
Development of dynamic interpretations of the CRC and the CRPD regarding the institutions as a viable alternative care option for children with disabilities and the ways forward

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Résumé

International human rights law provides a framework for the development of rights-based forms of care for children with disabilities. The primary international instruments here are the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). Norms analysed in this paper are contained in art. 20 and art. 23 of the CRC on the one hand, and on the other art. 19 and art. 23 of the CRPD. Although their norms are largely in line with each other, the respective treaty bodies have published documents reflecting differing interpretations of the two treaties' norms related to the question of institutional care for those children.

The emerging secondary law of the United Nations (UN) contains valuable information about evolutive approaches applied by UN bodies when interpreting the CRC and CRPD norms. The UN General Assembly has adopted several resolutions regarding alternative care, children with disabilities and children without parental care since the adoption of the CRPD, most notably the UN Guidelines for the Alternative Care of Children. The contents of these resolutions tell a story of how the CRC and the CRPD have been dynamically interpreted and reflect differing influences on the resolutions' drafting processes. As advocacy organizations and residential care providers are involved in this global discussion, those differences are becoming more prominent.

This paper primarily aims to determine if the named norms of the CRC and the CRPD are in conflict or another form of relation. By answering this question, the paper leaves little space for doubt on the drafters' intentions regarding the institutional care for children with disabilities and the states parties' obligations in that regard. To do this, it is necessary to analyse the relevant norms in accordance with the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties and the extensively developed and elaborated works of the International Law Commission. This is followed by an analysis of relevant UN resolutions since the adoption of the CRPD, as well as general comments of the two Committees, to assess characteristics of evolutive interpretations applied there.

Secondarily, the paper explores solutions to the treaty bodies', the two interpretative communities, discording interpretations. This is done by taking into account the functions and powers of the United Nations General Assembly to create secondary law in the form of resolutions, declarations, guidelines and treaty bodies' mandates to authoritatively further

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elaborate meanings of the corresponding treaties.

This international comparative human rights law study analyses the treaties' texts by applying the VCLT norms on treaty interpretation with the consideration for the dynamic interpretation method. The relationship of the corresponding norms and their potential divergences are explored through the writings on different forms of conflicts and divergences found in international human rights law and other international legal regimes, such as those by the ILC, Jenks, Vranes, Koskenniemi and Pauwelyn. The paper contributes by uncovering interpretative practices and courses of development of the CRC and the CRPD regarding institutional care, and exploring solutions to the discord between the interpretive communities.