

Intermarried Couples and Divorces in Japan

Resolution of Child-related Disputes after Divorce

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要 旨

日本における国際結婚数は、1980年から2010年の間に5倍と増加した。この増加傾向は、1980年代からの「花嫁不足」に一部よるところが大きく、夫・日本国籍、妻・非日本国籍、とりわけ、アジアの国籍をもつ妻が多数を占めている。他方、妻・日本国籍の場合には、夫の国籍の著しい偏りは見られない。国際結婚の増加にともなって、未成年の子どもをもつ夫婦の離婚の増加も目立っている。本論文は、現行家族法制度のもとで、国際結婚や離婚がどのように扱われているのか、また、離婚後の子どもの処遇に関して特別な配慮がなされているかについて検討するものである。諸外国と異なり、現行法には、離婚後の共同親権制度がない、離婚後の子どもへの扶養義務を強制する制度が整備されていない、面会交流権について規定がないなど、1994年子どもの権利条約の原則に必ずしも副わない点がある。すなわち、子どもは十分な保護を受けていないと言えよう。

Keywords: Intermarriage, divorce, parental rights and duties, child maintenance, contact

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I. Introduction

According to the scholars studying on international marriage, marriage between people of different ethnicities, races and nationalities may be regarded as international marriage, and the term intermarriage may be used as a shorthand term for it.¹ In this paper, marriage between Japanese and non-Japanese nationals in Japan is discussed as a form of intermarriage in Japan because the residents of Japan are distinguished only by nationality.² It can be also said as *kokusai kekkon* in Japanese. In recent times, a rapidly increasing trend in intermarriages is observed in some Asian countries which have the characteristics of delayed marriage, low fertility rate, shortage of wives, and aging population.³ According to the reported government data, intermarriage in Japan was only a small number until 1970s. However, the dramatic increase had begun in the mid 1980s and then the number had increased 5 times during the period 1980 - 2010.

In parallel with the increasing trend of intermarriage, the number of divorces between intermarried couples had been also increased. It rose from 7,716 in 1992 to 18,968 in 2010 which was composed of 7.5 percent of overall registered divorces.⁴ The important cause of those divorces may be marital distance between them which may refer to religious differences, racial differences, cultural differences, linguistic differences, and national differences too.⁵ In spite of those differences, the number of intermarried couples is increasing for many years for many reasons. One of the important reasons may be the rise of marriage squeeze which is a direct result of Japanese potential bride shortage.⁶ In the late 1980s, the term '*dansei kekkon nan jidai*' (the era of marriage difficulty for men) became a popular phrase in Japan because the Japanese men were difficult in finding eligible Japanese brides to marry.⁷ This phenomenon may lead Japanese men to enter marital relationships with foreign partners.

According to Yuka Ishii, intermarriages of Japanese men may be divided into three main types: entertainers' marriages, marriage through introduction agencies and marriages through ethnic ties.⁸ In the 1970s, many of Japanese men went to some Asian countries, particularly to South Korea, Taiwan, the Philippines and Thailand, to look for their happiness.⁹ These tours are often referred as sex tours.¹⁰ Actually, the social demand for those entertainment industries in Japan is as high as ever and partly for this reason, in the 1980s, the flow of Asian female immigration to Japan was increased and most of them worked mainly in the entertainment establishments such as bars and nightclubs.¹¹ Through those entertainment works, many Japanese men had an opportunity to meet with Asia women and then a number of intermarriages were created.

Again, in the 1980s, the Japanese rural local governments and the private marriage agencies tried to

arrange intermarriages between Japanese rural men and neighboring Asian women in response to the problem of potential bride shortage in rural Japan.¹² In the 1960s, a number of Japanese women in rural area have moved to urban areas to compensate for the labor shortage there. Those women then did not generally return home as they tried to avoid the inconvenience of rural life. As a consequence, a problem of bride shortage emerged in rural Japan. Faced with this problem, in 1985, one of the mayors from the Yamagata prefecture in the Tohoku region initiated a match making tour for local bachelors in the Philippines.¹³ It has resulted in some successful intermarriages. After that, many of rural Japanese men tried to find Asian brides in South Korea, the Philippines and Sri Lanka through the various introduction agencies.¹⁴

Later, in the urban areas also, many of the well-educated Japanese women, who enjoyed the freedom of single life with more career and life choices,¹⁵ do have fewer demands for early marriage as they want to choose good partners of *san kou* (three highs): high income, high education and high physical heights.¹⁶ As a result, not only in rural areas but in urban areas also, the Japanese men faced difficulties in finding the Japanese marriage partners. Finally, those Japanese men tried to marry Asian women through private marriage agencies. Until recently, the problem of Japanese bride shortage in Japan has not been resolved and thus the number of intermarriage between Japanese men and non-Japanese women has been still increasing. The above-mentioned Asian women who got married with Japanese men then introduced their friends and relatives to other Japanese men and, through their introduction, a small number of intermarriages were successful.¹⁷

As explained above, the involvement of intermarried couples in Japanese societies is becoming increasing, and thus the international family matters may attract academic researchers. Among the various family matters, it is frequently said that parental divorce has a harmful effect on children. Therefore the paper aims at studying how the intermarried couples' divorces are dealt with under the Japanese family law and how specific attention is given on the child after divorces. The organization of the remaining part of the paper is as follows. Section II presents the historical background of increasing intermarriages in Japan. Section III and IV discuss the current situations of intermarriages and divorces between intermarried-couples respectively. Section V and VI focus on divorcing parties, their children, and Japanese family law and Family Court system. Attention is given to the resolution of child related disputes after divorce and the current problems dealing with divorcing parties. The paper will end with a concluding discussion in Section VII. The necessary data using in the study is mainly from the Population Census, the Japan Statistical Yearbook and the Vital Statistics of Japan 2010.

II. Historical Background of Increasing Intermarriages

Historically, intermarriage is not a new phenomenon in Japan: a relatively small amount of intermarriage has occurred throughout its history.¹⁸ During the Tokugawa period, Japan was largely isolated from the outside world and had closed its doors to foreigners under the *Sakoku* (closed country) policy, except the Chinese, and the Dutch who were allowed to trade in a limited area.¹⁹ However, in 1853, the *Sakoku* policy was ended with the arrival of U.S. Commodore Matthew Perry and then, Japan's door had been opened to foreign trade with the United States, Russia, the Netherlands, Great Britain, and France.²⁰ In 1868, the Tokugawa government collapsed, the Meiji Government was formed and the later started to open Japan to the world. Since then, Japan has increased exchange with foreign countries. Consequently, Japanese people have more chances to come into contact with the foreigners and then the cases of intermarriage had begun to increase, but on a small scale.²¹

In the year 1900, the total number of foreign residents in Japan reached only 12,500.²² However, since the 1910s, immigration of Korean people to Japan was accelerated followed by Japanese annexation of Korea.²³ Although the number of Koreans in Japan was over 30,000 in 1920, it increased to 300,000 in 1930 and then reached 800,000 in 1938. In 1940, the number of Korean residents constitutes 95.2 percent of the total of 1,304,286 foreign residents in Japan.²⁴ During this period, Koreans were normally given the status of Japanese²⁵ and Japanese people were sometimes encouraged to marry with Korean colonial subjects.²⁶ As a result, a number of marriages between Japanese women and Korean male workers in Japan were successful. However, in a legal sense, those marriages of Japanese people with Koreans who have Japanese nationality would not be recognized as intermarriages because intermarriage is defined as a marriage of different nationalities, and Koreans in this period were not recognized as foreign nationals in Japan.²⁷

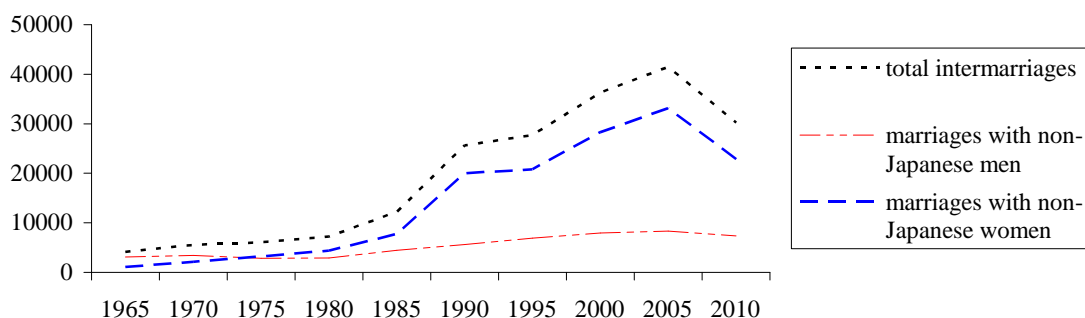
Nonetheless, those Koreans were divested of Japanese nationality after the Second World War by a unilateral decision of the Japanese government.²⁸ During 1945 to 1965 period, the nationality status of Koreans in Japan was complicated. In 1965, those so-called *Zainichi* Koreans, former colonial subjects, remaining in Japan were designated a special status as Treaty Permanent Residents.²⁹ In the same year, the percentage of Japanese intermarriages with one party being Korean was 47.4 percent of overall intermarriages and it was remarkable as the highest rate of intermarriages between Japanese and non-Japanese nationals at that time. In the 1980s, the labor shortage of low-skilled workers has been growing in Japan and consequently a great number of female workers from the Philippines, China and to a lesser extent from Thailand came to

Japan as contractual workers.³⁰ Then the number of intermarriages between Japanese men and Asian women has become increasing.³¹

Interestingly, at the beginning of the emerging of intermarriage in Japan, it was female phenomenon: some Japanese women were likely to marry to non-Japanese men, especially to Korean, Chinese and Americans. This may be partly because of lack of marriage-eligible Japanese men at this time. During the immediate post-war period, intermarriages between Japanese women and U.S. military personnel stationed in Okinawa and military bases of Honshu rose considerably.³² Those women were referring as *senso hanayome* (war brides) and, most of them are now residing in the United States. Until 1972, the number of intermarriages of Japanese women was higher than the reverse pattern. However, in the mid 1970s, the trend was changed conversely and the number of intermarriages between Japanese men and non-Japanese women has increased rapidly as a direct result of bride shortage (*yomebusoku*) problem in Japan.³³ Since then, the gap between the two is rapidly widening.

According to the statistics of the Ministry of Health, Labor and Welfare, in 1970 40 percent of all intermarriages were of Japanese men and 60 percent were of Japanese women, in 1985 65 percent and 35 percent, and in 2010 75.6 percent and 24.4 percent respectively. Among the 30,207 intermarriages registered in 2010, marriages to non-Japanese women were 22,843 and marriages to non-Japanese men were only 7,364. Therefore intermarriage between Japanese men and non-Japanese women is still the salient phenomenon within the incidence of intermarriage in Japan.

Figure 1: Trends in Number of Intermarriages in Japan (1965 – 2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

III. The Current Situation of Intermarriages in Japan

Although the level of intermarriages in Japan is still quite low in comparison to other Asian countries like Taiwan and South Korea, it may be said that Japan is not immune to the global trends towards more intermarriages.³⁴ Those intermarriages have increased the level of multiculturalism in Japan and then, the Japanese society today is gradually being recognized as an international society.³⁵ According to the Ministry of Health, Labor and Welfare data, the number of intermarriages in Japan has been steadily increasing, from 0.5 percent in 1970 to 0.9 percent in 1980, and then to 4.3 percent in 2010. In 2010, 34,393 of marriages were registered as intermarriages representing 4.3 percent of all registered marriages in Japan.

Table 1: Trends in Percent Distribution of Intermarriages in Japan (1970-2010)

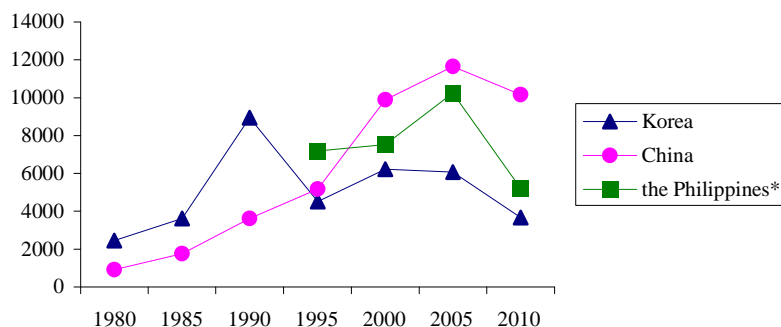
Year	Total Marriages	Japanese Couples	One of Couple is Non-Japanese National	Intermarriages of Japanese Men and Non-Japanese Women	Intermarriages of Japanese Women and Non-Japanese Men
1970	100	99.5	0.5	0.2	0.3
1975	100	99.4	0.6	0.3	0.3
1980	100	99.1	0.9	0.6	0.4
1985	100	98.3	1.7	1.1	0.6
1990	100	96.5	3.5	2.8	0.8
1995	100	96.5	3.5	2.6	0.9
2000	100	95.5	4.5	3.5	1
2005	100	94.2	5.8	4.6	1.2
2010	100	95.7	4.3	3.3	1

Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

During the intermarriages increasing period, there was also a change in the major nationality of non-Japanese women who married to Japanese men. Generally speaking, most of them are from Asian countries, i.e., Korea, the Philippines, and China. For the purpose to explain the changing trend of

intermarriages of Japanese men, it should be divided into three periods as shown in Figure 2: the Korean period prior to 1992; the Philippine period between 1992 and 1996 and, then the Chinese period.³⁶ In 2010, intermarriages of Japanese men totaled 22,843 with the majority Chinese women (44.5 percent) which is followed by Filipino women (22.8 percent) and Korean women (16 percent). In the same year, intermarriages of Japanese women numbered only 7,364, representing a third of the intermarriages of Japanese men. The biggest group of non-Japanese grooms in 2010 is Korean men (26.9 percent) followed by American men (18 percent) and Chinese men (12.4 percent).

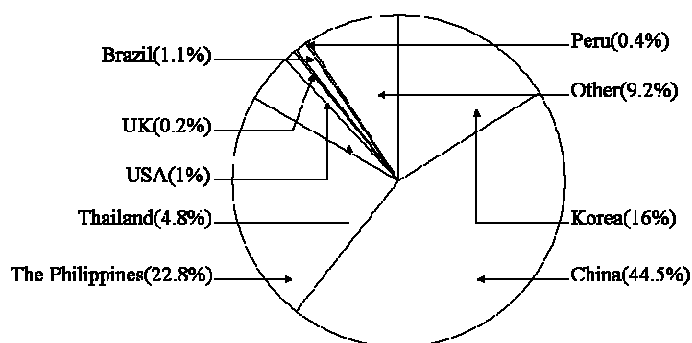
Figure 2: Trends in Number of Major Nationalities of non-Japanese Brides in Japan (1980 – 2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

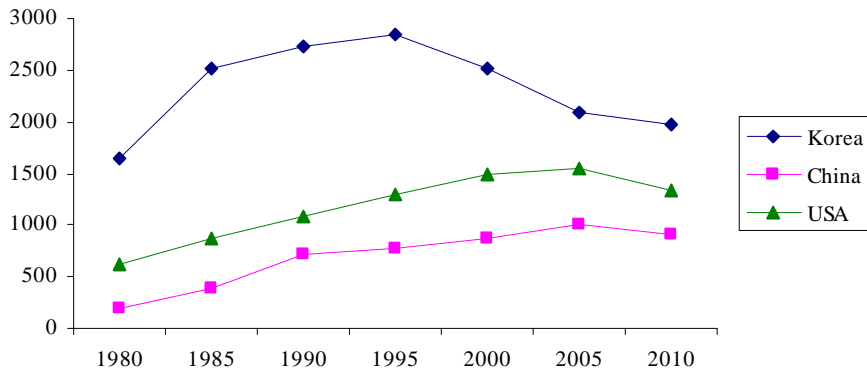
* Figures not available (1980-1990)

Figure 3: Distribution of non-Japanese Brides by Nationality in 2010



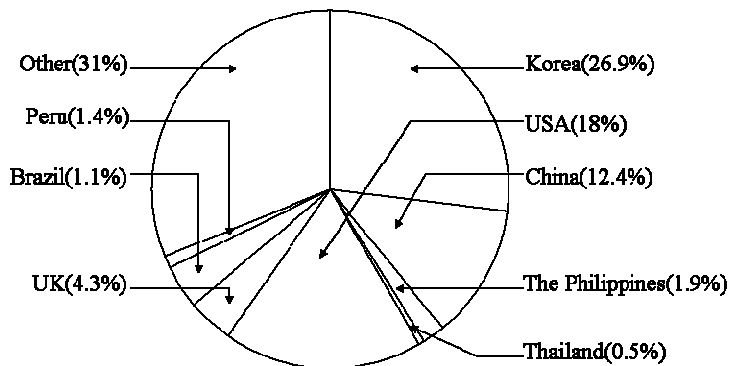
Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Figure 4: Trends in Number of Major Nationalities of non-Japanese Grooms in Japan (1980 – 2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Figure 5: Distribution of non-Japanese Grooms by Nationality in 2010



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

According to the above-mentioned figures, it can be concluded that among non-Japanese women, Japanese men wanted to marry Asian women and thus Korea, China and the Philippines became the prominent sources of non-Japanese brides. Those Japanese men may have an impression that those brides will obey them, take good care of their old parents, value their family life, and do the housework dutifully. However, in the case of Japanese women’s intermarriages, the characteristics of non-Japanese grooms may not be considered. Figure (5) pointed that Korea, China and the US are the prominent sources of

non-Japanese grooms but the diversity of the nationality of grooms was very evident. Among those prominent foreign brides and grooms, Chinese, Koreans, and the Philippines had entered into Japan as trainees, students, entertainers, low-wage workers and so forth. However, a great number of US military personnel were entering Japan with SOFA status (Status of Forces Agreement).³⁷

The recent Japanese Government data also indicates that Chinese people were residing in Japan as the country's largest foreign community today. During these years, many Chinese people are entering into Japan with student visas with the desire to see beyond the frontiers, to seize new opportunities for training and professional experiences.³⁸ Currently, Chinese students are also recognized as the majority group of foreign students in Japan. The government figure also pointed that the Korean people were the second largest group of foreign community and also of non-Japanese students studying in Japan. During the past two decades, the number of non-Japanese students including Chinese and Korean students studying in Japan was increasing considerably partly due to the Japanese invitation policy for foreign students.³⁹ After they have completed their studies, quite a number of those students chose to extend their stay in Japan through intermarriage with Japanese people for the purpose of their possible career advancement and of a better life in Japan.⁴⁰

Amongst the above-mentioned major nationalities of non-Japanese brides and grooms in Japan, the Philippines are the fourth largest group of foreign community in recent times with the majority women. Most of the Philippines women entered into Japan with entertainer visas and most of them came to Japan for the welfare of their families left behind in the Philippines.⁴¹ Mainly for financial reasons, those Filipina women married with Japanese men and the increasing number of those women entering Japan resulted in a high number of intermarriages between the Filipina women and Japanese men.⁴² In the case of intermarriages with the American men, the large numbers and long-term US military presence on a small island Okinawa is the main cause of those marriages. Until the present time, there is a heavy concentration of US civilians and military personnel in Okinawa. As a result, the American men and Japanese women have a chance to meet in a wide variety of circumstances and to create marital relationships.⁴³ Since many years ago, a union of Japanese-American was developed as a common type of intermarriage in Okinawa.

As mentioned above, intermarriages between Japanese and non-Japanese people are occurring with different expectations in different circumstances. Concerning those intermarriages, some studies in Japan described that those non-Japanese women from Asian countries marrying Japanese as opportunity seekers.⁴⁴ In reality, their marriage motivations seem to be much more complex than this insufficient interpretation.

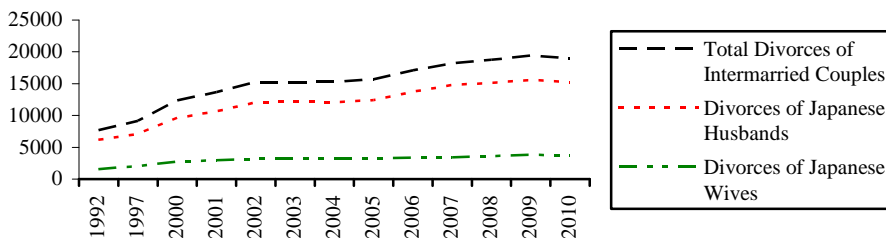
While some of those intermarriages were successful, many were unlucky enough to end in divorces. Not surprisingly, people of different nationalities usually have different aspects due to the cultural differences of their backgrounds.⁴⁵ Therefore when a union of intermarried couple is incapable of adjusting to those differences successfully, their family union will surely lead to irretrievable marital breakdown.

IV. The Current Situation of Divorces between Intermarried Couples in Japan

Since the 1960s, mainly due to the increasing number of married women working in the labor market and the improvement of their economic capability, Japanese society had experienced the upward trend of divorce rate.⁴⁶ It was particularly true for the period 1963 to 2002. During that period, the Japanese divorce rate (per 1,000 populations) was steadily increasing from 0.74 in 1963 to 2.63 in 2002. However, it turned again to a downward trend from the year 2003. Since then, the Japan's divorce rate has been declining slowly, and reached 1.99 in 2010.

In contrast to this trend, those divorces between intermarried couples in Japan were sharply increasing from 7,716 in 1992 to 18,968 in 2010. Similar to the case of intermarriages, of interest is the difference in gender. Of the overall intermarried couples' divorces in 2010, 15,258 of divorces were of Japanese husbands and non-Japanese wives and only 3,710 were of Japanese wives and non-Japanese husbands. In the case of divorces between Japanese husbands and non-Japanese wives, the largest group of wives was Chinese (37.8 percent) followed by the Filipinas (30.3 percent) and Koreans (16.8 percent). However, in the case of divorces between Japanese wives and non-Japanese husbands, the largest group of husbands was Koreans (26.3 percent) followed by Chinese (17 percent) and Americans (10.7 percent).

Figure 6: Trends in Number of Divorces between Intermarried Couples in Japan (1992 – 2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

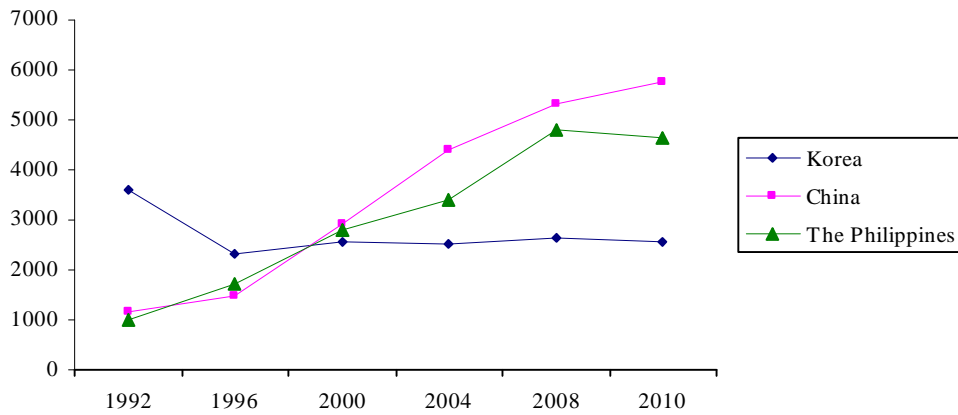
Table 2: Trends in Percent Distribution of Divorces between Intermarried Couples in Japan (1992-2010)

Year	Total Divorces	Japanese Couples	One of Couple is Non-Japanese National	Divorces of Japanese Husbands and Non-Japanese Wives	Divorces of Japanese Wives and non-Japanese Husbands
1992	100	95.7	4.3	3.4	0.9
1997	100	95.9	4.1	3.2	0.9
2000	100	95.3	4.7	3.6	1
2001	100	95.2	4.8	3.7	1
2002	100	94.7	5.3	4.2	1.1
2003	100	94.6	5.4	4.3	1.1
2004	100	94.4	5.6	4.5	1.2
2005	100	94	6	4.7	1.2
2006	100	93.4	6.6	5.3	1.3
2007	100	92.9	7.1	5.8	1.3
2008	100	92.5	7.5	6	1.4
2009	100	92.3	7.7	6.1	1.5
2010	100	92.5	7.5	6.1	1.5

Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

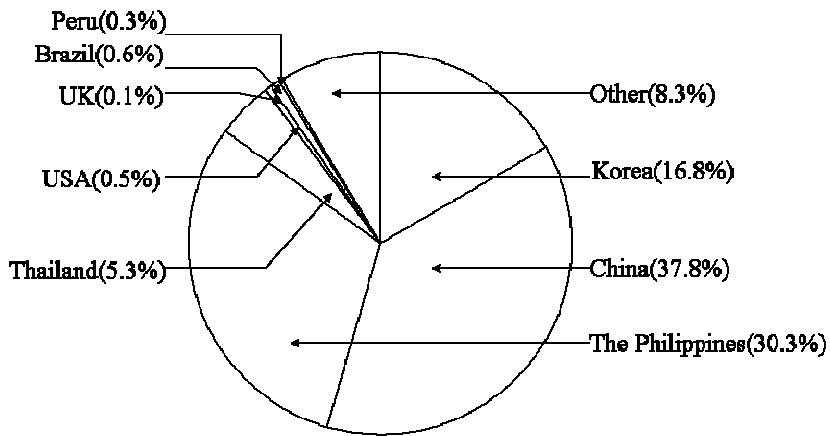
The number of Japanese men who divorced non-Japanese women has increased about 2.5 times during the period 1992 to 2010. It can be said that the trend of intermarriage between Japanese men and non-Japanese women has increased over time, and the number of divorces between them has increased in parallel. In 2010, about two in three those marriages ended in divorces and its divorce rate is also higher than that of Japanese women with non-Japanese men.

Figure 7: Trends in Number of Major Nationalities of non-Japanese Divorced Wives in Japan (1992 – 2010)



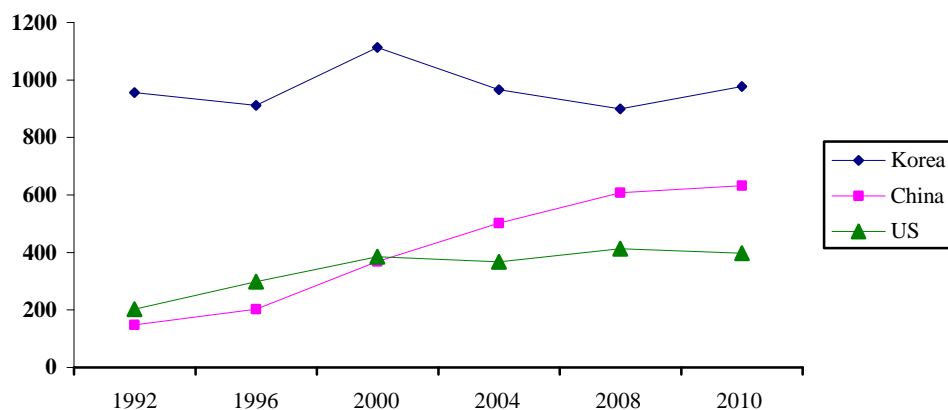
Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Figure 8: Distribution of non-Japanese Divorce Wives by Nationality in 2010



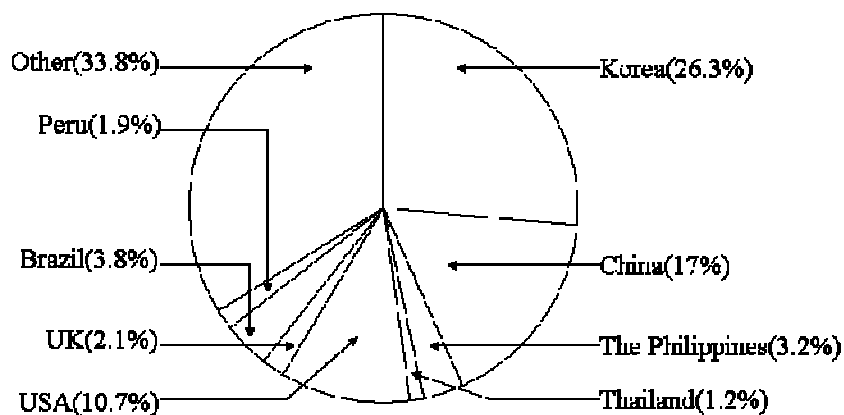
Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Figure 9: Trends in Number of Major Nationalities of non-Japanese Divorced Husbands in Japan (1992 – 2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Figure 10: Distribution of non-Japanese Divorced Husbands by Nationality in 2010

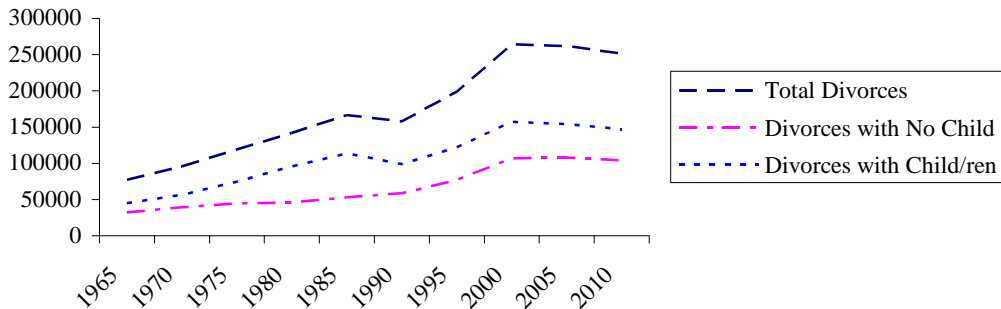


Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

It was also found that the existence of child/ren has no restraining effect on parental divorce in Japan although the impact of parental divorces may influence their children's welfare.⁴⁷ In 2010, the total

number of divorces in Japan reached 251,378 and, of these, 104,258 were of divorces with no child and 147,120 were of with minor child/ren requiring custody. The Japanese Government data indicates that almost 60 percent of overall registered divorces in Japan usually involve minor child/ren.

Figure 11: Trends in Number of Divorces with Child/ren Requiring Custody (1965-2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

Although the vital statistics of Japan does not carry detailed information which may indicate how many divorces with child/ren were annually occurred between intermarried couples, it may be said that the involvement of children in parental divorce in Japan appears to be increasing. As the number of divorce with child/ren is increasing, child-related issues occurring through parental divorces are increasing correspondingly. Consequently, today's divorce cases are becoming more complex with child-related legal problems.⁴⁸ This may be especially in the case of intermarried couples' divorce with child/ren as the Japanese governing law in those cases is quite different from that of other foreign countries.

V. Resolution of Child-related Disputes after Divorces

Actually, divorce in Japan is not a difficult matter⁴⁹ for both Japanese and intermarried couple unions. Under the Japanese law, all of those unions shall be treated in the same way to get divorces and to resolve child-related disputes after divorces.⁵⁰ In Japan, if both spouses agree on divorce and which parent should take parental rights and duties after divorce, if any, those divorces can be easily concluded by submitting a divorce notice form (*rikon todoke*) to the relevant registration office.⁵¹ This is a common type of

divorce in Japan and is well-known as divorce by mutual agreement (*kyogi rikon*).⁵² In 2010, 87.6 percent of overall registered divorces were completed in this simple way. On the other hand, if the spouses disagree on divorce itself or about parental rights and duties matters or both, other three different types of legal divorces are available at the Family Court: (1) divorce by court mediation (*chotei rikon*)⁵³, (2) divorce by court determination (*shinpan rikon*)⁵⁴, and (3) divorce by court decree (*saiban rikon*)⁵⁵. Moreover, since 2004, divorce by agreement through litigation procedure, the so-called *wakai rikon*, is also available according to Article 37 of the Personal Affairs Litigation Act 2003.

Concerning the resolution of child-related disputes following divorces, some scholars generally recognized that the divorced parents are the best suited person to decide what the best interest of their own children is. They pointed out that, at the time of parental divorces, if the divorcing parents are able to reach an agreement on child-related issues, they will minimize the role of court intervention and maximize their child/ren's ability to sustain a sound relationship with both parents.⁵⁶ Otherwise, the Family Court will intervene in the delicate private matters and then the communication between them will be harder than before as both parents usually fight each other before the Court to resolve various child related disputes such as parental rights and duties, maintenance and contact. Therefore, it can be noted that once the couples consider divorcing, they should first discuss their children's welfare matters carefully and push themselves to reach a mutual agreeable post-divorce arrangements.

a. Parental Rights and Duties

The Japanese word which is used with the meaning of parental rights and duties is *Shinken*. *Shinken* includes all of the parental rights and duties including in *Kangoken* which is usually translated as physical custody.⁵⁷ Therefore, it can be said that *Shinken* usually includes both legal and physical custody over child/ren.⁵⁸ According to Article 818 of the Civil Code of Japan, both parents exercise *Shinken* jointly during the existence of marital relationship. However, when their marital relationship breaks down, *Shinken* must be exercised by either of the parents after divorce.⁵⁹ In some divorce cases, one of the parents may have *Shinken* and the other may have *Kangoken* separately, however, in many cases, *Shinken* and *Kangoken* can be sole.⁶⁰ It may be said that it is common for the resident parent in Japan to hold both *Shinken* and *Kangoken* after divorce.⁶¹

Therefore, when an intermarried couple with child/ren⁶² is divorced under the Japanese law, the resident parent may be vested *Shinken* with certain powers for the care and control of their child/ren. Those

parents with *Shinken* usually have the legal rights to decide major decisions about the child/ren's care such as the child/ren's education and place of residence without the consent of the nonresident parent.⁶³ Therefore, it may be noted that the current legal regime of sole exercising of *Shinken* after divorce in Japan completely excludes the parent without *Shinken* from the primary responsibility of the entire upbringing of their child/ren.⁶⁴ Regrettably for divorced intermarried couples, joint custody and sharing parental rights and duties after divorce is not available yet under the present Japanese legal system even though it may be legal in many other foreign countries.⁶⁵

If the intermarried couples are divorced in Japan, the determination of parent for *Shinken* after divorce can be concluded on the paperwork easily as long as they are agreeing on it. In that case, a court decree has not been needed necessarily. On the other hand, when those couples agree on divorce and are having trouble agreeing about *Shinken*, their cases must be brought before the Family Court.⁶⁶ In that case, the Family Court will proceed those cases through mediation or determination procedure.⁶⁷ Under the mediation first principle,⁶⁸ those cases must first go through the in-court mediation (*chotei*) procedure which is principally provided by the Family Court mediation committee.⁶⁹ If the procedure is successfully concluded, the mediation committee will confirm the parties' agreement and then issue the *Chotei* document which has the same enforceability as the court judgment.⁷⁰ If not, the Family Court judge will decide those cases under the determination procedure. In 2008, 13,624 *Shinken* cases were successful through the mediation procedure, whilst other 1498 cases were by the determination procedure.⁷¹

There may be still some other cases in which intermarried couples cannot agree on divorce itself even after passing through the in-court mediation procedure. If so, one of the spouses can initiate a divorce litigation proceeding at the Family Court.⁷² If the divorce case including the disputes over *Shinken* goes to litigation, the Family Court judge will decide the divorce cases by applying Article 770 of the Civil Code of Japan and resolve the dispute over *Shinken* as an ancillary matter in the litigation procedure.⁷³ While determining the dispute over *Shinken* in the court procedure, the presiding judge usually consider which arrangements will best serve the interest of the child/ren rather than the parents' willingness.⁷⁴ Presently, there is no legal provision in Japanese law which provides the formal guideline of the determination of parent for *Shinken*. Therefore the Family Court judge's discretion by considering the accumulation of precedents is the only reliable important thing in deciding which of the parents should exercise sole *Shinken* after divorce over their children.⁷⁵

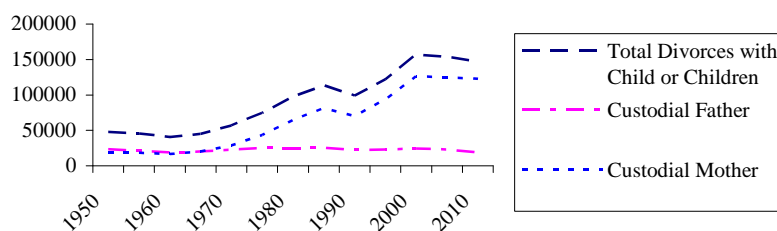
As mentioned above, the-best-interests-of-the-child principle is clearly of primary importance in

Japan while resolving the disputes over *Shinken* after divorce. In considering what are the best interests of the child, the Japanese Family Court usually weigh some important factors including the financial standing of the parents to provide the child/ren with their requirements, the present and past situation of interactions between the parents and the child/ren and the preference of child/ren if they attain sufficient ages to express their private feelings.⁷⁶

Under the old provision of Article 834 of the Civil Code of Japan, the Family Court may order to take off *Shinken* from the parent if there is misconduct on the part of the parent. However, according to the new provision of the same Article which will become effective in April 2012, the Family Court may order to forfeit *Shinken* to the parent only when the interest of the child/ren may be actually harmed because of the parents. Therefore, the morality and conduct of the parents may not be the main factor anymore in considering which parents should hold *Shinken* after divorce. Sometimes, if it is necessary, the Court may also use the Family Court's investigation officer's report concerning the behavior of child/ren and their current living situation to determine which parents should take *Shinken*.⁷⁷

After completing the above-mentioned court determination procedure, the children of divorced families usually need to relinquish their rights to stay with both biological parents. In this case, the resident parents with *Shinken* in post-divorce life may be either their mothers or their fathers. The reported government data shows that until the mid of 1960s, most of the resident parents with *Shinken* in Japan were divorced fathers. However, since the 1970s, the maternal preference rule was prominent in determining the dispute over *Shinken* and currently, most of the children from the divorced families are living with their divorced mothers.⁷⁸ In 2010, over 80 percent of divorced mothers were living with their child/ren as the parents with *Shinken*.

Figure 12: Trends in Number of Custodial Father and Mother after Divorces (1950-2010)



Source: Ministry of Health, Labor and Welfare, Vital Statistics of Japan, 2010.

According to the above-mentioned figure, it can be noted that Japan has increasing trends of lone mother families as a consequence of divorces. Generally speaking, the financial situation of divorced lone mother families may be considerably lower than that of divorced lone fathers'.⁷⁹ Therefore, the determination of support obligations (child maintenance) of the nonresident fathers may be particularly important for divorced lone mothers' families at the time of their divorces.

b. Child Maintenance

It is a legal principle that both parents of a child have a duty to contribute to the maintenance of the minor.⁸⁰ Therefore, when a couple with child/ren is divorced, they should discuss about the financial support from a nonresident parent to help the day-to-day expenses of their child/ren even though it is not a legal requirement for divorce. In Japan, there are two different types of resolving child maintenance disputes at the Family Court: one is by the parents' mutual agreement through the mediation proceeding and another one is by the court intervention through the determination proceeding.⁸¹ While determining how much maintenance payments should be paid to a resident parent, some factors such as the income of each parent, the number and age of children, and the children's needs will be taken into consideration.⁸²

Sometimes, the Family Court mediation committee is likely to propose the maintenance agreement to the parties involved.⁸³ In this case, the mediation committee may use the rate book for maintenance although the rates in this book are not legal norms.⁸⁴ If the divorcing parties do not accept such a proposal and are still disagreeing on the maintenance issue, the Family Court judge will determine the case in the determination procedure. According to the annual report of judicial statistics of Japan, in 2008, 292 maintenance cases were concluded with the assistance of a mediation committee and the other 1,146 cases were determined by the Family Court judge.⁸⁵ In comparing the annual statistics for filing of maintenance case at the Family Court, it can be noted that the number of filing cases is gradually decreasing.

This may be partly because of the lack of effective legal mechanisms for enforcing and collecting the maintenance payment⁸⁶ even after Article 151-2 of the Civil Execution Act has been revised in 2007.⁸⁷ According to the government statistics, the majority of nonresident divorced fathers are failing to pay the correct level of child maintenance: some made partial payment and some made no payment.⁸⁸ Among those noncompliant divorced parents, two different categories may be found: one is those who are capable to make their obligatory maintenance payments and just intentionally reluctant to do so because of the little negotiation of their opportunity to contact with their child/ren and another one is those who are not capable to

make their obligatory maintenance payments under their poor economic situation and then they cannot meet their obligations. As a result, most of divorced lone mother's families today are heavily relying on the welfare assistance of the Japanese Government.⁸⁹

c. Contact

Normally, in cases where one parent is awarded *Shinken* after divorce, other nonresident parent should be entitled to a right of contact with their children to maintain the relationship with them.⁹⁰ However the present Japanese family law does not recognize the contact as a legal right of the nonresident parent, and if a couple is getting divorce under the Japanese law, the parents usually have to determine only who should hold *Shinken* over their child/ren either by their agreement or by the Family Court's intervention. On the other hand, there is no legal requirement for them to determine how to arrange the contact of nonresident parents with child/ren.⁹¹ However, since the 1960s, the family Court has recognized the contact between nonresident parent and child/ren as an indispensable requirement for the welfare of children⁹² and, thus the family Court often grants contact upon the application of nonresident parent.

When a nonresident parent is wishing to claim contact with children, s/he can do filing a case at the Family Court.⁹³ In this case, the Family Court mediation committee usually assists the parties to resolve their disputes with focusing on the needs of the children. To grant the nonresident parent's application, the mediation committee carefully considers some important factors including the reason for application of nonresident parent, the current emotional condition of child/ren, the post-divorce life of parent with *Shinken*, and so on.⁹⁴ If the parent with *Shinken* is strongly refusing to cooperate with his/her ex-partners, the Family Court will not allow the nonresident parent's application⁹⁵ if it concludes that contact will be against the welfare of the child under such hostile relationship of the parents. Likewise, the family Court may sometimes denies a nonresident parent's application in case the Court observed that the nonresident parents' conduct and character may be harmful the well-being of the child/ren.⁹⁶ Otherwise, the Family Court may grant contact for the best interests of the child/ren. Theoretically, if the court thinks fit, overnight stays may be allowed, and practically, it is not common in Japan. Therefore, it may be here noted that the concept of granting contact after divorce in Japan is mainly based on the best interests of the child/ren.

Interestingly, even though the Japanese family law does not provide making an agreement of contact as a prerequisite to divorce, the divorcing parties may make a private agreement of contact at the time of their divorce, and if the resident parent does not comply with the agreement, the nonresident parent may ask the

Family Court for contact determination to be issued to fit the agreement. Sometimes, even when the court grants contact through the mediation or determination procedures, it may happen that the resident parent does not comply with the mediation agreement or the court order. In this case, the nonresident parent may ask the Family Court to issue an order to recommend noncompliant parent to do his/her duty.⁹⁷ Even after this, if the resident parent still fails to comply with the court order, the nonresident parent may ask the Family Court for enforcement determination and then the court may fine noncompliant parent for not exceeding ¥100,000 as a penalty upon his/her intentional fault.⁹⁸ This is the practicing court procedure in Japan to enforce the private agreement or the mediation agreement or the court determination order of contact between the child/ren and nonresident parents.

VI. Current Problems

As discussed above, the present Japanese governing law over child-related disputes after divorce is somewhat different from other foreign countries' laws. This may be the case when intermarried couples get divorced in Japan. Although Japan has ratified the UN Convention on the Rights of the Child since 1994, its domestic law still has some considerable weaknesses to comply with the Convention's mandates.⁹⁹ Article 8 of the Convention stipulates that "*State parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*". However, the present Japanese family law fails to recognize the joint exercising of *Shinken* over the children after divorce, and thus the parents without *Shinken* usually lose their opportunities to involve the entire upbringing of their child/ren. This may be an unexpected situation for the non-Japanese divorced parents.

Since Japanese law does not recognize joint exercising of *Shinken*, divorces in Japan require the designation of one parent as a parent with *Shinken*. In cases where the Japanese spouse is awarded the sole *Shinken* after intermarried couple's divorce, the non-Japanese spouses may be threatened to his/her staying in Japan. In some cases, those non-Japanese spouses have to leave Japan soon after divorces as they cannot effort to get the available legal visa status as a spouse of Japanese nationality. From that time on, the probability of having access to their child/ren is much diminished for them. On the other hand, if non-Japanese spouse is vested with the sole *Shinken*, the Japanese spouse is likely to loose the opportunity to access with their children because the non-Japanese spouse may bring their children back to their home country without the nonresident parent's notice. This is indeed a poor mechanism for the welfare of the

child/ren as they lose their right to maintain contact with both parents.¹⁰⁰ Even though the joint exercising of *Shinken* is not appropriate in every situation, it may benefit under some circumstances to the welfare of the children.

In cases where the resident parent and nonresident parent are living in different countries, the Japanese Government actually does not provide any assistance in any form for the recovery of maintenance payment from the noncustodial parent.¹⁰¹ Article 27(4) of the Convention on the Rights of the Child provided that “*State parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents of other persons having financial responsibility for the child, both within the state party and from abroad*”. However, the resident parents and their children within or outside Japan have no help from the Japanese Government. Although the UN Convention on the Rights of the Children is legally binding on the ratifying nations,¹⁰² the present Japanese family law does not adequately comply with the Convention.

VII. Conclusion

It was noticed that Japan has once a traditional notion of ‘one parent disappears after divorce’¹⁰³ and the cultural preference of ‘that state should not interfere in the family matters’ as in many other modernized countries.¹⁰⁴ This might have been the best system for the Japanese unions. However, today’s Japanese society has the increasing trends of intermarriages with non-Japanese national and of divorces between intermarried couples as well as between Japanese nationals. In resolving those divorce disputes, the Japanese traditional way of deciding divorce related matters may create some difficult situations for the parties involved. Therefore, in recent years, Japan has taken a more supportive view on resolving child-related disputes after divorce and begun to examine some existing provisions.

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