

Children's rights, private law and criminal law perspectives of parental child abduction

Written by Fanni Murányi, who will defend her PhD on Children's rights, private law and criminological perspectives of parental child abduction at the Eötvös Loránd University (expected in 2024).

In this short summary of her research, Fanni highlights her conclusions on the role of the child's views in abduction cases and the link between international child abduction and criminal law. She considered the legislative frameworks of the Hague Child Abduction Convention of 1980, the Brussels IIb Regulation (2019/1111) and the UN Convention on the Rights of the Child (UNCRC). She also investigated as well as the role of (domestic) criminal law.

The child's views

When a child is abducted by one of their parents, the child finds himself or herself in a very stressful situation. Even though the relevance of the child's views in these cases may be limited, listening to abducted children becomes increasingly important. As the Brussels IIb Regulation attaches even greater importance to the hearing of the child than the previous Regulation (2201/2003, Brussels IIa) did, more attention is needed. Children have the right to be given an opportunity to be heard (Art. 12 UNCRC, echoed by Arts 21 and 26 Brussels IIb). In the hope of presenting a nuanced picture of the European practice on child's involvement, Hungary and the Netherlands were compared. My empirical research is based on interviews with four Dutch and four Hungarian judges. Hungarian case law shows that - similarly to the European practice - the hearing of children by judges is typical in parental child abduction cases. This was also confirmed by the interviews. As there is no age barrier for hearing children in abduction cases, the Hungarian judges have multifaceted tasks. There is a demand for special training and for an assisting person, but the current form of *guardian ad litem* is not being used. In the Netherlands the court appoints a *bijzondere curator* for children three years of age or older. The *bijzondere curator* hears and accompanies the child and explains the court's decision if required. If supported by the *bijzondere*

curator, children six years of age or older are heard by one of the judges of the full court as well. The interviews conducted with Dutch judges confirmed that the *bijzondere curator* greatly helps assessing the child's maturity and understanding the child. All judges expressed the difference between the hearing by a *bijzondere curator* and by a judge in the same way: time and expertise.

Although the involvement of children in mediation is improving, the way in which a child's voice can be included is also controversial. Neither the Hague Abduction Convention, nor the Brussels IIb refers to the hearing of the child in mediation, but the latter clarifies the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject. In the Dutch model, the so-called *pressure cooker model*, integrates mediation into the schedule of the court proceeding. The mediation programme consists of three 3-hour sessions in the course of two days. The sessions are co-mediated by two mediators and on the first day of the mediation, the child is interviewed by a third mediator, a child psychologist. The child must be three years of age or older and both parents must consent to the hearing.

International child abduction and criminal law

If the court orders the return of the child to a country where parental child abduction is severely punished, the abducting parent has two potential routes permitted by law. The first is returning to that country with the child and being imprisoned for abducting. The second route is not returning with the child, avoiding these serious criminal consequences, but leaving the child alone with the left-behind parent. This shows that in countries where parental child abduction is severely punished, the return order might cause a separation between the parent (often the primary caretaker) and the child. Such separation might be a violation of Article 9 of the UNCRC (i.e. the right of the child not to be separated from the parents against their will).

Currently, there is no uniform criminal law definition of child abduction in the European Union. The types of punishment envisaged and the age of children involved in the offences vary widely. Thus, the act of the abducting parent may not be considered a crime in one country, while thousands of kilometers away it can lead to imprisonment for several years. The criminalization of abduction can be considered effective in searching for missing children, but the civil and criminal sanctions are unlikely to deter many potential abductors.

Allegations of domestic violence have often been raised as a defence in child abduction cases: the Hague Child Abduction Convention provides for a court to refuse to order the return a child if the return would pose a grave risk of exposing the child to physical or psychological harm or otherwise place the child in an intolerable situation (Art. 13(1)(b)). If the court rejects this exception and orders the return of the child to a country where parental child abduction is punished, the abducting parent as a *victim* of domestic violence may become a *perpetrator* of a crime. There is a real concern that primary caretakers are required to choose between returning with the child to an environment where they would face a real risk of violence, and refusing to return so that the child would have to cope with a new situation. In either case there is a real risk of harm to the child.