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# *The Child's Right to Co- and Self-Determination: A Comparative Legal Analysis Prawo dziecka do współdecydowania i samostanowienia – analiza prawnoporównawcza*

## ABSTRACT

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**RESEARCH OBJECTIVE:** The aim of the article is to present a comparative analysis of selected European countries' legal regulations for issues concerning a child's right to co- and self-determination when those who care for them (under parental responsibility, custody, legal guardianship, etc.) make decisions about their personal life.

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**THE RESEARCH PROBLEM AND METHODS:** The research problem concerns whether a child can co-decide or independently make decisions in matters concerning their person or property and, if so, what the scope of this right is. In investigating these questions, the authors used the theoretical and dogmatic legal method as well as the method of analysis (and synthesis) of relevant legal provisions of selected European countries.

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**THE PROCESS OF ARGUMENTATION:** In their analysis of the provisions in force in the internal legislation of selected European countries (Germany, Norway, Poland, Sweden and the Netherlands), the authors present the adopted legal solutions for regulating issues related to rights that a child is entitled to when making decisions about their personal life and the responsibilities of parents caring for a child.

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**RESEARCH RESULTS:** The legislation of each of the five selected countries gives a child under the care of parents the right to co-determination/self-determination when making decisions about their personal life, although there are noticeable differences between individual national systems.

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**CONCLUSIONS, INNOVATIONS AND RECOMMENDATIONS:** Due to the editorial limitations on the length of the article, the authors have limited the analysis to the legislation of five selected European countries and to a general analysis of national laws regulating the research problem. In the longer term, a more in-depth analysis of such provisions seems justified. It also would be interesting to analyze the legal solutions in force in other countries, both European and non-European.

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→ **KEYWORDS:** CHILDREN'S RIGHTS, THE CHILD'S RIGHT TO CO-DETERMINATION, THE CHILD'S RIGHT TO SELF-DETERMINATION, HEARING THE CHILD, PARENTAL RESPONSIBILITY

## STRESZCZENIE

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**CEL NAUKOWY:** Celem artykułu jest przedstawienie analizy porównawczej unormowań prawnych wybranych krajów europejskich regulujących kwestie dotyczące prawa dziecka do współdecydowania/samostanowienia przy podejmowaniu decyzji dotyczących jego życia osobistego przez osoby sprawujące nad nim opiekę (w postaci władzy rodzicielskiej, odpowiedzialności rodzicielskiej, opieki prawnej itp.).

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**PROBLEM I METODY BADAWCZE:** Przedstawiony problem badawczy dotyczy odpowiedzi na pytania: Czy dziecko może współdecydować/samodzielnie podejmować decyzje w sprawach dotyczących jego osoby lub majątku? A jeśli tak, jak kształtuje się zakres tego prawa? Poszukując odpowiedzi na powyższe pytania, autorzy zastosowali metodę teoretyczno- i dogmatyczno-prawną oraz metodę analizy (i syntezy) adekwatnych przepisów prawnych wybranych krajów europejskich.

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**PROCES WYWODU:** Analizując przepisy obowiązujące w ustawodawstwie wewnętrznym wybranych państw europejskich (Niemcy, Norwegia, Polska, Szwecja, Holandia), autorzy przedstawili przyjęte rozwiązania prawne regulujące kwestie związane z zakresem uprawnień przysługujących dzieciom przy podejmowaniu decyzji dotyczących ich życia osobistego oraz zakresem obowiązków rodziców sprawujących opiekę nad dzieckiem.

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**WYNIKI ANALIZY NAUKOWEJ:** Ustawodawstwo każdego z pięciu omówionych państw przyznaje dziecku pozostającemu pod opieką rodziców prawo do współdecydowania/samostanowienia przy podejmowaniu decyzji dotyczących jego życia osobistego, przy czym zauważalne są odrębności między poszczególnymi systemami krajowymi.

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**WNIOSKI, INNOWACJE, REKOMENDACJE:** Ze względu na wymogi redakcyjne dotyczące objętości artykułu autorzy ograniczyli analizę regulacji prawnych do ustawodawstw wybranych pięciu krajów europejskich oraz do ogólnej analizy przepisów krajowych regulujących omawiany problem badawczy. W dalszej perspektywie zasadna wydaje się wnikliwsza analiza przywołanych przepisów

prawnych. Interesująca wydaje się również analiza rozwiązań prawnych obowiązujących w innych krajach, tak europejskich, jak i tych spoza naszego kręgu kulturowego.

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→ **SŁOWA KLUCZOWE: PRAWA DZIECKA, PRAWO DZIECKA  
DO WSPÓLDECYDOWANIA, PRAWO DZIECKA  
DO SAMOSTANOWIENIA, WYŚLUCHANIE DZIECKA,  
ODPOWIEDZIALNOŚĆ RODZIELSKA**

## INTRODUCTION

On November 20, 1989, the most common international agreement, the United Nations Convention on the Rights of the Child (CRC), was adopted. The Convention, called the constitution of children's rights, introduces a wide catalogue of children's rights that are recognized by almost all countries in the world. Among the rights set out in the Convention is the right of the child to freely express their views on all matters affecting them. According to Article 12 of the Convention, this right is granted to every child who is capable of forming their own views, in accordance with their age and maturity. The CRC expresses the minimum scope of a child's exercise of their right to co-decide about matters concerning them. The signatories of the Convention may extend this right in the their domestic legislation.

In analyzing the provisions in force in the internal legislation of selected European countries (Germany, Norway, Poland, Sweden and the Netherlands), the authors present the legal solutions for issues related to the scope of rights that a child is entitled to when making decisions about their personal life and the responsibilities of parents caring for a child (in the form of parental responsibility, custody, legal guardianship, etc.).

## GERMANY

Since the CRC came into force, one may undoubtedly argue that the legal protection of children has benefitted in many different ways. While the first focus was on the international legal protection of the substantive rights of children – such as the right to shelter, family life and education – the more recent empowerment of children under international law has shifted to their procedural empowerment, for example, the introduction of the individual complaint procedure under the CRC (Madríñán, 2019, p. 1). This international recognition of the legal status of the child might lead us to presume that the national legal status of the child in most developed countries has been fully established. Taking a closer look at the legal status of the child in relation to the right to self-determination under German law, one may come to a (partially) different conclusion.

The CR CRC has been applicable in Germany since 1992. Since then, almost 30 years have passed. Article 6 of the German constitution, the "*Grundgesetz*" does,

indeed mention children. The limitation, however, is vested in the fact that this child-specific provision only entails regulations about children in terms of parents' and legal guardian's rights. The general right of self-determination can be found in Article 1 of the German Constitution. Paragraph 1 states that "die Würde des Menschen ist unantastbar." The German Constitutional Court (BVerfG, Judgement 15.02.2006 – BvR 357/05) unmistakably held that this provision entails the right to self-determination. No explicit mention of the child can be found at the constitutional level; instead, children are indirectly mentioned under the German Constitution. Children are thus not explicitly mentioned as active rightsholders. Considering this status quo, it thus seems rather logical that children's right to self-determination has thus far not been regulated at the constitutional level. There has, however, been an interesting initiative.

It was only at the beginning of 2021 that the federal cabinet (*Bundeskabinett*) introduced an initiative to include Article 6 Paragraph 2 into the German Constitution. The initiative reads as follows: "Die verfassungsmäßigen Rechte der Kinder einschließlich ihres Rechts auf Entwicklung zu eigenverantwortlichen Persönlichkeiten sind zu achten und zu schützen."<sup>1</sup> In other words, children's right to self-determination is to be respected and protected. While this initiative could have paved the way to introduce children's right to self-determination at the constitutional level in Germany, the necessary two-thirds majority could not have been reached in order to successfully introduce this novelty. Consequently, children have not thus far been empowered at the constitutional level as the bearer of rights enabling them to enforce their right to self-determination. What remains is the applicability of the CRC, as currently the only means for children to call upon the German state in case of a breach of their right to self-determination.

In family matters, by contrast, children are placed in a more active position. While Article 1631 Paragraph 1 of the German Civil Code states that parents are under an obligation to decide about a child's place of residence, from the age of 15 years onwards, in cases when it must be decided who the child is to live with, the children are to be asked about their preference – even if the child decides against its parents, the child's wish is decisive.<sup>2</sup> Likewise, Article 1626 (2) clarifies in this regard that parents should take into account the child's growing need for self-determination. Considering this regulation, case law has established that children are to be asked about their personal preference from the age of three onwards.<sup>3</sup>

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<sup>1</sup> Deutscher Bundestag – 19. Wahlperiode, Drucksache 19/28138, 7.

<sup>2</sup> OLG Brandenburg, Beschl. v. 07.08.2015 – 9 UF 8/15.

<sup>3</sup> BVerfG, FamRZ 2007, 1078; BVerfG, FamRZ 2007, 105; BVerfG, FamRZ 2005, 1057.

## NORWAY

In Norway, issues relating to the child's right to participate in decisions concerning their personal life made by those with parental responsibility over them are regulated primarily in the provisions of Act No. 7 of 8 April 1981 relating to Children and Parents (*Lov om barn og foreldre* 1981 [*barnelova*]). The issue of the child's right to co- and self-determination is governed by the provisions of Chapter 5 of the Act on Children and Parents, entitled "Parental Responsibility and the Child's Place of Residence."

Pursuant to § 30 of the Act, a child has the right to care from persons who bear parental responsibility for them. Persons who are entitled to parental responsibility towards a child are obliged to properly raise and maintain the child. They have the right and duty to decide on personal matters relating to the child within the limits set out in §§ 31-33 of the Act.

The provision of § 31 of the Act grants the child the right to co-decide in personal matters that affect them. Parents and others who care for the child are obliged to take into account the child's opinion according to the child's age and degree of maturity. Under § 33 of the Act, parents are required to gradually extend the child's right to make their own decisions as they grow up until the age of 18.

Pursuant to § 31 of the Act, parents are required – before deciding on personal matters relating to the child – to listen to a child who is able to form their own point of view on the matters at hand. Children at least seven years of age and younger children who can form their own point of view should be informed and given the opportunity to express their views before deciding on the child's personal matters, including matters of parental responsibility, custody and the child's right to contact with their parents. The legislature emphasizes the necessity to attach great importance to the opinion of a child who has reached the age of 12.

Pursuant to § 30 of the Act, persons with parental responsibility towards a child are obliged to provide the child with education in accordance with their abilities and possibilities. Under § 32 of the Act, children who have reached the age of 15 have the right to decide for themselves which school to attend and to apply for membership or resignation from various associations.

## POLAND

In Poland, issues related to the child's right to participation in decisions concerning their personal life are regulated primarily in the provisions of the Constitution of the Republic of Poland of April 2, 1997, the CRC of November 20, 1989 and the Family and Guardianship Code of February 25, 1964 (*Ustawa z dnia 25 lutego 1964 roku – Kodeks rodzinny i opiekuńczy*; hereinafter: KRO).

Article 72 Section 3 of the Polish Constitution creates the child's subjective right, comprised of the obligation to listen to the child and, if possible, to take into account

the child's opinion. This norm is addressed to public authorities and persons responsible for the child – above all, the parents and guardians of the child, both legal and factual.

As Witold Borysiak (2016) rightly points out,

the literal content of Article 72 (3) of the Polish Constitution suggests that only listening to the child is obligatory. [...] The obligation to be heard applies only to a child who is “capable of forming their own views.” [...] Referred to in Art. 72 (3), the right of the child “is somewhat in opposition to the subjects to which the final decisions belong.” These actors [...] help the child define their position in the world, guided by the child's good, respecting their opinion, beliefs and separateness, but also filtering them through their own experience and knowledge, which the child does not have for natural reasons.

Thus, according to Borysiak, Article 72 (3) assumes a limitation of children's rights.

The obligation to listen to a child and to take into account their opinion as far as possible is implemented in practice primarily in the parent–child relationship, and the most important provisions regulating the principles of implementing this right are in the Family and Guardianship Code.

Pursuant to Article 92 of the KRO, until the age of majority, a child remains under parental authority, which as a rule is vested in both parents (Article 93 § 1 of the KRO). According to Article 95 § 2 of the KRO, “a child under parental authority should obey their parents, and in matters in which they can independently make decisions and make declarations of will, they should listen to the opinions and recommendations of parents formulated for their good.”

As noted by Jerzy Słyk (2022), the child's obedience to their parents, as defined in Article 95 § 2 of the KRO, is an equivalent of the element of parental authority which enables parents to raise and direct their child, and is simultaneously a factor that brings the child security. The child's obligation of obedience was supplemented with the requirement to listen to the recommendations and opinions of parents formulated for the child's good in matters in which the child can independently make decisions and make declarations of will. These activities include submitting a declaration of marriage, submitting a declaration of paternity or confirmation of recognition, consent to change one's name and consent to adoption.

Pursuant to Article 95 § 4 of the KRO,

parents, before taking decisions on more important matters concerning the person or property of the child, should hear them out if the child's mental development, health status and degree of maturity allow it, and should take into account their reasonable wishes as far as possible.

The legislature did not define how to understand the notion of more important matters relating to the person or property of the child. As noted by Janusz Gajda (2021), it is not about everyday, current matters, but about matters of more importance, such as choosing a school for the child, going abroad or selling the child's property.

The parents' obligation to listen to the child, as specified in Article 95 § 4 of the KRO, does not depend on the child reaching a certain age. The only criteria for fulfilling this obligation are those of mental development, health and maturity, which are subjective in nature and may also refer to young children. As noted by Jerzy Słyk (2022), the obligation of parents to take into account the reasonable wishes of their child as far as possible is not absolute. Therefore, the parents' decision is ultimately dictated by the child's best interests and, above all, should be assessed in this respect.

Henryk Haak and Anna Haak-Trzuskawska (2019) write similarly about the fulfilment of this obligation. He emphasizes that parents are not obliged to take into account in every case each request made by a child, but only "as far as possible" and only such a wish that is reasonable – therefore, those that result from an accurate, factual assessment of the situation. According to him, "parents are therefore obliged to take into account a wish presented by a child when it is practically possible to fulfil under specific conditions, and the fulfilment of this wish does not prevent the parents from performing their activities as required by the child's best interests and social interest (arg. from Art. 95 § 3 KRO)."

## SWEDEN

In Sweden, the issue of the child's right to co-decide with caregivers in matters pertaining to their personal life is regulated primarily by the provisions of the Children and Parents Code of June 10, 1949 (Föräldrabalk [1949: 381]).

Swedish legislation does not make use of the concept of parental authority or parental responsibility. Instead, the terms custody (*vårdnad*) and guardianship (*förmynderskap*) are used. The combined content of both concepts is identical to the concept of parental responsibility that functions in the family legislation of most European countries. The concept of custody (*vårdnad*) that functions in Swedish law covers the entirety of a custodian's legal obligations towards the child in representing the child, determining their place of residence, meeting their needs for care and safety and providing proper upbringing, education and maintenance. Guardianship (*förmynderskap*) concerns the rights and obligations of a child's guardian in the context of managing the child's property and legally representing the child in financial matters.

Custody (*vårdnad*) and guardianship (*förmynderskap*) are generally granted to the child's parents. As noted by Marta Prucnal-Wójcik (2021, p. 17), if custody is entrusted to guardians other than the child's parents, they are also entitled to guardianship. Maarit Jäntherä-Jareborg, Anna Singer and Caroline Sörgjerd (n.d., p. 1) point out that as long as at least one of the parents is caring for the child, no other person can become a guardian of the child.

Issues related to the nature, scope and implementation of mutual rights and obligations of parents and children are found primarily in Chapter 6 of the Code on Children and Parents, which regulates the issues of care, place of residence and the right of a child

to contact with both parents. Pursuant to Article 1, Chapter 6 of the Code, children have the right to care, safety and well-being. Children must be treated with respect for their person and character and must not be subjected to corporal punishment or any other degrading treatment.

Pursuant to Article 2, Chapter 6 of the Code, the person caring for the child is responsible for the child's personal situation and is obliged to meet the child's needs. Pursuant to Article 2a, Chapter 6 of the Code, in all matters relating to the care of the child, the place of residence and social life of the child, the principle of ensuring the best interests of the child is of the utmost importance and decisions should be made according to it.

Maarit Jänterä-Jareborg, Anna Singer and Caroline Sörgjerd (n.d., p. 9) emphasize that the child's right to be heard is a fundamental principle of Swedish family law. In Sweden, it is assumed that the child is an expert in their own case. This competence is granted to them depending on their age and degree of maturity. On this basis, it is assumed that very young children cannot have clear opinions and thus cannot decide on their own matters. In turn, older children have considerable autonomy in their personal and property matters.

Pursuant to Article 2b, Chapter 6 of the Code, the wishes of the child should be taken into account when deciding on matters relating to care, place of residence and contact, taking into account the age and maturity of the child. Moreover, pursuant to Article 11, Chapter 6 of the Code, when making decisions about the child's personal affairs, the child's carer should, in line with the child's increasing age and maturity, increasingly take into account the child's views and wishes. Pursuant to Article 12, Chapter 7 of the Code, the guardian should listen to the child on matters relating to the child's property if the child is at least 16 years of age and if the matter is qualified as important.

## THE NETHERLANDS

A 2020 study by UNICEF among 41 wealthy states (Gromada et al., p. 9) ranked children in the Netherlands as the happiest. Although this is a great accomplishment, what is the legal status of the child's self-determination in the Netherlands? Has the country fully established the legal status of the child as recognized under the CRC? A close observation may lead us to interesting findings.

The Netherlands ratified the CRC in 1995. Even though nearly 30 years have passed, children are still not explicitly mentioned as legal subjects in the Constitution of the Kingdom of the Netherlands. The right to self-determination is codified in several Articles in the Constitution.<sup>4</sup> The most prominent one is Article 11, which states that "everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament." The term "everyone" used in Article 11 implicitly includes

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<sup>4</sup> Arts. 10, 11 and 15 of the Constitution of the Kingdom of the Netherlands.

children. Although the legal status of children in relation to the right to self-determination is not regulated at the constitutional level, it is reflected in several Dutch laws.

One should take a closer look at the “Medical Treatment Agreement” laid down in the Dutch Civil Code, which explicitly legislates self-determination in relation to children (Book 7, Title 7, Section 5). It contains three age categories, in which children have different levels to the right to self-determination regarding medical treatment (ECLI:NL:RBNHO: 2017:3955). The “Dutch Termination of Life on Request and Assisted Suicide Act” similarly reflects self-determination (with restrictions) in relation to children. From the age of 12 years, children have the right to request euthanasia (the consent of parents or guardians is compulsory until the age of 16) (Article 2). Although parents must be involved in the decision-making process, parental consent is not needed for 16- and 17-year-olds. Furthermore, the new transgender law in the making includes the self-determination of children as well. If the bill passes the House of Representatives, children under the age of 16 will be allowed to have the right to apply in court to have their gender designation changed on official documents such as passports and birth certificates. These developments show us that the right to self-determination for children is not explicitly laid down in the Constitution, but is reflected in various substantial laws in terms of Article 11.

In relation to litigating independently, self-determination of the child differs from area to area. In labor law, for instance, children are entitled to start proceedings from the age of 16 (Art. 7: 612 sub 1 Dutch Civil Code). In administrative law, on the other hand, children are only able to start proceedings based on a capacity assessment regarding their interests (Art. 8:21 sub 2 General Administrative Law Act). Based on case law, we can cautiously assume that age plays a significant role in the capacity assessment.<sup>5</sup> In family law, meanwhile, the child does not have any legal standing to start legal procedures independently. It is therefore interesting to point out that the Netherlands is the only country which has made a reservation to Article 26 of the CRC, which makes it impossible for children to independently apply for social security, including social insurance. Finally, an interesting fact is that the Netherlands has not ratified the third Optional Protocol to the CRC, which means that Dutch children are not able to file individual complaints for violation of their rights to the Committee on the Rights of the Child. These facts regarding self-determination in terms of procedural rights – in particular independent participation in legal proceedings – show us that the procedural position of children in the Netherlands is not only unclear, but also differs based on the type of proceedings (Bruning & Bolscher, 2020, p. 63).

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<sup>5</sup> For instance, in case ECLI:NL:RBMID:2001:AD5479, the court decided that the applicant was admissible based on her age (17 years). On the other hand, in case ECLI:NL:CRVB:2012:BW6529, the court decided that the applicant was not admissible based on her age (15 years).

## SUMMARY

The legislation of each of the five countries discussed (Germany, Norway, Poland, Sweden and the Netherlands) gives the child under the care of the parents the right to co-decide and sometimes the right of self-determination in making decisions about their personal life. This right is closely related to the right and obligation of the parents who take care of the child and its scope results from compliance with the principle of the best interests of the child. This principle, expressed primarily in Article 3 of the CRC, determines the ultimate scope of the child's exercise of the right to co- and self-determination in matters relating to them.

In the selected countries, the exercise of a child's right to co- and self-determination increases with the child's age and maturity and concerns the child's personal matters, including matters of parental responsibility, custody, contact with their parents, place of residence, education and medical treatment. Only in the Netherlands does the law go further, granting children the right to decide about their life and gender matters.

Due to the editorial requirements regarding the length of the article, the authors have limited the analysis to the legislation of these five European countries and to a general analysis of national laws related to research problem. In the longer term, a more in-depth analysis of these legal provisions seems justified. It also would be interesting to analyze the legal solutions in force in other countries, both European and non-European.

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