

JAPAN

NGO Report

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Parent-Child severance caused by judicial system in Japan

1. Related article of ICCPR

Article23-1: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article23-4: "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

Article14-1: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Related treaties:

- (1).UNCRC Article 9 (1), Article 18 (1)
- (2).The principle of the Hague Abduction Convention

2. Summary

Japanese courts have not declared Parental Child Abduction while living together to be illegal.

Since Parental Child Abduction is a serious form of child abuse for the abducted child and a violation of human rights for the left behind parent, the fact that Japanese courts do not recognize Parental Child Abduction while living together as illegal is contrary to the ICCPR. In addition, the fact that Japanese courts do not declare Parental Child Abduction while living together illegal causes many more human rights violations.

Japan has been criticized both domestically and internationally for Parental Child Abduction, but there has been no improvement in the situation.

In light of the above, we request the following recommendations.

3. Recommendations

We request the following recommendations:

(1) Directly addressed to the Supreme Court of Japan:

A recommendation to state that Parental Child Abduction is a wrongful human act in itself.

A recommendation to state that the operation of Courts, which does not consider Parental Child Abduction while living together illegal, is contrary to ICCPR.

(2) Directly addressed to the Diet and Cabinet of Japan:

A recommendation to enact a domestic law which stipulate a definition and illegality of Parental Child Abduction.

4. Location of the problem

4a. Definition

We defined "Parental Child Abduction" in this document as "the unilateral removal of a child without a consent of other parent and a reasonable ground upon divorce." Therefore, for example, an evacuation with a child from violence of a spouse does not belong to "Parental Child Abduction".

4b. Root of the Problem

4b.1 Judgment criteria in designating a custodian, etc.

In the the diet sessions, successive directors of the Family Bureau of the Supreme Court General Secretariat have stated that the family court's standard of judgment for designating the custodian of a child is a comprehensive consideration of the various circumstances of the case from the perspective of the best interests of the child (Asami

Tejima, House of Representatives Committee on Legal Affairs, April 27, 2021; Hitoshi Murata, House of Representatives Committee on Legal Affairs, March 8, 2017; Yoshihiro Toyosawa, House of Representatives Committee on Legal Affairs, Special Committee on Youth Affairs, April 20, 2011, <https://www.courts.go.jp/english/about/organization/index.html>).

In addition, in the case claim for damages for inaction of legislation to regulate Parental Child Abduction (Case No. 4920 of 2020 of Tokyo district court), the defendant State claimed that "Whether or not it is illegal under civil law when one of the parents while living together starts living separately with the child without the other party's consent is to be judged by comprehensively taking into consideration the specific circumstances and circumstances of the separation, the age of the child, the intentions of the child, and etc. (Brief (2), p. 10, dated September 25, 2020).

From the above, the standard of judgment in designating a custodian, etc. is comprehensive consideration of individual circumstances.

4b.2. Degree of Consideration of Parental Child Abduction

4b.2.1 Degree of Consideration of Parental Child Abduction by separated living parent

In the case claim for damages for inaction of legislation to regulate Parental Child Abduction, the defendant state said, "In judicial practice, there have been judgments holding that Parental Child Abduction constitutes a tort and judicial precedents awarding damages based on such judgments. (Osaka District Court, July 28, 1997 judgment - Heisei3(Wa)No.4016, Hanrei Times No. 964, p. 192; Nagoya District Court, November 29, 2002 judgment - Heisei14(Wa)No.63, Hanrei Times No. 1134, p. 243; Tokyo District Court, Decision of April 25, 2005 - Heisei16(Wa)No.6849, published in Hanrei-Hisho; Tokyo District Court, Decision of December 22, 2006 - Heisei16(Wa) No.21574, published in Hanrei-Hisho.) In this way, it is clear that even under the current legal system, Parental Child Abduction by a person who has parental authority can be evaluated as illegal under civil law." (Brief (2) dated September 25, 2020, p. 10). Therefore, these judicial precedents should be examined.

The Osaka District Court decision on July 28, 1997, in a case where a husband claimed alimony for violation of his parental rights against his wife, who had joined Aum Shinrikyo religious group with their two children, the court found that there were special circumstances that should make it illegal for the husband to place the two children in an environment that was extremely detrimental to their welfare, to exercise total control over them, and to completely eliminate the involvement of the husband who had parental rights.

The Nagoya District Court judgment on November 29, 2002, in a case where two

children who were living with a parent were forcibly taken from their elementary school and nursery school by their separated living parent, held that the act of forcibly taking the children from their elementary school and nursery school in broad daylight without legal means was illegal and beyond the limits of what is acceptable under socially accepted norms.

The Tokyo District Court decision on April 25, 2005, in a case where the separated living parent did not return the child to the cohabiting parent after the visitation.

The Tokyo District Court decision on December 22, 2006 was a case where the separated parent took the child. Even though the child was not handed over in the previous case of this family, the court found that the child's custody rights were illegally violated by Parental Child Abduction.

Although it is a criminal case, a two-year-old child under the mother's custody was abducted by the father who had parental authority of the child while they were living separated, the court ruled that the illegality of the parental child abduction by the use of force is not justifiable (Supreme Court, December 6, 2005).

From the above judicial precedents, it appears that the courts have ruled that Parental Child Abduction by a separated living parent or in exceptional cases where the illegality is particularly high is illegal, and there is no problem with these judgments.

The following discussion is limited to Parental Child Abduction while living together.

4b.2.2.Degree of Consideration of Parental Child Abduction While Living Together

4b.2.2.a From a Supreme Court case

In a case where a parent whose child had been abducted by the spouse filed a habeas corpus claim for handover of the child, the Supreme Court ruled that "where a husband and wife jointly exercise parental authority of their infant child, the custody of the infant by one of them should be lawful as based on parental authority, unless there are special circumstances" (The Supreme Court judgment, October 19, 1993). In other words, the sole custody of the infant after Parental Child Abduction while living together without the other parent's consent is "lawful in the absence of special circumstances", it means that Parental Child Abduction while living together is not illegal. Because, if Parental Child Abduction while living together is illegal, then the custody triggered by the Parental Child Abduction would be a continuation of the illegal state, but it is not.

4b.2.2.b From the Transcript of the Meeting with Supreme Court Officials

On January 20, 2020, Mr. Shunichi Fujiki and Mr. Hirokazu Nakano of ICOSA

attempted to "raise the issue of Parental Child Abduction" with Ms. Sawamura and Mr. Yamagishi of the Supreme Court. Ms. Sawamura and Mr. Yamagishi stated that courts would not judge Parental Child Abduction as legal or illegal as follows (Exhibit 1)。

[Arguments about the illegality of child abduction.]

NAKANO: Is parental child abduction itself illegal?

SAWAMURA: There is no law which makes it illegal.

NAKANO: There is an article in the Civil Code to the effect that custody of the child shall be exercised jointly ("Parental authority shall be exercised jointly by married parents" Civil Code Article 818(3) main clause).

SAWAMURA: Whether or not a violation of that provision is illegal is merely a matter of words.

YAMAGISHI: Aside from removal during visitation, the family court has not directly determined whether parental child removal is illegal or not.

NAKANO: You're saying that parental child abduction is legal in Japan?

SAWAMURA: I dare not say that it is legal. We are considering the circumstances of the removal as an element. There is no special meaning in making that distinction between illegal and legal. With regard to removal, it is one of the factors to be judged by taking into account the custody situation of the past and the prospect of future custody. The Court recognizes that it makes appropriate decisions from the perspective of the child in each case.

4b.2.2.c From a Specific case

The following is written with the consent of Mr. Hirokazu Nakano.

Mr. Hirokazu Nakano is an attorney at law specializing in intellectual property rights whose former occupation was an engineer and programmer. He was unaware of the issue of Parental Child Abduction when his then 3-year-old child was abducted by his wife while they were living together. He filed a preliminary injunction and a trial for handover of the child and designation of a custodian to the court.

Prior to the parental child abduction, he had abandoned his career path and shared childcare responsibilities in order to maintain his family. There was no domestic violence (DV), his wife's DV claim against him was not accepted, and the court found that both he and his wife were equally taking care of the child. In other words, if the court finds Parental Child Abduction itself to be illegal, this is a marginal case where the child should

be handed over.

He argued that Parental Child Abduction was illegal and contrary to the Constitution and treaties. The family court of the first instance ruled that there was no particular problem with the environment in which the child was taken, and therefore, the handover of the child was not allowed. The High Court of the second instance further ruled that "since the other party was in charge of the care and upbringing of the minor to at least the same extent as the appellant during the period of cohabitation and played an important role in the care and upbringing of the minor, it cannot be assessed that the separation eliminated the care of the minor by the primary caregiver, and in considering the cause and circumstances of the separation, the act of the other party in taking the minor cannot be regarded as an illegal removal." The Supreme Court ruled that "The reason for this appeal is an allegation of unconstitutionality, but the substantive allegation is a mere violation of the law, which is not a ground for special appeal."

It can be seen from this specific case that the court does not consider Parental Child Abduction while living together to be illegal in the overall consideration in designating a custodian, etc.

4b.2.2.d Brief Conclusion

As mentioned above, Japanese courts have not ruled that Parental Child Abduction while living together is illegal in the overall consideration in designating a custodian, etc.

5. Problems caused by the operation of the court that Parental Child Abduction while living together is not illegal

5a. A Specific Case

In a specific case, while a separation of parent and child is disastrous, a separation of siblings is even more.

Mr. A, a father living in Tokyo, had his son (then 10 years old) and daughter (then 7 years old) abducted by their mother in December 2018, while they were living together. The month after the abduction, his son returned to him after the mother told him "go away," and his son has lived with him ever since. He petitioned the court for custody of the daughter and the mother petitioned for custody of the son, but neither petition was granted.

If the court had ruled that Parental Child Abduction while living together was illegal, it is likely that the siblings would not have lived separately, because Mr. A and his wife would have had a discussion for their children. In other words, while a custody of a child in a divorce should be settled through parents' discussion, the court practice that

Parental Child Abduction while living together is not illegal creates the situation that a settlement through discussion is not acceptable, because it favors the party who abduct the child first.

5b. the court practice of not declaring Parental Child Abduction while living together illegal is contrary to ICCPR.

Article 23, paragraph 1 of ICCPR provides "The family is the natural and fundamental unit of society and is entitled to protection by society and the State." Parental Child Abduction destroys families. The fact that the courts do not consider Parental Child Abduction while living together as illegal in the overall consideration in the designation of a custodian, etc., means that the courts accept the destruction of families by Parental Child Abduction, which violates the right of the family to protection by the courts and is contrary to Article 23, paragraph 1 of ICCPR.

The first sentence of Article 23, paragraph 4, of ICCPR provides "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." If Parental Child Abduction while living together is not illegal, the fact that the parent is actually taking care of the child will give the parent who took the child during the cohabitation an advantage in obtaining custody of the child at the dissolution of marriage (the principle of continuity). By not declaring Parental Child Abduction while living together illegal, the court is not ensuring equality of rights and responsibilities of spouses during marriage and at the time of dissolution of marriage, which is contrary to the first sentence of Article 23, paragraph 4 of ICCPR.

The second sentence of Article 23, paragraph 4 of ICCPR provides "In the case of dissolution, provision shall be made for the necessary protection of any children." Parental Child Abduction can be considered child abuse, and the fact that Parental Child Abduction while living together is not considered illegal means that the court has not taken the necessary measures to protect the child when the parents dissolve their marriage, which is contrary to the second sentence of Article 23, paragraph 4 of ICCPR.

Article 14, paragraph 1 of ICCPR states, "All persons shall be equal before the courts and tribunals. In the determination of ..., or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." If Parental Child Abduction while living together is not unlawful, the taking parent will be favored in the dissolution of the marriage. Not declaring Parental Child Abduction while living together illegal violates the right of the court to a fair hearing by an impartial tribunal for the left behind parent, which is contrary

to Article 14, paragraph 1 of ICCPR.

6. Requesting recommendations to the Committee on Civil and Political Rights

We believe that the reason why the Japanese courts have not declared Parental Child Abduction while living together to be illegal is that the Supreme Court, which governs all the courts in Japan, does not recognize that Parental Child Abduction is in itself a wrongful act for a human being. Therefore, we request the Committee, directly addressed to the Supreme Court of Japan, a recommendation to state that Parental Child Abduction is a wrongful human act in itself, and a recommendation to state that the operation of Courts, which does not consider Parental Child Abduction while living together illegal, is contrary to ICCPR.

We also request the Committee, directly addressed to the Diet and Cabinet of Japan, a recommendation to enact a domestic law which stipulate a definition and illegality of Parental Child Abduction.

7. Historical Background

In the past, in Japan, child-rearing was considered to be mother's job, and it was customary that fathers are incapable of taking care of child. Therefore, there was usually a rational reason for a mother to take her child with her when they divorced, as she could not entrust her child to someone who was incapable of taking care of child. Under such social circumstances, we believe that the legal culture was formed in which it was not naturally illegal for a mother to leave her home with her child.

In response to the international trend of human rights protection, Japan has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, and has enacted domestic implementing laws. Under these circumstances, the stereotype that child-rearing is mother's job and fathers are incapable of taking care of child no longer exists. There are no longer social circumstances in which Parental Child Abduction while living together by one parent (the mother) should not be considered illegal.

However, it is difficult to change the legal culture once it has been formed because the system is designed so that the courts are not easily influenced by politics and public opinion. While Japanese society has been changing in accordance with international demands, the legal culture of the courts has not followed international demands.

For more information on the historical background of Parental child abduction issue in Japan and international trends, refer to the article International Trends in Human Rights Guarantees and Japan - Especially on "The Hague Convention on Removal of Child"

(Exhibit 2) by Professor Nobuhiko Kawamata, Vice President of Saitama University, a constitutional law scholar.

8. Current Situation

In Japan, one in three couples is divorced. The number of minor children whose parents are divorced is approximately 190,000 (Ministry of Health, Labor and Welfare, Vital Statistics 2020), of which approximately 70%, or 130,000 children, do not have visitation (Ministry of Health, Labor and Welfare, National Survey of Single Parent Households, 2016), and are not able to see their separated parents. There are many separated parents who commit suicide due to the pain of losing visitation with their children.

There are no direct statistics on the number of Parental Child Abduction, and according to the Supreme Court officials, they do not intend to obtain statistics (Exhibit 1) .

Since a certain percentage of parents who have had their children abducted will seek judicial redress, it is likely that the number of child handover cases (Judicial Statistics, Domestic Affairs, Table 37) and habeas corpus claims (Judicial Statistics, Civil and Administrative Cases, Table 4), which are judicial remedies for Parental Child Abduction, should not be less than the number of Parental Child Abduction cases. Therefore, the number of handover cases plus the number of requests for habeas corpus as the minimum number of Parental Child abduction cases is shown in the graph below for 20 years.

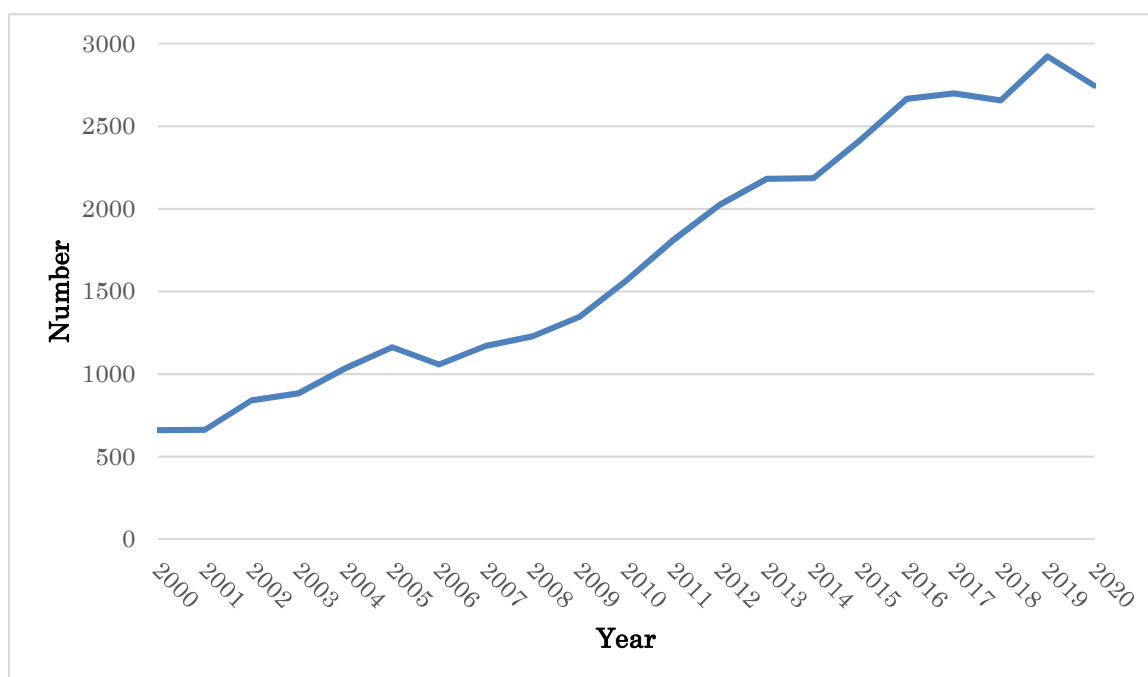


Fig.1 Minimum number of Parental Child Abduction cases

The minimum number of Parental Child Abduction cases has more than quadrupled, from 660 in 2000 to 2923 in 2019. We believe that the reason for the increase is that Parental Child Abduction is now known to be an effective means of gaining custody and parental authority in divorce. In other words, divorce counseling offices and lawyers who receive divorce counseling have to tell their clients that the family courts in Japan do not consider Parental Child Abduction while living together to be illegal, and that the parent who actually has custody of the child is in huge advantage due to the principle of continuity.

Related Documents A/HRC/40/NGO/171 "Child Abduction Business in Japan"

9. Conclusion

The issue of Parental Child Abduction in Japan has long been the subject of criticism in Japan and abroad, as shown below.

In 2003, a court's decision on a parental child abduction case, in which U.S. Navy Captain Paul Toland was the victim, became an issue between Japan and the United States. (<https://www.international-divorce.com/Struggle-for-Children-in-Japan>, <https://abcnews.go.com/International/fighting-custody-abducted-children-japan/story?id=8817579>)

In February 2019, the UN CRC noted that judicial bodies do not take into account the "best interests of the child" in family disputes.

In July 2020, the European Parliament adopted a resolution condemning the "International and domestic parental abduction of EU children in Japan" (https://www.europarl.europa.eu/doceo/document/TA-9-2020-0182_EN.html)

However, there has been no move by the Japanese courts to consider Parental Child Abduction while living together as illegal, nor any move to legislate to have it considered illegal.

For these reasons, we strongly urge the above recommendation.

END

Exhibit 1 Minutes of parental child abduction issue

Exhibit 2 International Trends in Human Rights Guarantees and Japan

- Especially on "The Hague Convention on Removal of Child"

Minutes of parental child abduction issue

On January 20, 2020, with the help of a member of Congress of whom Shunichi FUJIKI is familiar with, we attempted to "raise the issue of child abduction" with Supreme Court high officials. The following is a record of the meeting.

Attendee:

Ms. Tomoko SAWAMURA, Chief of the First Division of the Family Division of the Supreme Court's General Secretariat

Mr. Hideaki YAMAGISHI, Deputy Director of the Family Division of the Supreme Court's General Secretariat

Shunichi FUJIKI

Attorney at Law, Patent Attorney Hirokazu NAKANO (responsible for this record)

[Origin of discussion]

There was no disagreement that parental child abduction (removal without prior consent) would cause the child to be unhappy and unstable.

There was a disagreement on the point that "therefore, parental child abduction must not be tolerated. Hereafter, this point is taken as the origin.

[Problems caused in accordance with parental child abduction]

- FUJIKI and NAKANO (here in after referred to as "we" in this section) explained that parental child abduction has become a means for divorce lawyers to obtain economical profits.
- We explained that Attorney A was accused by name in the proceedings to the United Nations filed by Zimeray & Finelle Avocats.
- We explained that Lawyer B had incited how to abduct a child at the seminar at the Japanese Cultural Institute in Paris on May 15, 2018, co-hosted by the Ministry of Foreign Affairs and the Japan Federation of Bar Associations.
- We explained that the number of cases involving provisional measures of child extradition has quadrupled in 15 years.
- We explained cases of suicide and homicide caused by parental child abduction.
- We explained the reasons France is angry with Japan as follows.
- We explained that approximately 10% of the French population is aware of the issue of Japanese child abduction and that they are sympathetic to it through documentaries and

other media that deal with the issue in Japan.

- We explained that in France, both parents are responsible for the custody and visitation of their children, and that in the United States, there are penalties on obtaining a driver's license for interfering with visitation, but in Japan, there are no penalties.
- We expressed concern that NGOs and other organizations are working together to strengthen the siege on Japan, and it could lead from the family disintegration to the disintegration of nation body if the situation continues. Ms. SAWAMURA and Mr. YAMAGISHI did not have any comments, but we found their strong disapproval.
- We explained the differences in the concept of illegality of parental child abduction.

Japan: legal; France: illegal and human rights violation

[Arguments about the illegality of child abduction.]

NAKANO: Is parental child abduction itself illegal?

SAWAMURA: There is no law which makes it illegal.

NAKANO: There is an article in the Civil Code to the effect that custody of the child shall be exercised jointly ("Parental authority shall be exercised jointly by married parents" Civil Code Article 818(3) main clause).

SAWAMURA: Whether or not a violation of that provision is illegal is merely a matter of words.

YAMAGISHI: Aside from removal during visitation, the family court has not directly determined whether parental child removal is illegal or not.

NAKANO: You're saying that parental child abduction is legal in Japan?

SAWAMURA: I dare not say that it is legal. We are considering the circumstances of the removal as an element. There is no special meaning in making that distinction between illegal and legal. With regard to removal, it is one of the factors to be judged by taking into account the custody situation of the past and the prospect of future custody. The Court recognizes that it makes appropriate decisions from the perspective of the child in each case (hereinafter referred to as "Supreme Court's Recognition").

[How to review on the Supreme Court's recognition]

FUJIKI: The reality is not as the Supreme Court recognition; I know of only about 200 cases, but I am aware of many absurd cases, such as a parent who was unable to see the child because of a false allegation of domestic violence, or a parent who was found to be highly emotional and unable to see the child because he or she showed tears during visitation.

SAWAMURA: These are individual cases.

FUJIKI/NAKANO: Shouldn't you check whether the reality is as the Supreme Court's recognition? Do you track the percentage of parental authority/custody rights granted to the party who abducted the child? Shouldn't you have the statistics?

SAWAMURA: We don't intend to. We have not. We can't do that. We don't have the means to figure it out. We don't have the manpower.

[Working towards a solution]

FUJIKI/NAKANO: Only the courts have the data on which to base statistics. Without statistics, it would be impossible to solve the problems caused by child abduction.

SAWAMURA: There is no intention of conducting a survey. In the first place, the General Secretariat of the Supreme Court is the department that deals with administrative matters of the court and cannot influence the judges (of the lower courts).

NAKANO: In a marginal case where decisions can differ depending on the consideration of parental child abduction, shouldn't the Supreme Court rule that parental child abduction is illegal?

SAWAMURA: It is impossible to intervene in the decisions of the Supreme Court judges. This is a matter of legislation.

NAKANO: The only solution to the problems arising from the acceptance of parental child abduction is to operate to make parental child abduction illegal.

SAWAMURA: The courts hold an annual training session with people from courts all over the country to discuss what kind of solution is desirable for children.

[Conclusion (FUJIKI/NAKANO)]

In order to discuss the system to solve the problems, it should be based on statistics. The courts are the only state institution that has data on family court practice and is probably the only one capable of resolving the problems stemming from the admission of parental child abduction. Unfortunately, the proposal for a study of family court practice to obtain the prerequisite statistics was rejected. Therefore, the above-mentioned problems are unlikely to be resolved.

End

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<<International Society and Japan>>

International Trends in Human Rights Guarantees and Japan

- Especially on "The Hague Convention on Removal of Child"

Nobuhiko Kawamata

Introduction

1. Progress in Domestic Human Rights Guarantees in the Wake of the Convention
2. Overview of the Hague Convention on Removal of Child
3. Japan's Situation and Challenges Regarding Removal of Child
4. Consideration - Constitutional Argument on Removal of Child

Conclusion

Please go to

<http://nadesiko-action.org/wp-content/uploads/2022/07/Exhibit2.pdf>