).

Although there was some public interest in parental child abduction involving Japan at an earlier stage (see, for example, Buckland 2006), the issue did not gain full international attention until Christopher was arrested in Japan in 2009. The story

\textsuperscript{144} In a now infamous example of the pitfalls of journalism crossing into family law, in 2016, Australian journalist Tara Brown and her crew were arrested in Lebanon after reporting on a failed recovery of two Australian children who had been retained there by their father in violation of their mother’s rights of custody. Brown’s television show, \textit{60 Minutes}, reportedly paid child recovery agents Child Abduction Recovery International to undertake the recovery of the children in return for a story from the child’s mother, Sally Faulkner. Faulkner was also arrested and reportedly relinquished her custody rights as part of the negotiated release for her and the \textit{60 Minutes} journalist and crew (Callinan 2016a). A later report issued by the show’s network conceded that ‘We got too close to the story and suffered damaging consequences’ (Quinn and Bowden 2016).

\textsuperscript{145} See comment by ‘Green Hills’ on 6 October 2009, in response to the online article, ‘Recordings reveal kids, mom who abducted them’ (NewsChannel 5 2009l).
gained widespread international coverage, fuelled by the drama of Christopher’s arrest and incarceration, the public interest in the details of the Savoies’ marriage, confusion surrounding Christopher’s citizenship status, and his frequent display of his socioeconomic capital as a wealthy, highly intelligent and bilingual white American man. Further, Christopher is culturally and linguistically literate in Japanese society and well-connected in the US (meaning he has friends in high places). Public familiarity with the case has been sustained, as evidenced by a letter to the editor in the *Japan Times* in 2017, eight years after Christopher was arrested, which exclaims, ‘Thank God for Christopher Savoie’ while lamenting the state of Japanese family law (G. Piper 2017).

Christopher and Amy Savoie’s high level of social and economic capital and attendant ability to articulate their story did much to raise the media profile of the Savoie case. Its high profile meant that the case gained status as a media, if not legal, precedent of the potential perils associated with international marriage in the context of legal systems ill-equipped to deal with the complexities of cross-border custody disputes, as well as an example of ‘how international divorces can get ugly’ (Ito 2009). Christopher has positioned himself as a sympathetic, articulate and knowledgeable representative of left behind fathers (see Lah 2009a; News Channel 5 2009h). Shortly after Christopher’s release from jail, Amy acknowledged the couple’s wider role as spokespeople for the issue of children abducted by their parents to Japan (Lah 2009a). Christopher appears to have taken on this role willingly, as he reportedly wrote in a letter to Amy from jail: ‘In a strange way I am really quite grateful to God for this challenge ... it has afforded us to shine a bright light on an important injustice ... It is my hope that our ordeal will in the end help countless people in both Japan and the United States’ (cited in Newschannel5 2009h).
Like Christopher Savoie, Masako Akeo has positioned herself as a spokesperson for left-behind parents and an advocate for change in Japan’s family law system. She has made herself available to appear in press conferences in Japan (see, for example, Suzuki Akeo, Mayama and Tanase 2016) and newspaper interviews in Canada (see, for example, Bramham 2013), and started a left-behind parents’ support group. Despite her efforts to attract attention to her cause, Masako’s story does not have the level of public recognition that Christopher Savoie’s or James Cook’s stories have. Perhaps this relative indifference to her story is indicative of the sentiment that private family matters like this are not news in Japan, as discussed in Chapter 4. Masako’s public profile is driven predominantly by her role as ‘community organiser’, which has been facilitated by her use of social media (I discuss this in more detail later in the chapter).

While Christopher’s story is associated with high drama, which so often correlates with public interest, no one could deny that cases such as Qin Weijie’s also contain dramatic elements (including, in his case, an airport arrest and a reunion of a mother with her daughters after many years). They simply do not, however, have the ‘pulling power’ of the Savoie case. Cases of ‘outgoing’ abduction, such as Qin’s case and that of Kayako Yamada, attracted only moderate national attention in the Japanese press at the time. James Cook’s story has attracted only a fraction of that of the Savoie case at the national and international level; even his recent petition to impeach judges of the Supreme Court, a drastic step by any measure, seemed to be picked up only in the media in Japan (see Jones 2018). Other more conventional ‘incoming’ cases, such as that of US man Toshiro Sugimoto, received barely any media attention at all.¹⁴⁶

¹⁴⁶ A search of the news database ‘Factiva’ returned only one relevant result for ‘Toshiro Sugimoto’ as at 8 September 2018.
As noted in Chapter 5, silences in media and public discourse can tell us as much about a story and the society in which it unfolds as attention can. This can be seen, to a high degree, in the example of abductions involving Japanese–Filipino children, and, to a lesser, but still noticeable extent, in many of the other case studies examined in this thesis. There is a certain type of case that attracts mainstream media attention in the international parental abduction field, but there are many more people suffering from the effects of unacceptable endings to their parental child abduction cases, who, by quirk of their nationality, race, financial status, family circumstances and other markers of socioeconomic status, are not readily visible in the public eye.

The lack of parity in traditional media attention opens up a role for social media in these cases. While some left-behind parents have the capacity to attract mainstream media attention to their cases, the overwhelming majority (even if they seek media attention) do not, but often they do have access to some form of social media.\textsuperscript{147} While the use of social media to argue a case has its dangers,\textsuperscript{148} many aspects of social media use in international parental abduction cases involving Japan are positive. The public forums provided by sites such as the CRN Japan website provide a mechanism for left-behind parents to tell their stories. While much of the parent-generated content shared via social media may seem prosaic, in the case of international parental child abduction, it allows a disparate group of people with a specific and urgent issue to locate each other, subject to internet access around the world, and work together to share information, seek and provide support, attract attention and try to move toward solving their specific

\textsuperscript{147} According to data published by the World Bank, 93\% of people in Japan used the internet in 2016 (based on usage in the three months prior to time of survey). The Republic of Korea also had a usage rate of 93\%, while China and the Philippines had a usage rate of 53\% and 56\% respectively (2018c).

\textsuperscript{148} For a detailed discussion of the particular difficulties which can arise in social media interactions see Brake 2014, 42–74.
issues. In this way, social media is a leveller and community builder, cutting across
gender, race and socioeconomic boundaries. People whose children were abducted in the
1990s, about the same time as internet usage became widespread, are the first
generation of left-behind parents to activate collectively in this way, and they represent
the first generation of participants in a truly global protest about Japan’s management
of international parental child abduction cases.

7.2.2 Legal Literacy

Christopher Savoie’s capacity to perform the role of spokesman for left-behind parents,
and the attendant media attention, is embedded in his understanding, demonstrated
even prior to the abduction of his children, of the vulnerable legal position in which left-
behind parents find themselves when their child is abducted. This understanding of the
potentially disastrous legal consequences of Noriko taking the children to Japan without
his consent is another striking aspect of the Savoie case and an example of his legal
literacy and, more broadly, his socioeconomic capital. According to Judge Martin, expert
legal opinion, including relevant case law, was produced on behalf of Christopher during
the mediation of the couple’s divorce. This included details about Japanese law and the
difficulty faced by parents obtaining visitation rights once their children were taken to
Japan, and Japan’s status at the time as a non-signatory to the Hague Convention
(Savoie Transcript, 56). In his *viva voce* evidence to the court in the hearing relating to
Noriko’s restraining order in March 2009, Christopher demonstrated acute awareness of
the risk that Noriko would flee to Japan with the children and the difficult task he
would face enforcing his parenting rights in the Japanese courts if she chose to withhold
access to the children. This included many facets of the Japanese legal system which
have been discussed in this thesis: the principle of sole custody in common use in
Japanese family courts, a preference towards the mother in custody decisions (Savoie
Transcript, 9), the difficulties of enforcing a foreign custody order (Savoie Transcript, 10),\(^\text{149}\), the inability to enforce any rights to visitation (Savoie Transcript, 13), and Japan’s status at the time as a non-signatory to the Hague Convention (Savoie Transcript, 9–10, 49).

Christopher’s clear understanding of the law in Japan seemed to arise, at least in part, from a consultation with an international lawyer he had engaged prior to the restraining order hearing in March 2009 as to what his rights would be in the event that Noriko took the children to Japan (Savoie Transcript, 9). Indeed, Christopher’s agitation with Noriko’s blasé attitude towards Isaac’s participation in baseball was more than just frustration with her interrupting his allotted parenting time; it made him feel a lack of control and caused him to consider how much less control he would have if the children were in Japan:

> I can’t even get her with two parental coordinators … to allow me to take the kids to baseball with me as agreed … If we didn’t have any courts or anyone helping me on my side to do that, I would not be able to be involved in my children’s lives. That’s my fear.  
> (Savoie Transcript, 14)

Christopher’s perception of how Japanese family law operates in practice is trained on the worst-case scenario for a left-behind parent seeking to be reunited with their children: namely, a situation where custody rights are not recognised or enforced through the court system and the abducting parent does not facilitate access. The worst-case scenario is, however, the reality for the majority of left-behind parents in Japan.

His understanding that the parent with primary residence wields almost absolute

\(^{149}\) This echoed his petition in the case; ‘no court, tribunal, or other authority in Japan will enforce or give effect to a foreign custody order’ (Savoie Petition 2).
control in custody cases under Japanese law may have, in part, driven his application for primary residence of Isaac and Rebecca, although he also indicated his understanding, rightly or wrongly, that a foreign custody order may not be enforced anyway and fathers were not typically awarded custody in Japanese courts. This harks back to the ‘imperfect situation’ identified by Judge Martin in handing down his decision on 30 March 2009 and the idea that the law cannot offer ironclad protection in these cases, no matter how persistently it is invoked. While it is not clear how much legal research Christopher did by himself, and how much was performed by his legal counsel, it is clear that he possessed a very good understanding of the legal regime in which he found himself operating. In terms of legal awareness, it is difficult to discern any critical gaps in Christopher’s understanding of the gravity of his situation or identify any further steps he or his lawyers ought reasonably to have taken to prevent the abduction. Since his children’s abduction, Christopher has graduated from a law degree at the Nashville School of Law and is now an attorney at law in the state of Tennessee with a particular interest in the child abduction field (Filisko 2010).150

Given the similarities in their facts, it is interesting to compare the legal literacy, in the context of socioeconomic capital, of Christopher Savoie with that of James Cook. James also seemed to demonstrate an early understanding of the threat of international parental child abduction in his particular relationship. That his marriage had soured and his Japanese wife derived great comfort from being in her home country with her family arguably aroused some consternation in him about her travelling to Japan with the children. James sought written and notarised confirmation that Hitomi would return to the United States by a prescribed date. Unlike Christopher, James was not in

position to seek formal court orders relating to the children’s travelling arrangements, given the couple were still together at the time Hitomi left for Japan on 14 July 2014. However, perhaps the newly commenced operation of the Hague Convention in Japan gave James another level of reassurance that Hitomi would return.

It is of note that James’s legal response to the unlawful retention of his children in Japan was hampered initially by legal advice that did not take into account the remedies available under the Hague Convention. He discovered this legal avenue by chance with the help of a friend. While we cannot know what the qualifications of his lawyer were at the time, we do know that James was struggling financially and the burden of legal fees would have been high for him. It is hard to envisage that he would have been in a position to access the type of extensive legal advice obtained by Christopher in his proceedings. In this way, James’s socioeconomic capital affected his legal literacy.

Unlike the Savoie and Cook cases, Kayako Yamada seems to have been caught off guard by the abduction of her son to the Czech Republic in August 2009, despite there being prior discord in the marriage and discussion of divorce. In contrast, Qin Weijei and his wife were further along the legal process when Qin abducted his daughters to China in June 1999, with the couple engaged in mediation related to divorce at the time. It is not clear whether Qin’s wife was concerned about Qin taking the children to China. In any event, beyond lodging a notification that she did not agree to the issuance of a passport for them, she would have not had any legal measures within Japan to stop the children leaving the country.151 A *ne exeat* order (a writ that restrains a person from leaving the

---

151 There are many online posts by concerned parents about preventing their partners or ex-partners taking their children out of Japan. See, for example, the post by ‘Kitasan-san’, who submitted a query on legal
country) is not generally available to parties in domestic family law proceedings in Japan (Murakami 2018). These orders, along with the collateral order for the surrender of a child’s passport, were only recently introduced to Japanese family law as a procedure to facilitate the implementation of the Hague Convention (Murakami 2018).[^152]

### 7.2.3 The Influence of Socioeconomic Capacity on the Operation of the Law

Christopher Savoie’s story shows us that an individual’s high socioeconomic capacity can enhance their legal standing; it allowed him to understand his legal options and pursue his case extensively through the courts, even to the extent of suing Noriko for damages, as well as the judge who lifted the order restraining Noriko from leaving the United States. This is another example of the increasingly clear, intimate and direct connection between money and education and access to justice (Coumarelos et al. 2012, 1–2, 5–6), despite equality before the law being a key tenet underpinning the very authority of the rule of law (Rares 2015). Despite the ideal that ‘justice is blind’, the personal attributes of a party to an international child custody dispute can affect the way a case runs and the extent to which a favourable outcome is pursued.

---

[^152]: The **Implementing Act** provides that the court may, upon petition by either party to a return application, make an order prohibiting the removal of the child from Japan, when there is a risk that the other party may do so (art. 122[1]). It also provides that where the court makes a *ne exeat* order of this type and finds that the respondent holds the child’s passport, the court shall order that the respondent surrender the passport to the MOFA (art. 122[2]).
In turn, the markers of an individual’s high socioeconomic status (including economic wealth, a high level of education and extensive use of the legal system), combined with the dramatic aspects of their story (an international child abduction featuring an extra-marital affair, a wronged wife, and an arrest and period of incarceration) meant the Savoie story was readily featured and drawn out by the mainstream media for general consumption. The role of the media in the Savoie case cannot be understated, as it acted to magnify these types of family dramas for the purpose of critiquing and reinforcing moral values (Drucker and Hunold 1993, 138). Many media consumers are parents, many may have experienced divorce, and indeed all have had the experience of being children; thus, they are easily able to ‘buy into’ these relatable stories. Also, stories relating to families, broken marriages and personal narratives tend to be more appealing to the casual news viewer or reader, as opposed to the more ‘dry’ subjects of international news, such as trade agreements or politics, perhaps representing a shift in news consumption as a more ‘democratic’ practice representative of a broader audience base (Temple 2006, 262). Savoie’s case also demonstrates the increasing role of the media – including both the traditional television and newspaper media as well as online reporting and social media – in amplifying personal grievances to the point that they become international relations issues in a way that would not have been conceivable before use of the internet became widespread in the late 1990s or the expansion of global news networks such as CNN and BBC World News in the early 1990s. In the digital age, the media has the capacity to enhance the importance and reach of certain stories and generate external pressure more than ever before (Bucy, Gantz and Wang 2012, 145–6).

---

153 In this connection, Temple makes the salient point that politics and popular culture may be considered intrinsically connected; only knowledge of one makes it possible to know the other (2006, 262).
What do these findings on socioeconomic capital mean for the left-behind parents in the case studies? The high profile of Christopher Savoie’s case may have provided some leverage for the lawyers and officials assisting him to secure his release from jail. His remarkable efforts to pursue his rights through the legal system and his significant investment of time and money in his personal case have, however, ultimately not yet paid off, beyond obtaining a compensation order against Noriko which has no realistic prospect of enforcement. Many of the left-behind parents discussed in the case studies had custody rights to their children at the time of their abduction: Christopher Savoie, Qin Wiejie’s wife, Kayoko Yamada, James Cook and Toshiro Sugimoto. They may have had differing views on how secure their positions were, perhaps due to the legal structures in place at the time, or perhaps due to the assurances or cooperation demonstrated by the other parent prior to the abduction. They also had differing levels of access to justice. Out of all of these left-behind parents, Qin’s wife had the best outcome; she was reunited with her two daughters, albeit 10 years later. This outcome was not due to Qin’s wife’s determination to find her children; it was also not on account of the police complaint, her trip to China searching for her daughters, her appeals to the governments of both countries, or even the legal order obtained for their custody and return from the Japanese court. The result occurred due the actions of Qin – he allowed his daughters to return to Japan and he made the mistake of returning himself to be intercepted by the police.

In Chapter 5, I discussed the case of Moises Garcia and Emiko Inoue as a parallel to the case of Qin. In that case, Emiko, who had wrongfully removed the couple’s daughter from Wisconsin to Japan, was arrested when she made the decision to travel to Hawaii to renew her passport. Like Qin’s wife, Moises Garcia achieved the outcome he had searched for through the fortuitous alignment of events, rather than the operation of the
legal system. Could it be that achieving a positive result in these cases for left-behind parents relies more on luck than law? In such case, personal attributes of socioeconomic capacity matter a lot, until they don’t.

A closer reading of the Cook case is appropriate at this juncture, it being the only case study in which the new Hague Convention regime in Japan was available. James’s reaction to the abduction in his case was to seek recourse through the legal system. There was a false start and time wasted on an ultimately fruitless divorce application, apparently after receiving incomplete legal advice, but after that James worked his way through every level of the Hague Convention process and beyond. His level of legal literacy seems to be high. Compared to the other left-behind parents in these case studies, James has had a greater range of legal avenues to employ and, on the face of the facts, and according to at least some of the judges who heard his case, he had a valid claim under the Hague Convention: the retention of his children was in breach of his rights of custody under the law of the state in which the children were habitually resident immediately before the removal (that is, the United States) and at the time of the removal, James was actually exercising those rights (art. 3). James was, however, ultimately unsuccessful; but why?

The answer to this lies in the facts of the Cook case, which indicate that James was under financial pressure, even before the children were unlawfully retained in Japan. He had lost his job and was struggling to find employment. While Christopher Savoie’s financial standing affected how far he could take his case through the legal system, as discussed above, James’s financial standing had an impact not just on his capacity for legal action but the substantive legal outcome. Despite his financial difficulties, James continued to pursue his legal rights in each tier of the court system, up to the Supreme
Court in Japan. James has confirmed that the legal battle he engaged in has left him financially drained. Ironically, the linchpin of the Supreme Court appeal, which he lost, was that James had been forced to sell the family home in the United States and had been assessed as not having the financial resources to properly care for the children were they to be returned. In pursuing his legal rights, Cook actually undermined them; he lost his money because he was chasing his children – but his lack of money also meant he lost access to his children. Surely, this is a catch-22 of the worst kind. James’s personal financial attributes influenced the decision of the Supreme Court in circumstances which ought to have been free of such value judgements.

7.3 Time Sensitivity of Abduction Cases

The dislocation between the dynamics of a fractured family situation and static legal processes runs through the case studies. Sometimes, it seems impossible for the law to catch up. For example, Noriko Savoie gave evidence in court that she had not considered taking the children to Japan. Maybe she was telling the truth; maybe later events changed her mind. Noriko was heavily criticised by journalist Phil Williams for acting ‘contrary to her sworn testimony’ and ‘lying under oath’ (P. Williams 2009), but it is also conceivable to expect some variability in testimony; how long can someone be bound by what they say or think on a given day when it comes to something as volatile as her family situation?

Sometimes in these cases, the urgency of the situation sees left-behind parents take the wrong turn at a crucial moment. James Cook wasted four months (and presumably much money) trying to serve divorce papers on Hitomi in Japan rather than pursuing the more direct legal avenue of a return application under the Hague Convention. The fact that James even had legal advice at the time but only found out about the Hague
Convention later through a friend demonstrates how external factors can influence the course of these cases. It is unclear why his lawyer did not know about the Hague Convention; it may be that they were not regularly practicing in family law. It may seem obvious to say, but it is worth noting that the quality of legal advice one can locate and afford has a great impact on one's legal options.

James hit another external stumbling block when trying to undertake the direct enforcement action to recover his two older sons. That action was concluded after the court enforcement officer determined that the enforcement would not be possible due to the risk of physical and psychological harm to the two boys if the attempt were to be continued (Kyoka kôkoku jiken 2017, 2). That an action so critical could be abandoned on the decision of a court officer who may have no qualification or experience in psychology\textsuperscript{154} has to be regarded as a significant, even arbitrary, external factor in the legal process.

These external factors are particularly important in parental child abduction cases because of their time-sensitive nature. Children grow up, they can acclimatise to their new surroundings and forget their original language skills, and they can sustain psychological damage and become alienated from the other left-behind parent. This was the reality for Qin Wiejie’s wife, whose youngest daughter chose to return to China with her father, and whose elder daughter reportedly suffered mental health problems on her return. Further, and critically, from a legal perspective, once a child reaches the age of

\textsuperscript{154} The qualifications for court execution officers are set by the Supreme Court of Japan (Court Act [Saibansho hō] art. 62[2]). Candidates must as a general principle have at least 10 years’ experience in a law-related field, pass an examination on the constitution and a variety of legislation, and attend an interview to assess their character, suitability and specialist abilities necessary for the role (Supreme Court of Japan n.d.).
16, they no longer come within the jurisdiction of the Hague Convention. Patrick Braden, a US national whose daughter was abducted to Japan in 2006, has made the vital point that under the current system, cases of international parental child abduction take approximately 10 to 20 years to resolve (CBS News 2009b). This is the time it takes for the child to reach independence, which brings with it the possibility that they will try to make contact with the left-behind parent on their own. In this regard, many of these case studies must be regarded as works in progress. Christopher Savoie is appreciative of this fact and hopes that his children will, at a later time, make their own enquiries into what happened: ‘They're going to find out who their Dad is, what he's all about and that he loves them’ (NewsChannel 5 2009e). He notes, however, that he doesn’t know what his children look like now they are older (P. Williams 2016); at the time of writing, Isaac is 18 years old and Rebecca is 16 years old.

The dynamic and time-sensitive nature of these cases has meant that social media has come to play an important role in them. While a left-behind parent may have exhausted their legal options, their story does not end there. Many will feel compelled to keep agitating for their cause and looking to reach out to their lost children. Social media is a vital mechanism for documenting these ongoing stories. This idea was eloquently summed up by Scottish left-behind parent Douglas Galbraith, whose two sons were abducted from the United Kingdom to Japan by his Japanese wife. Douglas, an author, wrote a book entitled *My Son, My Son: How One Generation Hurts the Next* (2013) about his experience of the abduction, and likened his book to a ‘message in a bottle’ to his children (Ross 2012). Being unable to communicate with his sons, he felt his book was one way of potentially completing a ‘wide blank’ in their lives at a later date and possibly correcting other versions of the story they may have been told by their mother (Ross 2013). Not everyone has the resources and abilities to pen a publishable
commercial manuscript, but social media allows most parents to try to fill the ‘wide blank’ left by abduction and create a virtual message in a bottle for their children. The use of social media sites, including genealogy websites, has resulted in a ‘staggering number’ of reunions between parents and children after years apart in abduction cases worldwide (Dabbagh 2012b, 140).

7.4 Gender Issues

The effect of gender on the operation of the law also looms large in these case studies. A typical narrative when it comes to Japanese international custody cases includes the following points: abductors are normally mothers, the abducting parent wins, and therefore mothers usually win. While it can be easy to point to multiple instances of ‘winning mothers’, the purpose of this analysis is to explore how gender comes into play in the creation of abduction scenarios and how they are resolved, or not resolved. Gender plays a key role in how many of the case studies have played out to date. The similarities and differences between the cases demonstrate the Japanese authorities’ stance on issues involving the family, which are complicated not only by the legal barriers that arise from crossing jurisdictional borders, but also by the different gendered views of ‘proper’ parenting.

It is interesting to compare Japanese attitudes towards Qin Wiejie, Christopher Savoie and James Cook on the one hand, and Noriko Savoie and Hitomi Arimitsu on the other. Noriko and Hitomi, like Qin, had legal custody of their children but removed or retained them away from their country of habitual residence without the other parent’s consent. Like Qin, Noriko and Hitomi obstructed the other parent’s custody rights and contravened a foreign court order put into place after the abduction demanding the children’s return. Noriko Savoie’s actions, in particular, could be construed as a ‘text-
book case’ of abduction: fleeing with the children in secret, with passports she should probably not have possessed, in the midst of legal proceedings and against a court order. However, between the actions of Hitomi, Noriko and Qin, only Qin was subjected to scathing remarks from the authorities in Japan about his ‘selfish’ behaviour, while Noriko was protected by the Japanese police and has persistently interrupted contact between Christopher and his children. Hitomi’s complete failure to abide by court orders has meant that she ultimately achieved the outcome she wanted, and now the factual and legal tide has turned in her favour. It is also interesting to note that neither Christopher nor James were afforded the same sympathy extended to Qin’s wife, or any sympathy regarding the mental anguish the separation from their children has caused.

The difference in treatment between Noriko, Hitomi, James, Christopher and Qin, all of whom (excluding James) undertook or attempted the abduction of their own children, may be explained through a gendered lens. Traditional expectations of the roles of father and mother in custody cases may have influenced the Japanese authorities in the way in which each was characterised and treated (see Tanase [2011] for discussion of traditional gendered views of parenting in Japanese courts). Bringing to mind the advice provided by the Tokyo Family Court in 1965 that a non-custodial parent should be content to ‘pray from the shadows’ for their child, rather than seeking to remain in their lives (8 December 1965; translated and cited by Jones 2007a, 234–5), there was perhaps an expectation that Christopher, James and Qin were meant to step back from involvement in their children’s lives after the separation from their children’s mothers and that by seeking to assert their parental rights they were breaching an implicit social and gendered line. This is in line with a shift in social and judicial discourse in Japan from concern with patrilineal integrity to a focus on the ‘interests of the child’, reflected in the idea that children, especially young children, are better off with their mother,
which, in turn, speaks to the gendered nature of childcare in Japan. This attitude may be perceived in the lack of sympathy shown to Christopher, and ultimately James, by the Japanese justice system.

The status of both Noriko and Hitomi living with their children prior to the abduction, as opposed to Qin, who did not, may also be telling as to why they were treated sympathetically within Japan, where the stability of the bond between the child and custodial parent is prioritised (Tanase 2011). Masako Akeo’s case makes for an interesting contrast to the situation in which Noriko and Hitomi have found themselves. As the left-behind mother, rather than abducting mother, Masako does not seem to have been afforded any particular sympathy or preferential treatment by the Japanese courts at all. Without knowing the court’s reasoning, it is unclear why she is in the situation she is in. One may surmise, however, that it could be due to her status as a non-resident mother at the time of the abduction. There is also an undertone of possible domestic violence in this case, with Masako having a restraining order taken against her and living in transitional housing in Canada. It seems that for some reason she slipped out of the family while they were still in Canada and, despite her efforts to break back in, the Japanese court saw fit to retain the existent ‘family shape’. This harks back to the notion of how the Japanese courts and authorities view ‘proper parenting’. The elevated role of motherhood in the Japanese legal system means that mothers who lose physical custody of their children upon divorce, who don’t play the role, risk being cast as bad mothers instead (Jones 2007a, 245).

Gender plays a part in how parents are treated by the Japanese courts, police and other authorities in the aftermath of an abduction, but gender may also be seen at work in the genesis of abduction. While it is impossible to know how Noriko felt without her saying
so, given her social background in Japan, the situation in Tennessee may have been intolerable for her on a number of levels. Firstly, she may have struggled with the notion that she was to continue to have an ongoing ‘working’ relationship with Christopher for the sake of preserving his bond with the children, which may not have been a natural consideration for her (despite the evidence she gave in court). Secondly, the involvement of another woman, Amy Savoie, in the upbringing of her children may have become unacceptable to her. It is clear from interviews with Amy at the time of Christopher’s incarceration that she took a keen interest in the children and their day-to-day lives. A further consideration regarding the role of gender in this case is the position Noriko was placed in, albeit willingly at first, in Tennessee. While she was looked after financially in the divorce settlement, she was in a foreign country with no independent means of income and only a limited personal support base from which to start her new life. Further, it appears she was expected to remain there as the mother and primary carer for the children in a quasi-wife role to support the relationship between Christopher and the children. There is a sense that Noriko is being corralled into an existence in Tennessee that she is unhappy with. In a rare comment to the media, her father said that it had been hard for Noriko raising the children alone overseas and that she had felt like a babysitter dropping the children off at Christopher and Amy’s home (Yomiuri Shimbun 2009a). Of interest is the notion, which transpired in an interview with Christopher’s attorney, Paul J. Bruno, that Christopher had been nervous prior to the abduction because Noriko had not found a boyfriend or prospective husband in Tennessee. This seems to be an extremely condescending attitude to adopt with respect to a grown woman experiencing difficult circumstances against a backdrop of social and cultural isolation.
On the whole, the English narrative (media, academic and political) of the Savoie case portrays Christopher’s actions as those of a desperate and loving father, which he no doubt is. An objective reading of the abduction attempt, however, indicates that it would have been very frightening for Noriko. Christopher admits that he ‘sneaked up’ on the three of them in the street, that Noriko had ‘screamed bloody murder’, and that ‘a few’ of his friends, whom Noriko and the children may have never seen before, were also involved (Vieira 2010). Noriko also reported sustaining bruising in a scuffle with the men (Inbar 2010); this is surely, by anyone’s standards, a terrifying encounter. It could also be construed as an attempt to punish Noriko for her transgression. It seems that the aggressive nature of the attempted abduction is what drove Christopher’s arrest and incarceration. The statement issued by the local Yanagawa police department after the abduction attempt confirmed that Christopher was suspected of forcibly picking up the children and putting them in the car (Yomiuri Shimbun 2009c), force or enticement being a key element of the offence of kidnapping of minors under article 224 of the Penal Code. Noriko’s friend Crafton criticised Christopher for not thinking of the children in carrying out ‘some dramatic movie-type thing’ like snatching them in the street. She noted that Christopher speaks Japanese very well, has Japanese citizenship and ‘could have made other arrangements’ (Loller and Schelzig 2009). The physicality of the situation left Noriko helpless and allowed her to be portrayed as the sympathetic character in the story within Japanese society.

Noriko’s father said that he believed that Noriko had been subject to verbal abuse, allegedly by Christopher, while in America (Yomiuri Shimbun 2009a). This picks up on a common theme in discussions around international custody disputes in Japan. As discussed in Chapter 3, much of the debate over whether Japan would adhere to the spirit and letter of the Hague Convention related to the issue of domestic violence.
Before Japan signed the Hague Convention, one of the reasons given for Japan’s reluctance to join the treaty was that it might prevent Japanese women living overseas and in violent relationships from fleeing to safety in Japan. This argument was advanced by lawyers and politicians in Japan, as well as Japanese women who had abducted their children to Japan claiming they had been subjected to violence by their partners overseas. Spousal violence was only recognised legally in Japan in 2001 with the enactment of the *Act on the Prevention of Spousal Violence and the Protection of Victims* (for further discussion, see Yoshihama 2017, 207–9). Prior to this time, it was considered a private matter to be dealt with within the family unit (Yoshihama 2017, 214). Japanese society is still coming to terms with domestic violence as a criminal act and it could perhaps be said that Japan is particularly sensitive to laws such as the Hague Convention, which may create a hurdle for people fleeing violent situations. The domestic violence issue became intertwined with issues about gender and race when a pamphlet produced by the Ministry of Foreign Affairs in 2014 to explain processes under the Hague Convention to Japanese embassies and consulates carried a cartoon of a brown-haired white man beating up a small biracial child, who was shown as dreaming of Japan (MOFA 2014, 10).

![Figure 6. Source: MOFA 2014.](image)
This government-sanctioned picture caused something of an outcry among the foreign community in Japan (see Arudou 2014; Wada 2014). It is understandable that foreign men in particular would be concerned about all being tarred with the same brush as perpetrators of domestic violence and that such preconceptions could impair their chances of success in an application under the Hague Convention (particularly in cases of unsubstantiated allegations of domestic violence from former partners). Jones goes so far as to argue that Japanese family law proceedings are entrenched in gender and racial discrimination: ‘In some cases such discrimination appears so prevalent that it even supersedes clear statutory mandates to the contrary, without giving rise to even a hint of cognitive dissonance on the part of those who administer the system’ (2005).

Fathers generally, both Japanese and non-Japanese, can be seen as clearly being on the back foot in these cases. While the domestic violence narrative is prominent in discussions of custody, a perhaps less publicised, but no less important, part of the discussion is the growing tendency of fathers to step quietly out of their children’s lives after a divorce. A Tokyo Family Court committee meeting in December 2011 recognised that visitation cases handled by the Japanese family courts between 1999 and 2010 had increased 3.6 times, and the proportion of applications made through the Japanese family courts by fathers had also increased from 53% to 66% in that time (Supreme Court of Japan 2011, 3–4). The committee noted various reasons for the increase in applications for visitation by fathers after divorce: an increase in the overall number of divorces, the changing role of the father and the increase in the number of households where mothers and fathers split the management of the household and child-rearing.

---

155 Morely also highlights race inequality in the Japanese system: ‘If the child is a Japanese national, the system will only see it as his right to be raised in Japan. They feel it would be extremely unfair to a child to deprive him of the opportunity to live in a wonderful place like Japan’ (cited in Snow 2008, 53).
and a change in societal views about the importance of visitation by the non-custodial parent (Supreme Court of Japan 2011, 4–6).

The case studies in this thesis reinforce the influence of gender in the administration of justice in parental child abduction cases in Japan. There is an implicit expectation in the administration and enforcement of the law about how mothers and fathers should act in these cases, and the outcomes for parents not toeing the line can be grievous. These expectations share a powerful connection with the values embodied in law relating to the operation of the family and law, as discussed further below.

7.5 Japan v. the West? Contesting the ‘Culture Clash’ Narrative

Running through many of the case studies is an interesting tension between the prominence of a simplified ‘clash of cultures’ narrative in media and academic works and the reality that in these types of international parental abduction cases, traditional national demarcations are often blurry (for example, multiple countries of residence and parties with dual citizenship). There is a clear ‘clash of cultures’ narrative running through the Savoie case as discussed above, from the way the Savoies’ relationship was presented in court to the manner in which the eventual abduction and Christopher’s arrest was reported in the media. The media attention on Christopher’s situation clearly pitted it as a battle between American and Japanese cultures (Saltzman 2009b).

Paradoxically, Christopher is extremely conversant in the language and culture of both countries, holding citizenship of both, a relatively rare occurrence.156 The family had lived for an extended period in Japan before moving to the United States. Further,

---

156 In 2005, when Christopher took Japanese citizenship, 15,251 people were granted Japanese citizenship by the Ministry of Justice. Only 1,135 (7.4%) of these people were originally from countries other than South Korea, North Korea or China (MOJ 2018d).
Rebecca and Isaac were dual citizens too at that time, and Noriko held permanent residency in the United States.

Some of the issues raised during the couple’s court proceedings prior to the abduction can easily categorised as a case of cultural difference, particularly the co-sleeping issue. Many, however, could be also explained as simply a clash of personal preferences between two people who had hit upon an acrimonious period in their relationship. Regardless, the concept of culture clash was so prominent in this case that it threatened to eclipse the best interests of the children involved. The determination of extracurricular activities for the children, for example, was given close attention in the hearing on 30 March 2009, and the disputes that had ensued were construed as originating from cultural differences on parenting. However, Woolverton gave evidence under direct examination that Noriko and Christopher each had their own ideas about what activities the children should be doing, which did not necessarily have a cultural explanation and could merely be a case of personal parental preference (for example, picking baseball over cheerleading). Tellingly perhaps, Woolverton notes, ‘The kids want to take – well, I’m not really sure I should – it’s been unclear as to what the kids want actually’ (*Savoie Transcript*, 96). In this instance at least, the children’s wishes are silenced under the heavy fog of cultural difference. It is also notable that Noriko has the monopoly on cultural attributes in this case; as the ‘foreigner’, only her behaviour is explained in terms of cultural difference or tradition.

The ‘clash of cultures’ discourse also embodies the concept of a clash between national laws. Far from a clear-cut battle of the laws, however, the Savoie case represented a complex legal tangle. The tension between discourse and reality is clear in a NewsChannel 5 article on 20 October 2009. It reported that Christopher was forced to
take matters into his own hands because although he was awarded full custody of the children in the United States, ‘Japan doesn’t enforce foreign custody agreements’ (2009e). It was then reported that Christopher went to Fukuoka to take back the children ‘thinking he had the law on his side’ and that he had produced a koseki indicating joint custody. It is unclear which law Christopher believed was on his side here: the Japanese law, the American law, or both? Law is an amorphous beast indeed.

The entire tenor of the hearing on the restraining order application on 30 March 2009 was one of a clash of laws, nationalities and cultures, with Christopher cast in the role as the ‘American Dad’, despite being a Japanese citizen. When Noriko made the point that Christopher has legal rights as a Japanese citizen, she faced a stern rebuke from Judge Martin: ‘You'll never convince this Court that this gentleman has the same rights that you have in Japan to freely enforce the terms of this order’ (referring to the US parenting agreement; Savoie Transcript, 96). In accepting that Christopher has a significantly weakened position in the Japanese legal system, as opposed to the American legal system, the court is making an assumption that Christopher has less standing, from a social and cultural perspective, than Noriko would in Japan, and that this would put him in an unequal position in the eyes of the law, despite the fact that they are both Japanese citizens. While Christopher’s social and cultural standing is influenced by the role of gender in custody decisions (as discussed above), the ready acceptance on the part of the court, a cornerstone in the administration of justice, that extraneous attributes could undermine the key tenet of equality of citizens in Japan is concerning. Nationality seems to be a simultaneously brittle and ingrained construct in this case. Christopher has legal Japanese nationality, but it is considered that he would not be able to fully exercise his rights as a Japanese citizen. He is considered more American than Japanese. Citizenship is fluid dependant on one’s situation (in
Christopher’s case, his tax situation), and the implication here is that some citizenship is more valid than others.

The *Cook v. Arimitsu* case has been framed by the English-language media in a similar fashion as a battle between American and Japanese law and culture. In this case, the parties slot more neatly into the roles of ‘American Dad’ and ‘Japanese Mum’, although Hitomi did live in the United States for 14 years prior to her wrongful retention of the children in Japan in 2014. Unlike Christopher, James has not revealed any secondary citizenship, nor does he demonstrate intimate knowledge of Japanese language or culture; in a message to his elder sons, he recalls how they were uncertain when he took them by himself to Tokyo Disneyland: ‘You guys were nervous because you weren’t sure I really understood Japanese’ (US House Committee 2016, 69). The twist in this story is, of course, that the battle between cultures and laws was supposed to have been mediated by the Hague Convention.

The case of Masako Akeo makes for an interesting comparison to the Cook and Savoie matters. In that case, the child involved, Kazuya, had dual Canadian/Japanese citizenship and had lived his entire life in Canada. The father, Jōtarō, had obtained a parenting order in Canada granting him sole custody, but when this was challenged by Masako in Canada and an interim joint custody award granted, Jōtarō obtained a sole custody order from the Tokyo Family Court. The existence of family law proceedings in another jurisdiction does not automatically invalidate a proceeding issued in Japan, as is the general rule in some other jurisdictions, although it may influence a court’s decision to assume international jurisdiction in a given matter (Ōtani 2013, 230–1). It would seem that the proceedings in Canada were disregarded by the Tokyo Family Court in this instance for at least two reasons: first, they did not meet the criteria for
recognition of a foreign order and were therefore not final and binding (as discussed in Chapter 3); second, the court assumed direct jurisdiction over the custody matter in accordance with the criteria discussed in Chapter 5, on the basis that a child’s domicile determines jurisdiction in such matters and Kazuya’s physical residence in Japan satisfied the domicile requirement. It is unclear to what extent the Japanese court was appraised of the existing Canadian order at the time it made its order, but Masako presumably brought it to the court’s attention when she later applied for mediation in relation to visitation rights. As discussed in Chapter 5, Japan’s choice of law rules means that where a conflict of laws arise, the legal relationship between a parent and a child is to be determined by the child’s national law, where that is the same as the national law of either the father or mother’s national law, or in all other cases by the law of the child’s habitual residence. In Masako and Jōtarō’s case, their child’s national law was regarded as Japanese, the same as his parents’; His Canadian citizenship and entire life experience were rendered irrelevant; so too was the Canadian perspective on the custody and abduction issue. The domestic legal system’s reach here is significant; it was able to determine the matter according to its own criteria because the parents were both Japanese nationals.\footnote{157 By contrast, the jurisdictional provisions relating to family law in British Columbia (Kazuya’s residence prior to the abduction) requires a stronger connection to be established between the child and the forum. It provides that a court may only make an order with respect to guardianship, parenting arrangements or contact with a child if (a) the child is habitually resident in British Columbia when the application is filed, or (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that (i) the child is physically present in British Columbia when the application is filed, (ii) substantial evidence concerning the best interests of the child is available in British Columbia, (iii) no application for an extra-provincial order is pending before an extra-provincial tribunal in a place where the child is habitually resident, (iv) no extra-provincial order has been recognised by a court in British Columbia, (v) the child has a real and substantial connection with British Columbia, and (vi) on the}
The case of Toshiro and April Sugimoto offers another interesting example of how Japanese courts address multinational elements in family court decisions. In a way, the Sugimoto case presents the opposite dilemma to that posed by the case of Masako Akeo. In that case, California law was applied by a Japanese court to resolve the dispute between Toshiro and April, despite that fact that their younger son, Saizo, had lived his entire life in Japan, and the elder, Sasuke, had only spent one of his 10 years out of Japan, and the rest in the UK. Again, the choice of law was determined based on the children’s nationality, and that of their father, despite neither child having lived in the United States.

These cases highlight the difficulties faced by legal systems in applying static criteria to constructs as fluid as nationality, domicile and residence in order to ascertain proper jurisdiction. Given the position of the Japanese family law system on post-divorce parenting, the country of residence and birth of a left-behind parent can be crucial to the future relationship they are permitted to have with their child.

7.6 The Best Interests of the Child

The ‘wicked problem’ (Rittel and Webber 1973) of international parental child abduction is embedded in the social, cultural, legal and economic maze of how one might determine what is in the best interests of a child. It is not uncommon for abducting parents to rationalise their actions on the basis that it is in the best interests of their children. Qin balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia; or (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to (i) remain with, or be returned to, the child’s guardian, or (ii) be removed from British Columbia. Discretion is also given to the court to decline to make an order if it considers that it is more appropriate for jurisdiction to be exercised outside British Columbia (Family Law Act [SBC 2011], sec. 72).
Weijie said he had his daughters’ best interests in mind when he unlawfully took them to China, as he considered it was best for them to grow up there. Noriko Savoie did not like America and believed Japan was a healthier place for her children. In her book, Mika Yamashita (discussed in Chapter 5) writes about her Australian husband’s ‘crazy’ behaviour and the detrimental impact on her children of the operation of the Australian family law system, which she considered intrusive and futile (see for example Yamashita 2010, 185–213). For her, the best interests of her children involved moving them to Japan.

There is a global consensus regarding minimum basic standards of care for children, such as education, nutrition, shelter, medical treatment and right to a nationality and family relations, as set out in the UNCRC. As discussed in Chapter 2, the UNCRC establishes, as an international legal standard, that the ‘best interests of the child’ are to be a primary consideration in all activities concerning children (art. 3). As to be expected from law on such an ambitious scale, the statement of universal entitlements in the UNCRC tends to the ‘broadly normative’, qualified or aspirational (Population Council 1989), with much scope for interpretation. The shape given to the best interests of the child doctrine cannot be discerned through the participation in international treaties by any given country alone. Rather, it is reflected in domestic legal systems and fashioned through political, economic and social structures. Included in this scope for interpretation is the very definition of what a child is. Article 1 of the UNCRC defines a child as ‘every human being below the age of 18 years unless, under the law applicable

---

to the child, majority is attained earlier’, but this definition is open to wide interpretation. Once a person has been designated as a child, the doctrine then requires an assessment of their interests, a weighing up of competing interests and a determination as to what is best.

Childhood is lengthening. Or, at least, the transition from adolescence to adulthood, as it is socially constructed, is changing so there is an extended period of in-between time, an ‘emerging adulthood’ (see Arnett 2004; Cook 2016, 10–12). There is an interesting contrast between this gradual shift and the figure of the ‘legal child’, who has been a statistic in the eyes of the Hague Convention since 1980. Article 4 of the Hague Convention stipulates that the treaty ceases to have effect after a child turns 16 years old. The impact of this provision can already be seen in the Savoie case; in 2012, Christopher was advised that the US State Department would no longer advocate for his son, Isaac, because he had turned 16 years old (P. Williams 2012). Christopher has argued that the effect of the law seems nonsensical, given that Isaac was still a minor (under both American and Japanese law) and it would be too much to expect him to act of his own volition to take practical steps to return to the United States, such as going to a consulate or applying for a passport (P. Williams 2012). There is, however, a discourse in popular (see, for example, McDonnell 2002; Associated Press 2006; Coughlan 2013) and academic (see Bowen 2000, 19–20; Kobayashi 2010) spheres, which contends that children are in fact growing up faster today than in past decades or, at least, they are starting to act like adults at an earlier stage. This line of thought would have it that a 16-year-old child would be more than capable of amassing the knowledge required to convey themselves to a consulate and make contact with a left-behind parent.
It is not known what Isaac himself thinks about his capabilities. This silence is notable not only in his isolated case, but also more broadly in determining who ought to be treated as a child under the law. Laws and social conventions impose adulthood from above and the thoughts of the subject are not uniformly taken into account. The weight given to the teenage elder twins in the Cook case differed between the Osaka High Court and Supreme Court and appeared dependent on external factors, such as the parent’s financial stability. Conversely, adulthood is typically treated as a ‘one size fits all’ standard; this is, of course, a necessary efficiency as considering the question of adulthood on an individual basis would lead to uncertainty and social chaos, and would paralyse legal and enforcement systems. The question as to ‘who is a child?’, however, and the complexities involved in answering that question are just one part of the huge confusing puzzle as to what is in the best interests of a child in an international child custody dispute. It is highly subjective and therefore does not always fit in neatly with legal categories. It is a dynamic construct affected by complex social, cultural, political and economic factors. Can the law ever be agile enough to keep up?

As discussed above, international treaties can be explicit in their promotion of the best interests of the child standard (for example, the UNCRC), or they can indirectly involve the standard through other mechanisms (for example, the grave risk exception under article 13[b] of the Hague Convention). What such treaties have in common is their broad construction designed for universal, or near universal, application. While the notion of a court construing the Hague Convention in a broad sense to infuse international custody disputes with a local ‘interests of the child’ standard is repugnant to many, it happens to varying degrees around the world (see Kay 2004). The shape

---

159 For example, the majority judgement in one of the most influential Hague Convention cases, that of Justice Anthony Kennedy of the US Supreme Court in *Abbott v. Abbott*, strongly advocates a ‘uniform, text-
given to the best interests of the child doctrine by a given country cannot be judged on participation in international treaties alone.

As discussed in detail in this thesis, Japan has been criticised for its broad interpretation and application of the exceptions to a return application under the Hague Convention, involving determinations on matters which ought to be reserved for a substantive custody dispute in the child’s habitual place of residence. It is interesting to note that many of the criticisms levelled at Japan in this regard are similar to those historically directed at another member state, Germany, which is also considered to be a leading global power. The United States cited Germany as a country of concern in its reports with respect to compliance with the Hague Convention from 2000 to 2003, and 2007 to 2008 (US Department of State 2000, 2001, 2003, 2007 and 2008). In particular, the 2000 report found that there was ‘a lack of understanding among the German judiciary about the Convention’, an ‘unconscionably broad use’ of the exception provisions to deny return applications, and the use of the best interests of the child analysis in justifying denial of return applications ‘as if they were custody issues’ (US Department of State 2000, 7–8). Access granted under the Hague Convention in Germany was described as sometimes so condition-laden and restricted that it caused emotional distress to both the parent and the child (US Department of State 2001, 10). By 2009, however, Germany was no longer identified as a concern by the US State Department, and by 2016, the German government was observed to be an efficient and prompt processor of Hague Convention applications (US State Department 2009; 2016, 50). The change in the German approach to Hague Convention matters came about through a combination of factors: the introduction of expedited proceedings for Hague
Convention cases; the reduction from over 600 to 24 courts with jurisdiction to hear Hague Convention cases; and the delivery of specialised training to judges charged with dealing with these cases (US Department of State 2001, 9; 2009, 37).

It may simply be that countries adopting the Hague Convention must navigate growing pains in adapting to the treaty; but, unfortunately, as discussed above, time sensitivity is one the hallmarks of abduction cases. These cases have a unique statute of limitations: children grow up. Further, while the case of Germany demonstrates that it is possible for a state to grow into the role of a compliant Hague Convention member, it is vital to note that since 1997, the principle of joint parental responsibility has been enshrined in German law, with sole custody being relegated to an exception to the rule (Kindschaftsrechtsreformgesetz [Child Law Reform Act] of 16 December 1997; Dethloff and Martiny n.d., 7). The German Civil Code also provides for a duty and right of contact for each parent with their child (sec. 1684). Despite the nature of the Hague Convention as a procedural mechanism for the return of abducted or wrongfully retained children, the influence of the domestic legal structures and values is unavoidable. Orders for the return of a child overseas or for access with a non-custodial parent are simply more palatable coming from a position where joint parental authority or responsibility is the legal and social norm.

Effectiveness of the Hague Convention and the perceived fairness of any domestic family legal system are cantilevered on the deceptively diverse concept of the best interests of the child. Some of the guiding principles expounded and reinforced by Japanese case law have been observed through the case studies examined in this thesis, including the continuity principle, the maternal preference, and the importance of financial stability and family support. As Tanase wisely observes, however, ‘the distinction between fact
finding and value judgement is, indeed, a fine one’ and the merits alone of a given case do not determine its outcome, as such cases will always be coloured by predominant social values and expectations about the family and how law should operate (Tanase 2010, 65). These values and expectations are deeply embedded in Japanese society and have been borne out time and time again in the stories presented in this thesis, resulting in outcomes that would be inconceivable in other countries, such as the United States and Australia, which ostensibly share the same investment in the best interests of the child but where the post-divorce family unit is a common legal and social entity.

In March 2016, around the same time that James Cook was battling to have the return order in his favour enforced in Japan, the Matsudo branch of the Chiba district court delivered a break-out judgement awarding parental authority to a father, Yasuyuki Watanabe, who had been separated from his child for almost six years with only six instances of visitation permitted by the mother during that time, on the basis that the father’s attitude to parenting was more open to the mother’s continued involvement with the child than the mother’s was to his (Haraguchi 2018; US House Committee 2017, 19; Yamanishi 2018). The decision was praised by some in the Japanese media and legal field for its ‘parent-friendly approach’, which was more in keeping with contemporary circumstances of raising children (see, for example, Sankei Shimbun 2017a; Haraguchi 2018) and hailed as breaking down the maternal preference in custody cases (Shūkan daiyamondo henshūbu 2016). The decision was reversed by the Tokyo High Court on 26 January 2017 on the basis that the mother had been the child’s primary carer for many years, the abduction in the context of a marriage breakdown had not harmed her prospects of retaining parental authority, and the child wanted to live with the mother (Yamanishi 2018, 11–12). The Supreme Court upheld the decision of the Tokyo High

160 Rikon tō seikyū kōso jiken (Case of appeal regarding divorce and other matters). Tokyo High Court, 26 January 2017. Case no. 2016 (No) 2453. Hanrei jihō 2325.78.
Court on 12 July 2017,\(^{161}\) noting that the interests of the child were paramount, that the ongoing involvement of the other parent through visitation was just one of the considerations to be had in determining parental authority and that the amount of visitation that the father proposed to give to the mother (100 days per year) was not realistic and could, in fact, harm the child physically and socially (Yamanishi 2018, 12–13). This recent decision affirms the status of visitation as a weak right under current Japanese law, as discussed in Chapter 3 – a ‘reflex interest’ subject to the welfare-of-the-child test (Tanase 2010, 78). As the system stands currently, it is this unyielding legal position and solid official form (or non-form) of the post-divorce family which left-behind parents (mostly fathers) will come up against time and time again, whether they are foreign or Japanese, whether they have the socioeconomic clout of a Christopher Savoie or are struggling to make ends meet, and whether or not they have the remedies of the Hague Convention at their disposal.

### 7.6.1 The Hague Convention

The Hague Convention has brought change to the legal landscape in Japan, with the internationalisation of the family and the diversification of the make-up of the family, the pressure of changing social environments, and the expectations of the international community in relation to Japan’s management of international parental child abduction. The case studies in this thesis show that the Hague Convention is an important ideological and legal milepost on the way to a change in the way the welfare of the child is perceived in Japan and a formal acceptance of the internationalisation of the family. Masako Akeo and Kayako Yamada both advocated for Japan to ratify the treaty after their children were taken. Christopher Savoie raised his concerns that Japan was not a

---

\(^{161}\) *Rikon tō seikyū jiken* (Case of divorce and other matters). Supreme Court of Japan. 12 July 2017. Case no. 2018 (Ju) 810.
party to the Hague Convention prior to the abduction of his children to Japan, mentioning it in both his petition (Savoie Petition, 2–3) and viva voce evidence (Savoie Transcript, 9–10), indicating that he may have been more at ease with Noriko travelling with the children if the return remedies under the Hague Convention were available to him. Perhaps the newly commenced operation of the Hague Convention in Japan gave James Cook a level of reassurance that Hitomi Arimitsu would return. The very existence of law can have an influence on personal behaviour and choices, even where that law is not invoked. This connects to a core debate in classical legal philosophy that the goal of law is to shape the behaviour of those subject to it and that this is achieved through both direct and coercive means, such as punishment, and indirect means, such as the transformation of social norms and attitudes, manifesting as shaming behaviour and feelings of guilt upon contravention (see Kelsen 1941; Scott 2000; Forji 2010; Bilz and Nadler 2014). While international abductions to Japan have decreased since the Hague Convention was introduced, which may be indicative of some deterrent effect, the treaty is not operating smoothly to address the abductions that do occur, even in the narrow construction bestowed on it by the Japanese legislature. For example, the outcome of James Cook’s matter would be considered a ‘resolved case’ based on the statistics provided by Japanese authorities about the operation of the Hague Convention in Japan; but it seems disingenuous, almost unconscionable, to accept that a case like that involved any real closure for the parties. This is discouraging for left-behind parents whose children have been abducted to Japan since the Hague Convention took effect in April 2014, and there is even less hope for parents whose children were abducted prior to this time or who are not from Hague Convention member states. The treaty has, in effect, been grafted onto the current Japanese legal system and operates in isolation from, and dislocation with, it. It has not had any normative effect on how Japan manages the internationalisation of the family. If the traditional goal of law is to
influence behaviour, one must ask: What is the purpose of the Hague Convention in Japan?

7.6.2 Enforcing the Hague Convention

You know, when a country shows such a pattern of noncompliance, the decision to enforce it ought to be almost automatic. There can be mitigating circumstances. We all know that. But in Japan’s case, they are gaming the system. (Republican Congressman Chris Smith, cited in US House Committee 2018a, 15)

After Christopher Savoie returned to the United States after his imprisonment in Japan, he said: ‘I’m not happy with that we seem to have no ability in this great country of ours to be able to get our own children back’ (NewsChannel 5 2009e). Indeed, there seems to be frustration on the part of Japan’s traditional political and diplomatic allies that they cannot get Japan to do what they want with respect to the international parental child abduction issue.

As discussed in Chapter 3, there has long been scepticism regarding Japanese efforts to adhere to international best practice in resolving parental child abduction cases. However, the fact of Japan’s signing of the Hague Convention may have suggested that it was prepared to adopt changes, albeit slow and incremental, in its approach to abduction cases, and facilitate outcomes that would be in the interests of developing healthy connections between children and their parents in the future. The road to implementing the Hague Convention in Japan has been far from smooth, however, and there has been a growing sense that the treaty is not achieving the results that the international community had hoped for. This feeling took official form in May 2018 when the United States named Japan as one of 12 state parties to the Hague
Convention who had demonstrated a pattern of non-compliance in its Annual Report on International Child Abduction 2018 (US Department of State 2018a). The US Secretary of State is required to submit a report on compliance with the Hague Convention by its signatory states, including a list of countries which demonstrate a pattern of non-compliance, pursuant to the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (sec. 101[5]; hereafter, the Goldman Act). The Goldman Act was enacted with the purpose of ensuring compliance with the Hague Convention by its member states and setting out procedures and mechanisms for the US Secretary of State to deploy in responding to patterns of non-compliance, including issuing a diplomatic démarche or public condemnation, delay or cancellation of bilateral working, official or state visits, the withdrawal, limitation or suspension of development or security assistance, and a formal request for extradition of any individual engaged in abduction who has been accused of, charged with or convicted of an extraditable offence (sec. 202[d]). Congressman Smith, who wrote the law, has said that the intended effect was to elevate international custody disputes from the individual to the national level: ‘What this does is make it a country-to-country fight rather than David vs. Goliath’ (Oberman 2011b). While the Goldman Act may not have had the acute coercive effect intended by its author (US House Committee 2018a), it has the potential to pack a powerful diplomatic punch in international parental child abduction battles. The Annual Report on International Child Abduction 2018 (US Department of State 2018a) represents the first time that Japan has been named as non-compliant under the Goldman Act. While the report acknowledged that the average number of abductions to Japan reported to the US Department of State each year had decreased by 44% since the Hague Convention to effect in Japan in 2014, it criticised the Japanese enforcement system, noting that there were no effective means to enforce a return order where the

abusing parent would not cooperate and this had resulted in the pattern of non-compliance (US Department of State 2018a, 21). It attributed this to the limitations of the enforcement processes allowable in the domestic law and also noted the ‘excessively long’ enforcement process which sees left-behind parents engaged in additional enforcement proceedings even after securing a valid return order (US Department of State 2018a, 21–2).

As noted, Germany was similarly blighted with criticism for its handling of Hague Convention cases. This included its ineffective enforcement regimes (US Department of State 2000, 2001, 2003, 2005, 2006, 2007 and 2008). There is a sense of déjà vu in the Japanese context: the German legal framework was found to contain a ‘systemic failure to enforce contempt of court sanctions’, which allowed parents to refuse indefinitely to abide by court orders (US Department of State 2001, 10). To manage the enforcement problems, new legislation was passed in 2005 making German courts ex officio, or directly responsible for the enforcement of return orders (that is, without any application for enforcement by the applicant) and providing remedies in the form of fines and imprisonment for non-compliance with return and access orders, and coercive measures for non-compliance with a return order (Lowe, Patterson and Horosova 2007, 21–2). Force is now authorised against any party, including the child, to execute a return order. Although the use of force against a child in access cases is prohibited, fines or imprisonment can be imposed ex post facto on the non-compliant parent (Hague Conference 2010, 6). Given the ability of authorities to carry through with sanctions, a high rate of compliance was noted when the bailiff appeared with a police officer to execute a court order (Lowe, Patterson and Horosova 2007, 23). The German Ministry of Justice also carried out a training and outreach program to ensure the enforcement procedures were properly implemented (US Department of State 2009, 37). The German
example provides some clues as to how Japan might overcome the practical problems associated with its enforcement system; however, as noted above, the German scenario involved a very different domestic family law system.

The naming of Japan as a non-compliant country by the United States places it in the company of Argentina, the Bahamas, Brazil, China, the Dominican Republic, Ecuador, India, Jordan, Morocco, Peru and the United Arab Emirates. This is not a position with which one can imagine that the Japanese government is content. Approximately one year prior to the issuing of the report, on 14 February 2017, then Minister of Foreign Affairs Fumio Kishida told the Budget Committee of the House of Representatives in the National Diet that there was no known instance of the United States imposing any of the measures available to it under the Goldman Act, that it was quite unlikely that the Goldman Act would have any effect on the official visits or security guarantees with the United States, and that, in any event, Japan was earnestly performing its obligations under the Hague Convention (National Diet of Japan 2017b, 43). Kishida’s comments were not lost on Congressman Smith, who apparently found them to be quite aggravating. In the latest in a series of hearings that Smith has chaired in relation to the Goldman Act, he communicated Kishida’s comments in his opening speech, noting that only three days later the Osaka High Court reversed its own decision in the Cook case, denying James’s application for the return of his children to the United States (US House Committee 2018a, 2).

The naming of Japan as non-compliant by the United States is significant, as it demonstrates that Japan’s relationship with the United States may not be as amicable and even-handed as it once thought. It is also just one part of what may be seen as a broader movement by the international community to generate change with respect to
Japan’s law and policy on child custody matters. For example, on 6 March 2018, the ambassadors of the European Union members to Japan issued a démarche to the then Japanese Minister of Justice about problems with enforcement of laws and judicial decisions in relation to custody and visitation, and drawing attention to Japan’s obligations under the UNCRC (Maresca 2018). Further, in April 2018, an international alliance of parent groups published an open letter to high-ranking government officials and media of G7 countries seeking that the lack of access to abducted children in Japan and weak enforcement measures be placed on the agenda for the G7 summit in June 2018. Something that may have been regarded as a ‘comparatively minor irritant on the annual diplomatic calendar’ (Diplomat 2011) seems to be gaining in momentum. In Chapter 3, I discussed the internal and external pressures (the naiatsu and gaiatsu) that culminated in Japan’s signing of the Hague Convention in 2014. While joining the Hague Convention may have allowed Japan some political, social and diplomatic breathing space, it is clear that this was only temporary, as pressure again mounts and Japan finds itself under the purview of schemes such as that established by the Goldman Act. Certainly, Japan seems to have reached another political flashpoint on the parental child abduction issue in the years since the introduction of the Hague Convention. In 2017, Kenta Matsunami of the Japan Innovation Party (Nippon ishin no kai) aggressively questioned the government in relation to its track record under the Hague Convention and the logic of maintaining the sole custody system in Japan. He told the Budget Committee of the House of Representatives on 14 February 2017 that what Japan might call ‘taking a child’ (tsuresari) is called ‘kidnapping’ (rachi) overseas (National Diet of Japan 2017b, 42).

---

163  A copy of the signed démarche and the written letter of response by Japanese Justice Minister Yōko Kamikawa was posted on the website of the Ministry of Justice (2018a).

164  A copy of this letter was posted online by children’s rights organisation, Kizuna Child-Parent Reunion.
Matsunami’s exchange with the government was picked up by the *Sankei Shimbun* the next day in an article which noted growing international and domestic discontent with Japan’s administration of the Hague Convention (*Sankei Shimbun* 2017b). Matsunami attacked the government again on 7 April 2017, highlighting US Congressman Smith’s furious reaction to Kishida’s dismissal of the *Goldman Act* and telling the Committee on Audit and Oversight of Administration that the parental child abduction issue reflected problems with Japan’s administration of justice (National Diet of Japan 2017a, 19).

Japan is responding to both internal and international criticism, as we see with the proposed changes to its regime of enforcement of civil orders as discussed in Chapter 6; the timing of Japan’s plans to revise the *Civil Execution Act* and *Implementing Act* from 2016 is not likely to have been a coincidence, particularly as it was first identified by the US State Department as failing its obligations under the Hague Convention in the area of enforcement in the same year and pressure has been building ever since (US Department of State 2016, 32).

Japan is not the only world leader to disregard international standards. While the application of the Hague Convention studied in this thesis relates to protecting children from the harmful effects of parental abduction, there are many instances of global powers acting contrary to accepted international standards in other spheres. The United States has committed a series of clear human rights abuses throughout modern history: in recent times its Guantanamo Bay detention facility in Cuba has come to be known as emblematic of such abuses (see Zevnik 2011, 155; Sprusansky 2016). The United States has declined to come under the jurisdiction of the International Criminal Court, withdrawing its signature from the Rome Statute of the International Criminal Court in 2002 (Amann and Sellers 2002, 384). The United States is also the only country in the

(n.d.).
world not to have ratified the UNCRC (UN 2019, 2–3). China’s abysmal human rights record is well established (see Congressional-Executive Commission on China 2017). Australia, too, has been found by a Special Rapporteur to the UN Human Rights Council to be in breach of its international obligations under international law, including the ICCPR, due to its policies in relation to irregular migration (see Melzer 2018, 9). Why is it that issues such as parental child abduction and other breaches of human and environmental rights (such as commercial whaling) are so readily pressed with Japan by other international powers? There seems to be an expectation that Japan should ‘know better’ than to continue to violate international standards, or at least the standards of its political allies, in these areas. As Congressman Smith put it in urging sanctions against Japan for its non-compliance with the Hague Convention, ‘Friends don’t let friends commit human rights abuses’ (US House Committee 2017, 3).¹⁶⁵ In his critique of Japan’s standing in the world, Nihon wa naze sekai de mitomerarenai no ka (‘Why isn’t Japan appreciated by the world?’) media analyst and former journalist Tetsuya Shibayama contends that Japan lacks perception of, or is insensitive to, global feeling on important issues, such as whaling, including a failure to see their adversaries’ ‘innermost heart’ (kokoro no oku) (2018, 18, 157). Certainly, Japan is out of step on the issue of international parental child abduction with the countries it considers its most important allies (for example, the G7 countries). There is also, perhaps, a sense that while the individual cases of international parental child abduction are extremely complicated, as seen in the case studies examined in this thesis, at a local institutional level it ought to be an ‘easy fix’ compared to other international social, political and diplomatic problems (for example, managing rising immigration levels and combatting

¹⁶⁵ In his hearing in relation to the Goldman Act in April 2018, Congressman Smith also expressed outrage that a ‘great country like Japan’ would have such limited ability to enforce judicial orders (US House Committee 2018a, 16).
global warming). Underpinning this is the natural law precept, with its roots in Western philosophical thought, that parental authority is inviolable by state authority, except in cases of neglect or abuse (for example, see the examinations of the natural law origins of parental authority and family rights in Browning 2013; Moschella 2014; and Wagner, Wagner, and Marks 2014). Put simply, a parent being completely cut off from their child in the absence of any wrongdoing seems unnatural at a very elemental level.

7.7 Envisaging a More Effective Legal Process

The pursuit of justice is a normative concept in the mind of every person who feels that he or she has been done wrong. (Justice Steven Rares [Federal Court of Australia] 2015)

Is there a better way to hold fractured families together across international borders? It is certainly possible to see a way forward for a more effective application of the Hague Convention in Japan, and the case of James Cook serves as a blueprint for many changes which could be made. These are as follows:

- Interim access should be readily granted to parents applying for a return order under the Hague Convention to maintain the parent–child bond while the application is determined.

- The exceptions to return under articles 28(1) and (2) of the Implementing Act must be judged against a high bar to make the treaty meaningful (see Permanent Bureau of the Hague Conference on Private International Law 2001 [rec. 4.3], 12; 2006 [rec. 1.4.2], 8). If interpreted in overly broad manner, these exceptions can give rise to absurd outcomes, such as that seen in the James Cook case, where a loving and capable father was denied the return of his children due to the fact he had been forced to sell his house.
Article 28(2)(iii) of the Implementing Act, which sanctions the court to take into account ‘circumstances which make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence’, is inappropriate and incongruous with the purpose of the Hague Convention to secure the prompt return of children, and respect rights of custody and access (art. 1) and should be repealed.

Undertakings, safe harbour orders and mirror orders (where the courts in the state of habitual residence and destination state make orders that mirror each other in effect) could be utilised by Japanese courts to alleviate some of the anxiety surrounding the protection of returning children which is visible in the broad interpretation of the exceptions to return (see Kay 2000; Permanent Bureau of the Hague Conference on Private International Law 2006 [conclusion 1.8.1], 11–12); direct judicial communication between the judges of the jurisdictions concerned is a critical part of these mechanisms (Bennett 2013). Japan already participates in the International Hague Network of Judges and has confirmed that judges may engage in direct judicial communication without specific legislative authority (Permanent Bureau of the Hague Conference on Private International Law 2017, 3). The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children concluded by the Hague Conference (hereafter, the Hague Child Protection Convention), to which Japan is not currently a party, allows courts to make emergency orders in relation to children which will be recognised internationally until a court in the child’s habitual residence has otherwise ordered. Joining this treaty may enhance Japan’s adherence to the Hague Convention (see Nygh 2002, 70–3; Edwards 2015).
The right for a respondent to apply for the modification of a final order (kekkyoku kettei no henkō) after they have exhausted their appeal rights based on a change of circumstances under article 117(1) of the Implementing Act must be reviewed. This is a mechanism that is unique to the Implementing Act in Japanese law (Osaka Bar Association 2014, 9–10), although comparable provisions are found in laws administering the Hague Convention in other countries (for example, Family Law [Child Abduction Convention] Regulations [Australia], reg. 19A). In order for such a provision not to corrode the operation of the Hague Convention, it must be interpreted in a narrow sense. The provision must also operate in the context of an operational enforcement system. Appeals are already a well-established avenue for frustrating the efficacy of the Hague Convention and the kekkyoku kettei no henkō process, in its current incarnation in Japan, provides an additional mechanism to reward delay.

Finally, as discussed at length in this thesis, in order to operate effectively, the enforcement system must be streamlined and strengthened. Providing the court making a return order with the scope to order how and when the return is to take place, including who will pay for the return, and the consequences of non-adherence, would increase the likelihood of a successful return. Also providing the court making the return order with the power to order its execution (as opposed to having a separate court of enforcement) would speed up the enforcement process and courts should have broader powers in making such orders, including the ability to make ne exeat orders and require the surrender of passports throughout the enforcement process. Penalties for parents who do not

---

166 See decision by Justice Forrest of the Family Court of Appeal on 3 October 2012 in Garning and Department of Communities, Child Safety and Disability Services and Anor (Discharge Application) (2012) FamCA 839.
comply with execution procedures should be imposed, including fines and imprisonment. While there may be no expectation on the part of Japanese citizens that a child custody dispute could end up in the imposition of a criminal penalty (Kajimura 2015, 321), such penalties can at least offer an avenue for managing extreme cases of non-compliance and possibly act as a deterrent against protracted and wilful non-compliance. Police and court enforcement officers should also be explicitly authorised to use force to release the child. This is controversial in the context of the psychological damage that could be done to a child in that moment, but there must be formal recognition that the act of child abduction and wrongful retention are in themselves almost always psychologically damaging to children (Kay 2004, 2).

While these criticisms of the Japanese application of the Hague Convention are necessarily made on the backdrop of values and norms prevalent in Japanese law and society, they are not a critique of these norms and values per se. They instead form a critique of the application of a procedurally based international legal mechanism, in which Japan has chosen to participate and which prioritises the swift return of wrongfully removed or retained children (art. 11; Permanent Bureau of the Hague Conference on Private International Law 2001 [recs. 3.3 and 3.5], 10; 2006 [rec. 1.4.1], 8). They are an assessment of the gap between what the Hague Convention is meant to do, as understood through its text and the various discussions, resolutions and recommendations made by its member states over the years, and what it is actually doing in Japan at this point in time.

The issue of the values and norms prevalent in Japanese society, which take form as law governing the creation and unravelling of international families, is much more
complicated. Care must be taken in proposing that a given country needs to alter
domestic laws that promote a certain ideal family shape. Family law is law with an
‘emotionally raw edge’ (Miller 2018); as law, it occupies a singularly intimate connection
with the population it governs and there is no gold standard for how it should be. It is
always work in progress. For example, in Australia there is recognition that the family
law system has become dysfunctional, with then Family Court of Australia Chief Justice
Diana Bryant conceding in 2017, ‘I think the system is letting the people down’ (Powell
2017). The Australian Law Reform Commission (ALRC) is currently undertaking a
comprehensive review of the family law system and its report is due to be delivered at
the end of March 2019. Areas of review include managing a diversifying population,
problems with the cost of and access to legal services, and ensuring that the guiding
principles of the system align with the realities of contemporary society (ALRC 2018).

There are signs that Japan’s family law system, too, is being outgrown by the society it
is meant to serve. The repurposing of laws such as article 226 of the Penal Code to
prosecute taking parents (such as Qin Weijie), the regular reliance on a writ of last
resort such as habeas corpus as a remedy for parental child abduction, and the extreme
action of petitioning the impeachment of judges (such as in James Cook’s case) seem to
be attempts to make the law fit in situations where the current system is not sufficient.
The fact that the extra-legal action of abducting one’s child has become, on the whole, a
socially and legally sanctioned custody strategy is also evidence of a legal system which
has outlived its utility to its people.

The problems for Japan maintaining its current line on international parental child
abduction and, more broadly, custody disputes both domestic and international, can be
broadly categorised into practical and philosophical. On a practical level, the current
legal structure on which Japan depends to manage international custody cases threatens to entrench a ‘two-track’ and unequal system of law under which couples with jurisdictional ties to Japan are treated in a significantly different way from those who have an ‘international’ element. For example, as discussed in Chapter 6, ne exeat orders are not generally available in domestic family law proceedings but have been introduced into Japanese law through the Implementing Act. This means that couples coming under domestic law cannot access protections to prevent an abduction to an overseas country during family court proceedings in the same way that parties to a Hague Convention return application can. Differences between legal mechanisms available to parents in international couples and those in domestic couples are also evident when it comes to access. A non-Japanese parent from a Hague Convention country who is living in Japan and loses contact with their child after a relationship breakdown in Japan can theoretically move back to their home country and make an application for access under article 21 of the Hague Convention, thereby accessing assistance from the Japanese government that would not be available to them under the domestic system.\textsuperscript{167} The legal conceptualisation of rights of custody offers another salient example of this two-track system. Many of the case studies in this thesis have involved parents managing the loss of parental authority or shiken, and demonstrate the reality that these parents become persona non grata in the lives of their children. By contrast, Japan’s participation in the Hague Convention compels its courts and legislature to contemplate and manage parents who share parental authority on a very practical level. For example, in its review of the operation of the Hague Convention in Japan, the Ministry of Foreign Affairs entertained regulating to make it easier for one parent with parental authority

\textsuperscript{167} This was the solution proposed by an official from the Japanese Ministry of Foreign Affairs in the case of Tim Terstege, a Canadian father resident in Japan whose Japanese wife refused to allow him the 24 hours of supervised contact with his son, which was granted to him during court-based mediation in Japan in 2015 (Walsh 2018).
to require the other parent, also with parental authority, to surrender their children’s passports (MOFA 2017, 10); this is a scenario rarely, if ever, encountered under domestic family law, in which shared parental authority is rarely accommodated, and then only in cases where one parent takes physical custody and the other takes legal custody. Further, the Hague Convention only operates where custody rights can be established; custody rights for around 50% of divorced parents in Japan are tenuous at best, so while decisions may be easily rendered to send children back home from Japan, the convention’s effectiveness in relation to children habitually resident and abducted from Japan is limited. The area of enforcement also demonstrates how domestic and international custody disputes are currently managed differently, as discussed in Chapter 6. While the Hague Convention is meant to be addressed as an autonomous treaty with its own specific terms of reference (see, for example, Permanent Bureau of the Hague Conference on Private International Law 2011, 41), the distinction opening up between the domestic and international legal systems in Japan is noteworthy. It could be considered reflective of a difference in values ascribed to domestic custody disputes and international custody disputes, including those falling under the Hague Convention (Murakami 2018) and, by extension, Japanese families and international families.168 Whether or not this two-track system of family law is regarded as problematic really depends on society’s appetite for change.

168 Yamanishi also identifies what she refers to a two-layered double standard (nijū no daburu sutandādo) in that (i) Japan, with its domestic system of post-divorce sole parenting, must manage cases involving shared parental authority under the Hague Convention; and (ii) remedies for the swift return of an abducted child available in cases under the Hague Convention are not available domestically (2010, 15). Japanese politician Kenta Matsunami refers to another ‘double standard’ between the interpretation of continuity under the Hague Convention (the prompt return of an abducted child) and under the domestic law (the child remaining where they are) (National Diet of Japan 2017b, 43).
That Japanese and international families are by their nature different is a concept that is hard-wired into Japanese society. As discussed throughout this thesis, Japanese people have an officially sanctioned shape of the Japanese family prescribed to them in the form of the koseki. The koseki marshals the post-divorce family into the ‘same mould’ as a non-divorced family, often siphoning off one parent in the process (Tanase 2010, 83). The koseki is an administrative expression of the ie seido or household system, which is a linear structure that envelopes all family members whether living, dead or not yet born (Ronald and Alexy 2011, 1). This is underpinned at an even deeper level by ‘the true faith of Japan’, the worship of one’s ancestors, which is ingrained in society to the point of being ‘simple common sense’ rather than any manifestation of formal faith (Parry 2017, 108). The ‘corporation’ of the household depends on both its living and departed members for its very existence, and the dead provide the living with a sense of moral conscience and comfort (Plath 1964, 307). Given this weighty context, could law bring change to the prevailing paradigm of the family in Japan, and should it?

This brings me to consider the philosophical problem of Japan retaining its current position on international and domestic custody disputes. This philosophical problem is illustrated in the 2005 decision of the Supreme Court of Japan, which upheld a decision to find a Japanese father guilty of kidnapping his two-year-old child, with respect to whom he had legal rights of custody, being in the midst of divorce proceedings with his wife (Miseinensharyakushu hikoku jiken). In a dissenting opinion, Justice Takii Shigeo concluded that the father accused should not be found guilty of kidnapping his own child, but part of his reasoning was that what the father had done was within the bounds of normal parenting. This gives rise to a reaction of mixed feelings; perhaps the father should not be found guilty of kidnapping in these circumstances, so the outcome is just, but abduction should not be regarded as a natural corollary of normal parenting. It is
the Japanese system of sole custody that drives these uneasy conclusions and requires
navigation of such morally murky territory. It gives rise to situations which do not seem
like they are in the best interests of children, from a purely humanistic, ‘gut instinct’
perspective – for example, when pregnant women are automatically designated sole
custody of the child they are bearing at the time of divorce, meaning a father may never
see his child (Civil Code, art. 819[c]), or when siblings are split between parents and
living separate lives.

The outcomes generated by the Japanese family law system reveal a dislocation with
concepts of natural law, which, in turn form the basis for the highest goals of
contemporary international law, not least of all that children have a meaningful
relationship with their parents. Certainly, there is a sense that natural justice has not
been served in the matter of James Cook and Hitomi Arimitsu. This sense of injustice is
compounded by the fact that James had held a valid return order that the Japanese
authorities were unable to execute, and that the ‘change of circumstance’, which formed
the basis of Hitomi’s High Court appeal, was at least partially attributable to the failure
to execute. There was also little consideration given to the extent to which the ‘best
interests’ of the child ought to encroach on Hague Convention decisions. The term
‘natural justice’ is used here in its broader sense to refer to natural law theory and the
notion that law and morality are conceptually connected (see Wood, Hunter, and Ingleby
1995, 50–2). A neat definition of justice in this sense, drawing on the classical works of
philosophers Adam Smith and David Hume, is that the justice is the ‘mode of assessing
social and political behaviour, the central point of which is that the motives behind such
behaviour must not have an injurious tendency which would arouse the resentment of
an impartial spectator’ (Haakonssen 1978, viii). Humans may not be able to agree on
what should constitute justice, but we can more readily agree on what is injurious. One
does not need to be able to point to the failings of the legal system, which is also possible, to sense that something is inherently wrong with the way James’s case transpired.

Aggravating this sense of dislocation is the discrepancy between apparent acceptance of change by official Japanese figures with the reality that it is largely ‘business as usual’ for the key social and administrative institutions that support the status quo. This is on full display in the statements of some Japanese politicians, such as former Minister of Foreign Affairs Fumio Kishida’s assurance to the House of Representatives that Japan was earnestly undertaking its obligations under the Hague Convention, the statement by former Justice Minister Katsutoshi Kaneda that abducting parents have no advantage in custody disputes in Japan (National Diet of Japan 2017a, 20), and the written response by the former Minister of Justice, Yōko Kamikawa, to the démarche issued to Japan by the ambassadors of the European Union regarding enforcement of laws and judicial decisions in relation to custody and visitation; Kamikawa’s response included an assertion that Japan appropriately realises visitation and the handover of children (MOJ 2018c [see link to response]). This is a classic case of honne (one’s true feelings) and tatemae (one’s public facade). It is, however, hard to see at what end the honne is aimed in this context. Japan is flexing its legal sovereignty on the issue of international parental child abduction, but the Japanese government and courts cannot enjoy being targeted for their poor record on parental child abduction; it is not winning in this situation, and neither are left-behind parents or abducted children.

An important step in envisaging a better and more inclusive legal process in Japan will involve embracing family structures that have, until now, been considered broken or imperfect. Japanese culture provides many examples of embracing these qualities, most famously the aesthetic concept of wabisabi, but also artforms such as sashiko.
embroidery, which developed as a way to reinforce and insulate old materials and reduce waste (Sugino 2008, 2) and *kintsugi*, the method of repairing broken ceramic with lacquer and highlighting the seam with gold or other metal which has gained popularity as a concept to promote healing in modern psychology (see, for example, Navarro 2018). The philosophy behind these cultural forms – the acceptance of and respect for something which has weakened or broken – takes shape in Tanse’s vision of the post-divorce family, where involvement with offspring after divorce is not limited to an awkward meeting with an increasingly distant child a few times a year but a genuine involvement in their lives, where the post-divorce family is not something to be hidden but regarded as a legitimate family unit in its own right, albeit in a modified form (Tanase 2010). Despite his conservative view of the family emanating from the stem family structure so prominent in the *ie seido* or household system, Japanese Prime Minister Shinzō Abe demonstrated some insight, albeit slightly begrudgingly, into the possibility of accepting new family forms when he wrote in his manifesto for Japan, *Utsukushii kuni e* (*Towards a Beautiful Country*), ‘the form of one’s family does not always meet the ideal’ (*kazoku no katachi wa, risō dōri ni wa ikanai*) (2006, 219).

Law is an expression of social values, a social barometer (Forji 2010, 84). Any changes to the legal structure of managing post-divorce families must be supported at the social level if they are to succeed in a democratic society. In turn, to retain its relevance, law must evolve to serve its communities adequately (Yuen 2013). As discussed throughout this thesis, there are changes taking place in Japanese society that affect the complexion of the family structure. There are relaxed requirements for permanent residency, record numbers of immigration and a growing role for fathers in the care of their children. Japan is slowly embracing social change, including an internationalised form of the family. Fixed forms of national identity are being challenged and publicly
debated, as seen, for example, in the discourse around the 2016 Miss World Japan pageant winner, Priyanka Yoshikawa, who is Indian-Japanese and the 2015 Miss Universe Japan winner, Ariana Miyamoto, who is African American-Japanese, both the children of international unions (see, for example, Yoshino 2016). These are challenging but important discussions for Japanese society.

In my title abstract I refer to Zygmunt Bauman’s concept of liquid modernity (2012). While it is the liquid nature of the modern world that has brought us to this point in the internationalisation of the family, international family law, despite having its genesis in internationalisation, does not respond well to the concept of modernity as liquid, dynamic and free-flowing. Law may not be liquid. What we are seeing in Japan may not a lag as such, it might just be law: a heavy, solid behemoth. There are signs of an incremental shift in Japanese law affecting the family and human rights more broadly. Of the 10 decisions where the Supreme Court of Japan has struck down a law for unconstitutionality since its inception in 1947 to 2018, five have occurred in the period since 2002. This is quite a flurry of activity in Japanese constitutional legal terms (Hasebe 2018, 672), particularly for an institution branded as gun-shy in the context of judicial review (Matsui 2011). The last three of these cases have significant bearing on the future of the family unit in Japan: first, there was the Nationality Act case in 2008 (discussed in Chapter 5); second, the decision on the inheritance of illegitimate heirs in 2013 (discussed in Chapter 3),\(^{169}\) where the Supreme Court determined as unconstitutional article 900 of the Civil Code, which provided that children born out of wedlock should inherit less than those born in wedlock; and third, the decision on article

\(^{169}\) Isanbunkatsu shinpan ni taisuru kōkoku kikyaku kettei ni taisuru tokubetsu kōkoku jiken (Special appeal of the dismissed appeal relating to decision on inheritance).
imposing any waiting period on a woman to be remarried after marriage beyond 100 days was unconstitutional. These three cases improved equality among the members of the family unit, while also recognising that members of the family unit are more diverse than the nuclear family structure would suggest. All three cases made important majority statements recognising changes in the social and economic landscape of Japan and public perceptions of family life, particularly in the past 30 years, and the role of the Japanese legislature in ensuring that legislation keeps pace with public sentiment so that it aligns with the guarantees of individual dignity and equality provided under the Constitution (see *Isanbunkatsu shinpan ni taisuru kōkoku kikyaku kettei ni taisuru tokubetsu kōkoku jiken*, 4–5; *Kokuseki kakunin seikyū jiken*, 6; *Songaibaishō seikyū jiken*, 3–4, 9). More specific to the parental child abduction field, the Supreme Court has also recently, in March 2018, recognised the psychological damage that can be inflicted on a child by the undue emotional influence that a taking parent has over them, and how this may influence the child’s decisions and behaviour (*Jinshin hogo seikyū jiken*, 5). These developments provide us with hints that a more flexible and humane way of managing custody disputes in Japan may be possible, although not as long as the system of awarding only one parent sole authority after divorce remains. On that front, and as a reflection of the truly dynamic nature of this topic, there have been reports that the Ministry of Justice plans to consult with its legislative advisory committee as early as

---

*Songaibaishō seikyū jiken* (Petition for damages).

The constitutionality of the provision which mandates this system, article 819 of the Civil Code, has not come within the purview of the Supreme Court; however, a Japanese father filed an appeal with the Supreme Court in December 2018 arguing that the provision is unconstitutional. Interestingly, he is represented by the same attorney who appeared in the 2015 Supreme Court case noted above regarding the constitutionality of provisions regarding the remarriage of women (*Songaibaishō seikyū jiken*) (Bengo4.com 2018).
2019 regarding a review of the sole custody system (Yomiuri Shimbun 2018). The review is reportedly to take its term of reference from the amendments to the Civil Code, which took effect in 2012 and which require custody to be exercised in the interest of the child (ko no rieki) (Yomiuri Shimbun 2018), as discussed in Chapter 3. The importance of the Japanese government indicating that it is prepared to consider a ‘reboot’ of the concept of the interests of the child cannot be understated, particularly given the signs and symptoms in Japanese society that it may have outgrown the concept of sole custody, as explored through the case studies, and their social context, in this thesis. It is important, however, that any changes to the legal system relating to the sole custody system be supported by the administrative structure that the law underpins. The workings of the bureaucracy in child custody cases in Japan can be brutal: for example, Masako Akeo was unable to apply for greater visitation rights as she was not entitled to her son’s address under the Basic Resident Register Act. These sorts of practical issues will need to be addressed. Broader ideological concepts will also need to be challenged, such as the present incarnation of the koseki system and the laissez-faire approach to divorcing parties, which takes the form of minimal legal intervention in the distribution of property between parties. This current system generates inequality, which can lead to resentment and conflict (Tanase 2010, 84–8) and set up an unholy trade-off for parents between their children and financial stability.

The issues raised by international parental child abduction and the internationalisation of the family in Japan are connected by the heartstrings to fundamental questions of how Japan wishes to see its society progress in the future, and how the world will see Japan. From a sociolegal perspective, the scope for future research at this time of immense flux is enormous. Topics of interest for future exploration could include the use and effectiveness of alternative dispute resolution methods in international custody
disputes in Japan; an in-depth quantitative assessment of the Hague Convention cases so far canvassing the number parties involved, their nationality, the child’s place of habitual residence and the method of any resolution; the role of domestic violence allegations in the Hague Convention cases in Japan so far; and the possibility of Japan signing the Hague Child Protection Convention and how this may enhance the operation of the Hague Convention in Japan.

The social, political and legal expression of the family in Japan is at a crossroads. Japan is at an important moment in its family law history as it reviews, reworks and recasts its relationship to international family law through its implementation of the Hague Convention, as seen in the first cases heard under the treaty in Japan. By seeking to draw attention away from the domestic law throughout this process, or at least quarantine it from the workings of international law, lawmakers have, ironically, intensified scrutiny upon it. The recent willingness indicated by the Japanese government to consider introducing shared parental authority after divorce in particular could herald a significant shift in social and legal policy. It would be a remarkable revolution. Japan is inching its way towards legal acceptance of more diverse family structures but change will not be fluid, fast and sweeping; rather, social and political tensions mean that progress will be slow, incremental and difficult.
Glossary

ane-katoku matrilineal inheritance
bunmeikoku civilized nation
chōtei mediation
chōtei rikon mediated divorce
daïtai shikkō execution (of a court order) by substitute
daïyō kankoku 'substitute prisons'; police station holding cells
dōji sonzai 'simultaneous existence' (referring generally to the taking parent being present when a return order is enforced)
eta the 'untouchables' or underclass (Edo period)
futsū regular (marriage; the wife marrying into the groom's family) (Meiji period)
gaiatsu external pressures
henkan jisshisha return implementer (being a third party who is to return a child to their place of habitual residence pursuant to a court order under the Hague Convention in Japan)
hikiwatashi handover (of a child)
honseki permanent domicile
hōsei shingikai legislative advisory committee
hosuto homosexual and heterosexual men who perform work normally carried out by women in nightclubs
ie household
ie seido household system
ippan shadan hōjin general incorporated association
japayuki-san a pejorative blend word to describe Southeast Asian immigrants (predominantly women) to Japan
jinshin hogo habeas corpus
jūminhyō certificate of residence
jūmin kihon daichō
basic resident register
kaikon shakai
a society in which formal legal or de jure marriage is the norm

kaji chōtei
family conciliation
kaji shōgai jiken
international family law case
kangoken
physical custody (of a child)
kangosha
physical custodian (of a child)
kansetsu kyōsei
indirect compulsory execution

karayuki-san,
a term used to describe Japanese women sent to East and Southeast Asia to work, often as prostitutes, from the late nineteenth century

katei saibansho chōsakan
family court probation officers or family court investigators

kekkan
marriage
kekkyoku kettei no henkō
modification of a final order
kippari to wakareru
to make a clean break
ko (1)
artisan class (Edo period)
ko (2)
household or family unit
ko no rieki
interests/welfare of the child
ko no kangosha no shitei
designation of physical custody (of a child) and related matters
sono hoka no shobun

kōgyō
entertainment (visa category)
kyoka kōkoku
appeal with permission (to the Supreme Court)
kokusai kekkon
international marriage
koseki
family register
koseki seido
administrative household registration system
kyōgi rikon
administrative divorce by consent
kyōsei shikkō
compulsory execution (of a court order)
masshi sōzoku
ultimogeniture (inheritance by the last-born child)
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>menkaikōryū</td>
<td>visitation (post-divorce)</td>
</tr>
<tr>
<td>menkaikōryū ken</td>
<td>visitation right</td>
</tr>
<tr>
<td>mizu shobai</td>
<td>night-time entertainment business; literally ‘water trades’</td>
</tr>
<tr>
<td>mukosekisha</td>
<td>a person who is not legally registered in a koseki</td>
</tr>
<tr>
<td>muko yōshi</td>
<td>the arrangement of a husband being adopted as a son by his bride’s parents (Edo period)</td>
</tr>
<tr>
<td>naiatsu</td>
<td>internal pressures</td>
</tr>
<tr>
<td>nai’en</td>
<td>common law marriage/de facto relationship</td>
</tr>
<tr>
<td>nikkeijin</td>
<td>foreign nationals from Brazil and other Latin American countries who are of Japanese descent</td>
</tr>
<tr>
<td>nō</td>
<td>peasant class (Edo period)</td>
</tr>
<tr>
<td>nyūfu</td>
<td>marriage where the groom marries a female head of a household (Meiji period)</td>
</tr>
<tr>
<td>papanitt</td>
<td>‘papanity’; ‘cool paternity’</td>
</tr>
<tr>
<td>rachi taikoku</td>
<td>abduction superpower</td>
</tr>
<tr>
<td>rikon</td>
<td>divorce</td>
</tr>
<tr>
<td>ritsuryō</td>
<td>historical legal system with roots in Chinese legalism and Confucian ideals</td>
</tr>
<tr>
<td>saibankan dangai saibansho</td>
<td>Judge Impeachment Court of the Japanese Diet</td>
</tr>
<tr>
<td>saibansho shokuin sōgō kenkyūjo</td>
<td>Training and Research Institute for Court Officials</td>
</tr>
<tr>
<td>saibankan sotsui iinkai</td>
<td>Judge Impeachment Committee of the Japanese Diet</td>
</tr>
<tr>
<td>saikensha</td>
<td>obligee</td>
</tr>
<tr>
<td>saimusha</td>
<td>obliger</td>
</tr>
<tr>
<td>satogaeri</td>
<td>the return of a wife to one’s natal home at critical times in life</td>
</tr>
<tr>
<td>seinen</td>
<td>age of majority</td>
</tr>
<tr>
<td>shi</td>
<td>samurai warrior class (Edo period)</td>
</tr>
<tr>
<td><strong>shikkō kan</strong></td>
<td>court enforcement officer</td>
</tr>
<tr>
<td><strong>shinpan</strong></td>
<td>adjudication</td>
</tr>
<tr>
<td><strong>shinken</strong></td>
<td>parental authority/power (when encompassing physical custody or <em>kangoken</em>); legal custody (when separate from physical custody or <em>kangoken</em>)</td>
</tr>
<tr>
<td><strong>shinkensha no shite mata wa henkō</strong></td>
<td>designation or change of legal custody (of a child)</td>
</tr>
<tr>
<td><strong>shō</strong></td>
<td>merchant class (Edo period)</td>
</tr>
<tr>
<td><strong>shūgi’in</strong></td>
<td>House of Representatives</td>
</tr>
<tr>
<td><strong>shusshō</strong></td>
<td>birth(s)</td>
</tr>
<tr>
<td><strong>sosen sūhai</strong></td>
<td>ancestor worship</td>
</tr>
<tr>
<td><strong>taiji ninchi</strong></td>
<td>recognition of paternity of an unborn child</td>
</tr>
<tr>
<td><strong>teijūsha</strong></td>
<td>long-term resident (a type of visa)</td>
</tr>
<tr>
<td><strong>tokubetsu eijūsha</strong></td>
<td>special permanent resident</td>
</tr>
<tr>
<td><strong>wakai</strong></td>
<td>court-based settlement</td>
</tr>
<tr>
<td><strong>zainichi</strong></td>
<td>ethnic Koreans resident in Japan</td>
</tr>
<tr>
<td><strong>zainichi-chōsenjin, see zainichi</strong></td>
<td></td>
</tr>
<tr>
<td><strong>zainichi-kankokujin, see zainichi</strong></td>
<td></td>
</tr>
<tr>
<td><strong>zaisan bunyo</strong></td>
<td>division of property</td>
</tr>
<tr>
<td><strong>zakkon</strong></td>
<td>'mixed marriage'; marriage between racial groups</td>
</tr>
</tbody>
</table>
References


html.


*Christopher John Savoie v. John James G. Martin III, Stites & Harbison, PLLC and Celia Woolverton (Memorandum)*. United States District Court for the Middle District of Tennessee, Nashville Division, 2 December 2010, no. 3:10-0327.
Christopher John Savoie v. John James G. Martin III and Stites & Harbison, PLLC

(Opinion). United States Court of Appeals for the Sixth Circuit, 6 March 2012, no. 10-6529.


Civil Code of Japan [Minpō], act no. 89 of 1896.

Civil Code of Procedure [Minjisoshō Hō], act no. 109 of 1996.

*Civil Execution Act* [Minjishikkō Hō], act no.4 of 1979.


Connor, W. 1978. ‘A Nation is a Nation, is a State, is an Ethnic Group is a …’ *Ethnic and Racial Studies* 1 (4): 377–400.


Constitution of Japan [Nihonkoku kenpō], 3 November 1946.


Court Act [Saibansho Hō], act no. 59 of 1947.


Dohrn, B. 2015. ‘United States’. In Litigating the Rights of the Child, edited by T.


Drucker, S. J. and J. P. Hunold. 1993. ‘The Claus von Bulow Retrial: Lights, Camera,
Genre?’ In Popular Trials: Rhetoric, Mass Media, and the Law, edited by R.
Hariman, 133–47. Tuscaloosa: University of Alabama Press.

Dujardin, R. C. 2009. ‘International Dispute – Clash of Cultures Leaves a Native of R. I.


https://www.economist.com/international/2011/11/12/herr-and-madame-senor-
and-mrs.


wordpress.com/tag/noriko-savoie/.

Edwards, M. 2015. ‘Can the Child Protection Convention Save the Child Abduction
Convention in the Land Down Under?’ 26 March 2015 (provided to author by
personal communication).


Conceptualization and Taxonomy: A Lasswellian Framework’. Journal of


Family Registration Act [Koseki Hō], act no. 224 of 1947.


Friedman, L. M. 2005. ‘Coming of Age: Law and Society Enters an Exclusive Club’. 
*Annual Review of Law and Social Science* 1: 1–16.


*Habeas Corpus Rules* (Japan) [Jinshin Hogo Kisoku], Supreme Court of Japan Rule 22 of 1948. Available at http://www.courts.go.jp/kisokusyu/minzi_kisoku/minzi_


*Harris & Harris*. Full Court of the Family Court of Australia, 5 November 2010, [2010] FamCAFC 221.


Hasebe, Y. 2018. ‘The Supreme Court, One Step Forward (But Only Discreetly)’.


Isanbunkatsu Shinpan ni Taisuru Kōkoku Kikyaku Kettei ni Taisuru Tokubetsu Kōkoku Jiken [Special appeal of the dismissed appeal relating to decision on inheritance]. Supreme Court of Japan (Grand Bench), 4 September 2013, no. 2012 (Ku) 984.


https://www.japantimes.co.jp/opinion/2016/06/01/editorials/problematic-criminal-justice-reforms/.


https://www.japantimes.co.jp/community/2000/02/06/general/the-best-parents-are-both-parents/.


children along with visas.


Kansetsu Kyōsei ni Taisuru Shikkō Kōkoku Kikyaku Kettei ni Taisuru Kyoka Kōkoku Jiken [Permitted appeal of the dismissal of an appeal for the execution of indirect enforcement]. Supreme Court of Japan (First Petty Bench), 28 March 2013, no. 2012 (Kyo) 48.


Kobayashi, T. 2018. ‘Video Warns Foreign Trainees against Possible Abuse in Japan’. 
ajw/articles/AJ201801130003.html.

An Experimental Study of Japanese Attitudes Towards Immigrant Workers’. 

Kojima, I. 2011. Hanaretemo Kodomo ni Aitai, Hikihanasareta Kodomo to no Menkai 
Kōryū wo Kanaeru tame ni [Even though we are apart I want to see my child: 
How to achieve visitation with a separated child]. Tokyo: Seikatsu Shoin.

Kojima, Y. 2000. ‘In the Business of Cultural Reproduction: Theoretical Implications of 
the Mail-Order Bride Phenomenon’. Women’s Studies International Forum 24 
(2) 199–210.

Kokugai Isō Ryakushu, Kibutsusonkai Hikoku Jiken [Prosecution of kidnapping for 
transport outside of Japan and property damage]. Supreme Court of Japan 
(Second Petty Bench), 18 March 2003, no. 2014 (a) 805.

Kokuseki Kakunin Seikyū Jiken [Petition for confirmation of nationality]. Supreme 
Court of Japan (Grand Bench), 4 June 2008, no. 2007 (Gyō-Tsu) 164.


Krogness, K. J. 2011. ‘The Ideal, the Deficient, and the Illogical Family: An Initial 
Typology of Administrative Household Units’. In Home and Family in Japan: 
Continuity and Transformation, edited by R. Ronald & A. Alexy, 65–90. New 
York: Routledge.

———. 2014. ‘Jus Koseki: Household Registration and Japan Citizenship, Koseki Shugi, 
Koseki to Nihon Kokuseki’. Asia-Pacific Journal, Japan Focus 12 (35): 


McDonald, M. 2010. ‘Dear Japan: International Parental Child Abduction is a Problem’.


———. 2009. ‘The Family, the Nation-State and the Others: Policing the Boundaries of Sex, Gender and Nationality in Contemporary Japan’. In Viewing Bodies, Reading Desire, Conceptualizing Families, proceedings of the International Conference Thinking Gender in Culture and Society, 60–73. Nagoya: Graduate School of Languages, Nagoya University.


Menkaikōryū Mōshitate Kikyaku Shinpan ni Taisuru Kōkoku Kikyaku no Kettei ni Taisuru Kōkoku [Appeal of decision to deny appeal relating to decision to deny petition for visitation]. Supreme Court of Japan (Second Petty Bench), 6 July 1984, no. 1983 (Ku) 103.


Miseinensharyakushu Hikoku Jiken [Prosecution of kidnapping a minor]. Supreme Court of Japan (Second Petty Bench), 6 December 2005, no. 16 (a) 2199.


———. 2011a. ‘Hāgu Jōyaku no Chūō Tōkyoku no Arikata ni Kansuru Kondankai, Dai 3 Kai, Kaigō Giji Gaiyō’ [Panel discussion on the nature of the Central Authority


———. 2018c. ‘Kamikawa Hōmudaijin ga Kosutofu Chūnichi Burugaria Taishi, Pikku Chūnichi Furansu Taishi oyobi Morīni Chūnichi Itaria Kōshi ni yoru Hyōkei wo
Ukemashita (4 Gatsu 27 Nichi)’ [Minister of Justice Kamikawa receives a visit from Bulgarian ambassador Kostov, French ambassador Pic and Italian ambassador Morini (27 April)]. http://www.moj.go.jp/hisho/kouhou/hisho06_00515.html.

———. 2018d. ‘Kikakyoka Shinseishasū, Kikakyokashaosu oyobi Kikafukyokashaosu no suī’ [Trends in the number of applicants for naturalisation, number of people approved for naturalisation and number of people rejected for naturalisation]. http://www.moj.go.jp/content/001180510.pdf.


———. 2018g. ‘Zairyūgaikokujin Tōkei (Kyūtōrokugaikokujin Tōkei) Tōkeihyō’ [Table of statistics on foreign residents (formerly statistics on registered aliens)]. http://www.moj.go.jp/housei/toukei/toukei_ichiran_touroku.html.


MOJ and MOFA (Ministry of Justice and Ministry of Foreign Affairs). 2015. ‘Kokusaiteki na Ko no Dasshu no Minijō no Sokumen ni Kansuru Jōyaku no Jisshi ni Kansuru Hōritsu no Jisshijōkyō ni Tsuite’ [Implementation status of the Act for

389


Nationality Act [Kokuseki Hō], act no. 147 of 1950.


global/story.asp?s=11263121.


——. 2009o. ‘Savoie Describes Ordeal in Letters from Japan’. 14 October 2009.


Nihon Keizai Shimbun. 2015. ‘Shibuya-ku, Dōsei Kappuru ni “Pātonā Shōmeishō”’
[Shibuya gives ‘partnership certificate’ to same-sex couple]. 5 November 2015.
https://www.nikkei.com/article/DGXZZO93645140V01C15A1000000/.

Nigebā Ushinau”, Kitai, Fuan … Kuni Taisei Kadai mo’ [Decision to join Hague
Convention, issues for nation’s preparations, expectation and fears such as ‘I
wonder if I can meet my child’, and ‘I’ll lose my place of refuge from domestic
violence’]. 23 May 2013.


———. 2011b. ‘US Girl Reunited with Father After 4 Years in Japan’. Agence France Presse. 23 December 2011. https://www.google.com/hostednews/afp/article/ALeqM5gOLOKSYhJoZzaVsLzJvsh-MKmJtA?docId=CNG.1c87b5e9be895eb4be7ffda21026457.e1 (link no longer active).


Passport Act [Ryoken hō], act no. 267 of 1951.


Penal Code [Keihō], act no. 45 of 1907.


———. 2017. ‘Briefing Note: Legal Basis for Direct Judicial Communications within the Context of the International Hague Network of Judges (IHNJ)’. https://assets.hcch.net/docs/90895dc7-1d9d-4269-997e-dc5d2098f1f0.pdf.


Piper, N. 1997. ‘International Marriage in Japan: “Race” and “Gender” Perspectives’. 


Quillen, B. 2014. ‘The New Face of International Child Abduction: Domestic Violence Victims and Their Treatment under the Hague Convention on the Civil Aspects...


*Shūkyoku Kettei no Henkō Kettei ni Taisuru Kyoka Kōkoku Jiken* [Permitted appeal in respect of decision to modify final order]. Supreme Court of Japan (First Petty Bench), 21 December 2017, no. 29 (kyo) 9.


*Songaibaishō Seikyū Jiken* [Petition for damages]. Supreme Court of Japan (Grand Bench), 16 December 2015, no. 2013 (O) 1079.


———. 2001. ‘Shihō Tōkei (Kajijiken Hen)’ [Judicial statistics (family cases)].
http://www.courts.go.jp/app/sihotokei_jp/list?filter%5Btype%5D=1&filter%5By Year%5D=2000&filter%5ByCategory%5D=3&filter%5BmYear%5D=&filter%5BmMonth%5D=&filter%5BmCategory%5D=.

———. 2005. ‘Ko no Hikiwatashi Chōtei’ [Mediation of the handover of children].
http://www.courts.go.jp/saiban/syurui_kazi/kazi_07_09/.


———. 2006b. ‘The Training and Research Institute for Court Officials’.


*Tokyo Shimbun*. 2009a. ‘Kodomo Modosenai to wa ... Oya to no Menkai wa Kenri, Kokusai Kekkon ‘Kokugai Tasuresari’ Kō, Tonai de Shinpojium’ [Children not returned ... Contact with parents is a right, Tokyo symposium considers ‘overseas abductions’ in international marriage]. *Tokyo Shimbun*, 4 December 2009, 26.

———. 2009b. ‘Musume Futari Yūkai no Tsumi de Yūzai Hanketsu, Chūgokujin no Hikoku ni’ [Chinese accused found guilty of crime of abducting two daughters]. 4 December 2009, 22.

———. 2010. ‘Ubawareru Ko, Kokusai Rikon no In de (Jō) Shinken Mondai, Jōyaku Mikamei no Kabe, Tsurekaeru to ‘Yūkaihan’ [Children stranded on the hidden side to international divorce, the issue of parental authority, the obstacle of

413
Japan not signing the Hague Convention, and returning home with your children being a crime]. 11 January 2010, 23.


   Travel.State.Gov. https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/

——. 2007. ‘Report on Compliance with the Hague Convention on the Civil Aspects of
   travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2007%20
   Annual%20Report.pdf.

——. 2008. ‘Report on Compliance with the Hague Convention on the Civil Aspects of
   travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2008%20
   Annual%20Report.pdf.

——. 2009. ‘Report on Compliance with the Hague Convention on the Civil Aspects of
   travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2009%20
   Annual%20Report.pdf.

   Travel.State.Gov. https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/

   https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2017%20ICAPRA%

   https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2018
   %20Annual%20Report%20on%20International%20Child%20Abduction%20
   FINAL1.pdf.


20120611013801/http://www.abc.net.au:80/foreign/content/2012/s3508549.htm.


Yomiuri Shimbun. 2009a. ‘Kokusai Kekkon, ni Ko “Dakkan” Chichi Taiho, Fukuoka, Yanagawa no Jiken ... Bei de Hihan Takamaru’ [International marriage,

———. 2009b. ‘Musume Futari wo Chūgoku ni Yūkai Yogi, Yaku 10 Nen Kensatsugawa wa Chōeki 3 Nen Kyūkei – Tama’ [Charge of abducting two daughters to China for 10 years, prosecutors seek 3 years’ imprisonment – Tama]. 18 November 2009.

———. 2009c. ‘Yanagawa de Tsūgaku no Ni Ko Tasuresari, Beikokujinyōgisha ga Mototsuma Kara’ [American suspect took two children from ex-wife while travelling to school in Yanagawa]. 1 October 2009.


Yuzawa, Y. 2014. *Dēta de Yomu Heiseiki no Kazoku Mondai, Shihanseiki de Shōwa to Dō Kawatta ka* [Reading the data: Family issues in the Heisei Period. In 25 years how have they altered from the Shōwa Period?]. Tokyo: Asahi Shimbun Shuppan.
