

DRAFT

Marbury v. Madison and *The Matrix*: What Child Custody and Visitation in Japan Show us about the Japanese Court System¹

Colin P.A. Jones²

I am going to start with the proposition that Japanese family law proceedings are subject to entrenched and systemic discrimination based on gender and race. In some cases such discrimination appears so prevalent that it even supercedes clear statutory mandates to the contrary, without giving rise to even a hint of cognitive dissonance on the part of those who administer the system.

Racial discrimination has been revealed in the field work conducted by Professor Taimie Bryant in her field work in family courts in the 1980s and the 1990s, which showed that Japanese parents were generally preferred in custody awards, and that family courts were incapable of considering the non-Japanese aspects of a mixed race child's heritage in making such awards.³ This discrimination is most apparent in the recurring news items about foreign parents whose children have been abducted back to Japan by a Japanese parent; the Family Court system never provides any sort of relief in such situations. And while most Japanese lawyers or legal scholars will likely advise that the police will not get involved in family matters, and that the custody of a child is a delicate matter that requires the considered involvement of the expertise of the Family Court system, if you are a foreigner trying to leave Japan with your half-Japanese child, the police may arrest you under a statute originally intended to prevent prostitution, and summarily hand the child back to its Japanese parent, all of the foregoing niceties ignored.⁴

¹ An earlier version of this work was originally prepared for presentation at the October 2005 Japan Law Workshop at the University of Washington School of Law and is derived from "*In the Best Interests of the Court: Child Custody and Visitation in Japan: What American Lawyers Need to Know*" (working title), a work in progress by the same author. For the sake of brevity, some citations (particularly those to the same source) have been omitted or abbreviated.

² Associate Professor, Doshisha University Law School. A.B., U.C. Berkeley 1986; LL.M., Tohoku University 1990; J.D. and LL.M., Duke University School of Law.

³ Taimie Bryant, *Vulnerable Populations in Japan: Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1 (1995).

⁴ Article 226 of the Penal Code (Abduction or Enticement for Purposes of Removing from the Country) is the statute involved, and the foreign father's conviction under it was

The gender-based discrimination – against men – is apparently so accepted that it is rarely commented upon (indeed, it is institutionalized in the form of various statutory benefits schemes available only to single-parent households headed by women). Despite a constitutional requirement that family laws be gender neutral, and a family court procedural statute which reiterates this point, Japanese courts have created a preference for maternal parents that results in mothers being awarded sole custody in the vast majority of litigated divorces.⁵ This attitude may be reinforced by manuals for family court personnel – manuals which also reiterate the “fundamental equality of the sexes” that is a statutory foundation in family court proceedings - that mothers are priceless presence and that absent special circumstances, custody should always be given to the female parent.⁶ Fathers, apparently, are disposable.

The laws of divorce have long been developed and interpreted by Japanese courts for the benefit of women.⁷ Some observers go so far as to characterize the whole system as being “designed for women.”⁸ Until 1987 the Supreme Court of Japan (“SCJ”) interpretations of the Civil Code made it virtually impossible for the spouse “at fault” to obtain a divorce without the consent of the other spouse. This was intended to protect “innocent” wives from being unilaterally divorced by their husbands. Even now, the system is often administered in a manner which gives leverage to wives to enable them to obtain at least minimal financial protections when seeking a divorce.

appealed all the way to the Supreme Court of Japan (“SSCJ”). KEISHŪ (S. Ct., Mar. 18, 2003.) Article 226 of the Penal Code was amended in 2005 so that it covered removals of a person not just from Japan, but from whichever country in which they are located.

⁵ There may be nothing uniquely Japanese about such a result when compared to western jurisdictions, though the absence of a joint custody in regime doubtless renders custody battles much more of a zero-sum proposition than they are in many U.S. states, for example.

⁶ See, Takao Sato, *Shinken shitei/henkō no kijun*, GENDAI KAIJI CHŌTEI MANYUARU 219-223 (2002). In fact, this is the only standard articulated in this chapter. Even this standard is based on clear gender role assumptions: that it is preferable that a child be directly by its mother, rather than by the paternal grandparents of a working father. Since most Japanese mothers in a single-parent household work, and some even have their own careers, this may simply equate with a preference for maternal grandparents or an unrelated caregiver hired by the mother.

⁷ See, e.g. Harald Fuess, *DIVORCE IN JAPAN* (2004).

⁸ Hiroshi Yamaguchi, *RIKON NO SAHŌ* at 69 (2003).

This is not necessarily a bad thing: there is no formalized system for calculating or awarding ongoing alimony, it is often difficult for wives to obtain the 50% share of marital assets they are technically entitled to, and statistics for child support payments are dismal.⁹ With respect to the financial aspects of divorce, therefore, the system may appear to discriminate against women. The result, however, is a system which encourages (or “necessitates”, depending upon your point of view), one parent to use whatever leverage –including access to children – that can help to obtain a financially beneficial divorce. And what improvements are being made to the system are being directed primarily towards strengthening the position of women.¹⁰ That divorce is primarily for women and (to the extent it involves the legal system) as such is primarily a matter of financial concern is illustrated by the fact that three of the ten best-selling books on divorce law on Amazon’s Japanese web site were books devoted exclusively to the financial aspects of a divorce and written specifically for women.¹¹

That divorce is primarily a system for women is further illustrated by the simple fact that the great majority of divorces -80-90% by some estimates –are initiated by women. Because the possibility of losing custody (or even all contact) with their children is not a factor that women contemplating divorce have to take into consideration, the law in this area is not well developed, probably because it does not need to be – Mom gets custody, end of story.¹² Custody awards are made taking into consideration “the best

⁹ A recent Ministry of Health, Welfare, Labor and Welfare survey shows only 34% of divorced mothers having any arrangements for child support payments. Given the enforcement issues involved in child custody payments, it is reasonable to assume that an even smaller number actually received all or a portion of the agreed child support.

¹⁰ For example, recent amendments to civil enforcement laws have been made to make it possible to garnish wages for child custody payments. Similarly, an amendment to pension laws coming into effect in 2007 will entitle divorcing wives to 50% of their husband’s pensions.

¹¹ Ryoko Tanaka, *JOSEI NO TAME NO RIKON NO MANĒGAKU* (2004) and Toshie Otagawa & Rikon to okane wo kangaeru kai, *RIKON DE SON WO SHINAI TAME NO ONNA NO OKANE BOOK* (2003). Based on a September 2005 search. Another of the top ten books is also clearly directed almost exclusively at women readers, being about how to collect child support under the new enforcement laws. Terue Arakawa & Tomiko Sakakibara, *YŌIKUHI KYŌSEI SHIKKŌ MANYUARU* (2004). This being Japan, one of the top ten books was a *manga* guide to divorce.

¹² Indeed, despite being a chapter on standards for awarding custody in a manual for family court practitioners, the *only* criteria clearly expressed in the article cited in Note

interests of the child”, and everyone in the court system seemingly knows what that means, even though it is not a consideration in the 90% of cooperative divorces that take place without any involvement whatsoever from the court system.¹³

What is missing from a determination of the best interests of a child in the case of parental divorce or separation, however, is any clearly enunciated notion that ongoing and continuous contact with the non-custodial parent is a core part of these interests. Although the U.N. Convention on the Rights of the Child (of which Japan is a signatory) reflects this concept by requiring member nations to provide for ongoing contact between parents and children who are separated by legal process, Japan does little to fulfill these obligations. There are no provisions in the Civil Code or any other statute providing for visitation, and as shown below, the SCJ has been reluctant to accord visitation any status other than as a procedural disposition. As a result, the status of visitation in Japan is, simply put, dismal.

Visitation requires weeks or months of family court mediation before a court will even rule on it, and is generally only awarded if the custodial parent agrees to it.¹⁴ Since it does not appear to be awarded as an interlocutory remedy, even if it is ultimately realized, it will be preceded by months of mediation (and possibly litigation) during which time the custodial parent is free to completely deny all access to the non-custodial parent. Indeed, denial of access is possible (even recommended by practitioners) even before divorce proceedings are complete and while the non-residential parent is still theoretically vested with full custodial rights under law (which suggests that they are not in fact rights at all).

5 is that mothers should always be given custody absent extraordinary circumstances.

¹³ While this will need to be the subject of future research, I believe that the significance of this 90% figure can be easily and mistakenly referred to as an indicator of the value placed on consensus and dispute avoidance in Japan. While this may be true for some divorcing couples, the statistic may also reflect a significant number of people who, being aware of the limited utility of the family court system in achieving goals such as visitation, choose to give up and agree to a consensual divorce rather than wasting time and energy on proceedings that ultimately prove futile.

¹⁴ Or, as I suspects may often be the case, the court determines that the custodial parent will comply with an order of visitation.

And yet, visitation receives only limited attention from legal scholars and practitioners. There are virtually no books on the subject, and it generally receives one or two pages of treatment at best both in academic texts on family law and divorce handbooks written for general readers. Illustrative of this lack of interest is a recent popular book on children's rights written by a leading female Japanese lawyer. With around 200 pages in Q&A format on various subjects relating to the rights of children in Japan (*e.g.* “do my children have to sing the national anthem at school?”), this book contains two pages regarding the rights of children in divorce, of which a three sentences is devoted to visitation.¹⁵ The paucity of interest suggests that while divorce *is* an issue of importance for women, visitation is not, at least to the extent that it is necessary to retain contact to ones children. The frequency of visitation that is deemed acceptable (about once a month, or *three times a year*, suggests one female lawyer to her female readership),¹⁶ and the total lack of focus on quality (while one or two times a month is a common pattern where visitation is allowed, this may include merely being allowed to see the child, or spending an hour together in a restaurant in the presence of Mom and possibly her lawyer)¹⁷ also suggests that visitation is usually Dad's problem.

Furthermore, one of the fascinating things about much of the writing on visitation is this: although the criteria for awarding visitation again reflect the conveniently vague “best interests of the child” standard, there are extremely detailed criteria as to when visitation can be terminated, limited, or not awarded at all.¹⁸ Some are obvious (being a drunkard, being violent to the child), but others are quite subjective: bad-mouthing the other parent, using visitation to try to renew the marital relationship, and “other conduct that is against the best interests of the child” – even buying expensive presents, are given in professional literature and popular guides

¹⁵ Yukiko Yamaguchi, KODOMO NO JINKEN WO MAMORU CHISHIKI TO Q & A, 145 (2004)

¹⁶ Kurumi Nakamura, RIKON BAIBURU 199 (2005).

¹⁷ That seeing your father in such circumstances may be highly stressful for the child, causing the child to ultimately refuse to participate, thereby resulting in grounds for termination of visitation hopefully seems obvious, yet never seems to be commented on by Japanese writers.

¹⁸ See, *e.g.*, Daiichi Tokyo Bengoshi kai, KODOMO NO UBAIAI TO SONO TAIŌ 28-29 (2002).

as reasons for terminating or restricting a non-custodial parent's visitation rights (tellingly, these same criteria do not also feature as grounds for termination of custodial rights). The most effective method of terminating visitation, however, appears to be to not agree to it in the first place. Since *kattō* (*feuding*) between the parents is itself grounds for terminating or denying visitation, yet is a state of affairs which surely must apply to most situations where one parent has been denied access to his own children for months on end, denial of visitation can it seems be achieved merely by being stubborn.¹⁹ In fact, apparently any excuse will do if visitation can be deemed to interfere with the upbringing of the child by the custodial parent.²⁰ I have met one Japanese father whose visitation was terminated on the grounds that the thought of him seeing his children made his ex-wife physically ill.

Having set out the reasons why the Japanese legal system seems guilty of open and invidious discrimination in the field of child custody and visitation, I will now explain why I do not think that actual discrimination is the primary factor. I believe that principle reason why the system generates the results it does can be explained by issues of enforceability.

Enforceability, or the lack thereof, is key to understanding family law and probably many other aspects of the Japanese legal system. As noted by John Haley, Japanese judges lack contempt powers or other equitable tools to enforce their decisions.²¹ “*Saiban no himitsu*”, a popular book about civil litigation co-authored by lawyer Hiroshi Yamaguchi, contains an entire chapter about enforceability entitled “Finally, you Got a Judgment! But the Judgment is only Good for Wiping your Ass.”²² And a Japanese judge has

¹⁹ As with many of the things written about the welfare of children by legal scholars and practitioners, this concept has a pleasing superficial reasonableness to it – of course children should not be exposed to feuding parents. Yet it ignores the bigger picture, *i.e.*, the courts apparently have no issue with such feuding if the parents remain married and living together. In essence, the family courts are unable to imagine that divorce might actually be better for children in some situations.

²⁰ Sadly, this is in keeping with the SCJ's interpretation of visitation as simply being one of the things that a family court can order in connection with making dispositions for the physical custody of a child under Section 766 of the Civil Code.

²¹ John Haley, *AUTHORITY WITHOUT POWER* 118 (1987).

²² Hiroshi Yamaguchi & Takahiko Soejima, *SAIBAN NO HIMITSU* 45-74 (2003).

recently written a book showing (albeit without intending to do so) how Japanese courts deal with the issue of enforcement in lawsuits involving government conduct – by ruling in favor of the government on procedural grounds while criticizing its conduct in dicta.²³ Many rulings of unconstitutionality are actually generated in this fashion. For example much of the press around a recent Osaka High Court ruling that Prime Minister Koizumi's visits to the Yasukuni Shrine were an unconstitutional violation of the separation of church and state ignore the fact that the plaintiffs actually lost (their claim was thrown out on the grounds that they had not suffered any actionable damages).²⁴ Such rulings show the court system as being an active part of government and society while at the same time making it possible to explain why judicial determinations are so often freely ignored by other branches of government.²⁵

The situation in family courts is worse. Family court orders are widely acknowledged as being unenforceable and what remedies are possible can often easily be defeated by simple expedients such as not telling your child's father your address, keeping your bank account information secret, or not having significant assets subject to seizure. Even when a child is wrongfully taken by one parent, it is generally regarded as impossible to directly enforce an order for the handover of a child that is subject to a custody dispute (I met one mother whose effort to enforce such an order was defeated by her child's kindergarten teacher, notwithstanding the participation of a court enforcement officer). Since the police rarely get involved in family affairs, the parties are generally on their own when it comes to enforcement. Child support awards have traditionally been difficult or impossible to enforce, though recent amendments may change this.²⁶ Orders to hand over a child are difficult or impossible to enforce. And what is true for orders to hand over children to their legal custodian can only be more true for visitation, which is also widely acknowledged to be

²³ Kaoru Inoue, *SHIHÔ NO SHABERISUGI* (2005).

²⁴ These rulings have the added benefit of being unappealable.

²⁵ Mr. Koizumi has already indicated his intent to ignore the ruling.

²⁶ Which might explain why family court mediators will often suggest a lump sum child support payment, thereby removing the court from involvement in ongoing non-payment issues.

almost completely unenforceable.²⁷

Those working for the family courts are of course aware of the fact that their orders can be ignored with relative impunity. It would be unsurprising, therefore, if they sought to structure the results of family court litigation in a manner which both preserved the apparent authority of the court system, and rendered their own individual contributions to the system meaningful. As a result, a great deal of what family courts do is simply rationalize and ratify the status quo. Sometimes this is characterized as the courts being “conservative,” but more likely it is simply a reflection of their inability to do anything else. Status quo ratification also has the added benefit of minimizing the court’s work load, and it must never be forgotten that case management ability can play a key role in the success of a judge or other court personnel within the judicial bureaucracy.

This would explain why family courts are reluctant to grant visitation when one parent is opposed to it. Why order visitation when it will result in complaints and further demands for action when it is denied? It would also explain why the status quo of the child *prior* to litigation is apparently never considered when making custody determinations, despite the fact that in many instances one parent will have unilaterally removed the child from the home he or she grew up in, relocated geographically, put the child into a new school and unilaterally terminated contact with the other parent prior to commencing divorce proceedings. These considerations apparently *never* factor into custody determinations, again, possibly because there is nothing the court can do to reverse the situation.

Preservation of the stature of the court system in the face of its powerlessness is certainly the only thing I can think of to explain the ludicrous case of Samuel Lui whose child was abducted from California by its

²⁷ Occasionally parents are able to obtain damages in tort against a parent who has interfered with court-ordered visitation. Whether these awards are enforceable is another matter, of course, and based on my own discussions with Japanese parents a common tactic on the part of the custodial parent is to offer to allow visitation in exchange for dropping the suit. Once the suit is dropped, visitation is again denied requiring an entirely new lawsuit.

Japanese mother.²⁸ The validity of his California custody award was confirmed all the way up to the SCJ while at the same time his request for *habeus corpus* proceedings to hand over the child were being denied by the same court system. He was ultimately able to receive an order awarding him three hours of visitation *per year* on the grounds that he was the custodial parent. Finally he was forced to concede custody in exchange for minimal visitation rights. His California court order and its endorsement by Japan's highest court ultimately proved meaningless.

Enforcement issues would also explain why, after years of academic debate and split decisions on whether visitation was a right of the child, of the parent, both or something else, the SCJ issued a decision declaring it to be a right of nobody at all, but rather a right to request a family court to make an appropriate decision under Article 766 of the Civil Code in connection with the physical custody arrangements of a child. In effect the SCJ determined visitation to be a right of the court system, a prerogative to be conferred on parents who have already agreed to it or who otherwise promise to play nice.²⁹ In an explanatory memo, an SCJ official noted that were visitation to be determined a right of a parent or child, there might be constitutional issues every time visitation was terminated!³⁰ Think about that: visitation is not a right because if it were, it couldn't be terminated so easily. But this makes perfect sense if the interests of the court system in preserving its authority are paramount to the preservation of the parent-child relationship. Visitation thus retains significance as a legal right only to the extent that it can be terminated: termination of visitation is, after all, something the court system can do entirely through internal procedures, without involving any outside parties or giving enforcement issues. The ease with which visitation can apparently be terminated or

²⁸ An account of Mr. Lui's tragic encounter with the Japanese family law system, together with many other similar accounts, can be found at www.crnjapan.com.

²⁹ Since there is no way to provide for visitation in a cooperative divorce (no space on the form!), parents seeking to formalize visitation arrangements must go through the formal family court mediation proceedings to obtain the necessary court order. The SCJ has announced that it is not negatively disposed to endorsing visitation in such cases (*i.e.*, where enforcement will not be an issue).

³⁰ A description of the SCJ case in question, together with the complete text of the SCJ's explanatory memo can be found in Taichi Kajimura, RIKON CHÔTEI GAIDOBUKKU, at 170-177 (2003).

denied thus also makes sense in this light.

In any case, once it is understood that the family court system will in most cases simply ratify and rationalize a status quo (no matter how recent), many of the aspects of its workings that appear discriminatory cease to be so. Because women initiate most divorces, they will naturally be in the best position to create a new status quo. The same applies to Japanese parents as compared to non-Japanese parents, particularly in cases involving parental abduction back to Japan.

Some both inside and outside of Japan may be tempted to attribute a great deal of what I have just described to “culture”. Explanations such as: “Japanese people treat children like property” and “traditionally one parent disappears after divorce” are not uncommon in writing on the subject by both Japanese people and by foreigners. After all, what can be more central to culture than family? Nonetheless, my own view is that culture (whatever that is) should be rejected as a factor, in the first instance at least. First, for the simple reason that the way family courts deal with children does not present a very attractive picture of Japanese culture. Second, everything about the way the system functions now is radically different – in some cases the exact opposite - of the way it did fifty years ago (when custody almost always went to fathers) or a hundred and fifty years ago (when some parts of Japan had a divorce rate similar to the United States in the 1980s), suggesting none of what is generated by the current system is actually very “traditional.”³¹ Third, to paraphrase one Japanese father I have talked with who had not been able to see his children for years, “because courts have for such a long time done nothing to make it possible for father to see their children, it has supposedly become a cultural norm that we are supposed to watch our children from the shadows after divorce.”³²

³¹ In any case, changing historical trends in custody award – to fathers in the “old days”, to mothers in more recent times, is a feature of most western legal systems also.

³² Language from an early case in which visitation was denied suggests the attitude expected of men. *“We judge that it will be best for the child that the [parent] pray from the shadows for his healthy upbringing... If worried about the child, ask about him through others, secretly watch him from behind a wall, and be satisfied with what is heard about the way he is growing up. Acting in accordance with [parental] emotions, even if they are based on [parental] love, will cause the child misfortune. Suppressing [parental] emotions for the sake of one’s child at the times when then should be*

Fourth, and most importantly, as I have tried to show, I believe a great deal of how family courts function in child custody and visitation proceedings can be understood from the standpoint of the court as a bureaucracy doing what is necessary to preserve its stature with limited tools for doing so. To overstate it slightly, I believe that much of the functioning of family courts can be explained by the seminal U.S. Supreme Court Case, *Marbury v. Madison*, *i.e.*, the judge's dilemma of how to deal with a case where you know that one of the parties will ignore the results of your decision to the detriment of your credibility, and that there is little you can do about it. This is a dilemma which Japanese family court judges have to deal with on a daily basis.

Once a party realizes that submitting to the authority of family courts is largely optional, the situation can become like the movie *The Matrix*, when the main character discovers he has been living inside an artificial, computer-generated world. The realization allows him to go back into that world yet ignore most of its rules, which gives him seemingly superhuman powers. Seizing your child by force and creating a new status quo becomes an effective means of gaining sole custody, even if you are a father, and particularly if you do it before divorce. Here the results can be tragic for women and men alike. I interviewed a Japanese woman who had agreed to a consensual divorce that gave her custody of their child. Her ex-husband, however, refused to give the child to her. She went to family court, there was mediation, and her status as custodian was confirmed after proceedings that took many months and went all the way to the SCJ. Her husband persisted in refusing to hand over the child. She sought visitation, and ultimately had to give him custody as well as agree to significant child support payments in exchange for visitation, visitation that he began refuse to allow almost immediately after the family court proceedings necessary to formalize these agreements were complete. All of this took place despite clear rulings in favor of the mother throughout the proceedings, and despite the father being violent and having openly threatened her in front of a family

suppressed, that is the true love of a [parent] towards a child.” Family Court Cases 18-7-30, Tokyo High Court, December 8, 1965. Except that in this case, the parent being denied visitation was the mother, suggesting that the “traditional” expectations of fathers in divorce have only been recently formed.

court panel. When I interviewed her, her husband had recently offered to renew visitation in exchange for increased child support payments. Since her son was only one year old at the time of the divorce, her hope is to at least have him remember what his own mother's face looks like. However, even that simple wish may be impossible, and the family court system apparently can do nothing to make it come true, despite having been involved and ruling in her favor throughout.

Because this scenario reflects the sad realities of the Japanese system, custody cases can deteriorate into a vicious downward cycle which the involvement of lawyers (who are aware of the system's limitations) only exacerbates. Mom moves out with the kids and files for divorce. Mandatory mediation ensues. Dad seeks visitation. While Mom might actually be disposed towards allowing visitation, her counsel will probably advise against it – if the visitation becomes an opportunity for Dad to “take possession”, Mom may lose custody, as well as a valuable bargaining tool in the financial aspects of the divorce, and Mom may blame the lawyer for this result.³³ After months of being denied contact with his children Dad, who may actually have been disposed to allow his ex-wife to have custody, may come to view abduction and seeking custody based on the *fait accompli* as the only way to maintain a relationship with them. His lawyer may even advise him accordingly.³⁴ If it is an only child (as is increasingly the case in Japan), child custody rapidly becomes a completely zero-sum dispute. During this time, the court is unlikely to order provisional visitation, since it will not want to be blamed for any inadvertent transfers of possession that result. That none of this has anything to do with a child's interests is hopefully obvious.

Family court proceedings will chug along at their own pace: possibly by the end of them the court will consider visitation, but by this time the

³³ For example, Lawyer Kurumi Nakumara (*supra* note 15) suggests that in most cases her preference would be for disallowing visitation until the divorce is settled.

³⁴ In a popular book on the sad realities of divorce in Japan, lawyer Hiroshi Yamaguchi writes of such action as being the one sure way of becoming custodian, though notes that it is a course he could not be involved in as counsel, and that it should only be relied upon in extreme cases, such as where a mother is being abusive yet the court system has not noticed. Hiroshi Yamaguchi, *RIKON NO SAHŌ*, at 120-123 (2003).

children may have been completely alienated from Dad and not want to see him, which will enable the court to further enhance its authority by declaring this status quo – no visitation - to be in the best interests of the child. Dad loses all contact with his children – what one western practitioner has called a “civil death sentence” – as the result of secret proceedings where there have been no oral arguments, no opportunity to cross-examine the other party, no opportunity to have an independent custody evaluation conducted, and at which the judge himself may not have been present. Some may consider this result to be a reflection of culture. I believe it is mostly the sign of a bureaucracy that has limited tools with which to accomplish its mandate. What else can be said about a system which not only displays little awareness of the dynamics of parental alienation, but in effect rewards it in some cases?

This is not to say that culture (and discrimination) does not play a role in family court proceedings. If one accepts the authority of the family court system (“taking the red pill,” in my *Matrix* analogy), it will function in its own idiosyncratic way, which may include blatant discrimination on the part of its actors.³⁵ However, these idiosyncrasies are more likely to be a matter of luck – the notions of what constitutes a “good” family environment held by individual judges, mediators and other court personnel are randomly assigned to a given case.³⁶ When trying to understand what these notions might be, one is struck by three things. First, how little formal guidance in the form of statutes or regulations there is on the subject of how a child’s welfare is gauged. Second, how much such determinations are a matter of the absolute administrative discretion on the part of individual judges, mediators and investigators, operating within the context of proceedings that are secret, and the records to which are not freely accessible even to the parties participating in them.

³⁵ Family court proceedings are secret, but some books on divorce contain anecdotal accounts of discriminatory conduct on the part of judges and mediators, including one in which a male judge as tells a female party “if my wife got uppity, I would smack her too.”

³⁶ At least now visitation has come to be fairly well established as a part of family court proceedings. Japanese fathers who have been attempting to change the system for many years now tell me that visitation used to be truly a matter of luck – whether the judge assigned to your case believed in it or not. Even now there are supposedly a few judges who are infamous for never awarding visitation.

Third, how there is virtually no formal mechanism for representing the family values of the average Japanese person anywhere in the proceedings. Other than the parties themselves, of those whose views of the family can affect the results of the proceedings - judges, mediators, family court investigators and other personnel - *all* are chosen, trained, promoted and rewarded according to rules, criteria and structures established by the SCJ bureaucracy, with virtually no mechanism whereby average citizens or their representatives can participate in articulating what commonly accepted “Japanese” family values will be endorsed by the court system. Thus, to the extent that Japanese courts reflect any sort of cultural values about the family, they cannot said to be representative of Japan as a whole, and are more likely to be values of the court bureaucracy. This suggests that the Japanese court system may continue to be viewed as irrelevant by a significant portion of the Japanese population for years to come. Not because of any cultural aversion to litigation, but because the court system neither reflects the values of the average person, nor functions as a useful tool in solving their problems. The sad reality is that the court system will not make it possible for you to see your child or have your child remember your face. Individuals who have made that terrible realization will probably not expect much of the court system in other areas of their lives either.

Shortly before I wrote this piece, an item of news appeared on the television. A man had been arrested for forcibly bringing his 9 year old from Kyushu where she lived with his ex-wife, who had sole custody. The case struck me as unusual for two reasons. First, because it is so rare for the police to get involved in such matters. Second, and more importantly, because the man in question was a lawyer and former judge. He committed the alleged crime in the midst of ongoing litigation over custody, according to one account, on a day when family court mediation proceedings for visitation were scheduled. That a former insider resorts to such a course of action may be instructive as to what a regular person may come to expect from the court system when it comes to protecting the parent-child relationship: not very much.

DRAFT