

# Parental Kidnapping and Multiculturalism: A Focus on Japan

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## I. International Marriages and Children

Parent-child relationships are probably the single most important human relationships that exist. It is this relationship that can bring us great joy and great sorrow. Usually, but not always this relationship begins with a marriage between a man, a potential father, and a woman, a potential mother. Most marriages are a union of two people from the same country, same locale, same religion, and same cultural traditions.

However, when two people from different countries decide to join together in an international marriage, the relationship is much more complicated. Without knowing much about the other's cultural customs, traditions, and familial expectations, people take the risk of creating an international marriage, and having children who must straddle the bridge between their parents' differing cultures, languages, traditions and values.

International marriages are on the rise. For example, in Japan the number of international marriages has increased steadily for the past twenty years. Statistics for the year of 2000 show that 1 in 22 marriages registered with the government was an international union, representing 4.5% of the national total. We must keep in mind that foreigners represent only about 1% of the total population of the country, so this figure is quite high. In urban areas like Tokyo and Osaka, the figures are even higher. 1 in 10 marriages in the Tokyo area were between a Japanese spouse and foreigner and in Osaka the figure was 1 in 12.<sup>2</sup>

Couples meet, fall in love, and get married without fully understanding the

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2) [http://www.glocom.org/special\\_topics/social\\_trends/20021112\\_trends\\_s16/index.html](http://www.glocom.org/special_topics/social_trends/20021112_trends_s16/index.html)

dangers and pitfalls that lie ahead. Nobody gets married thinking that they will divorce years later. No, the marriage begins with a ceremony, itself culturally controversial. In what country should the ceremony be held? Since the bride and groom are from differing countries, a decision will initially need to be made as to where to hold the ceremony and who to invite. This decision making process leads to the first conflict due to cross-cultural differences. In most cases the wedding ceremony and party are followed by a romantic and wonderful honeymoon to some tropical island paradise.

Within a few months or years following the wedding the couple usually decides to start a family. When the first child is born it brings great joy to both parents, of course, but also great joy and pride to the families of both parents who are from two different and distinct societies with different histories, values, customs, and cultural heritage. What name to give the child? Should they choose a name from the father's culture or from the mother's culture, or a combination of both? The sheer weight of these cultural aspects and decisions on international marriages can be overwhelming and difficult to bear. If the stress on a marriage between two people from the same cultural environment is 1, the stress on international marriages is about 10.<sup>3</sup>

But what happens when the relationship breakdowns? What happens when the two people, who in the beginning thought they were in love, begin to grow apart, and the distance between them widens? What happens when they develop hate and disgust toward each other? What if these feelings of hate and ill-will toward a spouse results in behavior that seeks revenge for past wrongs? What tools or weapons are used to carry out such retaliatory behavior? Could it be the children? Yes, unfortunately far too often children of both domestic and international marriages are used as a weapon by one parent to get back at the other parent. Often times, the mother or father will return to her/his hometown or home country with the children, and the father or mother could be forever barred from seeing his/her own children again. It is difficult to imagine the daily pain and agony that these left-behind parents are forced to endure.

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3) An assumption by the author based on 30 years as an international lawyer dealing with international divorces and family matters.

## II. The Law Regarding Parental Kidnapping in the U.S.A.

Is there anything the law can do to help such couples? Yes, but the help is limited in some degree. The law can make such behavior criminal and punish and even imprison the offending parent, the parent who did the abduction, i.e. the taking parent. The crime can be either a misdemeanor or a felony depending on the jurisdiction. A misdemeanor is a relative minor offense punishable by less than one year in jail, and a felony is more serious and involves one or more years of punishment in a prison. In my own country, the United States of America, the act of kidnapping your own child in order to deprive the other parent of access to the child is a crime in all 50 states of the union. For example, in California such an act can be charged as either a felony or misdemeanor.<sup>4</sup> In New York it is a misdemeanor if the child is taken to some place within the State of New York, and a felony if the child is taken out of state.<sup>5</sup>

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### 4) **Parental Kidnapping** - California Penal Code Section 278

Parental Kidnapping can be charged when a person, not having a right to custody, maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian. Parental kidnapping is a “wobbler,” meaning it can be charged as either a felony or misdemeanor. Parental Kidnapping” (also referred to as child stealing) is punishable by imprisonment in a county jail not exceeding one (1) year or if charged as a felony, by imprisonment in the state prison for two (2), three (3), or four (4) years.

### 5) § 135.45 Custodial interference in the second degree.

A person is guilty of custodial interference in the second degree when:

1. Being a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian: or

2. Knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

Custodial interference in the second degree is a class A misdemeanor.

### § 135.50 Custodial interference in the first degree.

A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree:

### III. The Law in Japan Regarding Parental Kidnapping

What about Japan, does it have laws similar to the United States when it comes to the issue of parental kidnapping? While Japan does not have any specific laws dealing exclusively with the kidnapping of a child by one of the parents, it does have laws that address, to some extent, the problem. In Japan the combined use of three independent statutes is required. One is found in the penal code and the other two in the civil code section dealing with family relationships. Article 818 of the Civil Code provides for parental authority and this provision has been used by the courts in kidnapping cases.<sup>6</sup>

When this provision is used in conjunction with Article 224 of the Penal Code, and Article 820 of the Civil Code, a parent can be found guilty of kidnapping his/her own child. Article 224 of the Penal Code is the general prohibition against kidnapping or abduction.<sup>7</sup> Article 820 of the Civil Code

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1. With intent to permanently remove the victim from this state, he removes such person from the state; or

2. Under circumstances which expose the victim to a risk that his safety will be endangered or his health materially impaired.

It shall be an affirmative defense to a prosecution under subdivision one of this section that the victim had been abandoned or that the taking was necessary in an emergency to protect the victim because he has been subjected to or threatened with mistreatment or abuse.

Custodial interference in the first degree is a class E felony.

6) Article 818 of the Civil Code  
(Parental authority)

1. A child who has not yet attained majority shall be subject to the parental authority of its father and mother.

2. An adopted child shall be subject to the parental authority of its adoptive parents.

3. *While father and mother are in matrimonial relation, they shall jointly exercise parental authority. However, if either the father or the mother is unable to exercise parental authority, the other parent shall exercise it.* (emphasis added)

7) Article 224 of the Penal Code  
(Kidnapping or Abduction)

A person who kidnaps a minor by force, threat, fraud, or enticement shall be sentenced to imprisonment with labor for not less than three months nor more than seven years.

grants the right to custody and imposes a duty to educate on the parent with authority.<sup>8</sup> However, extreme and socially unacceptable means must be used in the abduction by the non-custodial parent in order for the act to constitute a crime.

#### IV. Domestic Case of Parental Kidnapping

In a landmark domestic case an estranged father living in Tokyo was found guilty of kidnapping his own two-year old son, and was sentenced to a year in prison, the sentence being suspended for four years.<sup>9</sup> In order to avoid domestic violence, the wife moved from Tokyo to her hometown in Aomori, in northern Japan, taking the son with her and the two of them lived with her parents. The boy attended a local nursery school. On November 22, 2002, the defendant husband drove from Tokyo to Aomori, a ten-hour trip by car. He missed his son very much and wanted to see him. At around 3:45 p.m., he went to the daycare center and parked his car nearby, leaving the motor running. The grandmother of the boy, the wife's mother, went to the school to pick up the child. When the grandmother was walking with the boy outside the school, the defendant ran up behind the boy and clasped his arms and dashed him to the car and placed the boy in the front seat of the car. The grandmother was trying to get the boy back and was pounding on the driver's window with her hand and yelling for him to stop. Later that evening at around 10:20 p.m. the police discovered the defendant in his car with the boy on a deserted forest road.

The wife had filed for divorce against the father and the couple was in mediation, a requirement under Japanese law when the divorce is contested by one of the parties. Since the marriage still existed legally at the time of incident, the defendant still had parental rights over the son at the time of the abduction. Nevertheless, he was found guilty of kidnapping because the act of taking the boy by force was beyond the bounds of socially accept-

8) Article 820 of the Civil Code  
(Custody and Education)

A person who exercises parental authority has the right to custody and duty to educate the child.

9) Decision of the Second Petty Bench of the Supreme Court of Japan, December 6, 2005.

able behavior. The father did not have any concrete plans for caring for the son at the time of abduction, and took the boy away from a stable family environment.

One of the five justices hearing the case wrote a dissenting opinion. Justice Shigeo Takii was in agreement with the view that when either the father or mother with parental authority takes out, by physical force, the child who is taken care of and reared by the other party with parental authority, and effectively places the child under his/her control, such act should be regarded as constituting the crime of kidnapping. However, such an act has roots in parental affection for the child. Therefore, the state authority must be especially careful about applying the criminal law in order to intervene in cases where either the mother or father behaves in such a manner. This was a domestic case and all the parties were Japanese.

## V. International Case of Parental Kidnapping

What would happen if the father or mother had been a foreigner and had attempted to take his or her child out of Japan? In Japan there is a separate provision of the penal code which makes it a crime to do such a thing.<sup>10</sup> In 2003, the Supreme Court of Japan upheld the conviction of a Dutch national who violated the law.<sup>11</sup> However, as with the previous case, the act must be committed with the use physical force and be outside the bounds of acceptable behavior in order to constitute a crime. The defendant was from Holland had been married to a Japanese woman, but lived separately from her. Their two year old daughter lived with the mother. The father went to the hospital where the girl was staying and at 3:15 a.m. he took the girl by force from her hospital bed. He put her in his car and drove away.

The Court held that, “given the facts outlined above, the defendant forcibly took his daughter, who had been living peacefully in the custody of his separated wife, one of the persons jointly having parental power over his

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10) Article 226(1) of the Penal Code

A person who kidnaps or abducts another for the purpose of transporting the same to a foreign country shall be punished with imprisonment with labor for a limited period of not less than two years.

11) Second Petty Bench decision of the Supreme Court, March 18, 2003

daughter, from the hospital where she was staying for the purpose of taking her away to a foreign country, thereby taking her away from the environment where she had been protected and in effect putting her under his control. Such an act of the defendant shall evidently constitute an offense of kidnapping for the purpose of transporting the kidnapped person to a foreign country. Furthermore, in light of his malicious manner in which the act was conducted, it shall not be regarded as an exceptional act that can be justified even though consideration is given to the facts that the defendant was one of the persons jointly having parental power over his daughter and he intended to take her back to his home country. Therefore, the second instance judgment acknowledging the establishment of an offense of kidnapping for the purpose of transporting the kidnapped person to a foreign country shall be justifiable.”

The law is very good at dealing with cases between two big corporations who are conducting business at arms-length. When there is a contractual dispute the courts can interpret the terms of the agreement and make a just decision.

It is quite another matter when judges are called upon to make decisions related to family problems and child custody. The relationship between a wife and a husband is very complex and there are many facts to the marriage that would be difficult for any third-party to understand completely. There is the delicate issue of privacy and the invasion of that privacy when the marriage breaks down. Nevertheless, the law and courts must have some method to deal with child custody issues in order to protect the child.

## VI. The Hague Convention and Parental Kidnapping

In response to the problem of parents in international marriages kidnapping their children and removing them from the family home, and taking them across international borders, the Hague Convention on the Civil Aspects of International Child Abduction was established on December 1, 1983. This convention is a multilateral treaty developed by the Hague Conference on Private International Law that provides for an expeditious method to return a child internationally abducted from one member nation to another. The purpose of the Convention is ensure the prompt return of

children who have been abducted by one parent and removed from the child's country of habitual residence, or wrongfully retained in a contracting state not their country of habitual residence.<sup>12</sup>

The basic intention of the Convention is to preserve wherever status quo child custody arrangement existed immediately before the wrongful removal or retention. One of its purposes is to deter a parent from crossing international borders in search of a more sympathetic court. The Convention only applies to children under the age of 16. As of February 2012, 87 countries are party to the convention.<sup>13</sup>

## VII. Japan and the Hague Convention

Noticeably absent from the list of member states is Japan. Japan is the only member of the G-7 that has not joined the convention. And for this Japan has been severely criticized by the U.S. House of Representatives. On September 29, 2010 this legislative body issued House Resolution 1326. Usually, legislatures make laws, but sometimes they issue resolutions which merely attempt to explain their collective opinion. Resolutions are usually used to send a message or make a request. The title of the Resolution 1326 is "Resolution Condemning Japan for International Child Abduction."

At first, one may ask what business does the United States House of Representatives have telling another government, in this case the Government of Japan, how to conduct its own affairs and make its own laws. Is it right for one country to put pressure on another country to join a treaty and amend its domestic laws? Well, 415 congressmen thought that it was their job to do so.

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12) Preamble to the Convention: The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

13) Status Table/Hague Convention on Private International Law [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)



The resolution calls on the Government of Japan to immediately address the growing problem of American children being kidnapped by the Japanese parent.<sup>14</sup> As is well-known, Japan is an important partner with the United States and the two countries have shared interests in fields of economics, military defense, the promotion of global peace and prosperity, and the protection of human rights.<sup>15</sup>

The resolutions points out that according to Japanese statistics there were 44,701 marriages in 2006 between a Japanese and a foreigner, and there were 17,102 divorces between a Japanese national and a foreigner.<sup>16</sup> Those numbers tell the story regarding international marriages in Japan. A couple has more than a one-in-three chance of breaking up, not a very promising outlook when it comes to family life and the pursuit of happiness.

To deal with the issues related to the children of such international families in the U.S.A., the Office of Children's Issues was established within the Department of State's Consular Affairs. The office is actively engaged in providing services to U.S. citizens regarding two issues related to multiculturalism - inter-country adoptions and international parental child abduction.<sup>17</sup> Regarding the latter, the State Department, since 1994, has opened 194 cases involving 269 United States citizen minor children abducted to or wrongfully retained in Japan, and as of March 25, 2010, the OCI had 85 open cases involving 121 children who have been either

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14) Preamble to HR 1326: Calling on the Government of Japan to immediately address the growing problem of abduction to retention of United States citizen minor children in Japan, to work closely with the Government of the United States, to provide left-behind parents with immediate access to their children, and to adopt without delay the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

15) *Id.* **Whereas** Japan is an important partner with the United States and shares interests in the areas of economy, defense, the promotion of global peace and prosperity, and the mutual protection of the human rights of the two nations' respective citizens in the increasingly integrated global society;

16) *Id.* **Whereas** according to Japan's National Institute of Population and Social Security Research, 44,701 marriages between a Japanese national and a foreigner were registered in Japan in 2006, and 17,102 divorces were registered in Japan in 2006 between a Japanese national and foreigner;

17) [http://travel.state.gov/abduction/about/about\\_605.html](http://travel.state.gov/abduction/about/about_605.html)

abducted or wrongfully retained in Japan.<sup>18</sup>

Congressman Ron Paul was the only member who voted against the HR 1326. The file in Rep. Paul's office on H.R. 1326 in the 111th Congress does not indicate he made a floor statement.<sup>19</sup> The explanation offered by his professional staff is that Dr. Paul voted "no" out of respect for the sovereignty of Japan and its right as a nation to decide how its internal law will address issues within its sovereign power.

According to his staff expert on foreign policy, Dr. Paul, is reluctant to support U.S. international measures or U.N. measures that seek to intrude into domestic legal and policy affairs of foreign countries when there is no U.S. national interest. In return, he takes the position that foreign nations and the U.N. should not interfere in U.S. domestic affairs.

He does not believe the U.S. needs to "coach" other countries on their internal legal and political systems, and vice versa. Instead, the emphasis should be on personal responsibility for those from one country who go live and have families in other countries.

The U.S. signed a peace treaty with Japan in San Francisco in 1951, but there is still a battle being fought over the children of divorced parents. If Japan joined the Hague Convention would the war be over? Probably not, especially for the cases occurring prior to Japan's entrance in the treaty, since the treaty is not retroactive. Therefore a separate agreement would have to be worked out to deal with the existing cases.

HR 1326, in no uncertain terms, "condemns the abduction and retention of all minor children being held in Japan away from their United States parents in violation of their human rights, U.S. law and international law." However, is not the Government of the United States telling Japan, a sovereign country, how to operate its internal affairs? The children being helped in Japan are also Japanese citizens, so does not the Government of Japan have a legitimate interest in protecting their citizens as well?

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18) HR 1326, **Whereas** since 1994 the Office of Children's Issues (OCI) at the United States Department of State had opened 194 cases involving 269 United States citizen minor children abducted to or wrongfully retained in Japan, and as of March 25, 2010, OCI had 85 open cases involving 121 United States citizen minor children abducted to or wrongfully retained in Japan;

19) Inquiry to Congressman Ron Paul's staff on May 8, 2012.

As part of the legislative process public hearings are held to get input from witnesses who testify before Congress about a given subject related to a proposed law or resolution. In the case of HR 1326, at least two such hearings were held, one on May 24, 2011, and on July 28, 2011. At the hearings left-behind-parents told of their ordeals and how their Japanese spouse or ex-spouse returned to Japan with their children.

## VII. Michael Elias Case

For example, Michael Elias explained what happened in his case. He testified at the hearing as follows:

“ I am a former sergeant of the United States Marine Corps, from August 2003 to November 2007. While stationed in Japan in 2004 to 2005, I met my wife, Mayumi Nakamura.... On October 18, 2005, we were married in Rutherford, New Jersey.”

The couple had two children, Jade and Michael, and in March 2007 Mr. Elias was ordered to go to Iraq and fight in the war. The wife and children remained in the U.S. and lived with his parents. During this time his Japanese wife started a relationship with a Japanese man, her travel agent. When Mr. Elias returned from the war he and his wife separated, and finally divorced. Mr. Elias was awarded joint custody of his children. This means that both parents share the raising and educating of the children. This is very common in America.

Because the Judge that heard the case felt that Mayumi might be a flight risk, he ordered that both American and Japanese passports be turned over to her attorney and held for safe keeping. Mr. Elias testimony continued:

“Mayumi was an employee of the Japanese Consulate in New York City issuing visas and passports. She used her position in the Consulate as a tool to carefully collaborate the abduction of our children. Mayumi had replacement passports issued in the Japanese Consulate in Chicago, where she and her boyfriend exited the country through Chicago’s O’Hare airport.

They carried out the abduction of our children on the Japanese Airline flight number 9, bound for Tokyo Narita airport in Japan on December 6, 2008. I still have in my possession their original passports....

Shortly after she had arrived in Japan, I was contacted by Mayumi, saying she had unilaterally decided that she would raise the children in Japan. When explaining to her that she had kidnapped our children, she maintained that, I quote, “It’s not kidnapping. My country will protect me...”

To date, no child has ever been returned by the Japanese Government.”

Via Skype Mayumi allowed Mr. Elias to communicate with his daughter on her 4<sup>th</sup> birthday. His testimony continued:

“Although it was very hard to see my children through a monitor, it was very satisfying to see them so happy to see me. My daughter, Jade, looked at her mother in heartache and said to her ever so softly something in Japanese. When I asked Mayumi what Jade had said, she replied, ‘She wants to be with you.’ The monitor immediately went blank. That was last time I saw my daughter’s face.”

#### VIII. Christopher Savoie Case of Re-kidnapping

Another case that made international headlines involved the American father who went to Japan and tried to retake his two children. In 2009, Christopher Savoie was arrested when he snatched the kids up in his arms from their school and ran to the U.S. Consulate office in Fukuoka seeking refuge. He was arrested on suspicion of kidnapping but he was never charged or indicted. He received a lot of sympathy from the most of the news media in the States. However, as a good friend once said to me, there always two sides to every pancake. How could a father who really loves his children take such drastic measures by physically subjecting these kids to such a traumatic encounter?

In Japan, there was a famous and wise judge, his name was Tadatsuke Oka. In one of the cases, two women were claiming to be the mother of the same child. In order to resolve the conflict he asked each of the women to hold on to one of the child’s arm and to pull the child like a game of tug-of-war. He declared that the woman who can get the child will be deemed the true mother. However, when one of the women, at the sight of the child screaming pain decided to release the arm of the child, the judge

decided that she must truly be the mother. There is a similar story in the Old Testament of a wise ruling by Solomon.<sup>20</sup> The Christopher Savoie case is much like this old Japanese case in that he was taking the law into his own hands and using physical force to get his kids.

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20) **1 Kings 3:16–28 A Wise Ruling**

16) Now two prostitutes came to the king and stood before him. 17) One of them said, “Pardon me, my lord. This woman and I live in the same house, and I had a baby while she was there with me. 18) The third day after my child was born, this woman also had a baby. We were alone; there was no one in the house but the two of us.

19) “During the night this woman’s son died because she lay on him. 20) So she got up in the middle of the night and took my son from my side while I your servant was asleep. She put him by her breast and put her dead son by my breast. 21) The next morning, I got up to nurse my son—and he was dead! But when I looked at him closely in the morning light, I saw that it wasn’t the son I had borne.”

22) The other woman said, “No! The living one is my son; the dead one is yours.”

But the first one insisted, “No! The dead one is yours; the living one is mine.” And so they argued before the king.

23) The king said, “This one says, ‘My son is alive and your son is dead,’ while that one says, ‘No! Your son is dead and mine is alive.’”

24) Then the king said, “Bring me a sword.” So they brought a sword for the king. 25) He then gave an order: “Cut the living child in two and give half to one and half to the other.”

26) The woman whose son was alive was deeply moved out of love for her son and said to the king, “Please, my lord, give her the living baby! Don’t kill him!”

But the other said, “Neither I nor you shall have him. Cut him in two!”

27) Then the king gave his ruling: “Give the living baby to the first woman. Do not kill him; she is his mother.”

28) When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice.

## IX. Using the Law: The Case Against Emiko Inoue<sup>21</sup>

Emiko Inoue was married to Dr. Moises Garcia and they lived in Milwaukee, Wisconsin, with their daughter Karina. Dr. Garcia filed for divorce in February of 2008. Inoue responded by abducting the child to Japan. A family court in Wisconsin gave Garcia custody of his daughter after Inoue fled. Nevertheless, since Japan does not recognize such court orders from U.S. courts, Inoue was back home in Japan and there was nothing the father could do. The court in Wisconsin issued an arrest warrant against Inoue, but it would not have any affect unless she stepped foot again on American soil.

She had a “green card” which means she had residency status in the United States, but she needed to travel to Hawaii to establish the requisite time for permanent status. When she arrived she was met by U.S. law enforcement officials and was arrested pursuant to the warrant and charged with a felony for interference with a custody order. Facing seven years in prison she agreed to a plea bargain, and the charges were lowered to a misdemeanor, but she had to return the child to Dr. Garcia. As part of the agreement, Inoue agreed to stay in the U.S. for three years. “Moises Garcia called it a miracle having his little girl home for Christmas, and he’s hoping the Japanese government realizes all children deserve two parents”.<sup>22</sup>

## X. Former Prime Minister Koizumi and His Sons<sup>23</sup>

Junichiro Koizumi married Kayoko Miyamoto in 1978, but the couple divorced in 1982, and agreed to divide custody of their three sons. He was 36 and she was a 21 year-old college student at the time of the wedding.<sup>24</sup> As to the issue custody, the couple agreed that he would keep the two older boys and raise them, and she would have the child that was still in her

21) <http://www.fathersandfamilies.org/2011/11/23/child-abducted-to-japan-to-be-returned-to-dad-in-u-s/>

22) <http://www.wisn.com/Fox-Point-Dad-Gets-Daughter-Back-From-Japan-In-Time-For-Christmas/-/9374034/8043386/-/np5wh6/-/index.html>

23) <http://www.jref.com/forum/japanese-news-hot-topics-4/japanese-typical-tale-divorce-110/>

24) <http://factsanddetails.com/japan.php?itemid=520&catid=16&subcatid=110>

womb, their 3<sup>rd</sup> son. Thereafter, the family kept a distant relationship and Koizumi refused to visit his third son, Yoshinaga Miyamoto. During an election the boy, 19 at the time, kept a photo of his father in his room and cheered for him when he won the election. The boy wanted to meet his father, but Koizumi refused. Why would a father behave in such a fashion? The son was an innocent victim in the dispute he had with his mother. Why should he be denied the right to have a father? What mental and emotional suffering did he have to endure as a boy growing up in Japan. Where was daddy during school events, like Sports Day, etc.? One can only imagine the suffering this child faced due to a heartless father.

This behavior by Japanese fathers is not uncommon and reflects Japanese culture and tradition. There is a widespread practice of not visiting or allowing visits with the other parents. Hiromi Ikeuchi runs classes and workshops on divorce, and said, "I'd be more surprised if there had been regular contact over the years, I myself have not allowed my ex-husband to see our daughter, who was 5 years old when we divorced and is now 13."

She said there is a big difference between the American idea of family and the Japanese idea of household. "Here the children inherit a position as head of the household. It's not the individual identity which the parents nurture, but the successors of the house," Ikeuchi said.<sup>25</sup>

## XI. The Opinion of the Japan Federation of Bar Associations<sup>26</sup>

On February 18, 2011, the JFBA prepared a statement on the Hague Convention and submitted it to the Cabinet Secretariat, the Ministry of Foreign Affairs, the Ministry of Justice, and the Supreme Court the same month. As we can see from the language of the opinion, the traditions and customs noted in the Koizumi case above are still reflected in Japan. The JFBA wants the "best interest of the child" to be the paramount interest in these cases. Also, Japan should not cooperate in cases of domestic violence or child abuse, or where the taking parent (usually the Japanese mother) is likely to be subject criminal prosecution upon return to the country of habitual residence with the child.

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25) Footnote 21, above.

26) <http://www.nichibenren.or.jp/library/en/document/data/110218.pdf>

In other words, if a Japanese mother could get in trouble with American authorities, if she returned with the child to America, then the Government of Japan should not cooperate with United States in such cases. This means that Japan might not ever cooperate in a case where the Japanese mother is in violation of court orders, or where the father has made a criminal complaint against the mother. As mentioned early in the paper, parental kidnapping is a crime anywhere in America.

As to the views of the child, their opinion, wants, and desires should be heard and respected in any proceeding related to enforcement of Hague Convention. Domestic Law must provide clearly that the Hague Convention does not apply retroactively. The JFBA wants approximately three years to be given before the Hague Convention and the Domestic Law take effect, in order to provide preparation for and notification to the public regarding implementation of the Hague Convention.

## XII. Conclusion and Comment-The Issue of Extraterritoriality

Under Article 3 of the Japanese Penal Code, a Japanese national who commits a crime in a foreign country, is also subject to punishment in Japan.<sup>27</sup> Kidnapping is one of the listed crimes in Article 3, and as noted above two fathers were found guilty of kidnapping their own children in Japan, one father being Japanese, and the other a Dutchman. However, in order for the Japanese Public Prosecutor to have the authority to pursue such a case, the victim or a relative, must file a complaint with the police. This is known as a *Shinkokuzai* in Japanese. Without this complaint the case does not move forward. Once the complaint is made, the prosecutor has two options. He/she can decide to indict the suspect, or they can decide to issue a declaration of non-prosecution, *fukiso* in Japanese.

When the prosecutor issues a declaration of non-prosecution, the victim

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27) Article 3. (Crimes Committed by Japanese Nationals outside Japan)

This Code shall apply to any Japanese national who commits one of the following crimes outside the territory of Japan: (xi) The crimes proscribed under Articles 224 through 228 (Kidnapping of Minors; Kidnapping for Profit; Kidnapping for Ransom; Kidnapping for Transportation out of a Country; Buying or Selling of Human Beings; Transportation of Kidnapped Persons out of a Country; Delivery of Kidnapped Persons; Attempts);



must be notified of this decision. In such a situation, the victim can file a request for the Prosecutorial Review Board to reconsider the matter. The Prosecutorial Review Board is made up of 11 ordinary citizens, much like an American jury. If 8 of the 11 members decide that case should be prosecuted, then the prosecution must move forward in what is known a compulsory indictment, *kyousei-kiso* in Japanese.

So what does all this have to do with The Hague Convention and the issue of parental kidnapping? I believe that some of these left-behind American fathers could file a criminal complaint with the Japanese police pursuant to Article 3 of the penal code because the abduction took place in America. If the prosecutor does not agree to proceed with the indictment, the victim, the left-behind American father could demand that the prosecutorial review board re-examine the matter.

I believe that even without the Hague Convention, the above domestic law of Japan could be used go after the taking Japanese mother. Through the process outlined above, the Japanese mother would be held accountable under Japanese law for the offenses committed abroad. If nothing else, it would help to force all parties to agree to a mutually acceptable arrangement that is in the best interest of the child.