

## CHILDREN ABDUCTION IN CASE OF SEPARATION AND DIVORCE

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### 1. Introduction

The problem of children abduction during a divorce or a separation, seems to be the extreme limit of the turmoil which characterizes the judicial proceedings.

As often happens, parents involved in a separation consider this fact as a war with winners and beatens; they can also come to think that it is “right” to realize the kidnapping of a child, though for him it’s a very traumatic experience that can also involve penal and civil issues. (art. 388, 573 and 574 penal code).

Using the terms “parental abduction” we want to indicate the unilateral and voluntary decision to take away the child from the other parent, with the intention to hide and keep the child permanently.

There are many different kind of children abduction, with different characteristics.

- a) The first case consists of the illegal transfer of the child in a different country from the one he usually lives by one of the parents without the assent of the other and without a previous judicial decision. Under this hypothesis can stand both the case of the *victim* parent who has the custody because of the law, the case in which the *victim* parent virtually has the custody, and, in the end, the case in which the kidnapper goes abroad with the child to take some kind of advantage from foreign laws regarding the custody.
- b) The second case consists of the abduction after that a judge in a Country has formally given the custody to one of the parents; for example the child can be kidnapped and taken in another Country in which there’s no official sentence about the custody, or can be kept in a different Country from the domicile one longer than the time that the judge gave for the parental visits.

- c) In the end, could happen that the parent without the custody abducts the child and takes him abroad, violating not only the sentence about the custody, but also a sentence that explicitly prohibited that the child could leave the Country.

In the last few years the phenomenon of children abduction has gone so far that it became a social problem that involves youth and adults, rich and poor, public institutions, professionals, racial and ethnical groups.

The increasing number of cases seems to be proportional to the increase in the number of interracial marriages and cohabitations, of divorces and separations, and to the new definition of roles between men and women in the society. Besides, the phenomenon seems also to be related to the increased possibility to travel and to the extraordinary level of immigration in Europe of citizens from not European Countries.

Another important difficulty, as well as cultural and religious differences, that are often the starting point of many separations of interracial pairs, is given by the differences between the laws of the Countries of origin of parents, due to the lack of political will to attune different regulations.

Therefore, when we talk about children abduction, we have to face the problem of children competed by parents that have different Countries of origin, but also the problem of children that are between two different cultural worlds. In other words, the international abduction implies for the child non only a dramatic separations from one of the two parents, but also the abandonment of his Country of origin and his social and cultural environment.

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\* This work has been monitored by Avv. Prof. Guglielmo Gulotta, in the professorship of the Faculty Psychology at the University of Turin.

## **2. Juridical side: the European Agreement and Aja Agreement.**

The only efficient way to fight against children abductions seems to be the international cooperation.

In the October 1980 two agreements were signed: the European Agreement of Luxembourg about the recognition and execution of the decisions regarding the custody, and the Aja Agreement about civil aspects of international abduction. Comparing two agreements, it is important to distinguish a common target and the specific targets of each agreement.

The common object of the two agreements is to make up quickly for children abduction and to guarantee the welfare and the interest of the child.

Both agreements want to protect the “*status quo ante*”: the more it will be quickly restored, the easier will be to protect the interest of the child and to avoid his integration in the new environment.

Another common point is the fact that both agreements consider the only civil aspects of international abductions.

On the other side, the approach to the problem of abduction is very different in the two agreements.

The European Agreement, that is the first one dealing with the international abduction, has got a double object: to provide for the return of the abducted child to the victim parent and to ensure that the sentences concerning the custody of the child given in a member Country, are recognized and executed also by the other Countries.

The European Council thought that the best way to fight the phenomenon was to compel the Countries to prepare simple and quick systems to ensure the recognition and execution of sentences, in order to discourage the practice of *forum shopping*.

The deputies of Aja Agreement decided a different approach, looking for new ways to solve the problem of abduction.

This different judgment generated different targets: the Aja Agreement has got the only target to restore the original situation before the abduction as soon as possible, quite apart from any previous foreign decision about custody.

Another important difference concerns the conception of *child abduction or legal kidnapping*: the Aja Agreement extends its application area to a very great number of abductions, including the hypothesis in which the abduction is made before a judicial decision about custody is taken. In other words, the target is to restore the situation as it was before the abduction, without trying to solve the legal aspects, on account of the fact that many abductions happen in order to take the child in a more favorable Country.

On the other side, the European Agreement operates only when the abduction violates a custody sentence given by a judge in the Country in which the child lived when he was kidnapped.

In the end, cases of abduction according to the Aja Agreement cover a wider area than the European Agreement, that operates only when already exist judicial sentences about the custody in one of the member Countries.

It is very important to consider the different disciplines in the two agreements about the return of the child to his Country of origin and about all the possible and exceptional reasons that can authorize a Country to refuse the restitution.

In the European Agreement there are many conditions that mitigate a lot the effectiveness of the measures; in particular, Countries are obliged to proceed to the immediate restitution of the child only if a petition has been presented within six months from the date of the abduction and both the parents are citizens only of the Country that presents the petition, that must also be the Country in which the child lived before the abduction. (art. 8). On the contrary, Aja Agreement states that Countries have always to send back the child, legally or not legally abducted, if a petition has been made within a year from the date of the abduction, and even after this term provided the child is not meanwhile well integrated in his new domicile Country (art. 12, I e II c.).

Because of the great importance of time, the two agreements tried to establish a balance point between two opposite needs: a minimum lapse of time which is necessary to localize the child, and a maximum term after which the transfer of the child is no longer his interest. In the two agreements, the evaluation of this balance point is different: the European Agreement states that six months is an enough period of time to let the child integrate in the new Country; Aja agreement, on the contrary, chose a longer and more flexible time limit from the abduction.

Aja Agreement, therefore, seems to be better in guarantying an effective struggle against *child abduction*; on the other side, its simplicity and its higher strictness will lead a lower number of Countries to accept the agreement.

As regards the reasons to refuse the restitution, Aja Agreement states only three exceptions considered in art. 13;<sup>1</sup> European Agreement, on the contrary, states a long list of reasons that justify the refuse (art. 9 and 10).<sup>2</sup>

Another important difference between the two agreements is represented by the rules about the possibility for the Countries to express reservations: when preparing an international agreement it should be very important to limit the number of reservations in order to ensure the effectiveness of the agreement itself.

Aja Agreement states a limit to the number of possible reservations, that are allowed only for marginal aspects of the agreement (art. 42). On the contrary, European Agreement authorizes Countries to express with a reservation different reasons for a refuse from the ones specifically stated (art. 8, 9 e 10).

In the end, there are some differences also about the organizational rules, that provide for the creation of special organization dedicated to the local application of the agreements: the Central Authorities. Competences of these organizations are stated much better by Aja Agreement than by European Agreement; inside this one, Central

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<sup>1</sup>The art. 13 of Aja Agreement states that the repatriation of the child can be denied only if: a) the parent who has the custody doesn't assert his right of custody or agreed with abduction; b) the repatriation implies a serious risk for physical or psychic wellness of the child; c) the child himself refuses the repatriation, if he has an adequate age and maturity to choose.

<sup>2</sup>The art. 9 of European Agreement legitimizes the non-repatriation if: a) the abductor was not enabled to defend himself; b) the repatriation was decided without the presence of the abductor or of his legal representative.

Moreover, art. 10 states that in some cases that are not regulated by art. 8 and 9 of the European Agreement, the repatriation can be refused if: a) the consequences of repatriation are incompatible with fundamental principles of Family Law of the Country in which the child has been brought; b) the repatriation is no longer in keeping with the interest of the child; c) at the moment of the repatriation request: 1) the child doesn't have any bond with his Country of origin, or with the Country in which he has his usual domicile; 2) the child has double nationality and usual domicile in the Country in which has been brought; d) is not compatible with some other issue of the Country in which the child is but is compatible with his interest.

Authorities have less powers: they just have to collect informations and data that have to be sent to the other Central Authorities or to Judicial Organizations. (art. 3, 4 and 5 European Agreement).

On the contrary, Aja Agreement explicitly states that Central Authorities have the power to start or support judicial or administrative proceedings (art. 7, let. f); this is a quite important competence, because it is necessary a strict bond between Central Authorities and the other organizations of the involved Country. Besides, Aja Agreement underlines the necessity to find and repatriate the child as soon as possible, giving this task to Central Authorities. (art. 7, let. a, h).

In this agreement there's also an original rule that gives to Central Authorities the power to ensure, if possible, the voluntary return of the child by the abductor, or to facilitate a friendly solution of the case (art. 7, let. c); there's no such rule in the European Agreement. This rule makes it possible to avoid the intervention of the law in situations that are already very difficult; moreover, a friendly agreement is the best interest of the child.

Finally, European Agreement and Aja Agreement face the problem of international children abduction with different points of view, to achieve results that are partially similar. Comparison shows that Aja Agreement is surely simpler, more direct and more effective in order to fight the phenomenon of *legal kidnapping* and to eliminate many of the reasons that lead a parent to realize an abduction.

On the other side, European Agreement has a more traditional approach, that looks for a difficult tuning between real needs of the abducted child and internal and external judicial problems; the proceeding is surely slower, to the detriment of the effectiveness and of the real possibility to defend child's interests. Moreover in the European Agreement there are very restrictive requirements about the nationality, without holding in consideration present-day international situation (interracial marriages, rules on nationality, etc.).

On the contrary, Aja Agreement doesn't face any juridical question, but is concentrated on the practical aspect of the abduction: when an abduction happens, the first thing to do is to make up for the situation and to provide for the immediate return of the child to the Country in which he was at the moment of the abduction.

In this way, it's possible to achieve three results: concrete advantages that the kidnapper hopes to obtain going abroad with the child are eliminated; it's possible to avoid further traumas for the child, bringing him back to his usual living situation as soon as possible; finally, the task of deciding is left to the judge of the Country in which the child was used to live.

Nevertheless, the application of Aja Agreement could be evaded by Countries: in fact too few reasons to refuse the repatriation are provided and there is no possibility for Countries to express reservations.

Moreover, the two agreements also consider different geographic areas: Aja Agreement have a worldwide importance, while the European Agreement was conceived as an agreement between European Countries.

Finally, the two agreements are not in competition, but they are two different parts of a whole, both aiming at the protection of children's interests.

### **3. Italy and the data of Central Authority.**

Italy began to take interest in the phenomenon of children abduction in the last few years, since *mass media* started talking much more about it, because of the growing number of cases. Italy, in fact, is one of the last European Countries in ratifying both the agreements (Law n. 64, January 15th 1994), after 14 years from their signature.

Thanks to the data that the Central Office for Juvenile Justice at the Justice Department sent us, we knew about the incidence of the phenomenon of international children abduction in Italy. (*Table 1*)<sup>3</sup>.

In this table we can notice that Italian Central Authority managed abduction cases that involved mostly foreign Countries as United States, Germany, UK, France and Switzerland.

Estimates say that in USA there are about 350.000 cases each year, in UK from 200 to 500. In Europe the only official data are related to international abductions, about 6.500 cases each year.

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<sup>3</sup> Examined years go from the first of may 1995, when Aja Agreement came into force, to 2000. Data related to year 2001 are still in progress.

In Italy international abductions are about 50 cases per year.

From 1995 to 2000, Italian children involved in international abduction was 395, in 297 cases (*Table 2*). Their names are different, but their stories are very similar: usually their parents, born in different Countries, choose to separate but they do not find any agreement about the custody of their child and one of them decides for the abduction.

***Table 2: total “active<sup>4</sup>” cases in Italy from 1995 to 2000***

<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>
46	54	48	56	41	52

In the following tables is possible to notice the number of abducted children per year (*Table 3*), the number of repatriated children per year (*Table 4*) and the number of not returned children with the involved Countries (*Table 5*). Besides, Central Authority confirmed us that “open” cases, that is that is not possible to solve them, are the ones involving Arabian area, that doesn’t recognize Aja Agreement.

***Table 3: children abducted per year.***

<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>
65	71	68	73	51	67

***Table 4: children returned and repatriated per year.***

<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>
25	24	30	30	17	27

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<sup>4</sup> “Active” means that Italy is the Country that asks the repatriation or the recognition of a visiting right.

**Table 5: children not returned per year.**

1995	1996	1997	1998	1999	2000
40	47	38	43	34	40

Foreign Country more involved in these cases are: USA, Germany, UK, France and Switzerland. The reasons for non repatriations are various and related to art. 27, 35, 38, 43 and 13 Aja Agreement.

#### **4. The survey: targets and methodology.**

The problem of children abduction always existed, but has been highlighted recently and it is still an unexplored territory. In Italy there's never been any systematic survey about this phenomenon.

Our survey aims to investigate and describe children abduction through a research in the field.

The main targets are:

- to outline a sociological and psychological profile of the abductor and his motivations;
- to study the characteristics of abduction;
- to analyze the emotional and psychological impact on the abducted child.

Last but not least, another important aspect that we investigated is related to the effectiveness of juridical system facing abduction cases and to the signing out of some preventive measures in order to stem this growing phenomenon.

In order to achieve these targets, we collected data using a questionnaire structured in two parts; in the first one we asked to 120 attorneys some personal data and any case of children abduction they had to face.

The second part is divided in five areas:

- I. the abduction
- II. the abductor
- III. marriage and its disintegration
- IV. children abducted
- V. law and prevention.

In order to obtain a sample of abduction cases we went and saw the attorneys of AIAF, that is Italian Attorneys Association, which deals with family and minors law.

In all, from September to November 1999 120 questionnaire were sent via fax. We had back 33: 13 attorneys told us that they never faced any abduction case and in the remaining 20 only 16 completed the questionnaire, giving us the final sample of 68 cases.

#### *4.1. Results.*

Thanks to the results of our survey, is it possible to highline two main profiles: abductor profile and abducted child profile. Looking at the kidnapper's chart it's possible to highlight:

- ❖ in most cases the kidnapper doesn't bring abroad the child;
- ❖ both the mother and the father are inclined to abduct their child, but the results pointed up that the second one is more frequently the abductor, because he has less chances to have the custody after the divorce.

In Italy, in fact, judges favour the mother in assigning the custody, without considering the possibility of a shared custody.

Figures given by Istat related to previous years show that the percentages of the custody do not move significantly and are divided in this way: 91% to the mother, 6% to the father, 2% shared or alternate, 1% to third parties or Institutions.

- ❖ The abduction happens, in the 50% of cases, before a provisional decision of the judge is communicated.
- ❖ In most cases the kidnapper is from 30 to 39 years old.

- ❖ In nearly the 50% of cases the kidnapper comes from the southern part of Italy.
- ❖ The social and economic level is usually low; actually, the professional qualification of the kidnapper is mostly worker or unemployed.
- ❖ The parent who abducts seldom committed other crimes before, in few cases he overindulges in alcohol and drugs, and usually he hasn't got any psychological disease.
- ❖ Marriage disintegration usually happens after 5-9 years and it's caused mostly by incompatibility between husband and wife.
- ❖ Justifications given by kidnappers can be set at the opposite limits of a *continuum*: on one hand they abduct their child because they love and want to protect him, on the other they want to revenge themselves and punish their husband/wife. In the middle we can find many other reasons, like the wish to live with the child in order to preserve his affection, the fear to lose the custody, the mistrust in the judicial system, and so on.

These results are in agreement with the American researches by Palmer and Noble (1984). They divide kidnappers in two categories, according to the justifications that they gave: the egocentric parents and the child-centric parents.

Looking at the chart concerning abducted children, it is possible to highlight:

- ❖ Males and females have the same probability of being abducted, males slightly prevailing.
- ❖ Most of children are from 0 to 5 years old.

These results, in agreement with the ones by some American researchers like Agopian, Forehand, Finkelhor, Hegar and Greif, show that younger children have an higher probability of being abducted in comparison with children from 12 to 17 years old; older ones, in fact, are able to offer a greater resistance and can choose one parent or the other. Younger ones, on the contrary, can be easier preys whose opinion is not considered at all.

- ❖ Abductions happen most frequently during the week-end or during holidays, prolonging the visiting right.

This is an important issue. During these periods, in fact, the kidnapper has the possibility to take easily away the child, without waking any suspicions; in this way he can go away from the town or the Country taking advantage towards the police, the other parent or any private investigator, that will start looking for him only when he will not bring back the child after the visit.

In all other cases, children are usually abducted when they are at home, while it's quite exceptional that they are abducted when they are at school.

- ❖ In international abduction cases, the child is usually brought into the Country of origin of the kidnapper; in the national cases, usually he remains in the same town in which he lives. In many cases, abductions last from eight days to a month, while longer periods of time (from two months on) usually characterize international abduction cases.
- ❖ In the 94% of cases, abducted children have been returned to the victim parent thanks to the mediation of the attorneys and of authorities; about a half of returned children have been followed by psychologists and social workers. Besides, once the children came back, in 64% of cases their custody has been given to the victim parent.
- ❖ Abduction causes to the child psychological, behavioral and relational problems. Questionnaires revealed what are the most frequent reactions in a child after an abduction: anxiety, sleep troubles, nightmares and recurring dreams, fear of open windows and doors and to be abandoned, derangement; these symptoms are characteristics in the so-called “post-traumatic stress trouble”.

Usually follow behavioral disorders, such as hostility, excessive affection and tendency to isolation; a regression to a motor and psychic condition preceding the condition at the moment of the abduction (nocturnal enuresis, suction of the thumb, refuse to use the toilet, etc.).

It is also possible that scholastic troubles appear: learning and relationship difficulties, troubles in attending again at school, difficulty in finding an emotional equilibrium, anger against the victim parent (the child thinks he has been abandoned by the victim parent); besides, anger and refusal of the kidnapper or, on

the contrary, flattery, total dependence and wish to come back with the kidnapper, if a strong bond has been established.

The increasing number of abduction cases in Italy and in the rest of the world, led us to investigate if there is any useful instrument in order to prevent this phenomenon.

Family attorneys pointed out that family mediation and psychological assistance before the separation or custody hearing are effective prevention tools; they could help husband and wife to think over the separation and could lead them to a better management in bringing up and educating their sons. Shared custody and a greater attention to the relationship between parents before and after the separation, are also useful, even if less effective.

Therefore, in order to prevent children abduction, it seems to be necessary a teamwork between social operators and attorneys: their task is not to radicalize the conflict but to make a mediation; besides, it is essential a greater attention and cooperation by politicians and public authorities, in order to promote new laws for the protection of children. If forces will be joined against children abduction it will be possible to stem the phenomenon and to save children from an unhappy and uncertain future.

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