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DIVORCE AND THE WELFARE OF THE CHILD IN JAPAN

Matthew J. McCauley[†]

Abstract: Current Japanese legal institutions are ill-equipped to resolve the complicated issues surrounding visitation, custody, and divorce. Japanese views toward family and society have changed greatly since the post-World War II family law was enacted in the 1950s, but the law has not evolved accordingly. This is especially clear in the methods used to determine custody and visitation, as well as the *kyōgi rikon*, or divorce by mutual consent system. Policy makers and activists are both working to resolve this problem, but their ongoing struggle has yet to produce any tangible results. This comment argues that the Japanese legal system must be reformed to allow for joint custody and to create a presumption for reasonable visitation, and the *kyōgi rikon* system must be changed to grant greater protections to all parties, including requiring a detailed parenting plan to provide for the children's welfare and continued relationship with both parents.

I. INTRODUCTION

In September of 2010, the *Japan Times* published a two-part series by a man under the pen name Richard Cory telling the extraordinary tale of his divorce and custody battles over his three children with his Japanese ex-wife.¹ Three months after filing for divorce, Mr. Cory's ex-wife took their three children, two boys and one girl, and left home after months of arguing over the terms of their divorce.² The mother took the children to a local government office, where she claimed that they were victims of domestic abuse.³ The office directed her to a women's shelter and suggested that she legally change her and her children's names to make it more difficult for Mr. Cory to find them.⁴ She and the children stayed at the shelter before moving to subsidized housing, where she reportedly abused the children emotionally and physically.⁵ Mr. Cory continued to search for his children during this

[†] Juris Doctor expected in 2012, University of Washington School of Law. The author would like to thank Professor Kate O'Neill, Naoko Inoue Shatz, and all the members of the *Pacific Rim Law & Policy Journal* for their guidance and help in writing this comment. Any errors or omissions in this analysis are solely the author's own.

¹ Richard Cory, *Battling a Broken System*, JAPAN TIMES, Sept. 21, 2010, available at <http://search.japantimes.co.jp/cgi-bin/fl20100921zg.html> [hereinafter Cory, *Battling a Broken System*]; Richard Cory, *Behind the Facade of Family Law*, JAPAN TIMES, Sept. 28, 2010, available at <http://search.japantimes.co.jp/cgi-bin/fl20100928zg.html> [hereinafter Cory, *Behind the Facade of Family Law*].

² Cory, *Battling a Broken System*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

time, but the government workers refused to tell him where his children were, and even refused to pass on a simple message on his behalf.⁶

Three weeks after being taken from home, Mr. Cory's daughter, the eldest child, found a pay phone while her mother was out and called Mr. Cory for help.⁷ She told him where she was going to school and that she just wanted to go home.⁸ The next day, Mr. Cory went to his daughter's new school after class and took her home, where she stayed throughout the remainder of the custody dispute.⁹ After a lengthy court battle, the court eventually decided to award custody of the two boys to the mother and custody of the daughter to Mr. Cory, reasoning that the children were happy with their current living situation and thus relocation was unnecessary—essentially custody by capture.¹⁰

While this case was more contentious and dramatic than most, it is emblematic of the Japanese family law system, which fails to consistently make decisions that protect the welfare of children, respect the rights of parents, and facilitate healthy interaction between parents and children following divorce. Divorce is rarely an easy process, requiring the family to divide everything that was shared in marriage, including custody and visitation rights for children. In Japan, this problem is compounded by the inadequate protection of visitation rights, the lack of a joint custody system, and a divorce system that features a procedure called *kyōgi rikon*, which allows the husband or wife to unilaterally determine all the conditions of their divorce without any oversight or guidance.¹¹ These institutions must be reformed because they often fail to protect the fundamental rights of children and noncustodial parents.

Part II of this comment will outline the current Japanese divorce system, showing how visitation is not protected as a fundamental right under the law, which results in extremely limited contact between children and their noncustodial parents. It will also show how the current law does not provide for joint custody, requiring parents to fight over who will exercise sole custody over each child. It will further show how the *kyōgi rikon* system lacks substance, provides no oversight, and does not allow for the creation of enforceable divorce agreements.

⁶ *Id.*

⁷ Cory, *Behind the Facade of Family Law*, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See infra* Part II.

Part III will focus on the social implications of this system, showing how visitation is regarded as a basic human right throughout the developed world that is indispensable to the healthy development of children. It will also show how joint custody provides a valuable affirmation to both parents and children that the parent-child relationship will be continually protected after divorce. Finally, it will show how the *kyōgi rikon* divorce system is prone to exploitation and does not require parents to properly plan their post-divorce relationships with each other or with their children.

Part IV will advocate for reform of the Japanese family law system in three key areas: 1) recognition of the right of visitation for the noncustodial parent, 2) creation of a preference for joint custody over children, and 3) reform of the *kyōgi rikon* system to mandate the creation of a detailed parenting plan when minor children are involved, require judicial approval of any divorce agreement, and provide access to mediation and litigation for the enforcement of valid divorce agreements.

II. JAPANESE LAW DOES NOT PROTECT VISITATION, ALLOW JOINT CUSTODY, OR PROVIDE EFFECTIVE OVERSIGHT OF DIVORCE

Current Japanese family law, largely unchanged since 1959, does not recognize visitation as a right for the noncustodial parent and requires divorcing parents to decide which parent will exercise sole custody over each child.¹² Furthermore, the *kyōgi rikon* system does not provide a substantive framework for creating a fair divorce agreement and does not provide an effective mechanism for enforcing these agreements. This section will examine how each of these areas function under the law today. Part A will look at the current visitation system. Part B will examine the limitations of the custody system. Part C will explain the *kyōgi rikon* system and how it is used more than any other type of divorce.

A. *Japanese Law Does Not Recognize Visitation as a Legal Right*

Japanese law does not provide any constitutional or statutory protections for the right of the noncustodial parent to see his or her children following divorce.¹³ Instead, all decisions regarding custody are left entirely

¹² MINPŌ [Civ. C.] arts. 763-71, 819. See also Mojuro Tonooka, *Kaisei Minpō to Shinkensha*, 25-3 WASEDA HŌGAKU 61, 68-75 (1950) (explaining the changes in the law relating to child custody); Masakazu Ueno, *Kyōgi Rikon no Mondaiten*, 1059 HANREI TIMES 57 (1995) (noting how the laws relating to *kyōgi rikon* effective today were enacted in 1959).

¹³ Saikō Saibansho [Sup. Ct.] July 6, 1984, Sho 58 (ku) no. 103, 37(5) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 35 (Japan) (restrictions on visitation do not violate the Constitution); TŌRU ARICHI, KAZOKUHŌ GAIRON 291 (2003).

to the discretion of the parents themselves in divorce by mutual consent, or to the courts in divorce litigation, resulting in visitation awards that are insufficient for facilitating meaningful interaction between parent and child.¹⁴ These court decisions have evolved in their reasoning over time, yet still do not provide any assurance of reasonable visitation.

The Japanese courts first recognized the value of visitation in 1969, but have since refused to treat it as a fundamental right.¹⁵ The first Japanese Supreme Court case on this issue was decided in 1984, which rejected a noncustodial father's argument that the right to visitation is protected as a right to pursue happiness under Article 13 of the Constitution.¹⁶ The only other major Supreme Court decision was in 2000, which affirmed the authority of the courts to award visitation under Article 766 of the Civil Code but explicitly rejected the argument that a parent had a right to visitation under the current law.¹⁷

Courts will often deny visitation when the custodial parent protests on the grounds that allowing visitation would place an undue burden on the child.¹⁸ However, critics assert that this "burden" is often a manifestation of the animosity between parents rather than a true desire to protect the interests of the child.¹⁹

Even when visitation is granted, the noncustodial parent's time with the child is often highly restricted in frequency and scope. For example, court statistics from 2009 show that only 14% of cases allowed overnight stays and only 52% permitted visitation once or more per month, which is generally interpreted as visitation rights of only one day per month.²⁰ The

¹⁴ Colin P. A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 *ASIAN-PAC. L. & POL'Y J.* 166, 234-35 (2007).

¹⁵ See Tōkyō Katei Saibansho [Tōkyō Family Ct.] May 22, 1969, Sho 44 (ie) no. 2262, 22(3) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 77 (Japan).

¹⁶ Saikō Saibansho [Sup. Ct.] July 6, 1984, Sho 58 (ku) no. 103, 37(5) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 35 (Japan); Jones, *supra* note 14, at 241.

¹⁷ Saikō Saibansho [Sup. Ct.] May 1, 2000, Hei 12 (kyo) no. 5, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1607 (Japan).

¹⁸ See e.g., Tōkyō Kōtō Saibansho [Tōkyō High Ct.] Feb. 29, 1990, Heigan (ra) no. 537, 42(8) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 57 (Japan) (justifying denial of visitation as a burden on the child); Ōsaka Kōtō Saibansho [Ōsaka High Ct.] Feb. 3, 2003, Hei 17 (ra) no. 1023, 58(11) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 47 (Japan) (denying visitation because the child was living in a stable environment with father and adoptive mother, and visitation would place a burden on the child); Yokohama Katei Saibansho [Yokohama Fam. Ct.] Apr. 30, 1996, Hei 6 (ie) no. 3582, 49(3) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 75 (Japan) (holding that it is best to deny visitation when there is conflict between the parents).

¹⁹ Takao Tanase, *Ryōshin no Rikon to Kodomo no Saizen no Rieki [The Best Interest of the Child During Divorce: Disputes over Visitation and the Japanese Family Courts]*, 60 *JYŪ TO SEIGI* 9 (2009). A translation of this article precedes this Comment.

²⁰ SUPREME COURT OF JAPAN, HEISEI 21 NEN SHIHŌ TŌKEI NENPŌ, KAJI JIKEN HEN [ANNUAL REPORT OF CASE STATISTICS FOR 2009, FAMILY CASES] 41 (2009), available at <http://www.courts.go.jp/sihotokei/nenpo/puff/B21DKAJ41.pdf>, cited in Jones, *supra* note 14, at 234-35.

remaining half of cases saw even less frequent visitation, with many cases only allowing visitation a few times a year or not at all.²¹

Visitation can become even more difficult when the non-custodial parent is not a Japanese citizen. Marriage-based visas terminate after divorce, sometimes leaving divorcees with no way to remain in the country legally to support their children.²² Non-Japanese parents are sometimes able to remain in the country after divorce if their children are Japanese citizens under a special program established by the Japanese Immigration Bureau, but research by the Asian Women's Fund has shown that education and economic issues prevent many parents from taking advantage of the system.²³

B. Japanese Law Does Not Recognize Joint Custody

Almost 60% of all divorces in Japan involve minor children, yet the law does not provide a framework for parents to share custody of their children.²⁴ This makes it necessary for the parents themselves, or in some cases the courts, to determine which parent will exercise sole custody.²⁵

The Civil Code divides custody into two distinct rights, *shinken* (parental rights) and *kangoken* (physical custody).²⁶ The law does not provide an explicit definition of either right, but *shinken* is generally interpreted as the right to administer assets, legally represent the child, and make major parental decisions while *kangoken* encompasses the everyday "care and education" of the child.²⁷ These rights are generally vested with

²¹ SUPREME COURT OF JAPAN, *supra* note 20.

²² Yorimitsu Masatetsu, *Gaikokujin Rōdōsha no Sedaikan Rigaini Kansuru Jirei Kenkyū*, HITOTSUBASHI UNIVERSITY INSTITUTE OF ECONOMIC RESEARCH 4 (2001), <http://hdl.handle.net/10086/14451>. "Status of residence" is a term used in Japan to designate a non-Japanese citizen's status in the country, and is commonly referred to as a visa.

²³ SETSUKO LI, JOSEI NO TAME NO AJIA HEIWA KOKUMIN KIKIN [ASIAN WOMEN'S FUND], ZAINICHI GAIKOKUJIN JYOSEI NO DOMESUTIKKU BAIORENSU HIGAINI TAISURU SHAKAITEKI SHIGEN—SONO GENJŌ TO KADAI [SURVEY ON SOCIAL RESOURCES REGARDING DOMESTIC VIOLENCE FOR FOREIGN WOMEN LIVING IN JAPAN], 48 (2004), *available at* <http://www.awf.or.jp/pdf/0160.pdf>.

²⁴ Ministry of Health, Labour, and Welfare, HEISEI 21 NENDO "RIKON NI KANSURUTŌKEI" NO GAIKYŌ [2009 OUTLOOK ON STATISTICS RELATING TO DIVORCE], tbl.3 (2009), *available at* <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyuu/rikon10/index.html> (last accessed Dec. 26, 2010), [hereinafter 2009 COURT STATISTICS] (Out of a total 250,136 cases, 143,834 involved minor children.); MINPŌ [CIV. C.] art. 819, para.1-2 (In *kyōgi rikon*, the parents must choose one parent to have sole custody, and in judicial divorce, the judge must choose one parent to have sole custody.).

²⁵ MINPŌ [CIV. C.] art. 819 para. 1-2.

²⁶ Takashi Shimizu, *Shinken to Kangoken no Bunri, Bunzoku*, 1100 HANREI TAIMUZU 144 (2002).

²⁷ Certain rights have been explicitly designated as *shinken*: the right to decide the child's residence, the right to discipline the child, the right to consent to employment, and the right to administer the child's assets and legally represent the child. However, this list is not exhaustive and modern law recognizes a much wider spectrum of parental rights. Shimizu, *supra* note 26, at 144; MINPŌ [CIV. C.] arts. 821-24.

the same parent after divorce, but they can be split between the parents under special circumstances.²⁸ Splitting these rights is rare, but sometimes parents will choose to divide the rights in order to achieve quasi-joint custody.²⁹

As the story of Richard Cory illustrates, problems associated with the lack of joint custody are worsened by inherent biases in the Japanese custody system against fathers and non-Japanese citizens.³⁰ Japanese government statistics from 2009 show a strong preference for the mother in divorce, with the mother getting sole custody over all children in 82% of divorces with children involved.³¹ While fathers historically had control over the children,³² most cases today are decided in favor of the mother under the controversial “tender-years doctrine.”³³ This doctrine draws its justifications from culture and biology, and its adherents argue courts should not deprive the mother custody of her young children unless there is clear evidence that the mother is not fit to care for her children.³⁴ The doctrine remains controversial among scholars, but has generally fallen out of favor in the United States as discriminatory against men.³⁵

Two studies conducted by Professor Bryant at the UCLA School of Law, the first from 1981 to 1984 and the second in 1992, found a similar trend against non-Japanese citizens.³⁶ The 1981 study found that courts placed a priority on maintaining the Japanese identity of children after divorce, even at the expense of their non-Japanese identity.³⁷ The second 1992 study found more cases where courts were willing to award custody to a non-Japanese mother, but there was still little recognition of “blended

²⁸ MINPŌ [CIV. C.] art. 766 (generally used in situations where the parents are unable to care for the child but still wish to retain legal custody).

²⁹ ARICHI, *supra* note 13, at 288.

³⁰ Cory, *Behind the Facade of Family Law*, *supra* note 1.

³¹ Japanese Supreme Court statistics show that out of 251,136 divorces in 2009, 107,302 did not involve children, the mother got custody of all children in 118,037 cases, the parents split the children in 5,202 cases, and the father got custody in 20,595 cases. 2009 COURT STATISTICS, *supra* note 24.

³² For example, in 1965, before the development of a strong preference for mothers, an all-male panel of judges denied visitation to the mother. Tōkyō Kōtō Saibansho [Tōkyō High Ct.] Dec. 8, 1965, Sho 40 (ra) no. 11, 18(7) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 31 (Japan).

³³ Shizuoka Katei Saibansho [Shizuoka Fam. Ct.] Oct. 7, 1965, Sho 40 (ie) 687, 18(3) KATEI SAIBAN GEPPŌ [KASAI GEPPŌ] 81 (Japan) (ruling that, barring special circumstances, it is best for the mother to take full custody); Jones, *supra* note 14, at 220-21.

³⁴ Cathy J. Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695, 697-98 (1977).

³⁵ MARY ANN MASON, THE CUSTODY WARS 2-3 (1999); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 335-36 (1982).

³⁶ Taimie L. Bryant, *Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1, 18-19 (1995).

³⁷ *Id.*

families” or “bicultural identity.”³⁸ These trends, combined with no provision for joint custody, make it highly likely that divorcing fathers and non-Japanese citizens will be deprived of all parental rights following divorce.

C. *The Kyōgi Rikon System Provides No Oversight*

Kyōgi rikon, literally “divorce by conference,” is a system allowing divorcing parties to decide all terms of divorce, including all issues of child custody and visitation, without any judicial oversight.³⁹ The law only requires the parties agree to divorce, determine the custody of their children, and submit a short form to their local municipal office, providing a simple and fast path to divorce that is used by almost 90% of divorcing couples today.⁴⁰

The institution of *kyōgi rikon* has existed for over a century, originating in the Meiji Civil Code of 1890.⁴¹ The 1890 Civil Code required a married couple to obtain the approval of parents and grandparents on both sides of the family as well as their legal guardian before divorce would be permitted.⁴² Japanese divorce law saw a major shift just a few years later with the new Meiji Civil Code of 1898.⁴³ This new law no longer required outside consent for *kyōgi rikon*, effectively replacing traditional safeguards with the ideals of personal freedom and the freedom to contract.⁴⁴ The law in effect today was enacted in 1959, and is essentially unchanged from the Meiji Civil Code of 1898.⁴⁵

Although a great majority of divorces are settled through *kyōgi rikon*, Japanese law does provide for divorce through conciliation, or litigation if

³⁸ *Id.*

³⁹ MINPŌ [CIV. C.] art. 763 (establishing *kyōgi rikon*); *id.* at art. 766 (allowing parents to unilaterally make decisions regarding children).

⁴⁰ YOSHIKI ŌSHIMA & HIROSHI YOSHIOKA, *KEKKONSURU MAE NI, RIKONSURU MAE NI: KEKKON TO RIKON NO HŌRITSU CHISHIKI* 94 (1986); 2009 COURT STATISTICS, *supra* note 24.

⁴¹ Ueno, *supra* note 12, at 57. The Old Meiji Civil Code was only in force for a few years until the Meiji Restoration, and was highly controversial due to its codification of ancient family rules that demanded unconditional obedience. Fujiko Isono, *The Evolution of Modern Family Law in Japan*, 2 INT J.L. & FAM. 183, 185 (1988).

⁴² Ueno, *supra* note 12, at 57.

⁴³ *Id.* This new civil code was created after the Meiji Restoration in a push to remake Japan into a modern nation state. Isono, *supra* note 41, at 189.

⁴⁴ Meiji Minpō [Meiji Civil Code] art. 808; Ueno, *supra* note 12, at 57.

⁴⁵ Compare Meiji Minpō [Meiji Civil Code] art. 808 with MINPŌ [CIV. C.] art. 763 (the only noticeable difference in the text of the two laws is a linguistic modernization to conform to post-war language reforms); Ueno, *supra* note 12, at 57.

conciliation fails.⁴⁶ Divorce conciliation offers a non-binding forum where the parents can bring their dispute before a family court judge or a two-person committee of licensed attorneys who specialize in family law.⁴⁷ While the court can order an investigator to conduct objective fact finding, the information can only be used to convince the parents to take a particular course of action and the final decision still rests with the parents.⁴⁸ A case may only proceed to litigation after a conciliation has failed,⁴⁹ and litigation is only available in a limited subset of cases.⁵⁰ Divorce litigation does provide a full forum for dispute resolution that is more familiar to Western lawyers, but it is only used in roughly 1% of all cases every year, making its overall effect very limited.⁵¹

III. THE CURRENT JAPANESE DIVORCE SYSTEM HARMS BOTH PARENTS AND CHILDREN

Japanese family law is coming under scrutiny both domestically and internationally because it fails to protect noncustodial parents and children, and arguably violates Japan's treaty obligations. In addition, this system fails to take advantage of the benefits of broad visitation rights and joint custody. Part A will examine how Japan's failure to recognize visitation harms children and arguably violates international law. Part B will show

⁴⁶ Kaji Shinpanhō [Domestic Causes Inquiries Act], Law No. 152 of 1947, art. 18, para. 1, 2 (Japan) (conciliation is generally mandatory before courts will hear a dispute). In 2009, 9.7% of divorces were resolved through conciliation and only 1-2% of cases went to court. 2009 COURT STATISTICS, *supra* note 24. The word “*chōtei*” has been translated as “conciliation,” “arbitration,” and “mediation” by different authors because it is difficult to find a precise translation for the word in English. This paper uses the word “conciliation” because it is the term used in official Supreme Court publications. See, e.g., Supreme Court of Japan, DOMESTIC RELATIONS CASE PROCEEDINGS, available at http://www.courts.go.jp/english/proceedings/pdf/domestic_personal/chart.pdf.

⁴⁷ Kaji Shinpanhō [Domestic Causes Inquiries Act], Law No. 152 of 1947, art. 3 para. 2 (Japan); *Id.* at art. 22, para. 1 (Japan). This committee is generally composed of one male and one female, competent in issues of resolving family disputes, have rich life experience, knowledge and deep insight, are ideally between forty and seventy years of age, and are appointed by the court for a term of two years. Bryant, *supra* note 36, at 9.

⁴⁸ Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chōtei (Family Court Mediation)*, 39 FAM. L.Q. 489, 494 (2005); Jones, *supra* note 14, at 185 (investigators must pass a test administered by the Supreme Court, but no degree in psychology or any related subject is required).

⁴⁹ Kaji Shinpanhō [Domestic Causes Inquiries Act], Law No. 152 of 1947, art. 24, para. 1 (Japan).

⁵⁰ A court may only grant divorce on five specific grounds: infidelity, malicious abandonment, when the spouse has been missing for over five years, severe mental illness, or any other condition that would make continuation of the marriage a severe burden. MINPŌ [CIV. C.] art. 770 (enumerating the grounds for judicial divorce). Also, the responsible party is not allowed to file for divorce. Saikō Saibansho [Sup. Ct.] Oct. 15, 1963, Sho 35 (o) no. 985, 68 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 393 (Japan).

⁵¹ Jones, *supra* note 14, at 196; 2009 COURT STATISTICS, *supra* note 24.

how the enactment of a joint custody system will help to hold both parents responsible for their children. Part C will look at how the *kyōgi rikon* system is open to abuse.

A. *Japan's Failure to Recognize Visitation as a Right Is Harmful to Parents and Children, and Arguably Violates International Law*

In cases where one parent retains sole custody, visitation rights are essential for the welfare of the child. Visitation allows the child to maintain contact with both parents, often helping to protect the child against the pain of loss, provide a sense of presence that can diminish the child's sense of vulnerability, and spread feelings of frustration and conflict that would otherwise be directed toward only one parent.⁵² Visitation also allows noncustodial parents to maintain relationships with their children, protecting a basic right of parenthood.⁵³

These arguments stem from attachment theory, which is used throughout the world to develop policies and laws relating to children.⁵⁴ This theory argues that children depend on an attachment to a primary attachment figure for development and survival, and that young children often develop such a relationship with both their parents.⁵⁵ It is clear that severing this bond between parent and child is detrimental to the child's personal development, and visitation soon after divorce has proven invaluable in putting the fears of children at ease.⁵⁶

Some scholars argue attachment theory leads to the opposite conclusion, that visitation provides no benefit and is potentially harmful for children. This argument is based on the idea that a hierarchy exists in these attachment relationships, usually with the mother at the top.⁵⁷ Their theory recommends that custodial parents make decisions regarding visitation and that young children should not be made to have overnight stays with their noncustodial parent.⁵⁸ However, recent research has shown that, while it is impossible to make all-encompassing conclusions, a balanced relationship

⁵² JUDITH WALLERSTEIN & JOAN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE*, 239 (1980).

⁵³ *Id.* at 132-34.

⁵⁴ Michael Rutter & Thomas G. O'Connor, *Implications of Attachment Theory for Child Care Policies*, in *HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS* 823-44 (Jude Cassidy & Phillip R. Shaver eds. 1999); Judith Younger, *Post-Divorce Visitation for Infants and Young Children—The Myths and the Psychological Unknowns*, 36 *FAM. L. Q.* 195, 198 (2002).

⁵⁵ Younger, *supra* note 54, at 198.

⁵⁶ Steven L. Novinson, *Transition: Post Divorce Visitation: Untying the Triangular Knot*, 1983 *U. ILL. L. REV.* 121, 146-48 (1983).

⁵⁷ Younger, *supra* note 54, at 200-01.

⁵⁸ Novinson, *supra* note 56, at 141-43.

with both parents is important for healthy development and growth, and proper communication and harmonious interaction between parents can overcome any undue stress or hardship resulting from separation from the mother.⁵⁹ There is also evidence that the relationship between the noncustodial parent and child can thrive through visitation even when their relationship was strained prior to divorce.⁶⁰

When Japan ratified the Convention on the Rights of the Child⁶¹ in 1994, it agreed to “use [its] best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their child,”⁶² and to “ensure that a child shall not be separated from his or her parents against his or her will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child.”⁶³ However, Japan has not reformed its domestic laws to conform to the Convention’s mandates.⁶⁴

Japanese law embraces neither the spirit nor substantive provisions of the Convention. The only relevant law in Japan provides that “[a]ll children who have not reached the age of majority will be subject to the authority of their mother and father.”⁶⁵ The Convention takes a more child-centered approach, protecting the right of the child to “know and be cared for by his or her parents.”⁶⁶ The Convention also extends this responsibility to the state by requiring it to facilitate and enforce these obligations and exercise due process when severing contact between parent and child.⁶⁷

This issue is attracting increasing international attention, even prompting the United States House of Representatives to pass a resolution condemning the Japanese family law system because it “does not recognize joint custody nor actively enforce parental access agreements for either its

⁵⁹ Younger, *supra* note 54, at 201-04.

⁶⁰ Novinson, *supra* note 56, at 149-50.

⁶¹ The Convention on the Rights of the Child, opened for signature in 1989, was the first comprehensive international agreement on children’s rights, and creates a binding obligation for states to protect “the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life.” Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. Japan became a signatory on September 21, 1990, and ratified the convention on April 22, 1994.

⁶² *Id.* at art. 18.

⁶³ *Id.* at art. 9.

⁶⁴ Shizuyo Kawashima, *The Rights of the Child and Joint Parental Authority—Joint Custody*, 17 KITAKYŪSHŪ SHIRITSU DAIGAKU BUNGA KUBU KIYŌ (NINGEN KANKEI GAKKA) 1, 3 (2010).

⁶⁵ MINPŌ [CIV. C.] art. 818. The age of majority is twenty in Japan. MINPŌ [CIV. C.] art. 4.

⁶⁶ Convention on the Rights of the Child, *supra* note 62, at art. 7.

⁶⁷ *Id.* at art. 9, 18.

own nationals or foreigners.”⁶⁸ This system does not protect children or parents, and does not meet Japan’s obligations under international law.

B. Joint Custody Helps Ensure that Both Parents Are Held Equally Responsible for Their Children After Divorce

Joint custody arrangements provide a valuable tool allowing both parents to take an active role in raising their children. For children, joint custody can provide a sense of security and continuance, providing the child with free access to both of their parents and helping to resolve issues of divided loyalties.⁶⁹ For parents, joint custody can help equalize power in their relationship and solve the problem of “overburdened” mothers and “underburdened” fathers.⁷⁰

While there are many benefits to joint custody arrangements, research has shown that they are not appropriate in every situation.⁷¹ Some joint custody arrangements result in high levels of conflict between parents, causing more harm than good for the child.⁷² Joint custody arrangements also increase stress by requiring the children to travel long distances and adjust to two different households with two sets of rules, schedules, and activities.⁷³ The very schedules used to ensure equal access can also cause repeated scheduling difficulties and conflicts of interest.

Although joint custody is not the solution for all families, those families that are willing to put in the effort and cooperate for the benefit of their children are able to reap great reward. Parents are able to lessen the burdens of childrearing by shifting some of the work to the other parent, and children are given a greater sense of security, community, and family.⁷⁴ Joint custody creates an atmosphere where “two committed parents, in two separate homes, car[e] for their youngsters in a post divorce [sic] atmosphere of civilized, respectful exchange.”⁷⁵

There are several factors that can suggest whether a family would be well suited for joint custody, such as parents who are committed to make the plan succeed, have a willingness to communicate, and are flexible to make

⁶⁸ H.R. Res. 3240, 111th Cong. (2010) (enacted).

⁶⁹ Meyer Elkin, *Joint Custody: In the Best Interest of the Family*, in *JOINT CUSTODY & SHARED PARENTING* 11, 12 (Jay Folberg ed. 1991).

⁷⁰ *Id.* at 12-13.

⁷¹ ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992); MASON, *supra* note 35.

⁷² MACCOBY & MNOOKIN, *supra* note 71, at 284.

⁷³ MASON, *supra* note 35, at 39-64.

⁷⁴ WALLERSTEIN & KELLY, *supra* note 52, at 308-09.

⁷⁵ *Id.* at 310.

changes to accommodate the child's needs.⁷⁶ However, families with abuse issues, intractable opposition to joint custody by both parties, or logistical issues that work against joint custody might not be appropriate.⁷⁷ Joint custody is not a fix-all solution that will make a divorced family whole, but it is an important legislative affirmation that both parents are equally responsible for their children after divorce.⁷⁸

C. *The Kyōgi Rikon System Is Open to Abuse Under Current Law*

While *kyōgi rikon* may be seen as the ideal of contractual and personal freedom, it allows for divorce without proper planning or protection. Often these simple divorce agreements are completed without any consideration for child support payments or visitation rights, resulting in low rates of payment and a loss of a sense of moral responsibility by the non-custodial parent.⁷⁹ This *laissez-faire* approach to divorce also introduces problems of coercion, especially when there is a power imbalance between the parties.⁸⁰ While a system has been established to prevent outright unilateral divorce against the will of the other spouse,⁸¹ there are many cases where one parent wants a divorce, and the other parent conditions their agreement on unfair concessions regarding custody, visitation, and child support.⁸² This creates the potential for one party to escape child support duties and gain other concessions that would otherwise not be allowed in a court-supervised dissolution.

Even when the parties make proper post-divorce plans regarding visitation, there is no way to enshrine this agreement in the divorce papers.⁸³ Some divorce guidebooks recommend creating a separate notarized agreement to get around this deficiency.⁸⁴ However, enforcing these agreements still requires action by the family court,⁸⁵ and judicial enforcement power is often insufficient to force the noncompliant party to

⁷⁶ Elkin, *supra* note 69, at 13.

⁷⁷ *Id.* at 14.

⁷⁸ Catherine Albiston, Eleanor Maccoby & Robert Mnookin, *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167, 177 (1990).

⁷⁹ Kawashima, *supra* note 64, at 2.

⁸⁰ ARICHI, *supra* note 13, at 263-64.

⁸¹ This can be accomplished by either submitting a form indicating one's will not to divorce when there is a fear that the other party may try and force divorce, or by filing a form within six months of divorce nullifying the divorce as against the will of one of the parties. ARICHI, *supra* note 13, at 263.

⁸² *Id.*

⁸³ Jones, *supra* note 14, at 229.

⁸⁴ TOYOAKI ISHIHARA, JYOSEI NO TAME NO RIKON KŌZA 109 (1990).

⁸⁵ Jones, *supra* note 13, at 229.

abide fully by their agreement.⁸⁶ For example, court fines for noncompliance are capped at ¥100,000,⁸⁷ and the court is not required to levy any fine given a finding of “justifiable cause” for noncompliance.⁸⁸ Courts are able to impose ongoing civil penalties against custodial parents who do not comply with visitation but are hesitant to use this tool out of a fear that it would impoverish the custodial household.⁸⁹ Not only does Japanese law allow divorce without proper planning, it is also ineffective at enforcing the agreements of parents who choose to create such an agreement.

IV. JAPANESE DIVORCE LAW NEEDS COMPREHENSIVE REFORM

Japan should reform its Civil Code to recognize visitation as a right for the noncustodial parent and allow parents to exercise joint custody over children. In addition, the *kyōgi rikon* system needs to be reformed to require the judicial oversight of parenting plans, and to create an effective mediation and enforcement system to resolve disputes. While these reforms target three separate areas of the law, it is important to pursue all of these changes as one comprehensive package. Part A will argue for changes to the Japanese custody and visitation laws. Part B will propose a series of reforms to the *kyōgi rikon* system. Part C will show how these three reforms are all necessary to effectively protect the rights of children.

A. *Japan Should Support and Expand Efforts to Reform Its Visitation and Custody Laws*

Japan should create a rebuttable presumption for reasonable visitation between the child and the noncustodial parent that is sufficiently flexible to account for the particular circumstances of each family. This would help provide a greater sense of balance in children’s lives, and will keep custody disputes from devolving into a “winner take all” contest with the children caught in the middle. To be effective, a presumption for visitation should mandate reasonable visitation consisting of unrestricted contact at least two weekends per month unless one parent can prove that it would be against the

⁸⁶ Kaji Shinpanhō [Domestic Causes Inquiries Act], Law No. 152 of 1947, art. 15 no. 5, 6 (Japan); Kawashima, *supra* note 64, at 6; Jones, *supra* note 14, at 248-49.

⁸⁷ Approximately US \$1200. As of May 10, 2011, the U.S. Dollar to Japanese Yen exchange rate was approximately 81 Yen to the Dollar. See Yahoo Finance, Currency Investing. <http://finance.yahoo.com/currency-investing> (last visited May 10, 2011).

⁸⁸ Kaji Shinpanhō [Domestic Causes Inquiries Act], Law No. 152 of 1947, art. 28 (Japan).

⁸⁹ MINPŌ [CIV. C.] art. 414; MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 172; Jones, *supra* note 14, at 250.

welfare of the child for the noncustodial parent to be with the child in an unsupervised setting.⁹⁰ These decisions must be made on a subjective basis in each case without entirely relying on unalterable schedules and guides.⁹¹

Japan should also create a preference for joint legal custody, while recognizing that joint custody arrangements are not appropriate for all families. A preference for joint custody does not rise to the level of a presumption, where joint custody is mandated unless one parent can prove such an arrangement would not be in the best interest of the child. However, it does create a broad policy assertion supporting joint custody arrangements and makes joint custody an accessible and encouraged post-divorce family arrangement.⁹² This policy would ensure that both parents retain a legal right to remain involved in their children's lives, while permitting the creation of individualized plans that can best protect the welfare of the child.

B. Kyōgi Rikon Reform Should Mandate Judicial Oversight and Parenting Plans

The *kyōgi rikon* system would benefit greatly from judicial oversight. This would allow a judge to look at the divorce terms and ensure that the terms are fair to all of the parties involved. Requiring parents with children to create a parenting plan is essential to this process because the plan could be used to enforce the custody and visitation reforms addressed above.

Requiring the parties in divorce to submit a detailed plan, especially with regard to their children, can reduce the potential for abuse in *kyōgi rikon*. The current system permits many divorces with no standing agreement on visitation or child support, creating the potential for further conflict and misunderstanding in the future.⁹³ The parties should be required to mutually draft a parenting plan and submit it to the court along with their divorce petition.⁹⁴ The judge would then be able to accept, reject, or modify the plan if it is incomplete or obviously unfair to one of the parties.⁹⁵

The parenting plan must clearly establish each parent's relationship with his or her children after divorce. These plans typically contain: 1) who will have custody and where the child will live; 2) when the child will see his or her parents; 3) who will pay what amount for child rearing; and 4)

⁹⁰ MACCOBY & MNOOKIN, *supra* note 72, at 288.

⁹¹ Younger, *supra* note 54, at 207-08.

⁹² EMILY M. DOUGLAS, MENDING BROKEN FAMILIES: SOCIAL POLICIES FOR DIVORCED FAMILIES: HOW EFFECTIVE ARE THEY? 117-18 (2006).

⁹³ Ueno, *supra* note 12, at 59-60.

⁹⁴ *Id.*

⁹⁵ *Id.* at 60 (judges will need additional training and guidance to help create a uniform standard for divorce).

who will make decisions about medicine, education, and religion.⁹⁶ As detailed as this may seem, there are other jurisdictions that allow for much more complex plans, such as the State of Oregon, which allows for determinations such as holidays, vacations, telephone access, and methods for resolving disputes.⁹⁷ These plans would not mandate shared parenting or joint decision-making but would require the parents to properly plan their post-divorce relationships.

Studies conducted in the United States show that parenting plans are very effective at facilitating post-divorce interaction.⁹⁸ One of the earliest studies looked at a revised law in Washington State and found that parenting plans significantly boosted shared parenting and joint residential planning among respondents.⁹⁹ A later Washington study, known as the *Lye Report*, found equal shared parenting agreements and shared decision making to be less frequent than the previous report, but recognized the value of the parenting plan itself and advocated for more detailed and structured plans containing a sturdy conflict resolution mechanism.¹⁰⁰ While these studies were not uniform in their results, they both show the value of a strong parenting plan that can serve as a baseline for future interaction.

Problematic enforcement mechanisms must be reformed to make parenting plans effective. Even if parenting plans were to become mandatory in Japan, it would do little good if they were not accompanied by a stronger enforcement mechanism. This needs to have a dispute resolution mechanism built into the document itself and have the backing of legal institutions that are willing to hold both parties to their agreement.¹⁰¹ These institutions need to be able to serve as an impartial third party mediator that will work with the parents to resolve disputes and issues of noncompliance as well as provide a stronger legal remedy in case this mediation fails.¹⁰² While there have been no thorough studies in the area, mediators have proven to be effective at defusing high-tension situations.¹⁰³ Requiring judicial affirmation and parenting plans, and actively enforcing agreements

⁹⁶ DOUGLAS, *supra* note 92, at 68.

⁹⁷ *E.g.*, OR. REV. STAT. § 107.102 (1997).

⁹⁸ DIANE N. LYE, WASH. STATE GENDER AND JUSTICE COMM'N AND DOMESTIC RELATIONS COMM'N, WHAT THE RECORDS SHOW: AN ANALYSIS OF RECENT PARENTING PLANS IN WASHINGTON STATE, (1999) (this is the most recent study on point); Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65 (1990).

⁹⁹ Ellis, *supra* note 98.

¹⁰⁰ LYE, *supra* note 98, at v-vi, 3-42.

¹⁰¹ DOUGLAS, *supra* note 92, at 75-77.

¹⁰² *Id.*

¹⁰³ *Id.*

would go a long way toward making *kyōgi rikon* more equitable for everyone, especially young children.

C. *Future Reforms Need to Address All Three Areas of Custody, Visitation, and Kyōgi Rikon*

With the help of citizen groups and private activists, the movement for joint custody and visitation rights has finally started to gain traction among Japanese policymakers.¹⁰⁴ On January 29, 2010, Takao Tanase, a lawyer and law professor who is actively advocating for legal reform of Japanese visitation and custody laws, brought a proposal before the Japanese House of Representatives for special legislation that would create a firm right to visitation, establish a joint custody system, and require divorcing parents to create a parenting plan.¹⁰⁵

Following Mr. Tanase's proposal, the Committee on Judicial Affairs has debated issues of custody and visitation on several occasions.¹⁰⁶ Speakers at these hearings raised many concerns about the current system, looking at the issue both domestically and internationally.¹⁰⁷ While there was a relative consensus that visitation laws were ripe for reform, Justice Minister Chiba shared some significant reservations toward adopting a joint custody system.¹⁰⁸ Her concerns were largely based on the argument that sole custody was better for the welfare of the child because it helped provide stability, and that most of the issues surrounding parental alienation can be solved through stronger visitation rights.¹⁰⁹ While the simple solution proposed by Minister Chiba may sound appealing, reform of the visitation system is not enough. All three relevant areas of the law, visitation, custody, and *kyōgi rikon* need to change to adequately protect the parent-child relationship after divorce.

An easy way to understand the integrated nature of these reforms is through a hypothetical family. This family is composed of a working father, a stay-at-home mother, and a young son. The father often does not come home until late at night, and the father's and mother's constant fighting leads

¹⁰⁴ See FATHER'S WEBSITE, <http://www.fatherswebsite.com/>; KYŌDŌ SHINKEN UNDŌ NETWORK, <http://kyodosinken.com/>.

¹⁰⁵ TAKAO TANASE, RIKONGO NO KYŌDŌ YŌIKU NARABI NI OYAKO KŌRYŪ WO SOKUSHINSURU HŌRITSU (DAI 3A AN) (2010).

¹⁰⁶ COMMITTEE ON JUDICIAL AFFAIRS, 174TH DIET, MINUTES, 12th Meeting (Mar. 9, 2010), 21st Meeting (April 16, 2010), available at http://www.shugiin.go.jp/index.nsf/html/index_kaigiroku.htm.

¹⁰⁷ *Id.*

¹⁰⁸ COMMITTEE ON JUDICIAL AFFAIRS, 174TH DIET, MINUTES, 12th Meeting (Mar. 9, 2010), available at http://www.shugiin.go.jp/index.nsf/html/index_kaigiroku.htm.

¹⁰⁹ *Id.*

to a straining of their relationship and eventually divorce. Under the current law, the statistics show a high likelihood that the mother would get sole custody over their son, and that the father would only be able to visit his child about one day per month.¹¹⁰

If the visitation system alone was reformed, as Justice Minister Chiba suggested, the father would probably lose all parental rights and responsibilities, and the son would lose the security and stability of retaining both parents under the law. In addition, the parents would still not be required to make any sort of agreement on how they will continue to care for their child following divorce, and a judge would never have an opportunity to verify that their agreement conforms to the standard of reasonable visitation.

If the custody system alone was reformed, the father would not have any guaranteed right to joint custody or visitation. There is still a chance that the father could lose contact with his son if the mother is strongly opposed to a joint custody arrangement. Also, without reform of *kyōgi rikon*, a judge would never have the opportunity to verify whether the rights of both parents and their son are all sufficiently protected through an enforceable parenting plan.

If the *kyōgi rikon* system alone was reformed, the courts would likely be hesitant to award the father anything more than one day of visitation every month, and could even deny visitation if the mother was firmly opposed. This option also fails to provide a way for the father and mother to share custody, even if the parents desire to share custody over their son. This might even drive a larger wedge between the father and mother if they both try to claim custody over their son.

The Japanese Diet¹¹¹ has shown an interest in starting the process of reform, but current proposals look to be too limited in scope. In October 28, 2010, the House of Representatives announced it had reached a nonpartisan agreement to draft legislation protecting the visitation rights of the noncustodial parent.¹¹² However, this legislation has yet to be drafted, much less passed into law, and the announcement only talked about visitation reform without addressing joint custody and *kyōgi rikon* issues. While this

¹¹⁰ 2009 COURT STATISTICS, *supra* note 24.

¹¹¹ The Diet is the legislative branch of the Japanese government, and is composed of the lower House of Representatives and the upper House of Councilors. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 41-42 (Japan).

¹¹² *Chotōha Giinga Shinhō Jyunbi—Rikonshita Chichioyoni mo Kodomo Awasete [Bipartisan Lawmakers Preparing Legislation to Allow Divorced Fathers to Visit Their Children]*, THE SANKEI SHINBUN (Oct. 29, 2010), <http://sankei.jp.msn.com/politics/situation/101029/stt1010290130000-n1.htm> (last visited Jan. 4, 2011).

is certainly a step in the right direction, effective reform will need to be comprehensive.

V. CONCLUSION

This comment has made three proposals to reform the Japanese family law system relating to visitation, custody, and the *kyōgi rikon* divorce system. These three reforms rely on each other to form a comprehensive whole. Japanese lawmakers have already taken the first few steps down this path, but change will be long and difficult. Any significant change will need to overcome tradition and decades of legislative inaction. Social attitudes will need to evolve with the text of the law itself, and this will require tailoring solutions to specific Japanese social considerations.

Successful reform will not be measured by the text of any new law but rather in that law's ability to protect the relationship between parents and children.¹¹³ The proposals in this comment are not the only way forward, and it is important to consider all options when creating new standards for divorce, custody, and visitation. However, research establishes the fundamental importance of the parent-child bond,¹¹⁴ and any new law must take all reasonable measures to protect this relationship with both parents. Reform must be based on this fundamental premise if it is to spare the next generation of children from inadequate protections and allow them to receive stable and continuous love and care from both of their parents.

¹¹³ DOUGLAS, *supra* note 92, at 109.

¹¹⁴ *See supra* Part III.A.