

PROTECTING CHILDREN IN FAMILY SEPARATION FROM A LEGAL PERSPECTIVE

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I. INTRODUCTION

My childhood in Gießen, Germany (5-7 years old)

Learning German, going to kindergarten & school

Japanese parents & child happily living in Germany



→ How different could it have been?

- Mother taking the child to Japan without Father's consent („child abduction“)
- No access with Father
- No child support/maintenance obligations fulfilled by Father
- Child's mental and financial sufferings



1980 Hague Child Abduction Convention (HC)

- ◆ Ensure prompt return & access
- ◆ Maintain the child's regular contact with both parents
(1989 UN Children's Rights Convention)

Focus of this talk

1. 1980 Hague Child Abduction Convention (HC): Five-year Experience of Japan & Remaining Challenges

→ Need of „transparency“: some misunderstandings abroad (U.S., France [French Supreme Court decision, 22 November 2018], etc.)

The U.S. „Blacklist“: 2018 Japan (← also Germany for 20 years)

2. A Comparative Perspective on Japanese & German Family Law: Parental Responsibilities & Access/Co-parenting

→ Germany as a Model: closer than Common Law Countries (Cf. U.K., U.S., Canada, Australia, Hongkong, Singapore etc.)

II. 1980 CHILD ABDUCTION CONVENTION

1. LEGAL FRAMEWORK

State B



Illicit Removal or Retention of the Child



Prompt Return



State A



Return & Access Order

(No Custody Order)

Amicable Solution is encouraged

Child's Habitual Residence
Custody Order

◆ Distribution of Competences among Member States

Avoid creating a new *status quo*
Prompt Return of the child

→ Custody issues decided in State A

◆ Limited Grounds for Refusal

- (1) More than 1 year has passed & Child settled in the new environment (Art. 28 (1) No. 1 Implementation Act)
- (2) LBP's no actual exercise of the rights of custody (No. 2)
- (3) LBP's prior consent/subsequent acquiescence (No. 3)
- (4) Grave risk to the child (physical or psychological harm) (No. 4)
- (5) Child's objections (No. 5)
- (6) Human rights (No. 6)



➔ “Obligation of the Result” (leeway for implementing the Convention)

2. EXPERIENCE IN JAPAN

Japan joined the HC on 1 April 2014

- **2014 Implementation Act**
- **Japanese Central Authority** (MOFA): Officers + appointed Experts
(Judge, Lawyer, Family Court Probation Officer, Expert of Child Psychology, Expert of Domestic Violence, Border Control Officer etc.)
→ Cooperation with Central Administration & Municipalities + NGOs
- **Return Proceedings: Tokyo & Osaka Family Court**
 - Concentration of Jurisdiction (expertise & efficiency)
 - Prompt Return Proceedings
 - Execution Rules will soon be amended (approved by the Legislative Committee)
- **Private Mediation & In-Court Conciliation**

STATISTICS APRIL 2014 - JANUARY 2019

(1-1) Application for Assisting Return of the Child (JCA)

◆ Incoming Cases = 104 Applications (90 approved; 71 decided)

U.S. (24), Australia (8), Germany (7), France (6), Canada (4), U.K. (4), Singapore (4), Brazil (3), Hong Kong (3), Russia (3), Italy (3), Korea (2), Spain (2), Turkey (2), Switzerland (2), Thailand (2) etc.

- Amicable Solution: Return (12), Non-Return (9)

- Family Court Proceedings

- > In-Court Conciliation: Return (13) (1 case non-enforceable; 2 cases pending), Non-Return (13)

- > Judicial Settlement: Return (1), Non-Return (1)

- > Court Order: Return (13) (3 cases non-enforceable; 3 cases pending), Non-Return (9)

- Others (withdrawn etc.) (3)



Solution by Consent = 70% of the Cases

Cf. 2015 All Member States = 30%

STATISTICS APRIL 2014 - JANUARY 2019

(1-2) Application for Assisting Return of the Child (JCA)

◆ Outgoing Cases = 96 Applications (85 approved; 53 decided)

U.S. (17), Thailand (10), Philippines (9), Korea (6), Brazil (6), Peru (5), Russia (4), France (4), Germany (3), Canada (2), Sweden (2), U.K. (2), Sri Lanka (2), Hong Kong (2), Poland (2) etc.

- Amicable Solution: Return (17), Non-Return (5)
- Court Proceedings: Return (17), Non-Return (14)
- Others (denied assistance etc.) (4)



STATISTICS APRIL 2014 - JANUARY 2019

(2) Application for Assisting Access with the Child (JCA)

◆ Incoming Cases = 101 Applications (85 approved)

U.S. (46), U.K. (6), Australia (6), France (5), Canada (5), Singapore (4), New Zealand (4), Mexico (2), Germany (2), Thailand (1) etc.

→ 55 Application in 2014 (incl. pre-convention cases)

◆ Outgoing Cases = 30 Applications (29 approved)

U.S. (6), Russia (3), Canada (3), Germany (2), Ukraine (2), Thailand (2), Korea (2), U.K. (2), Australia (1) etc.



3. MEDIATION FOR RETURN CASES IN JAPAN

(1) PRIVATE MEDIATION

- ◆ Mediation Centers of Bar Associations (3 Tokyo; 1 Osaka; 1 Nagoya; 1 Fukuoka)
- ◆ Professional Mediators: A pair of male & female mediators (lawyer & psychological counselor + language skills)
- ◆ Simultaneous Hearings of Both Parents



Advantages

- Flexibility, Expertise (useful for suitable cases)
 - Use of Skype or telephone etc. possible (not at Family Court)
- **But: Legally Not Binding** (settlement contract, not incorporated into court order)
- Cost- and Time-consuming** (fee at least 1000 EUR)

(2) IN-COURT CONCILIATION

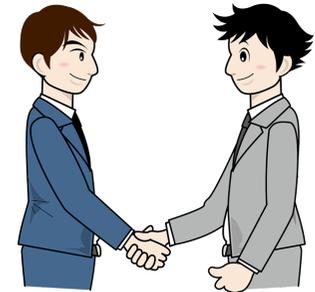
- ◆ In Return Cases: Broad Subject-Matter
(Return or Non-return; in case of return: time, means, costs, housing after return, visa application, exemption of criminal charge; provisional care of the child, access, maintenance obligations etc.)
- ◆ Parallel to the Return Proceedings (running at the same time)
- ◆ The same Judge supervises conciliation & predicts the outcome of the court decision
= Transparency & Efficiency
- ◆ Court Conciliators (conciliation usually without the judge)
- ◆ Caucus-Hearing (one party after another; no joint hearing)

IN-COURT CONCILIATION



Advantages

- Cost & Time efficient (no extra cost; concentrated hearings)
- Professional Court-appointed Conciliators
- Detailed Agreement is possible
→ Cf. Return Order: only „Return“ or „Refusal“ (without conditions)
- Protocol = *Res Judicata* Effects + Title of Execution (in case of „Return“)



4. REMAINING CHALLENGES FOR JAPAN

(1) “ENFORCEMENT” OF RETURN ORDERS

- ◆ “Preposition of Indirect Enforcement” (Money Order) → Enforcement by Substitute
- ◆ “Simultaneous Presence” of the TP & Child (no enforcement at kindergarten or hospital)
- ◆ No stringent measures by the Execution Officer
- ◆ “Habeas Corpus” Order; not sufficient (cf. Supreme Court of Japan, 15 March 2018)



Amendment of the Implementation Act (debated in the Diet)

(2) CARRYING OUT “ACCESS”

◆ No Special Rules in the Implementation Act

◆ If foreign law is applicable: Western standards possible (Art. 32 AGRAL)

(e.g.) Tokyo High Court, 19 May 2017: Canadian spouses + two children

→ Canadian Law (Nova Scotia) applied: Joint Custody & frequent access (overnight stay)

Article 32 AGRAL (Act on General Rules on Application of Laws)

(Legal Relationship between Parents and Child)

“The legal relationship between parents and their child shall be governed by the national law of the child if it is the same as the national law of one of the parents (if one of the parents is dead or unknown, as the national law of the other parent). In other cases, it shall be governed by the law of the child’s habitual residence.”

◆ If Japanese law is applicable: limitations

 Why?

III. FAMILY LAW AND CO-PARENTING

1. ACCESS IN JAPANESE FAMILY LAW

- ◆ “Access” developed by Case Law (since 2011: “custody measures” in Art. 766 Civil Code)

Best interests of the child; enhance the payment of child support; deterrent to wrongful child abduction

- ◆ No legal “Access Rights” of the Parents or the Child

→ Discretion of the Family Court; decision-making of the custodial parent; no access for grandparents, siblings, etc.



Difference to Germany/Western Countries (non-traditional/patchwork families)

Ratio of children born out of wedlock

Japan 2.2% ↔ France 57%, U.K. 48%, U.S. 40%, Germany 35%

CHARACTERISTICS OF JAPANESE FAMILY LAW

- Bound to Heterosexual Marriage (Marital Unit) = Also Family Name
- Status Difference: Legitimate vs. Illegitimate Children
- Custody shared only by Married Parents
(cf. South Korea, China, Taiwan also after divorce)
- “Agreement” instead of “Rights” & “Obligations”
 - 87%: Consensual Divorce + Consequences (custody, access & child support) (cf. South Korea)
 - Divorce by Family Court Conciliation → Only if no agreement: Divorce by Judgment



“Autonomy of the Parties” & Clean-Break” after Divorce

GERMAN FAMILY LAW

- Developments since the end of the 1970s (increase of divorce)
- Marriage: Hetero-sexual & Same-Sex Couples (since 2017)
- Divorce by Court Decree
- **Joint Custody** without marriage or after divorce (since 1997)
 - ECtHR, 3 December 2009 (“*Zaunegger*”) = No “Veto”-Right of an unmarried mother
 - Lobbying by “Väterrechte”-Organisations
 - Custody also for step-parents (“patchwork family”)



Access: Preserve Family Bonds after Divorce/Separation

→ **“Right of the Child”** (also “Right of the Parents” [Art. 6 II 1 GG])

2. IMPLEMENTING ACCESS IN JAPAN

Access Order at Divorce or Later

(1) In-Court Conciliation

(2) Family Court Decree

- “Care of the child” by the custodial parent has priority
- Non-custodial parent vs. custodial parent (compare the entire circumstances)
“Best interests of the child”



- Careful examination, assisted by the Family Court Probation Officers
- Access denied if (i) harmful to the child, (ii) risk of abduction or (iii) the child objects
- Flexible forms (vacation; overnight visitation; day-time visitation; phone calls, skype, letters etc.)

FREQUENCY OF ACCESS

In Japan (2017)

44% once a month

8% twice or more a month

6% once in 2 or 3 months

2% once a week

0.2% during long vacations

30% details by further arrangements

92% = without Overnight Stay



In Germany

- Residence Model: Overnight stay on alternate weekends (Fridays till Mondays or Tuesdays)
- Spend time during long vacations and holidays

- Depends on family forms, traditions, living & working conditions, and social environments
- Different interests of fathers
- Working conditions in Japan hamper access

REMEDIES IN CASE OF NON-COMPLIANCE

(1) Enforcement

Supreme Court 28 March 2013 : Indirect enforcement (money order)



Once a month, second Saturday from 10am till 4 pm

Outside the mother's house

Delivery of the daughter at agreed place, otherwise at the JR Sapporo Station

→ Specific access order: breach of clear obligation

Indirect Enforcement is possible: amount? (ca. 10.000 Yen/child a day)

(2) Damages

- ◆ Damages Claim: Solatium for mental damage + Pecuniary damage

➡ Shizuoka District Court, 21 December 1999: 5 million yen

Kumamoto Family Court, 27 December 2016: 700,000 yen

(3) Coercive Measures

- ◆ Access order: personal obligation; recurring and continuous acts
→ No direct enforcement or enforcement by substitution
- ◆ No “contempt of court” (only common law); no imprisonment

➡ **Coercive measures are not viable**

Cf. Germany: imprisonment possible, but never used (harm to the child)

→ Family Courts summon & encourage the parent to respect the access order

(4) Altering Court Orders

◆ Change Access Order

◆ Switch Custodian (also Germany, U.S., Canada & Australia)

➤ “Friendly Parenting Rule”?

➤ Chiba Family Court (Matsudo Branch), 29 march 2016

Father obtained parental authority by allowing 100days of access to Mother

→ Tokyo High Court, 26 January 2017: overruled; Mother obtained parental authority



Introducing a Monitoring System by Family Courts (desirable)

AMICABLE SOLUTIONS

◆ Mediation

- Expertise: Helpful for cross-border cases
- Example of MiKK (Prof. Odagiri)

◆ Assisting Parents

- Prefectures (Tokyo, Chiba, Kumamoto) & Municipalities (Akashi, Shizuoka, Hamamatsu, Kitakyushu)
Support prior to/at consensual divorce: advice; hear the child; share information on the child;
arrange access; provide a venue for access
- NGOs (FPIC, ISSJ etc.) ← 1980 Hague cases (financial support by JCA up to 4 times)



Amicable Solution: “Best Interests of the Child”

IV. CONCLUSION

◆ Japan: No Supra-national Organizations; No Driving Force

Cf. Germany = European Union; European Convention on Human Rights (Council of Europe);
Federal Constitutional Court

◆ Implementation of the Hague Convention & Access

- Particular needs in cross-border cases: flexibility, frequency & efficiency
- Assisting parents for an amicable solution

◆ Joint Custody after Divorce? (discussed in Japan)

- Court Order in case of discordance (e.g., schooling or medical treatment)
- Perception of the Society needs to change: “Right of the Child” (UN-CRC)
- Parental well-being



[REFERENCES]

- For the implementation of the HC in Japan: https://www.mofa.go.jp/fp/hr_ha/page22e_000249.html
- Major Japanese return cases are reported at „INCADAT“: <https://www.incadat.com/en>
- For statistics of access orders (2017): <http://www.courts.go.jp/app/files/toukei/029/010029.pdf>
- Barbara Holthus & Hans Bertram (eds.), *Parental well-being. Satisfaction with work, family life, and family policy in Germany and Japan* (Iudicium, Munich 2018).
- Osamu Kaneko, *Kokusaiteki na Ko no tsuresari he no Seidoteki Taiô* (Shôji Hômu, Tokyo 2015).
- Noriko Mizuno, “Die rechtliche Regelung der Ehescheidung in Japan”, in: *ZJapanR/J.Japan.L.* 7 (1999), pp. 120-137.
- Yuko Nishitani, “Aktuelle Entwicklungen im internationalen Familienrecht Japans”, in: *ZJapanR/J.Japan.L.* 43 (2017), pp. 21-50.
- Yuko Nishitani, “Kodasshu Jôyaku no Un-yô ni kansuru Hikakuhô-teki Kentô”, in: *Case Kenkyû* 329 (2017), pp. 4-68.
- Shuji Zushi, “Japan’s five-year experience in implementing the 1980 Hague Abduction Convention”, in: *International Family Law Journal* (forthcoming 2019).