

The Legal Responses to Child Abduction by Parents in Japan and England and Wales

Theint Theint Htwe

要 旨

本稿は、親による子の奪取事件に関して英国と日本との対処方法の差異を論じたものである。本稿では、まず国際的レベル、すなわち子の利益の保護を目的とした国際的な子の奪取に関するハーグ条約 1980 年に関して検討し、次に、国内的レベルとして両国の現実的方針を議論する。日本は英国と異なり本条約は未締結であるため、国際的子の奪取事件へのアプローチの違いにより救済は全く別なものとなっている。日本と英国それぞれの法的解決システムの比較は難しいが、本稿は、子の奪取事件の当事者が最大限の利益を得るために、両国の法的解決が十分であるかどうかの検証を目的とする。

Keywords: child abduction, convention, rights of custody

- I. Introduction
- II. The International Legal Framework under the Hague Convention on the Civil Aspects of International Child Abduction 1980
 - a. Wrongful Removal or Retention
 - b. Rights of Custody and Access
 - c. Habitual Residence
- III. Child Abduction by Parents in Japan
 - a. Abduction of Children within Japan
 - b. Abduction of Children into and out of Japan
- IV. Child Abduction by Parents in England and Wales
 - a. Abduction of Children within England and Wales
 - b. Abduction of Children into and out of England and Wales
 - ❖ To and from European States
 - ❖ To and from Non-European States

V. Conclusion

I. Introduction

This paper considers how the problems of parental child abduction are dealt with in the law both on an international and domestic level, particularly in Japan and England and Wales. It looks first at how international child abduction cases are treated under the international legal mechanism, namely the Hague Convention on the Civil Aspects of International Child Abduction 1980. Then the discussion moves to the practical ways which Japan and England and Wales work on these issues. Interestingly, Japan is not a Contracting State to the Convention yet whilst the United Kingdom has been a party to the Convention since 1986. Because of their different positions to approach international child abduction issues, their responses are especially different in terms of remedy.

The chief aim of this paper is to examine whether the legal responses of these two countries are adequate for the best interest of those people involved in the parental child abduction cases. In my previous papers, the resolution systems of child-related disputes for parents after dissolution of their relationships in Japan and England and Wales were discussed. Then it was realized that abduction of children is one of the child-related problems following the breakdown of parental relationship. Whatever the reason for the abduction may be, it is so true that a great number of cases occurred when the parental relationship was unstable and about to dissolve. In addition, it may also occur even after the dissolution of the parental relationship if a non-resident parent is not satisfied with his or her rights of access which he/she had after a separation or divorce.¹ Therefore, doing a research on that topic is not unworthy for me: it may partly support me to achieve the aims of my doctoral thesis.

The subsequent chapter explains what the Hague Convention on the Civil Aspects of International Child Abduction 1980 is, with the particular explanations of what primary objectives it has and how it operates as an international legal mechanism. In the international private law area, although a substantial number of States have not yet acceded to or ratified it, the Hague Convention on the Civil Aspects of International Child Abduction 1980 is accepted as a successful instrument for the protection of children internationally.² Therefore it is appropriate to discuss the international practices of child abduction issues in general before discussing the national practices of child abduction issues in Japan and England and Wales, and it is chosen to introduce first in this paper.

Following it, how the Japanese legal system treats the problem of parental child abduction issue is presented. Under this topic, the presentation is divided into two parts: abduction of children by a parent domestically and internationally. In order to complete the explanation of domestic law practice, some of the Supreme Court judgments will be added. In the part of international child abduction law practice, Japan is not yet a State party to the international treaty and therefore the weakness may be found in the resolution of international child abduction disputes.

The next part is about parental child abduction in England and Wales. The domestic law practice, both civil and criminal over the parental child abduction in England and Wales, is first discussed. Then the discussion is continued to the international legal practice over the international child abduction problem. As England and Wales is a State party to the Hague Convention on the Civil Aspects of International Child Abduction 1980, the courts in England and Wales are bound to order the return of cross-border abducted children to their habitual residence in complying with the Conventional provisions. In addition, as England and Wales is a State of the European Union (hereinafter EU) and a member of the European Custody Convention 1986, when a child is abducted from other EU States to England and Wales or from England and Wales to EU States, the provisions and procedures under Brussels II bis Regulation and the European Custody Convention is applicable. However, the legal response to EU states and non-EU states will be different slightly when these Conventions and Regulation are applied.

The final part is the conclusion part of the paper. In this part, what I have learnt from this study will be described with some opinions.

II. The International Legal Framework under the Hague Convention on the Civil Aspects of International Child Abduction 1980

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention) was adopted by the Hague Conference on 25th October, 1980. It is the fundamental civil instrument for person, institution or other body (hereinafter simply referred to as person) who actually exercised custody over the child prior to the abduction and is seeking the return of the abducted child from other Contracting State. The Convention is only applied to the international child abduction cases, not the interstate child abduction cases. However, the Convention does not cover all international child abduction cases because it has a number of limitations: the Convention is applicable only if both³ are Contracting States

to the Convention,⁴ only to the abduction cases occurring on or after the Convention entered into force in those Contracting States,⁵ only to the abducted children under the age of sixteen,⁶ and so on.

The Convention stated that it has two primary objectives:

- 1) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- 2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.⁷

In its simple interpretation, the first objective of the Convention provides a prompt civil remedy for the return of children in two categories: those children who have been wrongfully removed from and wrongfully retained outside the State of their habitual residence,⁸ and the second objective of the Convention is to secure the effective exercise of access rights granted to the non-custodial parent.⁹ In order to implement the first objective, the wrongful removal or retention of a child should be reported to the respective authority within one year from the date of such wrongful actions; otherwise, the Convention does not guarantee the prompt return of that abducted child and the possibility of granting a return order may be diminished.¹⁰ Although the term 'abduction' is used in the title of the Convention, it does not actually concern the criminal sense of kidnapping but the civil sense of wrongful removal or retention of a child by a parent across boundaries.¹¹

In order to have a clear understanding on the content of the Convention, it is appropriate to state here the definitions of some important technical terms used in it.

a. Wrongful Removal or Retention

The definition of wrongful removal or retention is described in Article 3 and it is regarded as the heart of the Convention because while seeking a return order in an abduction case pursuing the conventional provisions, whether the child is wrongfully removed from or retained in a Contracting State is one of the important issues to be proved by an applicant and to be examined by the authority also.¹² Article 3 of the Convention states that the removal or the retention of a child is to be considered wrongful where:

- 1) it is in breach of 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; and
- 2) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Accordingly, if a parent takes the child out from a State of his habitual residence to another Contracting State without the knowledge or consent of the person who is or would be exercising the rights of custody, such kind of removal should be considered as the wrongful removal of a child within the meaning of Article 3. In addition, if a parent lawfully removes a child from the State of his habitual residence to another Contracting State for a visit, and subsequently, the taking parent retains the child without return to the State of his/her habitual residence at the end of the visit, such retention should be considered as the wrongful retention of a child within the meaning of Article 3. In practice, the wrongful retention of a child by a parent is a frequent form of international child abduction cases.¹³

b. Rights of Custody and Access

The definition of the rights of custody and access is stated in Article 5 of the Convention:

- 3) 'rights of custody' shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence;
- 4) 'rights of access shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

For all cases under the Convention, the above-mentioned rights must be decided by the law of the child's habitual residence and can be obtained in three ways: by operation of the law, by a judicial or administrative decision, or by an agreement having legal effect.¹⁴ According to Article 3, the rights of custody may be possessed either by a person solely or by more than one person jointly. In case of exercising joint custody, the consent from all holders of rights may be necessary in order to legally remove a child from a State of his habitual residence to another State. Unless all joint holders gave their consent for removing the child, such a kind of removal will be considered as the wrongful removal of the child according to Article 3. Only those people who has the rights of custody and those rights were infringed upon or violated in a way may be entitled the remedy of return order under the Convention.¹⁵ With regard to the breach of one's access rights, although breach of rights of access is protected under Article 21, there will be no remedy of return order and the Convention conferred much discretionary power to the authority whether to help them to enforce their access rights effectively.¹⁶ Therefore, it should be here noted that the protection of one's rights of custody may be the prime concern of the Convention and awarding the immediate return order to the left-behind person may be its core.

c. Habitual Residence

Despite the fact that the determination of a child's habitual residence is the main connecting factor for the outcome of international child abduction cases,¹⁷ the Convention does not offer a specific definition on it.¹⁸ Therefore, a number of contradictory opinions may be found on this issue¹⁹ and there is no global consensus yet on a common definition.²⁰ As a consequence, case law in different jurisdiction reveals a number of different approaches to this issue.²¹ One said that the term 'habitual residence' may refer to the place where the child generally reside, goes to school and has some attachments such as friends, social activities, etc.²² Another one said that 'the habitual residence' is the one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time.²³ In general, in the wrongful removal cases, the State from which the child was taken out may be found as the child's habitual residence; whereas in the wrongful retention cases, the State in which the child is located may not be found as the child's habitual residence.²⁴ Nonetheless, in practice, because of a lack of statutory definition and uniform standard, determining the child's habitual residence in international child abduction cases is still a difficult task in particular for the borderline cases in which the child has close connections with more than one State.²⁵ Therefore, the current situation is very complicated and a uniform legal standard should be established to identify what a child's habitual residence is within the Convention.

After giving an explanation of the objectives of the Convention and some definitions of its technical terms, the explanation should be extended to its operating system. Currently, there are 87 Contracting States to the Convention and these States are obliged to establish their own Central Authorities to facilitate the operation of the Convention.²⁶ Actually, a Central Authority is an administrative body through which application can be made and received and which is generally charged to co-operate with the other Central Authorities of other Contracting States so as to achieve the objectives of the Convention.²⁷ As there is no uniform standard of the location and structure of the Central Authority and the personnel who work in it, a considerable diversity may be found in those aspects from one State to another.²⁸

In spite of these diversities, they all have a principal duty to assist the applicants by taking all appropriate measures to secure the return of their children or the effective exercise of their access rights. For this purpose, the Convention lists a number of functions which they have to discharge either directly or through an intermediary after receiving an application from an aggrieved person:²⁹

- to find out the whereabouts of an abducted child by requesting the necessary help from the local

authorities and other organizations;

- to prevent further harm to the child (in many cases, to prevent another removal of the child from the jurisdiction pending the proceedings) by taking appropriate provisional means;
- to secure the voluntary return of the child by encouraging the abductors to make the voluntary agreement for the return of the child; (if it is failed, the Central Authority will try to find an extrajudicial solution at a court.)
- to exchange information on the social background of the child when it is requested;
- to provide the relevant laws especially in determining whether a removal or retention is wrongful within the Convention;
- to initiate or facilitate the proceedings according to their domestic law; (In case the judicial intervention is needed to secure the child's return, the Central Authority will have to initiate the proceedings.)
- to provide the appropriate legal assistance where necessary;
- to provide the required administrative arrangements, e.g. travel arrangements, for the safe return of the child, and
- to make a record on the progress of each case and to maintain the accurate statistics of all cases with the purpose of sharing experiences with other Central Authorities.³⁰

As mentioned above, the Central Authority is playing an important role in the operation of the Convention. However, it is not the only way for an aggrieved person to seek a remedy under the Convention. The Convention provides two optional means by which the aggrieved person may seek the return order or may request a help to enforce his/her access rights: one is filing an application directly to a court of a Contracting State where the child is located³¹ and another option is filing an application either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State where the child is located³². Therefore, the aggrieved person is free to apply either to the Central Authority established pursuing the Convention or directly to the court which in his opinion is the most appropriate for his/her own case.

When an application of child return is brought before the court, the court has to examine some relevant factors: whether the applicant was actually exercising the custody rights at the time of abduction; whether his/her custody rights was wrongfully breached by the taking parent; whether the application is filed within one year of the abduction; and whether there will be any grave risk for the child if the return order is

made.³³ If it is found that the applicant's custody rights was wrongfully breached and the commencement of the proceedings is within one year of the abduction, the court is obliged to effort the prompt return of the child.³⁴ In this case, the court is required to act expeditiously throughout the proceedings; otherwise, it may be requested a statement of the reasons for its delay.³⁵ If the application is brought after the aforementioned period, the court is not bound to order the prompt return because the court has to examine one more factor whether the child is now settled in its new environment. If a sufficient reason is found to believe so, the proceeding will take much time to reach a conclusion.³⁶ In case the court believes that the return of the child will be contrary to his/her best interests under a grave risk, the court may exercise its discretionary power not to order the child returned. In addition, an application of securing access rights is applicable to the court where the child is located. However, the court has no provisional obligation to deal with the access issue.

To evaluate the operation system of the Convention, the third statistical survey was conducted by the Centre of International Family Law Studies concerning the applications made in the year 2008.³⁷ According to this survey, 1,961 return applications were received in 2008 which is 56% increase in comparing the total number of applications received in 2003 as found in the previous survey. Of these 1,961 applications, 19% of total applications were concluded in voluntary return and 27% were ended with judicial return. 5% of total applications were rejected by the Central Authorities because the applications had not fulfilled the requirements or were not well founded. 15% of total applications were refused by the courts based on various reasons: the most common reasons for refusal are that the return is contrary to the best interest of the child under grave risk (21%) and that the child is now settled in the new environment (11%). Concerning the timing of the operating system, voluntary return cases were resolved the most quickly with an average of 121 days taken, the judicial refusal cases took the longest at an average of 286 days and the judicial return cases took the average time of 206 days until a final decision was reached.

Concerning the access applications, 360 cases were received in 2008 which is an increase of 51% in comparison to the total number of applications in 2003. Of these 360 cases, 8% of total applications reached an agreement outside the court and 13% were judicially granted. 13% of total applications were rejected by the Central Authority while 3% of were judicially refused. The mean number of days taken to reach a final settlement was 339 days. The statistical survey shows that the vast majority of applications, (84%) of applications, made under the Convention were for return order and nearly half, (46% of these applications) were granted.

This is a brief explanation of the Hague Convention on the Civil Aspects International Child

Abduction 1980. The operating system under the Convention is relatively simple so as to ensure the requesting parties can easily access its protection. The Convention always focuses to give the remedy of prompt return of the abducted children unless there are no specific circumstances to consider. This shows that the Convention pays the respect to the existence of its member States' legal system. This may be desirable in the cooperation of the recent international society to form a peaceful community. If a member State works cooperatively with other member States, it will be helpful for not only his nationals but also other nationals of the member States. Under their cooperative work, their nationals are to be protected from the harmful effects of international parental child abduction problem. In the later part of this paper, the practices of a non-member State, Japan and, of a member State, England and Wales, on the international child abduction issue will be discussed.

III. Child Abduction by Parents in Japan

In one of my previous papers, the resolution system of child-related disputes after divorce in Japan was researched³⁸ and it was found that the Japanese system is somewhat unique in determining the rights of custody and the rights of contact. Although 'the best interest of the child' rule is always considered as a universal norm in determining child-related disputes, the Japanese traditional interpretation of 'the best interest of the child'³⁹ in determining the rights of custody and rights of contact is different from other jurisdictions. Some Scholars pointed out that the Japanese current practice of exercising sole custody rights after divorce may create a temptation to a non-resident parent (majority are fathers) to abduct his own child.⁴⁰ Here, it should be given a brief presentation of Japanese resolution system on rights of custody and rights of contact because they are interrelated with child abduction phenomenon in a particular way.

Article 819 (1) of the Civil Code in Japan provides that if a couple gets divorce by mutual agreement, they need to agree first which parent will exercise the parental rights and duties (*Shinken* in Japanese) after divorce. Article 819 (2) states that if a couple gets divorce through judicial proceeding, the court has to determine which parent will take *Shinken* after divorce. Article 766 (1) says that if a couple gets divorce through mutual agreement, they should determine who will have custody rights (*Kangoken* in Japanese) after divorce. If an agreement cannot be reached by them, the issue will be determined by a Family Court. By seeing these Articles, it can be simply noted that, if a couple gets divorce under the Japanese law, *Shinken* and *Kangoken* will be solely exercised together by a person or separately by the different people. In

the Japanese practice, *Kangoken* is always included in *Shinken* and in most divorce cases the same person is vested in both *Shinken* and *Kangoken* together. Majority of those divorced parents who exercises both rights exclusively are the child/ren's mother under the Japanese *status quo* principle and because of its custom and culture relating to family matters.⁴¹ Those custodial mothers have not only the physical custody rights to live with their child/ren but also the legal custody rights to determine the major decisions on their child/ren care matters unilaterally. Although it can be said that the non-custodial father theoretically still retains *Shinken*,⁴² it does not work in practice.

In the past, the Japanese Civil Code did not provide anything relating to the determination of the contact disputes for divorcing couples. However, the revised version of Article 766 of the Civil Code came into force in 2012 and then the divorcing couples need to determine the contact arrangement between a non-resident parent and his/her child/ren after their divorce. Accordingly, the contact matter becomes an issue to be determined at the time of the parental divorce. Although it is not still recognized as a legal right of a non-resident parent, it was recognized, in a court judgment, as the right of being a parent as long as it is not contrary to the best interest of the child since 1964.⁴³ If a divorcing couple can not reach an agreement on their own, they can resolve their contact dispute at a Family Court. In 2010, 7,749 of contact disputes were received at the Family Court and 3,826 cases were successful through mediation whilst other 934 cases were failed.⁴⁴ Even though a non-resident parent is legally granted the rights of contact, it is not easy for him/her to enforce it in the practice because most of the custodial mothers are not happy to allow their children to meet again with their non-resident parent and they may prefer to protest it.⁴⁵ In this case, there is a few intermediary organizations in Japan to implement or facilitate or promote the contact arrangement between the children and their non-resident parent.

As mentioned above, the Japanese dissolution system on rights of custody and rights of contact issues is not free from the controversy. Generally speaking, the outcome is very formal⁴⁶ although the background of every case may not be the same. Every divorcing party may be afraid that once they lose the custody rights over their children, they will be suffering from the uncertain contact rights later. Therefore, before getting divorce, parties try to be under the cover of the *status quo* principle in order to be the sole custodians after divorce. This is a connecting factor that makes a parent to abduct his/her own child. Under the Section 224 of the Japanese Penal Code, if a non-resident parent abducts his/her own child by using of physical force, he will be assumed as a criminal and may be punishable by a maximum of 7 years. This is an undesirable strong legal intervention in relation to the family disputes. The following part will discuss how

the parental child abduction issues are dealt with under the Japanese domestic law and the discussion will be supported by case studies.

a. Abduction of Children within Japan

When a non-resident parent takes the child without the consent of the child's custodial parent, it is generally true to say that the child is abducted by one parent. If it occurs within Japan, the custodial parent may seek a return order in three different ways.⁴⁷

- (1) The custodial parent may apply for a return order at the Family Court. If a Family Court receives such kind of application, the court will make an order to return the child through the determination procedure unless it was found that the child is well settled under the custody of the abducting parent or making a return order is contrary to the best interest of the child.
- (2) The custodial parent may file a civil litigation at a District Court following the civil litigation procedure.
- (3) The custodial parent may claim for a return order at a District Court or at a High Court pursuing the Habeas Corpus Act 1948.⁴⁸

Among these three procedures, the last one, claiming a relief under the Habeas Corpus Act was the most common practice because a prompt return may occur under the Act and its enforceability measure is also much stronger than the others. If a parent does not obey the judgment made by the Habeas Corpus Act, he/she may be detained for a certain period owing to his/her own fault.⁴⁹ This is impossible in other two time-consuming procedures however paying a certain amount of fine is possible instead. In order to get more understanding how the Japanese law treated the domestic child abduction cases, some judicial decisions of the Supreme Court should be observed here.

In one of the judgments, the Supreme Court held that unless it is contrary to the best interest of the child, the non-custodial parent who abducted the child shall return the child back to the custodial parent.⁵⁰ In this case, the unmarried father without parental rights and duties took a temporary care of the child with a promise to return back the child to his custodial mother after a certain period. The unmarried father later broke his promise and retained the child by refusing the custodial mother's request to return the child back. In these days, he took a good care of the child with much of his affection. The court of first instance believed that the child has settled in the new safe environment and therefore the return was not needed. Mainly based on this fact, the mother's application under the Habeas Corpus Act was dismissed. However, the

determination of the court of first instance was quashed later by the Supreme Court and the mother's request was upheld there. In its judgment, the Supreme Court ruled that placing a child under the custody of unmarried father who does not have parental rights and duties is unreasonable even though he is in a better position in terms of his financial situation. Admitting the custodial mother's request is also reasonable on the other hand as there is no sufficient ground found to believe it is contrary to the best interest of the child.

Another remarkable judgment was emerged with the presiding judges' different opinions in 2005.⁵¹ In this case, the child's father and mother were living separately due to the marital discord and their divorce application was made. A two-year-old child was living with his mother at the moment but there was also a dispute over the rights of custody. As a result, both parents wanted to place the child under their control in order to get a favor in the court proceedings. One day, the father took the child away by using physical force while the child was with his grandmother. Sometime later he was discovered and arrested by the police. Then he was prosecuted for the abduction of a minor by force under Section 224 of the Penal Code. The court held that the father committed a crime of kidnapping within the meaning of Section 224 of the Penal Code because the fact that he had the joint parental rights and duties at the time of taking the child was not a sufficient ground to justify his action.

This provision is also applied to on the foreign nationals if he/she commits abduction in Japan. In one case,⁵² a married couple, a Dutch father and a Japanese mother were living separately. Their daughter who is at the age of 2 years and 4 months was in the hospital with her mother at the moment. In the one early morning, the Dutch father took the child out from the hospital by using physical force. Then he tried to leave Japan with her daughter. However, his effort was unsuccessful: he was found and arrested at the immigration office before passing the borders. Then he was prosecuted under Section 226(1) of the Penal Code. In this Section, it provides that if a person kidnaps or abducts another for the purpose of transporting the same to a foreign country, he shall be punished with the imprisonment with labor force for a limited period of not less than 2 years. The Supreme Court held that the Dutch father's action constituted a crime under the provision of Section 226(1) even though he is a parent having parental rights and duties.

By studying these precedents, it comes to understand that the Japanese law is developed to some extent in the practice of domestic parental child abduction protection. Although the Habeas Corpus Act is not the substantive law for the child abduction cases, people are relying on it as a legal instrument to claim for their children's return. Although child abduction is not regarded as a crime, child abduction in a bad manner such as using by force, threat, fraud, or enticement may be punishable crime under the Japanese Penal Code.

These aforesaid laws are only applicable in the child abduction cases which are occurred within the jurisdiction of Japan and the later part will be concerned the child abduction cases which are occurred internationally with the involvement of Japan.

b. Abduction of Children into and out of Japan

According to the Ministry of Health, Labor and Welfare data, in 2011, 25,934 of intermarriages and 17,833 of intermarried couples' divorce were registered in Japan.⁵³ These data show that Japan is becoming an international society in the global world. In parallel with this phenomenon, the problem of international child abduction by a parent has emerged. Although the official data was not found, some foreign countries claimed that there are a number of children in Japan who are abducted from the foreign countries to Japan and these international child abduction cases are neglected by the Japanese Government.⁵⁴

In reality, there is no international legal mechanism yet to resolve international child abduction cases because Japan does not sign any treaty, multilateral or bilateral, that covers international child abduction issue. Therefore, when a child is abducted to or from Japan across the borders, the existing international legal mechanism is not applicable to resolve them. This defect may make it difficult for not only those foreign parents whose children were abducted to Japan but also those Japanese parents whose children were abducted from Japan in seeking a return order over their abducted children.

In recent years, the Japanese Government is considering to conclude the Hague Convention on the Civil Aspects of International Child Abduction 1980 in response to the needs of Japanese international society.⁵⁵ On this important movement, the Japan Federation of Bar Association (hereinafter JFBA) held a seminar in 2010, conducted a questionnaire survey via fax and issued their opinion paper in 2011. In this paper, the JFBA stated its concern about the retrospective authority of the Convention because there are a number of Japanese mothers who took their children from the foreign countries without the consent of the other parents. In the Japanese view, this is legal and nothing wrong but from other countries' point of view, it is in breach of the other parents' rights. This remains as an unsolved problem until now and the Japanese Government has started to find the possible way to resolve it.

Based on the abovementioned discussion on the child abduction by a parent domestically and internationally, it may be here concluded that: Japan is exercising very rigid rules and procedures to prevent the domestic child abduction cases; on the other hand, Japan's is lack of efficient measure of preventing international child abduction cases and to protect the left-behind parents' rights is very controversial in

today's global world.

IV. Child Abduction by Parents in England and Wales

Before the discussion goes to the child abduction issue, it should be started here with a brief explanation of resolution of child-related disputes after the dissolution of parental relationship. In England and Wales, the Children Act 1989 is the fundamental legal framework both in private law and public law area relating to the children matters. The important private law child-related matters which are usually discussed at the time of the dissolution of parental relationship are provided in this Act as follow:

➤ Parental Responsibility – It means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.⁵⁶ When a married or civil partnered couple dissolves their relationship, no one needs to relinquish their parental rights and duties: both parents retain it unless it is brought to an end by a court order.⁵⁷ When a cohabiting couple dissolves their relationship, the child's mother retains parental responsibility as before⁵⁸ and the unmarried father or the mother's female partner can retain it if only he/she had it already or can acquire it by making an agreement with the child's mother or by a court order.⁵⁹ This is called shared parental responsibility and those people who have parental responsibility are able to decide the child's upbringing matters unilaterally unless it is needed to consent from everyone with parental responsibility.⁶⁰

➤ Residence Order – It is a new term of the former custody order and means an order settling the arrangements to be made as to the person with whom a child is to live.⁶¹ At the time of the dissolution of parental relationship, if the parents disagree on the living arrangement of the child, the court may make a residence order, either sole or shared⁶², with the consideration of the child's welfare is paramount.⁶³ The residence order may prevent the child to be removed from the jurisdiction of the UK⁶⁴ without the consent of every person with parental responsibility.⁶⁵ Therefore, it has been used as a useful legal instrument in preventing parental child abduction. However, those people with the residence order are not under this restriction if the period of removal is less than one month.⁶⁶

➤ Contact Order – It is an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.⁶⁷ In this sense, the contact person may be any person related to the child.⁶⁸ When the court has a concern about violence or abuse or abduction during the contact period, a supervised type of

order may be granted and such order is implemented with the help of the voluntary contact centers.

➤ Prohibited Steps Order – It is an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.⁶⁹ It is usually used to impose a specific restriction on the exercise of parental responsibility. Therefore, when a person is concerned that the child will be removed from the jurisdiction by a resident parent, he/she likely to seek the prohibited steps order to prohibit the child's removal.

By seeing the above mentioned provisions, it is realized that the Children Act 1989 has an acute awareness over the parental child abduction issue. It sets out the rules how the divorcing parents take their parental responsibility over their children, how the non-resident parents maintain the relationship with their children and how the parent can prevent their children from abduction. Some possible ways can be found under this Act to prevent the child from abduction. The later part of this paper will explain what remedy the left-behind parent is able to entitle when his/her child is abducted.

a. Abduction of Children within England and Wales

If a child is abducted by a parent or other person connecting to the child within England and Wales, it is not recognized as a criminal offence unless it is contrary to the common law or the child is in the care.⁷⁰

Under the common law practice, if a parent takes away the child under 18 by using force or fraud without lawful excuse and without the child's consent, he is guilty of the common law offense of kidnapping.⁷¹ In this respect, the prosecution of such offense must be done with the consent of the Director of Public Prosecutions. When the court found the offender is guilty, the abducting parent may be punishable with imprisonment or fine at the court's discretion.⁷²

Under the Section 49 of the Children Act 1989, if any person (a parent or other person with parental responsibility) takes away the child in care from any responsible person⁷³ without lawful authority or reasonable excuse, he is guilty of child abduction in care and may be punishable with imprisonment for a term not exceeding six months or to a fine. Another civil remedy for such kind of abduction is applying a recovery order to seek the child's return.⁷⁴

Another important legal instrument concerning the parental child abduction is the Child Abduction Act 1984. Under the Section 1(1) of this Act, if a person (a parent or other person connected with

the child) takes or sends a child under 16 out of the UK without the appropriate consent, he commits a criminal offence of child abduction and punishable with imprisonment to a maximum of 7 years. Same as in common law practice, such a kind of abduction must be prosecuted with the consent of the Director of Public Prosecutions.⁷⁵ The interesting fact is that this Act is also applicable when a parent attempts to commit child abduction because attempting to take a child out of the UK itself is also an offense.⁷⁶

This is a part of the legal response in England and Wales to the parental child abduction which is occurred within its jurisdiction. In order to make a prosecution of abduction, an abducted child must be under 18 years of age according to the common law but he/she must be under 16 years of age in application of the Child Abduction Act 1984. The different criterion of the abducted child's age is noticeable. It means that if a child between 16 and 18 is abducted or has been subject to an attempted abduction out of the UK, the domestic law of the Child Abduction Act 1984 is not applicable. However, if the same child is abducted within England and Wales, the concept of common law practice will be applied. Nonetheless, both procedures must be commenced under the discretion of the Director of Public Prosecutions.

Based on the above mentioned legal provisions, it can be noted that if a non-resident parent takes the child from his/her resident parent with the child's voluntary consent and travel along England and Wales, it is a lawful movement of the child within the definition of common law offense of kidnapping and the non-resident parent is not punishable. This may be one of the concerns of the resident mother to allow the child to meet the non-resident parent within a court contact order. In this respect, the resident mother can deter it by applying the prohibited steps order at a court.

b. Abduction of Children into and out of England and Wales

If a child is abducted into England and Wales from the other member States of the Conventions or the EU States, the left-behind parent may seek a child's return order through one of the following ways and vice-versa:

- an order of recognition and enforcement either under the Brussels II bis Regulation (hereinafter Regulation) or the European Custody Convention 1980; or
- an application for a return order under the Hague Convention on the Civil Aspects of Child Abduction 1980; or
- an application for a return order within the High Court's inherent jurisdiction with respect to the children.⁷⁷

Under these Conventions and Regulation, the operating system is mainly based on the establishment of Central Authority. The Central Authority of England and Wales is located in the Office of the Official Solicitor and Public Trustee which is called the International Child Abduction and Contact Unit (hereinafter ICACU).⁷⁸ ICACU accepts all incoming applications for the return of a child who are abducted into England and Wales but it does not involve itself in the return proceeding. Once it accepts an application, it checks the necessary requirements on the application and then asks a solicitor to take on the case. After that the solicitor will conduct the case with the necessary assistant.⁷⁹ For outgoing cases application, the ICACU help the applicants to file the application for return order to the Central Authority of the States to which the child has been abducted. For incoming cases only, if the applicant wishes to make an application directly to the court, it is also possible and the application must be presented to the High Court. This is the general commencing procedures of the applications and when these applications are processing, they may be slightly different based upon the content of the Conventions and the Regulation.

In 2011, the third statistical survey was conducted by the Centre of International Family Law Studies concerning the applications made in 2008 and it was found that the ICACU received 238 incoming applications from 36 different Central Authorities. Of these applications, 66% of the total number is from the EU States. Therefore, it can be said that most of the international child abduction cases of England and Wales occurred within the EU States. The next part of the paper will discuss the operation procedure of England and Wales over these applications.

❖ **To and from European States**

If a child is abducted within the EU States, the return application is able to make under the Conventions or the Regulation as the applicant thinks fit. Nowadays, the Brussels II bis Regulation is seen as a strengthened legal instrument within the EU States because it introduced new return rules for abducted children. Article 11(8) of the Regulation provides that 'notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in order to secure the return of the child'. Accordingly, if an applicant is refused to return the child under the Convention, he may find another remedy under the Regulation. In this respect, the applicant has to make another application at the court of the child's habitual residence within the three months of the non-return order. During the process under the Regulation, the children and parties concerned may be heard before the judge. If the court of the

child's habitual residence reaches a different decision to the former non-return order, the court can make freely a return order and its judgment is automatically recognized and enforceable.⁸⁰ Throughout the proceeding, the court must apply the most expeditious procedures to issue a decision within six weeks.⁸¹

Such a kind of strengthened Regulation is not applicable outside the EU and there is no similar mechanism under the Convention. Therefore, if an applicant is refused to return a child under the Convention, there is no way to find another remedy for the applicant and the court of the child's habitual residence can do nothing about it.

❖ **To and from Non-European States**

If a child is abducted from the Non-European States to England and Wales or from England and Wales to Non-European States, only the Hague Convention on the Civil Aspects of International Child Abduction 1980 is applicable if the said Non-European States are the parties to the Convention. England and Wales is regarded as an actively implemented party to the Convention because the survey shows that England and Wales received the second highest number of applications in 2008 following to the US.⁸² The operating procedures are the same as described earlier and the national law to implement the Convention is the Child Abduction and Custody Act 1985. The return order made under the Convention is a final one and it does not allow appeal. However, if the applicant wants to set it aside, he may apply to do so at the Court of Appeal.

V. Conclusion

At the end of the study, it is realized that the legal response of the England and Wales to the parental child abduction is much effective than that of Japan. Particularly in the EU States, a great concern about the parental child abduction problem is visible because they have adopted a much strengthened return procedure for abducted children. As it is well known, people can go freely throughout the EU and it makes an opportunity for a non-resident parent to abduct their children easily. Therefore, they may adopt the legal procedures to control such kind of free movement within the EU. Out of the EU, the Hague Convention is very important to prevent the parental child abduction. By joining it, member States are secure to return their abducted children from other member States. This is mutual respect between the different jurisdictions and it maintains the stable and peaceful international community. Nowadays, Japan is also thinking about joining the Convention. In 2011, the Japanese Government announced that it will ratify the Convention. Then, in

2012, the Ministry of Foreign Affairs launched a pilot project towards concluding the Convention.⁸³ In addition, as I mentioned in Part III, the JFBA also made some preparations to conclude the Convention. Because of differences in culture and way of thinking between the western world and Japan, it is necessary for Japan to think deeply how to join the Convention. Without good preparation, it is not possible for Japan to join the Convention.

Endnote

- 1 Beaumont and McEleavy, *"The Hague Convention on International Child Abduction"*, (Oxford University Press, 1999), pp.2-3.
- 2 <http://www.hcch.net> (Accessed on 15 October 2012)
- 3 Those States from/to which a child is abducted.
- 4 Article 35 of the Convention.
- 5 Ibid.
- 6 Article 4 of the Convention.
- 7 Article 1 of the Convention.
- 8 Nigel Lowe, Mark Everall QC and Michael Nicholls, *"International Movement of Children, Law Practice and Procedure"*, (Family Law, Jordan Publishing Limited, 2004), p.249.
- 9 Priscilla Steward, *"Access Rights: A Necessary Corollary to Custody Rights under the Hague Convention on the Civil Aspects of International Child Abduction"*, Fordham International Law Journal, Volume 21, Issue 1, Article 9, (1997), pp. 309-310. Available at <http://ir.lawnet.fordham.edu/> (Accessed on 17 October 2012)
- 10 Article 12 of the Convention.
- 11 Elisa Perez-Vera, *"Explanatory Report of the Convention on the Civil Aspects of International Child Abduction"*, in the Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Volume III, pp. 426-476 (1982), p.441.
- 12 Linda Silberman, *"Hague International Child Abduction Convention: A Progress Report"*, in *The Hague Conference on Private International Law*, Edited by Paul D. Carrington and Adair Dyer, Jr., pp.209-269, (Law and Contemporary Problems, Volume 57: No.3, Summer 1994), p.212.
- 13 Thalia Kruger, *"International Child Abduction, The Inadequacies of the Law"*, (Hart Publishing, 2011), p.25.
- 14 Article 3 of the Convention.
- 15 Article 12 of the Convention.
- 16 Marilyn Freeman, *"Rights of Custody and Access under the Hague Child Abduction Convention – A Questionable Result?"*, California Western International Law Journal, (California Western School of Law, 2000). Available from <http://www.lexis.com> (Accessed on 17 October 2012)
- 17 A child's habitual residence is the main ground of jurisdiction in relation to all matters under the Convention.
- 18 Beaumont and McEleavy, supra n. 1, pp.88-90.
- 19 There has been a debate to argue whether the determination of a child's habitual residence is a question of purely factual or a question of mixed fact and law.
- 20 Thalia Kruger, Supra n.13, p.20.
- 21 Rhona Schu, *"Habitual Residence of Children under the Hague Child Abduction Convention? Theory and Practice"*, Family Law Quarterly, Vol.13, No.1, (2001), p.1. Available at SSRN: <http://ssrn.com/abstract=270989> (Accessed on 25 October 2012)
- 22 Thalia Kruger, Supra n.13, p.20.
- 23 Beaumont and McEleavy, supra n.1, p.101.
- 24 Rhona Schu, *"Policy Consideration in Determining the Habitual Residence of a Child and the Relevance of Context"*, Journal of Transnational Law and Policy, Volume 11, No.1, (fall, 2001), p.14. Available at SSRN: <http://ssrn.com/abstract=270991> or <http://dx.doi.org/10.2139/ssrn.270991> (Accessed on 25 October 2012)
- 25 Rhona Schu, supra n.20, p.3.
- 26 Article 6 of the Convention.
- 27 Nigel Lowe, Mark Everall QC and Michael Nicholls, supra n.8, p.225.
- 28 Nigel Lowe, Mark Everall QC and Michael Nicholls, supra n.8, p.228.
- 29 Article 7 of the Convention.
- 30 Nigel Lowe, Mark Everall QC and Michael Nicholls, supra n.8, pp.228-244.
- 31 Article 29 of the Convention.

- 32 Article 8 of the Convention.
- 33 Article 12 & 13 of the Convention.
- 34 Article 12 of the Convention.
- 35 Article 11 of the Convention
- 36 Elisa Perez-Vera, supra n. 11, p.459.
- 37 A Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Global Report, Prel. Doc. No. 8 A of May 2011. Available at <http://www.hcch.net> (Accessed on 30 October 2012)
- 38 Theint Theint Htwe, “*Intermarried Couples and Divorces in Japan: Resolution of Child-related Disputes after Divorce*”, The Journal of the Study of Modern Society and Culture, No.53, (Graduate School of Modern Society and Culture, Niigata University, 2012).
- 39 In the western countries’ thinking, seeing both parents after dissolution of parental relationship is important to provide the best interest for the child. However in Japanese thinking, after a parental divorce, living stably with one parent under the *status quo* principle is beneficial for the children and seeing the non-custodial parent openly may make the child/ren to get confused and further stress.
- 40 Satoshi Minamikata, “*Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*”, Family Law Quarterly 39(2), (2005), p.499.
- Mikiko Otani, “*Experiences with Child Abduction with Non-member States of the Hague Convention, Situation of Child Abduction in Japan*”, International Symposium on Child Abductions, Berlin, (2009), p.3. Available at http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/091022-SymposiumKindesentziehung_node.html (Accessed on 2 November 2012)
- 41 In 2010, over 80% of divorced mothers were exercising the rights of custody. Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan 2010.
- 42 Satoshi Minamikata, supra n.39, p.492.
- 43 Takao Tanase, “Post-divorce Child Visitations and Parental Rights: Insight from Comparative Legal Cultures Part III: A Normative Theory of Community and the Law”, in *Community and the Law*, Translated and Edited by Luke Nottage & Leon Wolff, (Edward Elgar Publishing Limited, 2010), p.63.
- Satoshi Minamikata, supra n.39, p.500.
- 44 Japan Statistical Yearbook 2013, Edited by Statistical Research and Training Institute, MIC. Available at <http://www.stat.go.jp/english/index.htm> (Accessed on 10 November 2012)
- 45 Takao Tanase, supra 42, p.63.
- 46 Mother become custodian and father become non-custodian.
- 47 Satoshi Minamikata, supra n.39, p.503.
- 48 Article 2(1) of the Habeas Corpus Act states that a person who is physically restrained otherwise than by due procedure under the law may make a request for relief from the restraint as provided for by this Act.
- 49 Article 18 of the Habeas Corpus Act.
- 50 1994 (O) No. 1437, November 8, 1994, Minshu Vol.48, No. 7 at 1337. Available at <http://www.courts.go.jp/english/judgments/index.html> (Accessed on 12 November 2012)
- 51 2004 (A) No. 2199, December 6, 2005, Keishu Vol.59, No.10. Available at <http://www.courts.go.jp/english/judgments/index.html> (Accessed on 12 November 2012)
- 52 2002 (A) No. 805, March 18, 2003, Keishu Vol.57, No.3 at 371. Available at <http://www.courts.go.jp/english/judgments/index.html> (Accessed on 12 November 2012)
- 53 In this sense, intermarriage means a marriage between Japanese and non-Japanese national but not foreign couples.
- 54 Robin S. Lee, “*Bringing Our Kids Home: International Parental Child Abduction & Japan’s Refusal to Return Our Children*”, Cardozo Journal of Law & Gender, Volume 17, Number 1, (2010), pp.109-111.
- Colin P.A Jones, “No More Excuse: Why Recent Penal Code Amendments Should (but Probably Won’t) Stop International Parental Child Abduction to Japan”, Whittier Journal of Child and Family Advocacy, 2007. <https://litigation-essentials.lexisnexis.com> (Accessed on 12 November 2012)
- 55 Statement of Opinion on Recommended Measures to be Taken on the Conclusion of the Convention on the Civil Aspects of International Child Abduction (the Hague Convention), Japan Federation of Bar Association, 2011. Available at <http://www.nichibenren.or.jp/en/document/opinionpapers> (Accessed on 27 November 2012)
- 56 Section 3(1) of the Children Act 1989.
- 57 Section 91(7) of the Children Act 1989.
- 58 Section 2(2) of the Children Act 1989.
- 59 Section 4(1) of the Children Act 1989.
- 60 Section 2(7) of the Children Act 1989.
- 61 Section 8(1) of the Children Act 1989.
- 62 Section 11(4) of the Children Act 1989.
- 63 Section 1(1) of the Children Act 1989.
- 64 For this purpose, the UK shall include England and Wales, Scotland and Northern Ireland.
- 65 Section 13(1) of the Children Act 1989.

- 66 Section 13(2) of the Children Act 1989.
- 67 Section 8(1) of the Children Act 1989.
- 68 Section 10(1) of the Children Act 1989.
- 69 Section 8(1) of the Children Act 1989.
- 70 Nigel Lowe, Mark Everall QC and Michael Nicholls, *supra* n.8, p.135.
- 71 “*Simplification of Criminal Law: Kidnapping*”, Consultation paper No.200, The Law Commission. Available at <http://lawcommission.justice.gov.uk/> (Accessed on 30 November 2012)
- 72 Nigel Lowe, Mark Everall QC and Michael Nicholls, *supra* n.8, pp.138-140.
- 73 Responsible person means any person who for the time being has care of the child by virtue of the care order or the emergency protection order, or where the child is in police protection.
- 74 Section 50 of the Children Act 1989.
- 75 Section 5 of the Child Abduction Act 1984.
- 76 Nigel Lowe, Mark Everall QC and Michael Nicholls, *supra* n.8, p.137.
- 77 Nigel Lowe, Mark Everall QC and Michael Nicholls, *supra* n.8, p.464.
- 78 <http://www.justice.gov.uk/> (Accessed on 3 December 2012)
- 79 *Ibid.*
- 80 <http://europa.eu/legislation> (Accessed on 5 December 2012)
- 81 Practice Guide for the application of the new Brussels II Regulation.
- 82 A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part 1, Global Report.
- 83 http://www.mofa.go.jp/policy/human/pilot_120501_en.html (Accessed on 10 December 2012)

主指導教員（南方暁教授）、副指導教員（田寺さおり准教授・田巻帝子准教授）