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**Towards an “Asian” child abduction treaty?
Some observations on Singapore and Japan
joining the Hague Convention**

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Towards an “Asian” child abduction treaty?
Some observations on Singapore and Japan joining the Hague Convention

Colin P.A. Jones*

ABSTRACT: This paper will briefly compare the regimes adopted by Japan and Singapore for adopting the Hague Convention on the Civil Aspects of International Child Abduction, together with the two countries’ underlying family law systems in order to consider whether an “Asian” approach to the treaty may develop in the future.

I. Overview.

The Hague Convention on the Civil Aspects of International Child Abduction¹ provides a mechanism for locating and returning children “wrongfully” removed from or retained outside of their jurisdiction of habitual residence, a problem that most commonly arises in the breakdown of an “international” marriage. The Convention seeks to protect the welfare of the children involved by deterring and remedying unilateral action by one parent. Put simply, the treaty is based on the assumption that the interests of children should be evaluated by courts in the jurisdiction where they have been residing, rather than the one in which they may have just gotten off a plane.

A country that joins the Convention commits to establishing a central authority to facilitate the return of abducted children and providing a prompt judicial process for realizing their return. It also provides for the facilitation of rights of access between contracting states, most academic and professional interest on the treaty is directed at the return process. The same will be true of this article.

A map of the world showing Convention signatory nations as of the end of the first decade of the 21st century would portray a very “Western” treaty regime.²

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¹ 25 October 1980, 1343 UNTS 89, 19 ILM 1501 (entered into force 1 December 1983).

² The author is cognizant that terms such as “Western” and “Asian” are problematic both in terms of generating subjective associations and being geographically imprecise, particularly

At the time of writing, virtually every country and territory in Europe, North and South America as well as Australia and New Zealand had signed. By contrast only a handful of African nations had done so. Asian countries seem particularly under-represented, given their importance in terms of population and economic development. Of the small number of Asian jurisdictions that were parties to the Convention as of 2009, two (Hong Kong and Macao) achieved their contracting status due to colonial legacies. The two other Asian “early adopters” - Thailand and Sri Lanka (acceding in 2001 and 2002) – are still both developing nations that have not yet been able to establish treaty relations with all of the other signatories.³

Having acceded in 2010, Singapore could be described as the first “developed” Asian nation to have independently joined the Convention. It was followed by Korea in 2012 and Japan in 2013. Japan’s accession comes after years of high-level lobbying by Western governments and media condemnation of its status as a “black hole” for parental child abduction from which no child has ever been returned through the Japanese judicial process.

With more countries in Asia joining the Convention, the time may be ripe to consider whether they will cause it to become more “Asian” (whatever that means) in the way it is implemented and interpreted. This article will briefly compare and contrast the implementation regimes of Japan and Singapore as well as the relevant features of the two country’s family law systems before suggesting a preliminary, highly tentative conclusion.

II. Japan and Singapore compared and contrasted

Japan is one of Asia’s largest countries in terms of GDP (473 trillion yen in 2011) and population (128 million as of 2010).⁴ Compared to many neighboring

with respect to nations such as Turkey or Israel. Nonetheless, a detailed exposition of such semantic issues, however, is beyond the scope of this article.

³ By its terms (Art. 37), the Convention is open to signature between states that were members to the Hague Conference on Private International Law at the time of its Fourteenth Session in 1980 when the Convention was adopted. Other states may join, but their accession must be accepted by other contracting states for treaty relations to arise between those two states (Art. 38). Japan was a member of the Hague Conference in 1980 while Singapore remains a non-member.

⁴ See National Accounts for 2011, “Gross Domestic Product Account (Production and Expenditure Approach)”, online: Japan Cabinet Office <http://www.esri.cao.go.jp/en/sna/data/kakuhou/files/2011/25annual_report_e.html>; Population Statistics of Japan 2012, “Population and Growth”, online: National Institute of Population and Social Security Research

countries its population is highly heterogeneous in terms of ethnicity, country of birth, language, educational background and other elements of cultural identity. The Japanese practice a variety of religions including various forms of Buddhism, Shintoism and Christianity, all of which coexist peacefully. Such minority populations as do exist in Japan represent a very small percentage of the population overall.⁵

Of the 700,214 marriages recorded in Japan in 2010, 30,207 (4%) were between Japanese and foreign nationals. Of the 1.049 million children born in that year, almost 22,000 (2%) were born in households with one non-Japanese parent. In total, 252,617 children in Japan experienced the divorce of their parents in 2010. Of 251,378 divorces in the same year, 18,968 (7.5%) were “international”, with one spouse being non-Japanese. As these statistics make clear, most instances of divorce or other forms of parental separation in Japan are strictly “domestic”, with those involving a non-Japanese spouse or parent being a very small minority.⁶

Although economically Japan’s peer – the seventh richest country in the world on a GDP per capita basis – Singapore is quite small in terms of territory (697 km²) and population (5.3 million in 2012).⁷ Furthermore for historical reasons it is demographically more complex than Japan, with an ethnic Chinese majority (approximately 77%) as well as significant minorities of Malay and South Asian extraction (14% and 8% respectively). This complexity reflected in the nation’s four official languages (English, Mandarin, Malay and Tamil). Singapore’s culture also encompasses a variety of very different religious traditions and includes a significant Muslim community for which a separate system of family justice exists.

As a center of international business and finance, Singapore also has a significant population of transient “expats” and other categories of temporary

<<http://www.ipss.go.jp/p-info/e/psj2012/PSJ2012.asp>> (last accessed 31 May 2013).

⁵ At the end of 2011 there were slightly over 2 million registered foreign residents in Japan. Chinese, Filipino and Koreans accounted for over two thirds of this number. See Japan Ministry of Justice statistics, online: <http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri04_00015.html> (last accessed 31 May 2013).

⁶ See Japan Ministry of Health, Labor and Welfare statistics, online: <<http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii10/>> (last accessed 30 April 2013).

⁷ See CIA World Fact Book, online: <<https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html>>; Department of Statistics Singapore, online: <http://www.singstat.gov.sg/statistics/browse_by_theme/marriages.html> (last accessed 31 May 2013).

workers.⁸ Of Singapore's population of 5.3 million in 2012, 3.28 million were citizens and a further 0.53 million were permanent residents. The remaining 1.49 million – 28% of the total – were classified as “non-residents”, a category comprising foreigners working, studying or living in Singapore but not having permanent residence (and excluding tourists and short-term visitors).

In 2011 Singapore recorded 27,258 marriages and 7,608 divorces and annulments.⁹ 32.2% of marriages and 22.4% in this year were characterized as “inter-ethnic”.¹⁰ The same year saw 39,654 live births.¹¹ Of the marriages in 2011, a full 39.4% were between a Singaporean citizen and a non-citizen, with 31.1% of children being born to such couples.¹²

Because of the demographic complexity of its population and families, Singapore courts are well-acquainted with cases involving an international component. In fact, *CX v CY*¹³ (discussed later), one of the Singapore Court of Appeal's most important custody cases, involved a dispute between parents neither of whom were Singaporean.

In connection with the Convention Singapore may prove to be special in primarily being a source of outbound cases. As of March 2013, Singapore's Central Authority had dealt with four outbound cases against one inbound.¹⁴ This ratio is consistent with research by Professor Debbie Ong on pre-Convention international cases, which identified 22 outbound cases to only four inbound.¹⁵

III. Rights of custody in Japan and Singapore

So much for statistics; let us turn to law. Under the Convention an abduction or retention is “wrongful” (and therefore likely subject to return proceedings) if it is “in breach of rights of custody” in the child's country of habitual

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² National Population and Talent Division Prime Minister's Office, “Marriage and Parenthood Trends in Singapore” (June 2012), available at: http://www.singstat.gov.sg/statistics/browse_by_theme/marriages.html. (Last accessed 31 May 2013).

¹³ [2005] 3 SLR (R) 690 (CA) [*CX v CY*].

¹⁴ Inbound cases include what became the very first instance of Singapore's High Court upholding a return order, in an inbound case involving a German father and a Singaporean mother. *BDU v BDT*, [2013] SGHC 106, 15 May 2013.

¹⁵ Debbie Ong, “Parental Child Abduction in Singapore: The Experience of a Non-Convention Country” (2007) 21 *IJLPF* 220.

residence, if such rights were being exercised at the time. This section will focus on trying to develop an understanding of what “rights of custody” might mean within the context of Japanese and Singaporean family law.

A. Japan: Parental Authority and the Family Registry System

1. The Family Registry System. Before discussing concepts such as “custody” it is necessary to first understand a system that forms the basic framework of Japanese family law, the *koseki seido* or family (or “household”) registration system - a nationwide registry of family units. Unlike many countries where an official document certifying a particular event (e.g. a birth or marriage certificate or court decree) is used as evidence of a legally-significant family relationship, in Japan this would be established by submitting an official extract of the family registry instead. Rather than merely being a record of a specific event, the family registry presents a snapshot of familial relationships at the time the extract was produced. It thus shows not only a marriage, but subsequent divorces and the locus of parental authority as well. An extract will also show whether a child has been born out of wedlock. Since the locus of parental authority (discussed below) is inexorably linked with marital status, a family registry extract may be important for purposes of proving authority to take legal acts on a child’s behalf (e.g., when applying for a passport).

Several features of the family registration bear noting. First, it is inherently nationalistic: only Japanese citizens have family registries. A foreign spouse or parent will be recorded in the registry of their Japanese spouse or children, but non-Japanese residents of Japan do not themselves have a registry. Thus, while procedures have been developed to deal with non-Japanese family members, they are essentially a “work-around” for an overall system that assumes a family composed of Japanese citizens.

Second, the family registry is best understood as existing primarily to facilitate dealings between a family unit on the one hand and government and other third party actors on the other. It may thus be helpful to think of the family registry as performing a function analogous to a real estate title registry, which discloses legally pertinent information about a particular tract of land for the benefit of people who might wish to transact in connection with it. In fact, until recent concerns about privacy led to laws and regulations that made doing so much more difficult, a person’s family registry was essentially a public document

that could be seen by accessed without their knowledge or consent. Family registry extracts remain a basic form of identity document; they may be demanded in the course of applying for employment, government benefits or other purposes.

Just as with a title registry, the family registry only contains a limited number of data fields, and since one of the purposes is to clarify the state of family relationships for the benefit of third parties, ambiguity is kept to a minimum. Accordingly, relationships are recorded as being either “on” or “off”, with a significant number of the *Civil Code* provisions on marriage, divorce and adoption being devoted as much to defining how these relationships are created and terminated as they are to the substance of the relationships. Just as a title registry reflects the details of a piece of land and whether it is subject to a mortgage or other encumbrances but not the condition of the house or whether it has a nice view, the family registry would show that a man and woman are legally married and have children but not the fact that they have not cohabitated for years and may already be in other relationships. The most important feature of the family registry for purposes of this article, however, is that the locus of parental authority over a child is readily evident from the family registry, whereas “care and control,” access rights, maintenance obligations and other matters commonly decided in the course of a divorce are not.

Third, the family registry is based primarily on *consensual* transactions such as marriage, most divorces and even adoptions. Marriage is at the heart of the system; even if celebrated at an elaborate ceremony with many witnesses, a marriage does not take legal effect unless it has been registered at the appropriate local government office.¹⁶ Doing so results in a new family registry being established in the name of one of the newlyweds.¹⁷ Marriage in Japan is quite easy, since it merely involves filing paperwork.

It is similarly easy to get a consensual divorce. In fact, Japan may be one of the easiest places in the world to get a divorce if both spouses want it. Such a divorce is possible merely by submitting paperwork in the same manner as a marriage. Approximately 90% of divorces in Japan are accomplished this way.¹⁸

¹⁶ *Civil Code*, Art. 739.

¹⁷ *Civil Code*, Art. 750. Note that because the family registry is tied to nationality rather than location, it is possible for Japanese persons to get married anywhere in the world (for Japanese law purposes) by filing the necessary paperwork with consular officials in the country where they reside. The same is true of consensual divorces.

¹⁸ See Japan Ministry of Health, Labour and Welfare, online: <<http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/rikon10/01.html>> (last accessed 31 May 2013).

Having children does not complicate the process, since all that is required is for the parties to indicate in the paperwork which one of them will have parental authority over which children after divorce. These arrangements are reflected in the family registry, with the couple's registry effectively being split into two. 2011 amendments to Article 766 of the *Civil Code* added a requirement that divorcing parents must make arrangements for child support and access, but this is only reflected in the divorce paperwork through the addition of a "check-box" asking whether such arrangements have been made. The authorities accepting such a filing do not look at the substance of such arrangements and they are outside the scope of the registry system in any case.

Together with Singapore and every other country on Earth,¹⁹ Japan is a signatory to the UN Convention of the Rights of the Child (UNCRC). Under Article 3(1) of the UNCRC the best interests of children must be a primary consideration in all actions concerning children taken by the governments of contracting states. Whether this mandate is being satisfied in Japan through a system by which the great majority of divorces are given effect by the government without any supervision of the post-divorce arrangements for the children affected is debatable.

When one of the persons in a marriage does not want to get a divorce, or the couple is unable to agree upon the terms (the most important of which may often be who "gets" the children), proceedings must be brought in a family court. However, Japanese family courts operate on a "mediation first" principle for divorce and child custody proceedings, meaning that the parents may be required to participate in a number of court-sponsored mediation sessions before they are allowed to proceed on to seeking a judicial divorce.²⁰ The majority of cases brought to court are resolved through this process, yet the end result is still based on whatever the parties can be convinced to agree upon, including arrangements relating to children.

Since Article 770(1) of Japan's *Civil Code* only provides limited grounds for granting a judicial divorce and courts have traditionally interpreted them as requiring one party (and not the party bringing the action) to be culpable, failure to agree upon a mediated divorce can mean years of litigation, during which time both parents nominally remain vested with parental authority. Many of the small

¹⁹ Except the USA.

²⁰ This process is also sometimes called "conciliation" since interactions between the parties are intermediated by the court, with a judge resolving many issues (though not the divorce and allocation of parental authority) through a decree if the mediation is unsuccessful.

minority of cases that do proceed from mediation to litigation stage are resolved through settlements, though a court will typically have made a decision regarding care and control at the time the mediation is deemed a failure. Judicial resolutions in which a judge makes the final decision regarding divorce and the allocation of parental authority thus represent a very small percentage, approximately 1-2% of the total.

Even in the minority of cases where a divorce does result from court involvement (whether through mediation or a judgment) the results are ultimately reflected in the family registry by filing the terms of mediation or decree with the local government. This is a feature of the Japanese system that is easily-overlooked yet potentially important in cross-border custody disputes. Foreign courts may attach great importance to whether their decrees will be given effect in Japan, but because of the family registry system there is unlikely to be any need for a parent to ever produce a divorce decree in the course of raising a child in Japan.

2. Parental Authority and Custody. Under Japan's *Civil Code*, minor children are subject to the "parental authority" (*shinken*) of their parents.²¹ Parental authority is exercised jointly by both parents during marriage and solely by one parent after divorce or in the case of children born and raised out of wedlock, in which case the mother has parental authority by default.²²

Parental authority has a number of components which are set forth over several articles of the *Civil Code*. These include: the right and duty to care for and educate the child (Article 820), the authority to determine where the child should reside (Article 821), the right to reasonably discipline the child (Article 822), the right to permit the child to work and manage his or her property (Articles 823 and 824). Article 825 makes it clear that the objection of one parent having parental authority to legal acts on behalf of the child conducted by the other have no effect on the validity of such acts.

Under the *Civil Code*, joint parental authority is *only* possible during marriage: only one parent may be vested with it after divorce.²³ A corollary of this requirement is that a husband and wife both nominally retain parental authority until a divorce takes place, even if they have been separated for many years,

²¹ *Civil Code*, Art. 818(1). The age of majority in Japan is 20 (*Civil Code*, Art. 4).

²² *Civil Code*, Arts. 818(3), 819(1), (2) and(4).

²³ *Civil Code*, Arts. 819(1) and (2).

during which time one parent may not even be able to see their child if the other parent does not allow it.

Divorcing parents are now also required to make arrangements for who should have “custody” over the child and other matters relating to child custody (including access), with a court making such determination if the parents are unable to agree. The term “custody” is taken from the Japanese government’s official translation of the *Civil Code* but should be treated with caution. The Japanese term is *kango*, which is also translated as “care” in Article 820 of the code, which recognizes parental authority as including the right and duty to care for and educate children. Although the *Civil Code* clearly defines parental authority in terms of parental rights and duties, academic theory and court practice has moved in the direction of interpreting these provisions in terms of parental responsibilities rather than rights.

Possibly because of the length of judicial divorce proceedings, during the pendency of which parental authority nominally remains with both parents, courts have developed a practice of making pre-divorce determinations relating to the custody of the children, notwithstanding the fact that title of Article 766 clearly refers to custody matters after divorce. Such dispositions might include designating one parent as sole custodian and ordering child support and access (or, as is often the case, explaining why no access has been ordered). Such dispositions essentially allocate some of the components of parental authority to one parent, while leaving both parents jointly vested with the remainder until divorce.²⁴ Although based on the wording of the civil code custody (*kango*) is but one of a number of enumerated components of parental authority, a parent who is awarded sole custody effectively gains almost exclusive decision making authority over all aspects of the child’s life, including where the child will live and go to school and even whether the other parent will be excluded from their life. Custody arrangements are not reflected in the family registry. What is meant by “rights of custody” under Japanese law for purposes of the Hague Convention is not immediately clear, as is discussed in more detail below.

B. Complex Simplicity – Singapore’s “Law of Parenthood”

²⁴ It is possible to “split” parental authority after divorce, with one parent receiving “custody” and the other having parental authority (*i.e.* having the child remain on the family registry and retaining sole authority to manage property and take legal acts on the child’s behalf). This is a fairly rare compromise that is occasionally ordered by courts, but typically only when both parties agree to it.

Unlike Japan, which has historically based many of its laws and legal institutions on continental European models, Singapore has inherited a legal system deeply rooted in the English system of common law and equity. Long before Singapore's independence in 1965, it was established that the English law of guardianship of infants applied in the territory, and that the Singapore courts were vested with the same equitable powers of the Court of Chancery in connection with the welfare of children.²⁵ Singapore courts continue to refer to English and other common law precedents, and English common law and equity, as well as certain Acts of Parliament remain through the *Application of English Law Act*²⁶. The *Women's Charter*²⁷, one of Singapore's principal family law statutes, has "*its origins in English law, particularly the UK Matrimonial Causes Act 1973.*"²⁸

This is not to say that Singapore has slavishly followed English practice, particularly in the field of family law where modifications were required to reflect local conditions. In the past, common law rules of inheritance rooted in monogamy and English notions of legitimacy had to be rejected in light of the various forms of polygamy recognized under the customary laws of some of the territory's principal ethnic communities. While these customary rules have been mostly eliminated, today, Singapore still retains a separate system of Islamic law and a Syariah Court (and board of appeals) for its Muslim minority community under the *Administration of Muslim Law Act*²⁹.

To consider what "rights of custody" mean in Singapore, it is necessary to look at the country's laws of custody and guardianship. Unfortunately, this area of the country's jurisprudence has been described as a "maze"³⁰ and being in a state of "confusion."³¹ The description of Professor Debbie Ong may be a bit more accurate: "[t]he law on custody of children is both simple and complex."³²

²⁵ *In re Sinyak Rayoon & Anor*, [1885-1890] 04 KY 329; *In the Matter of the Intended Marriage between Lee Keng Gin and Catherine Wong Kim Lan*, [1935] SSLR 7 [Lee Keng Gin and Katherine Wong].

²⁶ Cap 7A, 1994 Rev Ed Sing.

²⁷ Cap 353, 2009 Rev Ed Sing.

²⁸ See "Review of Child Custody Law" (October 2005), at 2, online: Attorney-General's Chambers

<http://app.agc.gov.sg/DATA/0/Docs/PublicationFiles/ChildCustodyLaw_DP_andExecutiveSummary.pdf> (last accessed 31 May 2103).

²⁹ Cap 3, 2009 Rev Ed Sing [AMLA].

³⁰ *Halsbury's Laws of Singapore*, vol 11 (Singapore: LexisNexis, 2006) at para 130.463.

³¹ Leong Wai Kum, "Restatement of the Law of Guardianship and Custody in Singapore" (1999) Sing JLS 432 at 432.

³² Debbie Ong Siew Ling, "The Next Step in Post-Divorce Parenting" (2005) 17 Sing Ac LJ 648

First, the complexity: at the time of writing Singapore had not adopted a comprehensive statute governing children and the parent-child relationship comparable to the UK's *Children Act 1989*. The primary source of statutory law governing the parent-child relationship remains the *Guardianship of Infants Act*³³, which has its origins in a colonial-era ordinance. Because the *GOIA* speaks primarily in terms of “guardianship”, it is common to refer to the guardianship and custody together. To avoid confusion, this article will refer only to “custody”.

The *GOIA* is supplemented by the *Women's Charter* and the *AMLA*, which provide rules for child custody determinations in connection with marital actions, secular and Muslim (due to the limits on the powers of the Syariah Court, it is both possible and common for Muslims to seek orders from the secular family court under the *Women's Charter* in parallel with divorce proceedings in the Syariah Court).³⁴ By contrast, the *GOIA* applies to all children in Singapore regardless of the faith or marital status of their parents or the pendency of marital proceedings.

The term “custody” is not defined in any Singapore statute and its meaning in case law has changed over time, generally moving away from a “rights based” concept. The *Women's Charter* is said to have been highly progressive, both in declaring mothers and fathers to be equal as parents, but also in espousing the “modern idea of a parent owing responsibility towards his or her child necessarily [which] rendered obsolete the old common law idea of a parent having rights over the child.”³⁵ This primacy of parental responsibility rather than parental rights has been built upon by Singapore's courts and now applies throughout Singapore law. As described by Professor Wai Kum Leong, of Singapore's leading family law scholars:

“From the 1960s, the law in Singapore expects married, unmarried, separated or divorced parents (a) to view their child as someone towards whom they owe responsibility, (b) the responsibility should be discharged co-operatively with the other parent and/or guardian and (c) for the purpose of achieving the welfare of the child.”³⁶

at 648.

³³ Cap 122, 1985 Rev Ed Sing [*GOIA*].

³⁴ *AMLA*, s 35A. Ahmad Nizam bin Abbas, “The Islamic Legal System in Singapore” (2012) 21 *Pac Rim L & Pol'y J* 163 at 175.

³⁵ Leong Wai Kum, “A Communitarian Effort in Guardianship and Custody of Child after Parents' Divorce” (2006) *The International Survey of Family Law* (Jordan Publishing, 2006) 375 at 378.

³⁶ Leong Wai Kum, “Parental Responsibility as the Core Principle in Legal Regulation of the Parent-Child Relationship” (2011) *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010* (Academy Publishing, 2011) 244 at 246.

Thus, even the statutory provisions of the *GOIA*, the *Women's Charter* and the *AMLA* relating to custody should be regarded as being based on a "moral view" of parenthood. As posited by Professor Leong:

"It is not the law that bestows authority on a parent over her child. A parent naturally, from the way society is organized around family unites, possesses and exercises authority over her child. The law accepts that parental authority is unlimited in scope. A parent must be able to do everything necessary to discharge her responsibility in the upbringing of her child. The law merely recognizes a parent's authority so that the exertion of authority is lawful."³⁷

Thus, even the law of guardianship is considered as being limited to court interventions that do not directly undermine parental authority or, to use the more modern term, parental responsibility.³⁸ According to Professor Leong, the law of custody in Singapore should be viewed as something separate from what she refers to as the "law of parenthood".

"It bears noting that the law of parenthood that regulates the parent-child relationship contains all the principles necessary for optimal regulation of the upbringing of a child by her parents. It is this area of law, rather than the law of guardianship and custody that should regulate parents."³⁹

Thus, although the term "custody" is still used in Singapore, it is in many ways an outdated notion that is of only secondary importance to a court charged with advancing the welfare of children. Here we can turn to the simplicity in Singapore's law of custody: everything that is done by a court or other government institutions must advance the child's welfare. In other words, "[c]oncern for the welfare of the child is ubiquitous in the law in Singapore relating to children."⁴⁰

³⁷ *Ibid.*

³⁸ See Leong Wai Kum, "Parental Responsibility as the Core Principle in Legal Regulation of the Parent-Child Relationship" in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds, *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010* (Singapore Academy of Law, 2011) 244 at 249-250.

³⁹ Leong Wai Kum, *Elements of Family Law in Singapore*, 2nd ed (Butterworths, 2013) at 316 [Leong].

⁴⁰ *Ibid* at 242.

As already noted, the paramountcy of the welfare of children is a basic principle of the UNCRC. Both the *Women's Charter* and the *GOIA* also contain provisions regarding the application of this principle in court proceedings.⁴¹ Most recently a 2011 amendment to the *Children and Young Persons Act* added a general declaration that “the parents or guardians of a child... are primarily responsible for the care and welfare of the child...and they should discharge their responsibilities to promote the welfare of the child...”⁴²

However, insofar as Singapore's law of guardianship is founded in the equitable powers of English courts to intervene when doing so is in the best interests of a child, the paramountcy principle could thus be said to predate any ordinance, statute or treaty on the subject.⁴³ Moreover, unlike Japan, the principle appears to supersede even the agreement of both parents, as noted in a recent article by two Singapore family court judges:

“The paramount concern of the Court in family disputes or in cases involving children directly or indirectly is the welfare and best interest of the child and this consideration is entrenched in the laws of Singapore and cannot be circumvented by the parties under any situation.”⁴⁴

The paramountcy principle is further reflected by Singapore family court practices such as requiring non-adversarial mediation and family counseling so that all divorcing parents can be made aware of the potential impact on their children.

The shift away from common law “rights-based” notions of custody towards a welfare-based “law of parenthood” has been reflected in Singapore courts no longer treating custody as a form of judicial empowerment of one parent at the expense of the other. This was illustrated by *L v L*⁴⁵, a leading case from 1997 in which the court held that a mother who had been awarded sole custody

⁴¹ *Women's Charter*, s 124; *GOIA*, s 3.

⁴² Cap 38, 2001 Rev Ed Sing, s 3A. A similar mandate directed at parents in general was added to Art. 820 of Japan's *Civil Code* in 2011.

⁴³ *Leong*, *supra* note 39 at 543. For example, in a 1935 judgment a Singapore court overruled a father who had refused to give his consent to the marriage of his minor daughter because he did so for reasons related to his own faith rather than his daughter's best interests (*Lee Keng Gin and Katherine Wong*, *supra* note 24).

⁴⁴ Richard Magnus & Wong Li Tein, “The Role of Judicial Process in Child Protection” (21 November 2005), online: Subordinate Courts of Singapore <http://app.subcourts.gov.sg/Data/Files/File/eJustice/Archives/ISPCAN_Paper.pdf> (accessed 27 March 2013).

⁴⁵ [1996] 2 SLR (R) 529.

over her child was nonetheless not free to unilaterally change the child's surname without the knowledge or consent of the father.

This trend has also been reflected in the development of a presumption that joint custody will usually be in the best interests in most cases. This has gone beyond a mere system of "permissive" joint custody, in which courts allowed it if the parents appear cooperative, to one where courts have even ordered it notwithstanding "tremendous bitterness and hatred" between the parents.⁴⁶ Under current practice, an order of sole custody is only deemed appropriate when it is found to be in the child's best interests that the non-custodial parent be excluded from his or her life.⁴⁷ Otherwise the presumption is that it will always be best for a child to have both parents continue to be involved in their lives, including in making major decisions about their upbringing.

That "custody" may have become unimportant is further illustrated by the comparatively recent practice of courts sometimes not issuing any custody order at all. In the groundbreaking case of *Re Aliya Aziz Tayabali*,⁴⁸ the High Court declined to issue any custody order – a so-called "no custody order" – despite competing petitions from both sides. In the absence of a formal custody decree, both parents "continue to be regulated by the default law, *ie*, the law regulating parenthood."⁴⁹ The "no custody" order approach has been both recommended and praised by academics and would be consistent with the approach adopted by the UK's *Children Act 1989*, section 1(5) of which declares that courts should not make orders unless doing so will be better for the child than not making any order at all.⁵⁰

In 2005, Singapore's Court of Appeal issued its decision in the case of *CX v CY*⁵¹, which has become one of the most important Singapore cases on the subject of child custody. In it, the court confirmed that the idea of joint parental

⁴⁶ *ALJ v ALK* (unreported), [2010] SGHC 255; discussed in *Leong*, *supra* note 38 at 316.

⁴⁷ "Such an order [i.e., of sole custody] is the exception to the rule (even when the parents have an acrimonious relationship), because it deprives the child of one parent's involvement in the major aspects of his or her life. Sole custody orders are only made in exceptional circumstances; for instance, where one parent physically, sexually or emotionally abuses the child, or where the relationship of the parties is such that co-operation is totally impossible and the lack thereof is harmful to the child." Law Society of Singapore, *The Art of Family Lawyering*, 2nd ed (Singapore: The Law Society of Singapore, 2013) at 46-47 (citing *CX v CY*) [*The Art of Family Lawyering*].

⁴⁸ [2000] 1 SLR 754, relocated to [1992] 3 SLR (R) 894.

⁴⁹ *Leong*, *supra* note 39 at 311.

⁵⁰ See, e.g. Debbie Ong, "Making no custody order: *Re G (Guardianship of an Infant)*" (2003) Sing JLS 583. See also discussion in *Leong*, *supra* note 39 at 267.

⁵¹ *Supra* note 13.

responsibility is “deeply rooted in [its] family law jurisprudence.”⁵² More importantly, it used the case as an opportunity to announce a new direction:

“...in line with the outlook that parental responsibility is for life, the time was right for us to expressly endorse the concept of joint parenting. We believe that, generally, joint or no custody orders should be made, with sole custody orders being an exception to the rule.”⁵³

In expressing a preference for joint parenting while declining to favor joint custody or no custody, the High Court noted that “the practical effects of a ‘no custody order’ and a ‘joint custody order’ are similar where a ‘care and control order’ has been made.”⁵⁴ As to when joint custody should be awarded as opposed to no custody, the High Court indicated that the latter result would be preferred “where there is no actual dispute between the parents over any serious matters relating to the child’s upbringing.”⁵⁵

Shortly after *CX v CY* was issued, it was also endorsed by the Appeal Board of the Syariah Court, which declared that:

“[W]e are of the view that the Muslim law on custody of children as administered under the [AMLA] is no different from that set out in *CX v CY*. We say this because under both Muslim and the civil law the interest or welfare of the child is the paramount consideration.”⁵⁶

Therefore, Singapore’s laws of custody can essentially be considered uniform regardless of the faith involved.

A slightly cynical interpretation of these developments might be that courts have merely redefined custody so that it means less. It is generally accepted that in Singapore today the “battlefield” has moved from custody to care and control and access.⁵⁷ “Care and control” refers to which parent the child

⁵² *Ibid* at [26].

⁵³ *Ibid* at [24].

⁵⁴ *Ibid* at [18].

⁵⁵ *Ibid*.

⁵⁶ *Zaini bin Ibrahim v Rafidah binte A Rahman*, Appeal Case No 26/2006.

⁵⁷ “Our development now mirrors more closely that in England where, although custody or “parental responsibility” is no longer an arena for parental disputes, the contests for residential order and contact orders continue to be tricky.” See *Annual Review of Singapore Cases 2007*, 8th ed (Singapore: Academy Publishing, 2008) at 235. “...the battlefield today is over “care and control”. See *Annual Review of Singapore Cases 2011* at 301.

should live with, and which parent “*makes the small decisions that are needed for daily living*”.⁵⁸ In this sense it is similar to “custody” as used in the Japanese *Civil Code*.

However, care and control is different from Japanese custody and from Singaporean notions of custody in that it does not empower a parent to make major decisions about the child without involving the other parent.⁵⁹ Unlike custody, where courts can order joint custody or refrain from making a custody order at all, a care and control order in favor of one parent is generally required when they divorce or separate.⁶⁰ Furthermore, joint care and control orders are still rare, though one scholar has identified a recent trend towards their increase.⁶¹ At the time of writing it was reportedly usual for both parents to have joint (or “no”) custody and thus be expected to participate and cooperate in all major decisions in the child’s life, while only one parent would have care and control with the other having access.⁶²

Of access in Singapore, little needs to be said other than that “convincing evidence” is required before a court will deny a parent reasonable access to his or her child.⁶³ To the extent cross border access is also considered in the best interest of the child, courts can generally be expected to allow it also.⁶⁴

With Singapore having moved away from “custody” as a primary concern in judicial determinations, particularly in the sense of being a “rights-based” notion, one might reasonably wonder what “rights of custody” means for purposes of the Convention. On this point it may actually be useful to look at the country’s criminal

⁵⁸ *Leong, supra* note 39 at 337.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See, e.g. Debbie Ong, “Family Law” (2011) 12 Sing Ac L Ann Rev 298 at 301.

⁶² See *The Art of Family Lawyering, supra* note 47 at 48.

⁶³ *Halsbury’s Laws of Singapore, supra* note 30 at 130.515, citing *Tay Ah Hoe (mw) v Kwek Lye Seng* (unreported), Div Pet No 3080 of 1995. “*Within the law of guardianship and custody, a parent who does not live with her child and who seeks an order of access should, generally, obtain it.*” *Leong, supra* note 39 at 247. See also *Sumathi d/o Boominathan v Kathiravan* (unreported), Divorce Petition 6009977/2001 (DC) (summarized in Debbie Ong & Valerie Thean, “Family Law” (2002) Sing Ac L Ann Rev 225 at 236 (father given overnight access to four-year old daughter “despite mother’s fears that the child may be exposed to violence and fears that being apart from the mother overnight may cause the young child some trauma”).

⁶⁴ *BG v BF*, [2007] 3 SLR (R) 233 (dispute between two non-Singapore parents). One area for further research would be the question of whether Singapore’s geographical condition has any impact on child custody resolutions. Given its small size, in cases involving parents who both reside in Singapore, the determination of which parent has care and control is unlikely to greatly impact the frequency with which the other parent is able to exercise rights of access. Thus, the type of dispute which might arise in a strictly domestic case in a much larger jurisdiction (Texas, or Japan, for example) may only arise in Singapore in cases involving a prospective international relocation by one parent

law for further guidance.

Unlike in some other Hague Convention signatories such as the United States or Canada, Singapore does not have provisions in its Penal Code or other statutes making it a crime for a parent to abduct his or her own child internationally or domestically. As explained by one scholar writing on the subject in 1999, “[u]nder the Singapore Penal Code, then, a parent cannot kidnap his or her child.”⁶⁵ Joining the Convention has not changed anything in this respect: as of March 2013 the home page of Singapore’s Central Authority clearly stated that “[i]n Singapore, parental child abduction is not considered a criminal issue but is viewed as a civil matter.”⁶⁶

There is one exception: a 1996 amendment to section 126 of the *Women’s Charter* makes it an offense for any person to remove a child *subject to a custody order* from Singapore for more than one month without the consent of both parents or the leave of the court.⁶⁷ The proscription applies even to a parent vested with sole custody and thus amounts to a prohibition on unilateral relocations abroad without the consent of the other parent or the leave of the court.

For Hague Convention purposes, therefore, any parent of a child in Singapore who is subject to a custody order under the *Women’s Charter* (whether or not the order gives them custody) appears to have a statutory *ne exeat* right – essentially the right of one parent to veto the removal of the child from the jurisdiction of residence by the other parent, even when the other parent has full (sole) custody rights. Courts in some convention signatories, including the U.S. Supreme Court, have found *ne exeat* rights to constitute “rights of custody” under the Hague Convention, insofar as they necessarily give the parent holding them the “right to determine the child’s place of residence”.⁶⁸

The above provision of section 126 of the *Women’s Charter* does not apply in cases where no custody ruling is in place (as is often the case of abductions that take place before any court proceedings have been commenced). Furthermore, it is not clear whether a “no custody order” qualifies as a “custody order” for purposes of applying the provision. It seems inconceivable, however, that a parent

⁶⁵ Leong Wai Kum, “International Co-operation in Child Abduction Across Borders” (1999) 11 *Sing Ac LJ* 409 at 418.

⁶⁶ See Frequently Asked Questions, online: Ministry of Social and Family Development <<http://app.msf.gov.sg/SingaporeCentralAuthority/FAQ.aspx>> (last accessed 31 May 2013).

⁶⁷ *Women’s Charter*, s 126.

⁶⁸ *Abbott v Abbott*, 560 U.S. ___, 130 S. Ct. 1983 (2010).

who has full parenthood under the “law of parenthood” before any restrictions are applied by courts through the *Women’s Charter* in the form of a custody order would *not* be found to have a right to participate in decisions regarding his or her child’s residence when a parent who had lost custody would, merely because of the mechanistic operation of section 126. In addition, insofar as Singapore courts have held that non-custodial parents should be consulted about important matters such as a change of name, the same requirement would seem likely to apply to a change of residence.

The author’s conclusion is thus that between the *Women’s Charter* and the “law of parenthood” described above, virtually all parents in Singapore have “rights of custody” for purposes of the Hague Convention. In most cases originating from Singapore, therefore, the inquiry would seem likely to focus not on whether the left-behind parent had rights of custody, but whether they were actually being exercised at the time – a subject that is beyond the scope of this Article.

IV. Implementing the Convention

A. Singapore’s International Child Abduction Act of 2010

The *International Child Abduction Act*⁶⁹, Singapore’s implementing legislation for the Convention can probably be seen as a natural extension of the legal regime described above. Singapore courts have often had to deal with international custody disputes, including in abduction-type situations before the country joined the Convention. In at least one case, a Singapore court even referred specifically to the principles of the Convention in resolving such a case.⁷⁰ Doing so can be seen as a natural extension of the principle of the paramountcy of the welfare of the child, a principle in which the Convention itself is also rooted.

The *ICAA* is a comparatively short statute, containing just 26 sections which cover the basic aspects of implementation. First, it establishes Singapore’s Central Authority within the Ministry of Social and Family Development, which

⁶⁹ Cap 143C, 2011 Rev Ed Sing [*ICAA*].

⁷⁰ In *AB v AC*, [2004] SGDC 6, a case decided in 2004 and involving a Norwegian man and a Singaporean woman who had been residing in Norway with their child after their divorce there, the Singapore court awarded custody to the father for purposes of returning him to Norway after the mother brought the child to Singapore in violation of the Norwegian court order. Interestingly, in addition to referring to the principles of the Hague Convention, the court also noted that failure to order a return would result in a double standard arising in connection with s 126(5) of the *Women’s Charter*, since to rule otherwise would be to condone removals to Singapore even though a similar removal *from* Singapore was subject to criminal penalties.

already has jurisdiction over the administration of other aspects of child welfare and family policies, and is responsible for the implementation of the UNCRC in Singapore. Second, the *ICAA* establishes the basic procedural framework for court involvement in ingoing and outgoing cases arising under the Convention. More detailed procedural rules have been left to the rule-making authority of the High Court (the Syariah Court has no role in cases arising under the Convention).⁷¹ The *ICAA* also addresses legal aid and certain other miscellaneous matters relating to implementation. The bulk of implementation is established through section 3 of the *ICAA*, which accords most of the provisions of the Convention itself (including the Article 5 definition of “rights of custody”) the force of domestic law, the relevant articles being attached as an appendix.⁷² Since the *ICAA* is readily-available online, in English, and accomplishes implementation through adoption of the Convention provisions as they are written, a brief summary should suffice.

B. Japan’s Implementing Act

Before discussing Japan’s implementing legislation, two points should be raised about the country’s pre-Convention performance in international abduction cases. First, as with Singapore, when committed by a parent, “child abduction” is generally not considered a criminal offense. However, there have been occasional arrests and convictions of parents snatching their own children, though they have typically also involved some element of “disturbing the peace”.⁷³ Second, prior to implementation, Japanese courts have had an exceptionally bad track record in returning children removed from another country in violation of a custody order in that country. It is commonly said that the return of a child to another country has never been realized through the court system in Japan, a state of affairs which is a reflection of the Japanese legal system’s limited capability to remedy abductions

⁷¹ *Supreme Court of Judicature (Transfer of International Child Abduction Proceedings to District Court) Order 2011* (Cap 322, O 76, 2011 Rev Ed Sing).

⁷² Specifically, under s 3 of the *ICAA*, the following parts of the Hague Convention have the “force of law” in Singapore: Arts. 1, 3-5, 7-10, 12-15, 17-22, 24, 26-32. Notably absent from direct incorporation is Art. 11 of the Hague Convention, which establishes a six week time frame for making decisions in return cases, a deadline that has proved difficult to meet in many jurisdictions.

⁷³ Here again, the Family Registry plays a subtle role. Japanese police are generally reluctant to become involved in civil disputes. However, after divorce a parent who has lost parental authority is for family registry purposes in the same position as a stranger, making it more likely that police will regard a post-divorce abduction as potentially criminal.

even in strictly domestic cases.⁷⁴

A great deal of the diplomatic pressure on Japan to join the Convention can thus be said to have been on the expectation that doing so would result in Japanese courts acting differently. At the same time, however, it has also resulted in a portrayal in the Japanese media of the Convention as something Japan “must” sign because of foreign pressure rather than for reasons relating to the welfare of children.⁷⁵

Against this background, Japan’s law for implementing the Convention the “Act in connection with the implementation of the convention on the civil aspects of international child abduction” (the “Act”) presents a stark contrast to the *ICAA*. Submitted to Japan’s Diet in March 2013 which quickly approved it, the Act was promulgated on June 19 but had not come into effect at the time of writing. The Act contains a total of 153 articles (not including supplementary provisions) and fills 110 A-4 sized pages.⁷⁶ Further procedural details will come in the form of rules to be established by Japan’s Supreme Court. Since at the time this Article was written no English version of the Act was available, a more thorough description will be given for the benefit of those readers unable to read it in Japanese.

Longtime observers of Japan’s international abduction problem might be tempted to conclude that such a baroque statute evidences a desire to make it difficult to actually achieve the return of a child from Japan. Much of the Act (Articles 32-143) is devoted to establishing an entire procedural regime for handling return requests, including detailed rules governing applications, initial trials, mediation, appeals, retrials and enforcement. Each step of the process established in the Act seems to present an opportunity for a disposition either

⁷⁴ Some may find the author’s previous work a useful reference in understanding the problem. Colin P.A. Jones, “In the Best Interests of the Court – What American Lawyers Need to Know about Child Custody and Visitation in Japan” (2007) 8 *Asian Pac L & Pol’y J* 166 [Jones]. Readers should be cautioned, however, that this work no longer reflects current Japanese law (including a recent wholesale amendment of the family court procedural statute) or judicial practice, though the institutional factors described still apply.

⁷⁵ If anything, the welfare of children has come up in public debate in Japan over joining the Hague Convention primarily in the context of how to protect Japanese mothers and their children fleeing from abusive foreign fathers. This has resulted in a spate of vaguely-tautological editorials that support Japan joining the Convention while calling for it to be implemented in a manner that protects the interests of children. See, e.g. “Hāgu jōyaku, kodomo no tame ni taisei tsukuri isoge (Hague Joyaku – Need to make a system for children quickly)”, *Yomiuri Shimbun* (30 April 2013) online: <<http://www.yomiuri.co.jp/editorial/news/20130429-OYT1T00933.htm>>.

⁷⁶ As promulgated cite not yet available.

preventing or delaying return.

Some cynicism may be justified. For example, going so far as to allow a losing party to apply for a retrial *after* appeals have been exhausted (Articles 119-120) seems inconsistent with the Convention mandate that return cases be handled expeditiously, not to mention Hague Convention Best Practices calling for the minimization of opportunities for further delay once a judgment has become final.⁷⁷

Cynicism aside, other factors may be at work in the Japanese approach to implementation. First, for linguistic reasons it is unlikely that Japan could simply emulate Singapore by adopting convention provisions “as is” into Japanese law. This would likely involve complex translation issues (including conformity with domestic legal usages) and has never been Japan’s practice with treaties.

Second, and perhaps more importantly, Japan’s judicial system is based on continental models; Japanese judges can only exercise those powers given to them by the law and lack the many vaguely-defined “inherent powers” of their common law counterparts (including the broad wardship jurisdiction that courts in common law systems have long exercised over children). This difference is illustrated by Article 73(2) of the Act which empowers judges hearing return cases to allow parties to speak, as well as to tell them to shut up, a power most common law judges likely take for granted! In a similar vein, the Act gives a court hearing a return case the authority to issue orders prohibiting the removal of an abducted child from Japan (Articles 122 and 123), a power which to the author’s knowledge has never been used by Japanese courts in pre-Convention cases.⁷⁸

Thus, insofar as the Hague Convention requires Japanese judges to act in a particular way (expeditiously and adjudicating only a limited range of issues) in specific types of cases (requests for return orders), it may not have possible to accomplish this by merely modifying existing procedures and expecting judges to take the lead in implementation. This seems particularly likely when one recalls that the existing system of child custody litigation is based primarily on mediation aimed at producing consensual result which, if unsuccessful may require years of

⁷⁷ A motion for a new trial may result in enforcement of a return order being suspended, and can be requested for any of the reasons set forth in Art. 338 of the *Code of Civil Procedure*, which include: “[t]here was an omission in a determination with regard to material matters that should have affected a judgment.” See also, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part II – Implementing Measures* (Jordan Publishing: 2003) Ch 6.

⁷⁸ Note that Art. 22 of the Japanese Constitution guarantees the freedom to “move to a foreign country”.

judicial proceedings before a final result is reached. The fact that Japan has chosen to have cases arising under the Convention handled in just two designated family courts (in Tokyo and Osaka) doubtless further necessitates a procedural regime different from the existing system of procedural rules which are designed for a nationwide network of family courts.

Another source of cynicism might be the gatekeeper role the Act accords to the Minister of Foreign Affairs (who under Article 3 of the Act is designated as Japan's Central Authority) in rejecting defective applications for returns and access assistance. While Singapore's *ICAA* merely empowers its Central Authority to reject incoming applications which do not meet formal requirements, Japan's Act (Articles 7 and 18) goes into significant detail as to when the Minister is required to reject applications, including instances when doing so might involve performing a quasi-judicial function. For example, under Article 7(1)(6) of the Act, the Minister must reject a return application if "it is clear" that the applicant did not have or was not exercising "rights of custody" under the laws of the child's habitual residence. The ability of Japan's Central Authority to make decisions about law and fact in "clear cases" seems inconsistent with Hague Convention Best Practices, which state that:

"...Central Authorities must exercise extreme caution before rejecting an application, especially where there is a difference of opinion between Central Authorities concerning habitual residence or rights of custody, as these issues will require judicial determination."⁷⁹

One of the Act's most contentious features may prove to be its implementation of the Convention exceptions to the return principle. Under Convention Article 13(b) a child does not have to be returned if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." This exception is replicated in Article 38(1)(4) of the Act, but in paragraph 2 of the same article judges hearing return cases are authorized to take into account a wide variety of factors in evaluating whether an exception is applicable, including the risk of violence (defined as including verbal behavior) to the taking parent or the child. Another factor which can be considered is whether there are circumstances that would

⁷⁹ *Guide to Good Practice under the Hague Convention on International Child Abduction Part I – Central Authority Practice* (2003) Ch 4, 9.

make it difficult for the taking parent or the requesting parent to care for the child after a return. Such a provisions seems to come close to authorizing something close to an evaluation of both parents' custodial capacities, a determination that is essentially proscribed by Article 19 of the Convention.

A final reason for the Act's baroque nature may be because rather than building upon a pre-existing foundation of compatible domestic law and practice as in the case of Singapore's *ICAA*, the Act essentially reflects an effort to graft a treaty onto a system of family law that is arguably inconsistent with it. The Convention is rooted in widely-accepted notions of what is in the best interests of children (not being abducted and having their welfare decided in their jurisdiction of habitual residence), while Japanese family law is based primarily upon consensual arrangements in which the government provides a largely administrative function (processing paperwork) without any supervision over the welfare of the children affected by them.

For example, it is noteworthy that the Act uses the term "*kango no kenri*" ("rights of custody") but does not include a definition. While similar to the term "*kango*" (care, custody) used in Articles 766 and 820 of the *Civil Code*, it nonetheless seems intended to have a different meaning. The author suspects that the drafting in this area reflects an awareness of potential discrepancies with the law governing domestic cases. As already noted, the "right to determine the child's residence" is not only part of the Convention definition of "rights of custody" but also identified as a component of parental authority in the Japanese *Civil Code*. Were "rights of custody" in the Convention and the Act clearly tied to "parental authority" rather than "custody," the discrepancies between how Japanese law treats international cases and domestic cases would become apparent. Under the Convention, a Japanese parent can request and probably achieve the return of a child taken to a foreign country based on having joint parental authority over the child during marriage. In the same scenario taking place domestically, the Japanese parent may not even be able to see the child, let alone expect a Japanese family court to realize a return to the *status quo ante*.

The discrepancies between the Convention and Japanese domestic law become most apparent in connection with access rights. Under Article 16 of the Act, a parent may seek the Minister's assistance in facilitating contact with a child in Japan based on access rights recognized in another Convention country. Such an application must include documents establishing that the applicant is entitled to access rights under the laws of the child's habitual residence. If one were to file

an application from a hypothetical country that had exactly the same laws as Japan, however, the author has no idea what such documents would be! Japanese law contains no clear statements regarding access (the term did not even appear in the *Civil Code* until 2011!) nor are there any judicial precedents declaring access to be assumed because it is in the best interests of children absent special circumstances. Finally, even in cases where courts get involved in access dispute, mediation is required first and access itself may be the subject of mediation. As a result, it is not uncommon for parents to go for extended periods with no access despite court involvement through mediation.

The Act appears to have been drafted with full cognizance of the deficiencies of Japanese law on the subject of access. In Article 21, the provision that to an extent mirrors Article 16 and by which parents *in Japan* can seek assistance in exercising rights of access with respect to children to another Convention country, there is no reference to rights of access “under Japanese law” - only a generic reference to the “law of habitual residence.” Here again, the author suspects that a clear reference to “rights of access under Japanese law” would invite unwelcome inquiries about what that means the context of strictly domestic cases.

V. Synthesis

With these brief comparisons behind us, we can now return to the question posited at the beginning of this article: is there anything about the two implementation regimes presaging the development of an “Asian” version of the Convention in practice? Accepting that this is a very limited comparison, and one that can only truly be properly done with a greater range of samples (including the implementation regimes of “Western” Convention signatories), the author would nonetheless suggest the answer is likely “no.”

As this article has hopefully made clear, the systems of family law and manner of implementing the Convention in Japan and Singapore are very different - even the two countries’ motivations for joining the treaty may be quite different. Moreover, the author believes that many of the differences between Japan and Singapore described in this article are likely to be attributable to the differences in the underlying common law and continental systems in which their respective legal systems are based. Despite having a population comprised of a variety of Asian ethnic and religious groups, the manner in which Singapore’s courts handle

child custody-related matters seems quite familiar to a common law-trained lawyer such as the author. The Japanese system would likely seem quite different – and in some respects (the role of the family registry, for example) unique, even.

At the same time, however, many of the features of the Japanese system that may seem different may be so as much because of their continental European heritage as because of “Japanese-ness”. For example, a widely-identified problem with Japanese family courts in custody and access cases has long been lack of enforceability.⁸⁰ Yet Germany – a country on which many features of the Japanese civil justice system is modeled – was identified by the U.S. State Department as a country showing “patterns of non-compliance” with the Convention as recently as 2008 for essentially the same reason.⁸¹ In fact, a review of U.S. State Department annual reports on compliance with the Convention shows that the countries identified as having compliance issues – particularly with respect to enforcement – tend to overwhelmingly be those with civil law, rather than common law systems.⁸²

The American view of Convention compliance is not conclusive of anything, of course. However, it may be the case that, as more Asian countries do come to join the Convention, the inquiry should be as much on the differences between the two main sources of Western legal tradition as between more vaguely-defined “Western-ness” and “Asian-ness.” If anything, the differences between Asian family law systems with civil law roots and common law roots may be more apparent in Asian countries due to the adopted character of either system of law.

Finally, if there is one area where more detailed scrutiny as to possible differences between “Asian” and “Western” modalities of resolving disputes may be merited,

⁸⁰ Until a few years ago the U.S. State Department website included the following description of the situation: ““compliance with [Japanese] Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parents agree.” Reproduced in *Jones*, *supra* note 73 at n 317.

⁸¹ “American parents often obtain favorable court judgments regarding access and visitation, but the German courts’ decisions can remain unenforced for years. Since physical force cannot be used to enforce court orders and legal sanctions are rare, taking parents can and do avoid allowing court-ordered access. As a result, a number of U.S. parents still face problems obtaining access to and maintaining a meaningful parent-child relationship with their children who remain in Germany.” See U.S. Department of State, “Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction” (April 2008) at 14. With the exception of the first sentence, the above would also serve as an accurate description of the situation in Japanese courts.

⁸² Bureau of Consular Affairs, *Reports on Compliance with the Hague Abduction Convention*, online: U.S. Department of State <http://travel.state.gov/abduction/resources/congressreport/congressreport_4308.html> (last accessed 31 May 2013).

the author would suggest it may be in the area of family mediation. However, this must necessarily left a subject for future research.