

## CUSTODY AND ACCESS ISSUES IN JAPANESE INTERNATIONAL FAMILY LAW—A SUMMARY\*

JUN'ICHI AKIBA

### I. *International Legal Norms Affecting Japanese International Family Law*\*\*

1. UN covenants and conventions:
  - i. Human Rights Covenants A and B 1966 (21 September 1978)
  - ii. Refugee Status Convention 1951 and Protocol 1967 (1 January 1982)
  - iii. Women's Rights Convention 1980 (25 July 1985)
  - iv. Child Rights Convention 1989 (22 May 1994)
2. The Hague Private International Law Conventions:
  - i. Applicable laws
    - ① Maintenance Obligations (Children) 1956 (19 September 1977)
    - ② Maintenance Obligations (General) 1973 (1 September 1986)
    - ③ Form of Testamentary Dispositions 1961 (2 August 1964)
  - ii. Procedural matters
    - ① Civil Procedure 1954 (26 July 1970)
    - ② Service Abroad 1965 (26 July 1970)
    - ③ Legalisation 1961 (26 July 1970)
3. Agreement with the Republic of Korea  
Agreement concerning Legal Status of Koreans in Japan 1965 (17 January 1966)

### II. *Problems in Matters of Custody and Access*

The problems include; ① allocation, re-allocation and restriction of parental responsibilities; ② delivery or return of child; ③ access or contact; ④ and modification of variation of prior decisions relating to these issues.

---

\* Submitted to the International Society of Family Law 8th World Conference, FAMILIES ACROSS FRONTIERS, 28 June~2 July 1994, Cardiff, Wales, UK.

\*\* Date of entry into force in Japan designated in each parentheses.

# 1. Existing rules or standards with respect to these problems.

## i. International Jurisdiction

Statutory provisions: none.

Family courts practice: they have been exercising their jurisdiction if, by their pronouncement, ① all parties (type A rule),<sup>1</sup> or ② the child and either parents (type B rule),<sup>2</sup> or ③ the child (type C rule),<sup>3</sup> is domiciled in Japan. As a matter of fact, the child and either parents did have their domicile in Japan in most cases reported.<sup>4</sup> They have been exercising jurisdiction also over custody or access issue where such is raised ancillary in divorce proceeding, if they find themselves competent for the main issue.<sup>5</sup>

In an application for relief in Habeas Corpus proceeding, where return of child is sought for, a District Court declared that the application, in accordance with the Protection of Personal Liberty Act 1948, shall be dismissed for lack of jurisdiction "if the person allegedly having the child under his restraint stays abroad beyond Japanese sovereign territory and

### Abbreviations:

F.C.=Family Court; D.C.=District Court; H.C.=High Court; MBFC=*Monthly Bulletin of Family Courts*; LCR (civ.)=*Lower Courts Report (civil cases)*; SCR (civ.)=*Supreme Courts Report (civil cases)*. All of these materials are written in Japanese.

<sup>1</sup> Kobe F.C., 17 January 1970, 22 MBFC (8) 86 (Japanese mother (ex-wife) asked, against Chinese father (ex-husband), for delivery of the child and re-allocation of custody from father to mother, after divorce is effectuated).

<sup>2</sup> Osaka F.C., 27 December 1963, 16 MBFC (5) 183 (appointment of the custodian parent after divorce between Chinese spouses); Tokyo F.C., 27 April 1987, 39 MBFC (10) 101 (Japanese mother (ex-wife) appointed as the custodian against missing Philippino father (ex-husband and custodian)).

<sup>3</sup> Tokyo F.C., 20 June 1969, 22 MBFC (5) 110 (American spouses divorced in Mexico: modification of Mexican order relating to custody); Tokyo F.C., 12 August 1975, 28 MBFC (6) 87 (divorced American spouses); Tokyo F.C., 31 March 1987, 39 MBFC (6) 58 (non-custodian English father asked for access to the child, against custodian Japanese mother, after divorce); Matsuyama F.C. (Uwajima Branch), 9 January 1976, 29 MBFC (3) 101 (American father (ex-husband) against Japanese mother (ex-wife)); Shizuoka F.C., 27 May 1987, 40 MBFC (5) 164 (Mexican father (ex-husband) against Japanese mother (ex-wife), divorced in U.S. without settling the issues of custody. The court declared the place where the child is residing at present shall be the determinant factor to base its jurisdiction). See further Tokyo F.C., 16 July 1959, 11 MBFC (10) 115 (American father (ex-husband) against Japanese mother (ex-wife)). Japanese law takes the domicile of the child concerned as the sole determinant factor for internal jurisdiction over custody cases: Supreme Court Rules for Domestic Causes Proceedings 1947, §§52, 70, 72~74, 81.

<sup>4</sup> Cf. Tokyo F.C., 22 September 1989, 42 MBFC (4) 65. In this case, an Iranian father, resident in Japan, petitioned for his custodial authority over his daughter, against his Japanese ex-wife, the mother of the daughter, both now residing in Germany. The court denied jurisdiction, "because the minor concerned has been living with the authorised parent in Frankfurt, . . . , and has no residence in Japan."

<sup>5</sup> Yokohama D.C., 14 August 1964, 15 LCR (civ.) 2002 (jurisdiction affirmed for the state either of the common nationality or the common domicile of the spouses). This type rule supported by a few writers: according to their contention, these two problems of divorce and custody are not severable, particularly where the law applicable to divorce requires, like Japanese law, to determine the sole custodian parent at the time or before the divorce is effectuated. Cf. Japan, Civil Code §819① "Either one of the parents ought to be determined as the custodian, by their agreement, where they wish to divorce through their mutual consent." Id. §819② "The court shall determine either one of the parents as the custodian, in cases where divorce is sought in judicial courts." See however, the Supreme Court Rules, above cited in note 3, stipulates in its Article 52 Item 1 as follows:

"The Family Court competent for the place of the domicile of the child concerned shall have jurisdiction over such custody issues as appointment of *de facto* custodian or related problems, in cases of annulment or dissolution of marital relationship of the parents."

is, therefore, not subject to Japanese jurisdiction.”<sup>6</sup>

ii. Choice of Law.

Statutory provision: Article 21 of *Ho-rei* (Application of Laws (General) Act 1898 as partially amended in 1991).

“The legal relations<sup>7</sup> between parents and child shall be governed by the national law of the child, if the child has such law in common with either parents or, where one of its parents is lacking, with the other parents. Otherwise, the relations shall be governed by the law of the place of the habitual residence of the child concerned.”

The article 32 of *Ho-rei* in its proviso explicitly rejects *renvoi* in determining the law applicable to the issues coming under the broad scope of “the legal relations between parents and child.” Custody or access issues fall within the scope of the Article 21, according to its established interpretation through long practice.

Where one files petition for delivery or return of child in Habeas Corpus proceeding, courts apply Japanese law, namely, the Protection of Personal Liberty Act 1948 as the basic rules for determining the case. The courts, however, refer to the foreign law, applicable to custody issues under the Article 21 of *Ho-rei*, to find if the person having the child under his control is without legal authority or so doing in violation of laws.

iii. Recognition and Enforcement of Foreign Court Decisions.

Statutory provision with explicit reference to custody issues: none.

Judicial practice: rules unsettled.<sup>8,9</sup>

Rule proposed by doctrines:

(1) application direct of general recognition requirements: Article 200 Code of Civil Procedure—finality of the judgment and ① jurisdiction, ② due service to the defeated defendant, ③ public order and good morals, and ④ reciprocity of recognition.

(2) application *mutatis mutandis* or by analogy of the Article 200 C.C.P., excluding the reciprocity requirement prescribed in the Article.

(3) twofold test of jurisdiction and public order.

The first type test seems gaining more supporters in theory and practice.

<sup>6</sup> Osaka D.C., 16 June 1977, 33 *MBFC* (1) 86.

<sup>7</sup> With the exception of status issues, regarding confirmation, creation or termination of parent-child relationship.

<sup>8</sup> One may contend that judicial practice would vote for the direct application of the Article 200 C.C.P., Supreme Court once stated that an urgent and provisional order of custody by an Italian tribunal, dealing with separation between husband and wife, “does not come under the ‘final and conclusive’ judgment in the sense of the Article 200 C.C.P.” in rejecting recognition. Cf. Supreme Court, 26 February 1985, 37 *MBFC* (6) 25.

This attitude of the Supreme Court seems to suggest that they consider the Article 200 as prescribing the rules directly applicable to recognition of foreign decisions in matters of custody. A Japanese father, in this case, took his children back to Japan, in the absence and without consent of their Italian mother, during pendency of separation suit against the father, in a Tribunale Civile e Penale di Torino. see 2. i. (a). *infra*.

<sup>9</sup> Issues of recognition itself may not be raised in proceedings for reallocation of custody, because the court treats the petition as that for a new order in a new trial. Cf. Tokyo F.C., 20 June 1969, *spura cit.*; Shizuoka F.C., 27 May 1987, *supra cit.*

As to child abduction cases,

Cf. Supreme Court, 29 June 1978, 80 *MBFC* (11) 50; Supreme Court, 26 February 1985, 37 *MBFC* (6) 25; Osaka D.C., 16 June 1980, 33 *MBFC* (1) 86

## 2. A Few Judicial Experience.

Custody issues, relating to delivery or return of the child in particular, have been raised in such proceedings as (i) under the Protection of Personal Liberty Act 1948, or (ii) within the strict sense of International Family Law.

### i. Two cases of abduction.—relief under the PPLA.

(a) An Italian wife, mother of three children, filed an action for separation against her Japanese husband in Turin, Italy. Shortly after the suit was initiated, the husband, the father of those children, brought two of them, who were sympathetic with their father, to Japan in the absence of the mother and without her prior consent. A few days later, the Italian Tribunal issued an urgent and provisional order to place the three children under the mother's custody, without examining the father himself. The two children started their new life with the father and his parents in Japan.

About two years and six months later, the mother came to Japan and tried to see her children. As her attempt turned out unsuccessful, she applied for relief on behalf of the children at the Tokyo High Court, in accordance with the Protection of Personal Liberty Act.<sup>10</sup> Since the Court dismissed her application, she appealed to the Supreme Court, which again dismissed her appeal.

On dismissing her appeal, the Supreme Court affirmed the judgment of the High Court that the custody under the father could provide better surroundings for the children; they have well adapted themselves to such new social as well as new familial environment in which they had been staying with psychological stability for more than two years and seven months. The Supreme Court also supported the High Court decision in that it would be more appropriate for the children to be allowed to remain under the present circumstances than to be removed therefrom, in the interest and welfare of these children, because such removal could give birth to the children's tender mind psychological disturbance from the drastic change of circumstances, which is to be avoided, at least for the time being until final decision regarding allocation of custody would be rendered, together with settlement of divorce issues between their parents. Their removal from Italy, to the contrast, in the absence and without consent of the mother had little influence for the Court to reach such conclusion.<sup>11</sup>

According to the finding of the High Court, one of the children, 13 years and 10 months old boy, is capable enough to act and think by himself. The Court also found him wishing, by his own will, to stay with his father in Japan. The boy, resisting against recommendation by his grand-mother, showed hesitation to meet his mother on her visit to his home, and hid himself somewhere. He even rejected to respond to his mother's call on telephone. The High Court held upon these findings, one of the conditions for relief is not fulfilled, because the boy could not be considered as being kept under any restraint.<sup>12</sup>

<sup>10</sup> Tokyo H.C., 31 October 1984, 37 *MBFC* (6) 38.

<sup>11</sup> Supreme Court, 26 February 1985, 37 *MBFC* (6) 25.

<sup>12</sup> It is to be noted to obtain the relief under Protection of Personal Liberty Act, the following three conditions should be fulfilled; ① existence of the state of restraint upon the person to be released, ② existence of illegality in such restraint, and ③ lack of better alternative measures, more appropriate and more efficient to attain the purpose within a reasonable period.

Cf. Protection of Personal Liberty Act §2; Supreme Court Rules for Protection of Personal Liberty §4.

As regards the other child, their daughter of seven years of age, the High Court could see no signs of illegality in her being kept under the father's restraint,<sup>13</sup> after examination of ① how the restraint had started; ② how the daughter was adapting herself to a new living circumstances, at home and in school; ③ which would be better for the child, to bring her into another change of circumstance or let her remain under the environment in which she could feel ease and safe, without being bothered or disturbed. And the lack of illegality in restraint, if any, means also one of the conditions for the relief is missing.

The Supreme Court added another reason, in rejecting appeal and responding to the contention raised in the brief for appellant. Conflict of authoritative decisions will not be incurred, because the Italian order does not come under the "judgment" in the meaning of article 200, C.C.P., thus, it shall have no effect in Japan.<sup>14</sup> The Court read the Article as requiring any judgment to be "final and conclusive" for its recognition in our law.

This case seems to show that a kind of abduction may not always be considered illegal; and that children of a certain age are given opportunities to be heard their wish, which has some significant meanings for a court to reach their conclusion. And also to be noted is that foreign decisions may not be recognized its effect in Japan, on the ground of their provisional nature. The High Court pointed it out that the Italian tribunal issued the order in the absence of the children, and without their examination. If we take this point up, the Italian decision might be rejected its recognition, not because of its provisional nature, but because it might be considered as incompatible to our way of procedure in these cases, thus contrary to our public order and good morals. If, however, the father wanted such result in mind when he planned removal of the children from Turin, the lack of measures, in this case, for the mother to take resort to would be responsible to her unsuccessful attempt.

(b) An American wife, resident in Japan, left for America with her son of one year old, to visit the mother's parents in California, saying that they would come back by next birthday of the infant. To tell the truth, however, the mother had intention to leave there for a start of her new life, separated and finally quitting from her Japanese husband. The husband eventually went after his wife and child to their home in California, to persuade her to come back with the child to Japan. Having failed to persuade her, he took the child in pyjama out of its mother's home, pretending to go just for buying some sweets at a shop in neighbourhood, but, in fact, he was going to take the infant across the Ocean to Japan.

Very shortly after the event, the wife filed an action in Los Angeles seeking for divorce against husband and for custody of the infant. The Superior Court of Los Angeles rendered a divorce judgment by default in favour of the wife-mother, and at the same time ordered that the wife-mother shall have the custody of the infant. It was no more than five months

<sup>13</sup> "Custody could be considered as a kind of restraint in the meaning of the Protection of Personal Liberty Act, since custody itself necessarily involves some restraint upon personal liberty of such incapable infant." Supreme Court, 28 May 1958, 12 *SCR (civ.)* 1224.

<sup>14</sup> The Article 200, Code of Civil Procedure: "final and conclusive judgment by foreign court shall have its effect in so far as it fulfils the following conditions:

- ① jurisdiction of the foreign court is not denied by laws or international conventions,
- ② the defendant was served summons or orders necessary for the initiation of the procedure, by other means than publication, or has voluntarily appeared without being served such documents, if the defeated defendant is a Japanese.
- ③ the judgment rendered by the foreign court is not contrary to the public order or good morals in Japan, and
- ④ reciprocity is guaranteed.

after the abduction.

Another three months later and after she had obtained the final judgment of divorce and custody, she came again to Japan for further negotiation, with her ex-husband still keeping the infant under his control. As she had failed to settle the dispute, she asked Osaka District Court for relief under Protection of Personal Liberty Act, in her effort to get the son back to her hand.<sup>15</sup>

The Court examined, in the first place, if the Californian judgment has effect in Japan under the Article 200, CCP, but concluded that it has no force because the Californian Court lacked jurisdiction over the divorce action against the Japanese husband, who has retained his domicile in Japan.<sup>16</sup> Accordingly, this case was treated by the Court as between the married spouses living apart but having joint custody of the infant, and mother wanted the infant to be returned because it had been allegedly kidnapped from her home by its father before she was aware of it.

Although the Osaka D.C. admitted that the infant had been being cared in good condition by the father's parents, the Court affirmed the mother's petition saying that it would be better and more natural for a 3 years old child to be bred up under the mother's care and custody, weighing the balance between the mother and the father or his parents, in terms of their respective affection toward the infant, each of their living conditions and circumstances, respective capacity of maintenance, and intention or motivation of each person to obtain the custody. The Court had knowledge that the infant was living in peace and in happiness, mental as well material, under care of the father's parents. And also the court had some anxieties about the infant's mental disturbance likely to occur in the course of its adaptation to a new environment, if brought back again to California—the infant was found already losing his mother's tongue in fact. Still, the court decided in favour of the petitioner mother, thinking of the future of the infant in longer perspective. The method applied by the father in his taking the child back from California, also was found evidently illegal.

The father appealed from the High Court judgment, but it was dismissed by the Supreme Court, which affirmed the judgment rendered by the Court below.<sup>17</sup> The Supreme Court followed the principle established by its own precedents; *i.e.* "if one of the spouses of a marriage, already broken down, applies for delivery of their infant under their joint custody, against the other spouse keeping the infant under its factual control, in a PPLA proceedings, basic considerations should have focus upon which one of the spouses will be more appropriate person for the welfare of the infant, in determining whether the alleged restraint is illegal."<sup>18</sup> The Court stated in the same opinion that it is irrelevant whether the custody has

<sup>15</sup> Osaka D.C., 8 March 1978, 30 MBP (11) 25.

<sup>16</sup> Cf. Supreme Court, 25 March 1964, 18 SCR (civ.) 486. This is the leading case setting the jurisdictional rules for international divorce. According to the opinion of the Supreme Court, our courts have no jurisdiction over divorce, unless the defendant is domiciled within our territory; provided the defendant wilfully deserted the plaintiff, or is missing, and in other cases comparable to such. In such exceptional cases, our courts have jurisdiction if the plaintiff is domiciled in Japan.

<sup>17</sup> Supreme Court, 29 June 1978, 30 MBFC (11) 50.

<sup>18</sup> Supreme Court, 18 January 1949, 3 SCR (civ.) 10; 28 May 1958, 12 SCR (civ.) 1224 (see note 13 *supra*); 4 July 1968, 22 SCR (civ.) 1441.

<sup>18-s</sup> See further, Tokyo D.C. S-52 (jin) #6 (1978). A German wife of Japanese husband, filed an action for divorce in Hannover, after taking their 3 children from Japan to Germany. The husband appeared in that proceeding to defend the case, but the Court issued a provisional order allocating custody over those

been being exercised—after abduction—by the person having legal custody, or whether such exercise of custody derives from affection or satisfies emotional needs—for the time being—of the infant.

The age of the infant—3 years old, being cared mostly under the hands of grandparents, the father's way of its abduction and the mother's quick response in and out of the courts, foreign and domestic, after the abduction, may have meant something for the Supreme Court in its reaching conclusions contrary to the case cited above.

## ii. Recognition of foreign custody order—an example

On granting divorce, in May 1984, between a Japanese wife and an American husband (Texas citizen), married in Texas, and then domiciled there, a Texas District Court issued an order to appoint the wife-mother as the sole managing conservator of their child—one year and ten months old daughter—, and the husband-father as its possessory conservator who may take the child under his physical custody for a certain period like in summer vacation in accordance with the terms set in the court order. The court, in addition, prohibited the parents to transfer the child out of border without the judicial permission.

4 years later, in August 1988, the father filed a motion at the same court, for modification of the prior order in his favour, to exchange the role of conservator, namely, the father shall be the sole managing conservator, and the mother the possessory conservator with limited right of access to the child—then six years old.

In May 1989, the mother moved to Japan taking the child with her, under permission obtained from the same court, in March the same year for change of domicile, and in April for taking the child out of Texas jurisdiction.

In November 1989, the Texas court issued an order through jury trial, affirming the father's motion, upon verdict followed by discovery process, to change the sole managing conservator from the mother to the father, making the mother the possessory conservator. It also ordered the mother to deliver the child to the father, with the exception of a certain period where the mother may take the child under her physical custody. This decision was made in the absence of both the mother and the child who appeared to the proceeding only through two attorneys as their representatives.

2 years later, in early 1991, the father filed an motion at the Tokyo D.C., for enforcement of the modified order by the Texas Court; delivery of the child—now eight years old—to the father, and payment by the mother of support for the child, respectively.

And issues are raised here if such an order is to be recognized under the Article 200, C.C.P., and if the Texas Order is to be granted its execution in accordance with the Article 24, Execution (Civil Matters) Act 1979.<sup>19</sup> The Tokyo District Court affirmed the father's

---

children to the wife-mother until final solution of divorce matter was reached. About six months later, the husband-father brought them back to Japan without the mother's consent and before she was aware of it. The mother filed an application in Japan under PPLA for prompt return of the children. The wife-mother finally withdrew the application, because they were able to reach an accord in which it is determined (1) the children should be cared by the parents of the husband-father, (2) both the father and mother should be allowed to make access or visitation to the children any time they wish.

<sup>19</sup> The Execution (Civil Matters) Act 1979; Article 24 (extracts):

“(2) The judgment for enforcement shall be entered without examination of right or wrong of the foreign judgment;

(3) The motion under the (1) of the present Article shall be dismissed unless the foreign judgment is established as final and conclusive with evidence, or it satisfies the requirements prescribed in the Article 200, Code of Civil Procedure; . . .”

motion and ordered the mother to deliver the child to the father, in compliance with the Order issued by the Texas Court, which the Tokyo D.C. considered fulfilling the conditions set by the Article 200 C.C.P. and the Article 24 Execution (Civil Matters) Act.<sup>20</sup>

The mother appealed from this District Court judgment to Tokyo High Court, asserting again that the Texas Order shall not be recognized nor to be allowed its execution on the ground (1) that the Texas Order does not fall within the meaning of "judgment" prescribed in the Article 24, Execution (Civil Matters) Act, and (2) it is not to be considered as falling within the scope of the "final and conclusive judgment" in the Article 200, C.C.P., and (3) the Order fails to satisfy any of the other requirements in the said Article, and so forth.

The Tokyo High Court affirmed the appeal and reversed the judgment rendered below,<sup>21</sup> upon the grounds, however, subtly different from those alleged by the appellant mother. The High Court considered the Texas Order not falling within the meaning of "final and conclusive judgment" prescribed in the Article 200, C.C.P., because such issues relating to custody or support are to be determined in the proceedings of voluntary jurisdiction, thus, not in ordinary procedure of civil matters. Nonetheless, the Court admitted this kind of decisions entered by foreign court shall be recognized and enforced if these decisions satisfy requirements *comparable* to those prescribed in the Article 200 cited above, but with exclusion of the reciprocity requirement. This attitude of the Court suggests that they would deny direct application of the Article. Rather, they would prefer application *mutatis mutandis* or by analogy of the said Article.<sup>22</sup>

Following this line, the Court examined, in the first place, if the Texas Court had jurisdiction over the modification of its prior order. The Tokyo High Court held this point in the affirmative, because both the appellant mother and the child were found domiciled in that State at the time of initiation of that modification trial, and in addition, it is clear from the evidence that the appellant mother voluntarily appeared at the Texas proceeding.

The High Court then proceeded to inquire into how and on what grounds the Texas Court had come to modify the prior order, looking into the evidences submitted to the latter trial.<sup>23</sup> And the High Court found that the Texas court considered it more appropriate, for the welfare of the child, to let her live in the United States because the child would suffer more difficulties, in adapting herself to the society, if she stays in Japan, where people are more unfavourable to handicapped persons or more discriminatory against children of mixed marriages and much more competitive in their school life.

In evaluating such process of foreign decision in this case, the High Court considered

<sup>20</sup> Tokyo D.C., 30 January 1992, *Hanrei Taimuzu* (Law Times Reports) 789, 257; *Hanrei Jiho* (Case Law Reports) 1239, 138.

<sup>21</sup> Tokyo H.C., 15 November 1993. *Hanrei Taimuzu* (Law Times Reports) 835, 132.

<sup>22</sup> Cf. II,1,iii,(2). *supra*. The theory for full and direct application, with flexible interpretation of the fourth requirement of "reciprocity" (guarantee of mutual recognition), Article 200, C.C.P., is gaining more support from both theory and practice. See, Supreme Court, 7 June 1983, 37 *SCR* (civ.) 611. Tokyo D.C., the court of first instance of this case, adopted the theory cited above.

<sup>23</sup> The Tokyo D.C. followed the same procedure, but reached contrary result, saying that the allegations by the respondent (appellant) are not satisfactory to this point.

Cf. Supreme Court, 7 June 1983, 37 *Sup. C.R.* (civ.) 611.

"The stipulation of the Item (3) of the Article 200, Code of Civil Procedure, shall be construed as requiring foreign judgments not to be contrary to our public order and good morals in *its process* of decision making as well as *its contents*."



it reasonable in general that they may take into consideration those facts or changes of circumstance occurred *after* rendition of the foreign decision in determining if its enforcement is to be affirmed, at least for the type of decisions in voluntary jurisdiction.

The Court acknowledged that the child in this case had to go through some hardships earlier at the start of her life in Japanese society, due to her poor proficiency in Japanese language. The Court recognized considerable progress in her learning that language to enjoy her happy life those days at school, while she has lost her ability to read and write English. Under these circumstances, the Court went on saying, she will be forced to stay in the society where she knows little means of communication, if she is to be brought back to the United States, and to live with a newly appointed Managing Conservator with whom she can not easily communicate. The child, on an opportunity to be heard of her opinion, told the Court that she would not go to stay with her father because she feels fear and hatred of him; she wanted rather to remain with her mother in Japan. It is interesting to find that her wish is supported by expert opinion, by a practising psychologist, submitted to the Texas Court for their trial.

Considering the age of the child—nearly eleven years old at the time of closing that appellate instance, it surely is, according to the opinion of the High Court, incompatible with the welfare of such child and detrimental to her well-being, if she is to be placed under these state of protection. The Court came to conclude, from the foregoing findings and observations, it is against the welfare of the child, and in that sense, it incurs results contrary to the public order and good morals, if they recognize and to enforce the delivery of the child as ordered by the Texas Court.

It is to be noted in this case, the Court applied the Artifice 200, C.C.P., *mutatis mutandis* or by analogy; the Court construed the public order requirement in terms of child's interest and welfare; the Court examined compatibility with such public order *at the time of enforcement*, not at the time of rendition of the foreign judgment; accordingly, the Court took into their consideration the facts or changes of circumstances occurred after the rendition of the foreign judgment in their examination of compatibility with public order; the Court, however, did not explicitly answer another question raised by the parties; the question if it is contrary to our public order to recognize the foreign order issued without personal appearance of the mother and the child, and without their direct examinations.<sup>24</sup>

The present writer would like to support basically most of these holdings of the Tokyo High Court, with the exception of the last point. Hardly conceivable is a custody proceeding in the personal absence and the lack of direct examinations of the parties, the child involved in particular. It would be really important for the persons in charge of making right decision regarding issues of custody, to eye-witness and observe by themselves verbal and non-verbal transactions between the parties, *and* preferably on several occasions. Rules for jurisdiction and for taking evidences ought to be constituted to meet these needs. And means for securing personal appearance of the parties should properly be provided.

Considering the nature of the problem, dealing with younger persons developing themselves, mentally as well as physically day by day, adapting themselves to the surroundings every day, request for enforcement of foreign delivery order, too late after its rendition, may lose their grounds; the foreign judgment could hardly be expected to function properly

---

<sup>24</sup> The Tokyo D.C. answered this question in the negative.

in many of the cases by such time of its enforcement. Highly demanded in our country are those means to assure quick and efficient return of child, in cases of unreasonable removal of children, and measures to ensure prompt and safe delivery of child, in cases of modification of prior orders rendered by competent courts elsewhere concerning its custody.<sup>25</sup>

### III. *Closing Remarks*

The present writer has tried so far to show the state of things, in Japan, regarding matters of custody, by introducing relevant or typical cases dealt with in our recent judicial practice. Problems are now clear, and the problems emerged up there might have already been solved properly by use of varieties of measures in other countries. And we have been making efforts of our own to reach proper solution, learning from experiences of those countries. Lacking still, in our country, is more appropriate measures or institutions recognized effective in world arena. Such deficiencies vividly show themselves in relation to exercise of right of access in trans-border situation.

Difficulties arise in most cases where each parent is living apart not only across border but also in long distance. Geographical situation of Japan makes visitation a *grand tour* by air of inter-continental or trans-oceanic nature. Even a person-to-person call ought to go through inconvenient time difference of 8 to 12 hours. Week-end stay will surely be impractical and unsatisfactory for both parties. A longer journey during summer school holidays may increase satisfaction of the parent living abroad. This sort of access tour, however, will cause fear and anxiety in the mind of custodian parent sending the child overseas. Fear for possible reallocation order of custody, in favour of the parent whom the child is now staying with, by the court of the place where the child is physically present. Nervous mothers may file a counter-petition here if she comes to know father's initiation of the action abroad. There might well be battle of suits or conflict of decisions across border. Some mothers might have good reason to be anxious about the child's indecent treatment during its stay alone with its father and abroad, absolutely beyond its mother's control and protection, particularly when the child is female.

It is extremely difficult, under these circumstances, for the parents to reach an accord or agreement regarding allocation or re-allocation of custody, not to mention of matters relating access right or its exercise. Institutional guarantee of rights of custody, backed with international cooperation, guarantee of advice and finance in cases of emergency are urgently needed.

This state of things has certainly been quite familiar with most of readers. Almost of all situations similar to those I introduced here as happening in our country, has already been vividly described and accurately observed in Mr Dyer's Report 1978, prepared for making the Hague Child Abduction Convention. Though it was no less than 15 years ago.<sup>26</sup>

That is why we consider the said Hague Convention will surely provide us with an effective

<sup>25</sup> This is the very objects of the Hague Child Abduction Convention 1980, explicitly stipulated in its Article 1.

<sup>26</sup> As regards, for instance, typical elements of the situation which results in an abduction, see the Dyer Report at pp. 22 *et seqq.* Visitation as an opportunity for abduction; needs for restriction or control of access or guarantee against abuse of such rights, etc. at pp. 78, 82 *et seq.*, 98-102, etc.

tive scheme, for better assurance of children's rights and welfare.

We think it indispensable and quite timely for our Government to act more positively to ratify the said Convention, in its responsibility to keep and enhance the best interest and the welfare of children, now that our country has ratified the U.N. Child Rights Convention, though it was only yesterday.

HITOTSUBASHI UNIVERSITY