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**CHILDREN'S RIGHTS IN EXCLUSIVE RELIGIOUS
COMMUNITIES:
Do they need protecting?**

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Abstract

This essay will analyse children's rights in the context of exclusive religious communities. It will firstly analyse the right to religion, concluding that it includes the right to change religions. It will then analyse the right to education, concluding that it includes the right to be prepared for life in the exclusive religious community or in society generally. It will compare both of these rights to the case study of the Gloriavale Christian Community, to see whether New Zealand does enough to protect these rights. Concluding that there are risks of rights breaches within exclusive religious communities, it will suggest a number of possible reforms including an amendment to the Charities Act 2005 requirements, rights education for children in New Zealand and a judicial approach which considers the Convention on the Rights of the Child.

Key words

Children's rights

Right to religion

Right to education

Exclusive religious community

Gloriavale

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I Introduction

For most New Zealanders, the words "exclusive religious community" will conjure images of long blue skirts and names like "Hopeful Christian". To many, such a life will only ever be experienced from the other end of a television screen. However, life within an exclusive religious community (ERC) is real for a number of New Zealanders, including children, who do not know any different. This essay analyses two key children's rights for children within ERCs. In doing so, it will look at the Gloriavale Christian Community as a case example to help illustrate whether New Zealand does enough to protect children's rights in such communities.

A Essay Outline

The rights that this essay will analyse are children's right to freedom of religion, especially the tension between parent's rights and children's rights, as well as the right to education. Although other rights are engaged when looking at ERCs, the scope of this essay does not allow for a full analysis of all these rights. The rights to religion and education have been chosen as they are fundamental to an analysis of children's rights within these communities.

Firstly, the right to freedom of religion is key because it is not actually clear what the right encompasses and how far parental direction and guidance extends. As religion is a fundamental part of living in an ERC, it is vital to figure out what this right entails. Secondly, the right to education is significant for children within these communities because education may be the only way for these children to uphold their other rights. This essay will attempt to define what these rights are within the context of ERCs and then examine them using the case example of Gloriavale.

Concluding that there are at least risks to children's rights within ERCs, the essay will then undertake to put forward some suggestions at how children's rights within these communities can be better upheld. It will suggest an amendment to the Charities Act 2005 requirements, better rights education for children in schools across New Zealand and a change to the way in which our Judiciary approaches guardianship disputes involving religion.

B Children's Rights Framework

1 The Convention on the Rights of the Child

A detailed analysis of specific rights will be found in the relevant sections of this essay. However, for completeness, this essay will be focusing its discussion on the Convention on the Rights of the Child (the Convention). Article 14, which protects the child's right to freedom of thought, conscience and religion, will form the basis of the discussion. Articles 28 and 29 set out the right to education, which will be analysed in the context of children in ERCs.

New Zealand has signed up to the Convention and ratified it on 6 April 1993.¹ This means it is in force and the courts, when interpreting domestic legislation, will strive to uphold it in their decisions.² New Zealand also periodically reports to the United Nations Committee on the Rights of the Child (the Committee) on progress towards fulfilling the obligations within the Convention.³ However, because of New Zealand's dualist system, unincorporated treaties are not actually binding in law unless incorporated into domestic legislation. While referenced in s 5 of the Oranga Tamariki Act, the Convention has not been formally incorporated into New Zealand law.⁴ This means that falling short of incorporation, the best thing New Zealand can do is implement measures such as those suggested later in this essay, in order to give the Convention effect.

2 Other international instruments

The International Covenant on Civil and Political Rights (ICCPR) is also relevant, as art 18 defines the right to religion for everyone while also specifically protecting parents' rights

¹ Ministry of Justice "UN Convention on the Rights of the Child" (19 August 2020) <justice.govt.nz>.

² University of Melbourne "New Zealand Guide: International Treaties" (29 April 2020) <unimelb.libguides.com>.

³ Ministry of Social Development "United Nations Convention on the Rights of the Child" <msd.govt.nz>.

⁴ Te Herenga Waka – Victoria University of Wellington "NZ must do better on children's rights" *Newsroom* (online ed, 3 September 2019).

to provide direction to their children. This must be weighed against the child's own right. The ICCPR was also ratified by New Zealand on 28 December 1978.⁵

There are also a number of international instruments dealing with the right to education. Most notably, arts 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide a detailed overview of the right. New Zealand ratified the ICESCR on 28 December 1978 as well.⁶

C Background Information

1 "Exclusive religious community" defined

The term "exclusive religious community" (ERC) will be used to describe the types of communities in question. This will refer to communities whose belief system dictates their day-to-day lives and which limits their association with people outside the community. This limitation can range from small restrictions, such as not socialising with people outside the community, to large restrictions, such as being self-sufficient and totally independent from the outside world. In many ERCs, education and employment will take place within the community through community-led schools and work schemes. This essay will assume that this is the case for the communities it refers to.

There are numerous reasons why these communities are the focus of this essay, as opposed to mainstream religious groups. Firstly, the exclusive nature of them inherently limits any exposure of children to other belief systems or opportunities which they would otherwise have. This effectively deprives them of the choice to engage in any other thought processes or ways of life, especially if they are not educated about the beliefs of the outside world. In some communities, there are severe consequences for leaving, such as being prevented from seeing your family and friends again or being left with no financial support. This

⁵ Ministry of Justice "International Covenant on Civil and Political Rights" (19 August 2020) <justice.govt.nz>.

⁶ Ministry of Justice "International Covenant on Economic, Social and Cultural Rights" (19 August 2020) <justice.govt.nz>.

again acts as a barrier to children exercising their rights. Secondly, if schools are run within the community, there may be an issue with the right to education, depending on the standards and quality of the education provided to the children. Once again, the exclusive nature of the community will prevent children from seeking further education elsewhere. Finally, the nature of these groups is often that their religion dictates their daily lives. This means that every aspect of a child's life will be influenced and affected by the belief system that has been chosen for them since birth.

2 *Gloriavale*

The Gloriavale Christian Community will be used as a case study and one example of an ERC. It is found on the West Coast of New Zealand's South Island and can informally be described as the most well-known ERC in New Zealand. The community is comprised of approximately 550 – 600 members.⁷ Its belief system is intended to emulate the early Christian church.⁸ Rather than going to church, members of Gloriavale seek to represent religion in their daily living and live every day in service to God.⁹ It has no internet presence and almost completely excludes outsiders, other than hosting a concert once a year for invited members of the public.¹⁰

Income is derived from members and is controlled by the Christian Church Community Trust (the Trust). The Trust is registered as a charity under the Charities Act, which makes it open to investigation and regulation by the Department of Internal Affairs in order to maintain its charity status.¹¹ Children attend the Gloriavale Christian Community school until the age of 15, when they are then encouraged to take up work within the community.¹²

⁷ Paul Budd "The Christian Church Community Trust: Charities Services Investigation" (22 December 2016) (Obtained under the Official Information Act 1982 Request to the Charities Services) in Morgan Tait "Gloriavale allegations: Read the report" *Newsroom* (online ed, 28 March 2017) at [2.7].

⁸ Liam Sumpter Beashel "Investigation Report: The Christian Trust Community Church (Gloriavale)" (December 2013) (Obtained under the Official Information Act 1982 Request to the Charities Services) at 5.

⁹ At 5.

¹⁰ At 5.

¹¹ At 2–8.

¹² Paul Budd "The Christian Church Community Trust: Charities Services Investigation", above n 7, at [7.58].

While this essay will not cover recent allegations about the Gloriavale Christian Community, including allegations of sexual abuse, inadequate working conditions and mismanagement of trust, these cannot be ignored.¹³ They act as a further justification for conducting a rights analysis into ERCs like Gloriavale because they indicate that rights breaches might be present.

II Right to religion

A Introduction

The right to freedom of thought, conscience and religion is a key human right associated with life in a free society. While enshrined in numerous international instruments and by art 14 of the Convention, there are a number of issues and it is unclear how far it extends to children. Firstly, there is a clear tension with parents' rights in this sphere, because while children have the right to choose their religion under art 14 of the Convention, parents also have the right to direct their child in their thinking.¹⁴ Secondly, there is an issue with the principle of "evolving capacities", which determines how much parents can direct their children. It is unclear what the right actually involves, including the right to change religions. Additionally, it is unclear whether States Parties have a positive or negative obligation to protect this right.

These issues are a barrier to answering the question of whether children in ERCs are able to exercise their art 14 right. While an issue for children everywhere who are guided by their parents in the exercise of their beliefs, as set out above, the nature of these communities increases the level of direction given to them and limits their ability to partake in thought processes and activities contrary to the community's beliefs, making them particularly vulnerable to rights breaches. The direction offered by their parents and communities may go too far and breach their right to religion. Hannah Harrison, an ex-

¹³ Sally Murphy "Gloriavale leavers petition government, plan to protest" *Radio New Zealand* (online ed, 6 October 2020).

¹⁴ Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 14(2).

Gloriavale member, has expressed that it is wrong to think that life at Gloriavale is a choice:¹⁵

For the last 50 years everyone that is in there was born in there. Their parents were born in there. So for those minors, their parents' choosing means nothing because those parents have never had the choice in the first place. That is not religious freedom. That is not what religious freedom's about. That's religious slavery. That's a bunch of 16 men holding 500 other people up to their standard, and they decide whether they're going to heaven or hell.

This part will attempt to clarify what the right entails and who has an obligation to protect it, based on existing scholarship and Committee guidance. This will allow for a better understanding of how consistent the religious upbringing of children in ERCs is with art 14.

B Competing Rights

Freedom of thought, conscience and religion is one of the classical fundamental freedoms firmly entrenched in human rights law, such as art 18 of the ICCPR, for all human beings.¹⁶ Specifically for children, art 14 of the Convention provides that:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

¹⁵ Radio New Zealand "'These people are voiceless, we're here to be a voice' – ex-Gloriavale member urges inquiry" *Radio New Zealand* (online ed, 6 October 2020).

¹⁶ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion* (Martinus Nijhoff Publishers, Leiden, Boston, 2006) at [1].

It is important to draw attention to art 14(2) which protects the parent's right to provide direction to the child about their thought, conscience and religion. Eva Brems labels this an "accessory" to the child's right. In other words, the parents are able to guide the child in the exercise of his or her right.¹⁷ This is different to other provisions which specifically recognise the right of parents and guardians to ensure the religious education of their children in conformity with their own convictions. The fact that parents have this right has led to the possible argument that the religion of children has been brought within the realm of the rights of their adult caretakers.¹⁸ Article 18(4) of the ICCPR also provides that:¹⁹

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Therefore, when considering a child's right to freedom of religion, it may be argued that there are two competing interests; the right of the child to choose their own religion, and the right of parents to direct their children in that choice and to educate their children as they see fit.

C Parent's Rights and "Evolving Capacities"

1 What rights do parents/caregivers have?

Heiner Bielefeldt, the previous Special Rapporteur on freedom of religion and beliefs, has said that while the child should be considered as a rights holder from early on, parents are not obliged to provide a religiously 'neutral' upbringing in the name of the child's right to an 'open future'.²⁰ He said that parents should direct the child in the exercise of their religious belief in line with the child's evolving capacities, in order to facilitate a more and

¹⁷ At [14].

¹⁸ At [1].

¹⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 18(4).

²⁰ Office of the United Nations High Commissioner for Human Rights "Children also have the right to freedom of religion or belief, and that must be protected" (New York/Geneva, 23 October 2015).

more active role of the child. However, he clarified that the rights of parents to freedom of religion or belief "include their rights to educate their children according to their own conviction and to introduce their children to religious initiation rites."²¹

This is consistent with art 14(2) of the Convention, which prevents States Parties from interfering with the religious and philosophical education provided by parents.²² State intervention is only justified in the instance that it is protecting the child's right to freedom of religion.²³ Moreover, this obligation is not just a negative one – the State has an active role to prevent interference with a parent's direction to their child.²⁴ In the final version, a draft paragraph was dropped from the Convention. This paragraph was modelled off art 18(4) of the ICCPR and would have put the child's choice on equal footing with that of the parents'.²⁵ It stated:²⁶

The States Parties shall equally respect the liberty of the child and his parents and, where applicable, legal guardians, to ensure the religious and moral education of the child in conformity with convictions of their choice.

Initially, this was intended to ensure that "education is in conformity with both the child and parent's convictions, "in order to provide a buffer for the family and to prevent a religious belief and education being foisted on the child".²⁷ It is unclear why it was removed. Some participants were concerned that the proposed article would undercut certain rights and freedoms established in the ICCPR, while another concern was creating a universally acceptable legal document which did not impose positions upon other

²¹ Above n 20.

²² Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [54].

²³ At [54].

²⁴ At [57].

²⁵ At [52].

²⁶ Sharon Detrick *The United Nations Convention on the Rights of the Child: A guide to the Travaux Préparatoires* (1992, Kluwer Academic Publishers, the Netherlands) at 246.

²⁷ United Nations Economic and Social Council "Report of the Working Group on a draft Convention on the Rights of the Child" E/CN.4/1984/71 (23 February 1984) at [33].

delegations and different models of social development.²⁸ Ultimately, the version omitting this paragraph was chosen as it did not contain "any new or controversial provisions".

Great weight is given to parental rights. When signing up to the Convention, Bangladesh made a reservation to art 14(1) due to being concerned that it gave children the right to change their religion, which would go against Islamic law. This essay will analyse whether children to have the right to change their religion later, but it should be noted that Bangladesh was involved with eight other parties in inserting the second paragraph into art 14, respecting the rights and duties of parents.²⁹ Only two of the Islamic participants involved in the drafting made reservations, suggesting parents' rights are given great weight by art 14(2) alone.³⁰

Eva Brems also clarifies that extended family members and community members are included within the realms of "parents". Therefore, they also have a right or duty to provide direction on religious matters, due to art 14(2) being modelled of art 5 of the Convention.³¹

2 *Disestablishment of parent's rights*

James Dwyer would argue for the disestablishment of parent's rights altogether. James Dwyer is from the United States, where the current approach requires a successful argument that the interests of the child and society outweigh the rights of the parent.³² Disestablishing parent's rights would mean that this approach is no longer required.

In terms of a child's right to religion, Dwyer's approach would give parents no right to provide direction to their child on matters of religion. Practically, parents would still have a role in providing day-to-day guidance to their children, but we can assume that Dwyer's

²⁸ Sharon Detrick *The United Nations Convention on the Rights of the Child: A guide to the Travaux Préparatoires*, above n 26, at 247 – 248.

²⁹ International Commission of Jurists "Reservations on the Rights of the Child: A Look at the Reservations of Asian State Parties" (Geneva, Switzerland, 1994) at 9.

³⁰ At 9.

³¹ Eva Brems, *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [52].

³² James Dwyer "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parent's Rights" (1994) 82 *Cal L Rev* at 1377.

approach would result in parents' rights not being a legitimate argument in Court, should a dispute arise. However, in New Zealand, such a drastic approach would not be required due to the paramountcy principle, which requires all decisions to be made in the best interests of the child.³³ A parent's rights perspective would not outweigh whatever was in the best interests of the child as far as custody decisions go.

Dwyer's article nevertheless provides some insightful analysis. He argues that because there is an incompatibility between parent's rights and principles of the nature and limitations of individual rights, we have to seek other moral and legal principles to legitimise them. If we are unable to find such a justification, Dwyer argues that:³⁴

... we might be forced to conclude that parents' rights, like the plenary rights of husbands over their wives in an earlier age, ultimately rest on nothing more than the ability of a politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class, and on an outmoded view that members of the subordinated group are not persons in their own right.

3 Evolving capacities of the child

However, the reality is that even if parent's rights were disestablished, most children would be subject to their parent's guidance and direction as set out in art 14(2) of the Convention anyway. Therefore, it is best to focus on the scope of parental guidance and how any undue influence can be mitigated. Brems notes that the manner in which legal parents and guardians exercise their discretion must be consistent with the Convention.³⁵ Most notably, art 14(2) obliges the States Parties to ensure that parents exercise their direction "in a manner consistent with the evolving capacities of the child".³⁶ The implication of this is

³³ Care of Children Act 2004, s 4.

³⁴ James Dwyer "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parent's Rights", above n 32.

³⁵ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [63].

³⁶ At [59].

that as the child gets older, the parental power to direct diminishes.³⁷ As Sylvie Langlaude puts it, the evolving capacities of the child is the guiding principle.³⁸

However, Brems notes the problem with all of this. Specifically, "evolving capacities" is an extremely unclear concept.³⁹

Very small children obviously do not have the capacity to choose a religion. Hence, parental direction at that stage means amongst other things that parents choose whether or not the child joins a religion, and if so, which religion... yet a child brought up within a religion may want to give it up or change it for another religion. If the parents do not agree with this, they can impose their will on their child only until a certain age. Art 14 does not indicate at what age a child's 'evolving capacities' have reached the stage at which the child's fundamental choice in matters of religion and conscience must get priority over that of the parents.

In attempting to solve this issue, the Netherlands have made a declaration saying the child has this right "as soon as the child is capable of making such choice in view of his or her age or maturity", consistent with their interpretation of art 18 of the ICCPR. This indicates that they believed art 14 was not clear in meaning and required further specification. Nevertheless, this too would require further guidance on when a child would become capable of making such a choice.

Eva Brems says it is not necessarily incompatible with art 14 to give priority to parental authority until the age of majority, while allowing growing child autonomy in matters relating to less fundamental choices such as certain rules within the religion.⁴⁰ The Committee believes a right to autonomous choice in religion must be granted below the age of 18. Brems' approach could therefore be problematic in New Zealand, where the age of majority is 20. However, it is clear that New Zealand views children as achieving

³⁷ At [59].

³⁸ Sylvie Langlaude "The Right of the Child to Religious Freedom in International Law" (1st ed, Brill, 2007) at 247.

³⁹ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [60].

⁴⁰ At [60].

capacity at different ages for different things. For example, the age of criminal responsibility in New Zealand is 18, the age of sexual consent is 16 and the alcohol purchase age is 18. During the drafting of the Convention, New Zealand recognised this issue, noting that:⁴¹

It seems that it would be very difficult to declare an across-the-board age and that the end of childhood would be related to specific issues (right to leave home, vote, drive a motor vehicle, have sexual intercourse, etc.) which would be covered by specific legislation in each country.

Some States have made it legally clear, such as the Swiss Civil Code where art 303 says a child can choose their religion at the age of 16. Similarly, the German Religious Education of Children Act dating back to 1921 sets that age at 14.⁴²

This problem with "evolving capacities" is not one unique to the right to freedom of religion. Its uncertainty pervades many areas of children's rights. However, it is particularly problematic in relation to the right to freedom of religion for children in ERCs, because of the issues outlined at the start of this essay. As Hannah Harrison noted, when the religion, chosen by the parents before the child's birth, dictates every aspect of the child's life, it is unclear whether the child is exercising their freedom of religion or whether they are going along with something that they have had no choice in. The issue is summed up well by HA Alexander and D Carr, who have said that:⁴³

a tension arises for affiliated liberals between the rights of parents to initiate their children into particular spiritual traditions, or of groups to sustain themselves across the generations, and the right of any children who may be so educated. On the one hand, if the rights of those on the receiving end of such education are only recognised at the age of legal majority (from 18 to 21), then they may by that point have already been denied the possibility of challenging or refusing the value to which they have

⁴¹ Office of the United Nations High Commissioner for Human Rights "Legislative History of the Convention of the Rights of the Child" HR/PUB/07/01 (2007) at 582.

⁴² Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [60].

⁴³ HA Alexander and D Carr "Philosophical Issues in Spiritual Education and Development" in EC Roehlkepartain, PE King, L Wagener and PL Benson (eds) *The Handbook of Spiritual Development in Childhood and Adolescence* (Thousand Oaks, California, USA: Sage Publications, 2005) 73-91 at 81.

been exposed. On the other hand, if the right of challenge or refusal is extended at an earlier age (adolescence, the age of reason, or the stage at which they become conscious of choice), then they may not have been sufficiently well exposed for full appreciation of the tradition they are challenging or refusing.

D Children's Right to Religion

1 What is the right?

The Convention clarifies that children have some right to freedom of religion. This right inevitably links to other rights such as the right to identity, freedom of expression and access to information, including information about religion.⁴⁴ The UNESCO Convention against Discrimination in Education specifies that no one should be compelled to receive religious instruction inconsistent with his or her own conviction. Not only does this offer protection against State indoctrination according to Brems, but it can equally serve as a basis for protecting children's rights against religious instruction imposed by their parents.⁴⁵ Additionally, the right to join a religion, no matter how small, should be protected as much as a decision to join a major world religion.⁴⁶

However, what is not clear is what is included within the right. Where other international instruments provide direction and detail on issues such as the freedom to change one's religion, the freedom to manifest one's beliefs, the specification of modalities and protection against coercion impairing free choice in religion, the Convention is silent.⁴⁷ The wording of art 14 is far more restrictive than the wording in art 18(1) of the ICCPR, for example, which provides that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and

⁴⁴ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [17].

⁴⁵ At [14].

⁴⁶ At [45].

⁴⁷ At [9].

freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The phrase "include the freedom to have or adopt a religion or belief of his choice" in art 18 of the ICCPR can clearly be construed as including the right to change one's religion.⁴⁸ General Comment No 22 also confirms that.⁴⁹ However, when compared to art 14 of the Convention, it is not clear what manifestations are protected by the Convention and it is unclear whether art 14 protects the right to change one's religion.⁵⁰ When art 14 was drafted, a paragraph giving a child the right to choose and change their religion was not adopted.⁵¹ The debate during drafting was divisive and it was unclear whether the right to choose and change religions was included.⁵² The controversy focused on the existence of a child's own right vis-à-vis his or her parents, rather than on the protection of the choice in religion vis-à-vis public authorities.⁵³ It is unclear whether the final version was chosen so as to prevent children from having the choice to change.

Nevertheless, we can infer that art 14 includes the right to not have a religion and to choose your religion. Not only is it difficult to reconcile having the right to a religion with the idea that you might not have a corresponding right to change religions or choose no religion, but the actions of some States Parties indicate the intention behind art 14. As above, several Islamic states made reservations to art 14 due to it not recognising the right to choose a religion that is not Islam. The fact that they felt it necessary to have a reservation on art 14 suggests they see it as incorporating the right to choose a different religion or no religion at all.⁵⁴ Several states stated during negotiations or made declarations upon ratification that they believed changing religions was included. Vandenhole, Türkelli and Lembrechts

⁴⁸ At [49].

⁴⁹ Office of the High Commissioner for Human Rights *General Comment No 22: The right to Freedom of Thought, Conscience and Religion (art 18)* UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

⁵⁰ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [41].

⁵¹ At [42].

⁵² Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts *Article 14: Freedom of Thought, Conscience and Religion* (online looseleaf ed, Elgar Commentaries series) at 14.11.

⁵³ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [42].

⁵⁴ At [49].

argue that the Committee clearly adopts that approach.⁵⁵ Therefore, we can assume that art 14 not only provides protection to children when following their chosen religious beliefs, but also that it protects the child's right to change religions or choose not to follow a religion. This may pose an issue for children who are living within a closed community and have no practical way to leave that community or outwardly change their beliefs.

2 *Justifying the right*

It is necessary to consider the foundations of the right to freedom of religion. Langlaude argues that the right of a child to freedom of religion is centered not on the child's autonomy, rather, on their interest in growth as "an independent and autonomous actor in the matrix of parents, religious community and society".⁵⁶ This is consistent with a statement from the Committee that "the human rights of children cannot be realised independently from the human rights of their parents, or in isolation from society at large".⁵⁷ She thinks it is wrong that the Committee has treated the child as an autonomous rights-bearer and believes there is too much focus on "protecting" the child through intervention.⁵⁸ Langlaude argues the Committee's link between the child and their family and community is too tenuous and that there is too much emphasis on the child making their own individual choice.⁵⁹ This, she believes, is because the Committee comes from a place where religion is implied as a negative thing for children.⁶⁰

Langlaude suggests that if we look at the reasons for giving children rights and figure out the right achieves specifically, it will then be possible to develop a framework for the right. She looks at the interest theory to do so. This is because the interest theory does not tie a right to capacity. It says that a right is an interest worthy of moral or legal protection, or a

⁵⁵ Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts *Article 14: Freedom of Thought, Conscience and Religion*, above n 52, at 14.11.

⁵⁶ Sylvie Langlaude "The Right of the Child to Religious Freedom in International Law", above n 38, at 245.

⁵⁷ United Nations Committee on the Rights of the Child "Concluding Observations: Uzbekistan" UN Doc CRC/C/15/Add.167 (2001), in Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion* at [21].

⁵⁸ Sylvie Langlaude "The Right of the Child to Religious Freedom in International Law, above n 38, at 247 – 248.

⁵⁹ At 247 – 248.

⁶⁰ At 247 – 248.

good of such importance that it would be wrong to deny it or withhold it to the individual. The law should advance the interests of the individual on the premise that it is good for them, and the law will make it legally wrong to withhold that good from them.⁶¹

E Duty on States Parties

There has been a question about whether the wording of "shall respect" in art 14 places a positive or negative obligation on States Parties to uphold the right. Eva Brems argues that it may restrict the scope of state obligations by potentially excluding the obligation to protect and fulfil.⁶² The idea that the word "respect" only imposes negative obligations is one that has been gaining ground. Moreover, the word "respect" was chosen in place of language like "ensure" and "uphold" during the drafting stage.⁶³

However, this is not an automatic interpretation and it is likely that the wording of art 14 was not intended to only impose negative obligations on States Parties. In the context of art 9 of the European Convention on Human Rights, it was stated that "there may also be positive obligations inherent in an effective 'respect' for the individual's freedom of religion".⁶⁴ Moreover, the Committee has indicated that States Parties do have positive obligations to take measures to protect the right.⁶⁵ For example, in its *General Guidelines regarding the form and the contents of the periodic reports* (UN Doc. CRC/C/58, 1996) the Committee requested States to:⁶⁶

indicate the measures adopted to ensure the child's freedom to manifest his or her religion or beliefs, including with regard to minorities or indigenous groups. Information should also be provided on measures to ensure respect for the child's rights in relation to any religious teaching in public schools or institutions.

⁶¹ At 43.

⁶² Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [7].

⁶³ At [23].

⁶⁴ At [22].

⁶⁵ At [24].

⁶⁶ At [57].

This seems to have reinstated the nature of the obligation in art 14 to "ensure".⁶⁷ The *travaux préparatoires* suggest the word "respect" is a compromise between "ensure" and "recognise".⁶⁸

There is limited discourse on whether the articles are enforceable against the State or parents. However, it appears the State is the party with the obligation to uphold the right. While parents will always practically bear the burden of ensuring the right to freedom of religion, States must ensure that they do so. For example, Eva Brems makes clear that state interference will only be justified when it is protecting the child's right to freedom of religion.⁶⁹ This implies that states have an obligation to interfere in the first place.

F Case Study: Gloriavale Christian Community

The most recent Charities Services Investigation into Gloriavale was conducted after increased media coverage and reports from people who had left the Gloriavale Christian Community.⁷⁰ Charities Services investigated some of the claims around Gloriavale to see whether there was any serious wrongdoing under the Charities Act, which would threaten Gloriavale's status as a registered charity.⁷¹ While the Charities Services do not have the authority to investigate serious criminal offending, the report contains useful information which is otherwise difficult to obtain given the exclusive nature of the community.⁷²

The Report refers to the "What We Believe" document (the Document) which is the strict interpretation of the Christian bible as the leaders of Gloriavale have decided. Each member is expected to sign the Declaration of Commitment (the Declaration), which gives the

⁶⁷ At [57].

⁶⁸ Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts *Article 14: Freedom of Thought, Conscience and Religion*, above n 52, at 14.02.

⁶⁹ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [54].

⁷⁰ Paul Budd "The Christian Church Community Trust: Charities Services Investigation", above n 7, at [1.1] and [3.1]–[3.3].

⁷¹ At [1.3]–[1.7] and [4.1].

⁷² At [1.4] and [3.5].

Gloriavale trust complete control over their financial affairs as well as their ability to do things such as apply for a passport.⁷³

Many former members allege that they were coerced into signing the Declaration and that youth are coerced into doing so. Over the five years preceding the Report, nine of the people who left signed the Declaration before the age of 18.⁷⁴ Former members have alleged that if someone did not wish to sign the Declaration, they were threatened with shunning, removal from the community and being separated from family and friends.⁷⁵ The same former members alleged that young people have little option but to sign the Declaration if they wish to stay in the community.⁷⁶

It is unclear whether a child who signs the Declaration has capacity. Trustees of the community have said that children are taught about the Document and the Declaration from a very young age, and are expected to approach the leadership when they feel ready and willing to sign.⁷⁷ However, there is no evidence that there is any assessment of the child's capacity to make that choice. The child may have been coerced by their parents or by other members of the community, or may be influenced by the factors just mentioned.

Not only is this a question of evolving capacities, but also of whether these children are exercising their right to freedom of religion. While a child may choose to sign the Declaration, they may only be doing so because the alternative of being sent cast out of their community, away from their family and friends, seems intolerable. In the case of *Henderson v Henderson*, [Anne], a young child wishing to leave Gloriavale, was prevented by senior women in the community from having telephone access to her mother. To leave, she was required to speak with an elder at the community.⁷⁸ This demonstrates the barriers to children changing their religion.

⁷³ At [2.8] and [7.23] – [7.25].

⁷⁴ At [7.26].

⁷⁵ At [7.27].

⁷⁶ At [7.28].

⁷⁷ At [7.30].

⁷⁸ *Henderson v Henderson* [2019] NZFC 9936 at [29].

Another concern is the use of "Servants and Shepherds meetings", where members who have breached rules of the community are summoned to a meeting to be held accountable.⁷⁹ It is alleged that at these meetings, the leaders of the community would shout insults at the wrongdoers. Children as young as 13 to 15 have been present at these meetings, where female members have allegedly been called "sluts", "whores" and "evil".⁸⁰ Not only do these meetings raise concerns such as the right to be free from torture and cruel treatment, but they also impact on the right to freedom of religion. If a child is essentially being forced into acting in accordance with a certain religion, this raises serious concerns about their right to be free in this regard. A lot of the rhetoric from Sylvie Langlaude in argument against viewing children as autonomous rights-bearers refers to the inherent good for a child that comes with being involved in a religion. However, it is difficult to see how this kind of treatment would be consistent with Langlaude's interest-based argument.

Finally, we cannot escape the inevitable question about indoctrination in the context of parent's rights. A child brought up within the Gloriavale community will be brought up according to the strict interpretation of Christianity that the community believes in and adheres to. It is the parent's right to direct their child in that, and the community's right to aid with that direction. However, children within the Gloriavale community differ to children who are brought up according to religions elsewhere in the world. This is because they are effectively shut off from the rest of society and receive no exposure to any other belief systems.

G Conclusion

While the balancing between parental direction and children's rights is difficult, it appears clear that children have the right to a religion and that it includes the right to change religions if they wish. If the above allegations are true, it is highly likely that there are significant breaches of children's right to religion within the Gloriavale community. While they are exercising their right to a religion within the community, the actions above are likely to prevent a child from exercising their right to change religions. Moreover, it is

⁷⁹ At [7.75].

⁸⁰ At [7.76].

unclear whether the children within the community have actually chosen to exercise the religion or whether they have been coerced into it in a manner that would exceed the protected parental direction. The State, having ratified the Convention, has an obligation to do more to protect this right of children within communities like Gloriavale.

III Right to Education

A Introduction

The right to education is one of the most powerful rights a child has. However, the right to education cannot be viewed separately from the right to religion. As Eva Brems explains, introduction to religious belief is part of the education process, establishing a clear link between these two rights.⁸¹ Even more specifically, Brems notes that:⁸²

art 29(a) [of the Convention] stipulates that the education of the child shall be directed to the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all religious groups.

Questions arise about the right to education in ERCs, due to schools often being run from within the community, educational standards being different and the expectation that children will not go on to higher education, but that they will leave school to work within the community. In New Zealand, significant concerns have been raised about the quality of education in the Gloriavale community.⁸³ However, it is impossible to analyse these issues without first answering some questions about the right to education more generally. What exactly does the right to education entail? Should education prepare a child for life in society generally, or for life within their particular community?

This part will attempt to resolve some of these questions. Unfortunately, the right to education has not been clearly defined and there is a lack of professional and academic

⁸¹ Eva Brems *Article 14 The Right to Freedom of Thought, Conscience and Religion*, above n 16, at [20].

⁸² At [20].

⁸³ See pages 34 – 37 of this essay.

literature on it.⁸⁴ Therefore, in answering these questions, this part will firstly look at the background to the right to education, including its status as an economic, social and cultural right (ESCR) rather than a civil and political one. It will then attempt to set out what the right involves, including the specific requirements of the right. It is here that the right to religion will be intertwined with the right to education. Finally, it will look at Gloriavale as a case study and attempt to answer whether the right is robust enough to protect children's education in ERCs.

B Historical Foundations

1 Changes in view

Historically, the burden of educating children has fallen on parents and the church. It is only in the last couple of hundred years that this onus has shifted onto the state.⁸⁵ This is best reflected by the change in the attitudes of liberal theory towards education. While socialist theory necessarily views the state as "the primary means to ensure the economic and social wellbeing of communities", liberal theory is more cautious of excessive state involvement in education. This is reflected by the primary burden being placed on parents to provide an education to their children.⁸⁶ However, by the end of the 19th century, liberal states had already begun regulating curriculum and providing minimum education standards, indicating a growing acceptance by the state of their role in the education of children.⁸⁷

This change in attitude may lie with revolutionary action that has taken place over the last few centuries. Where education was once only available to the privileged and elite, the ideals pushed forward by revolutionary action during the 18th and 19th centuries included

⁸⁴ Katarina Tomaševski "Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004" (2005) 5 *HRLR* 205 at 207, 208 and 211.

⁸⁵ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR" (2010) 32 *HRQ* 253 at 262.

⁸⁶ Above n 85.

⁸⁷ Above n 85.

an upheaval of education. It was realised that education is a tool through which equality and freedom can be achieved.⁸⁸ This idea now encompasses a popular belief in international human rights law that "education should enable the individual to freely develop her own personality and dignity, to participate in a free society, and to respect human rights".⁸⁹

C International Framework

1 Relevant treaties

The right to education was first recognised in the Universal Declaration of Human Rights in December 1948.⁹⁰ Since then, it has been enshrined by many other pieces international law, including Arts 28 and 29 of the Convention. Article 28 protects the right by providing for compulsory primary education and accessible higher education, while art 29 details what the right entails.⁹¹

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.

⁸⁸ Above n 85.

⁸⁹ Above n 85.

⁹⁰ Universal Declaration of Human Rights GA Res 217A (1948), art 26.

⁹¹ Convention on the Rights of the Child, above n 14, arts 28 and 29.

The ICESCR, however, provides the most comprehensive protections of the child's right to education.⁹² The right is set out in arts 13 and 14, which provide both practical guidance similar to that provided for in the Convention, such as compulsory primary education and accessible higher education, as well as more significant details:⁹³

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2 Education as an Economic, Social and Cultural Right

The inclusion of the right to education in the ICESCR cemented its status as an ESCR. These rights have generally been neglected in comparison to their civil and political counterparts.⁹⁴ One reason for this is that certain states find ESCRs at odds with their conception of the state's role and obligations.⁹⁵ These states may view the obligation to invest in resources and take positive steps to protect economic rights as too onerous and detracting from their other obligations. Another is the requirement of progressive realisation.⁹⁶ This requires States Parties to the ICESCR to only realise the obligations incrementally. Moreover, the ICESCR does not specify a time period in which the rights have to be realised.⁹⁷ While there is a "minimum core" of rights that must be realised

⁹² Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 261.

⁹³ International Covenant on Economic, Social and Cultural Rights, above n 19, arts 13 and 14.

⁹⁴ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 255.

⁹⁵ At 255.

⁹⁶ At 256; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 13: The right to education (Art 13)* UN Doc E/C.12/1999/10 (8 December 1999) at [6] and [43]–[44] and Aoife Nolan "Children's Economic and Social Rights" in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 239 at 245 - 247.

⁹⁷ At 256.

immediately, this does not lift the status of ESCRs to match those of civil and political rights.⁹⁸

What this means for the right to education is that states may question the extent of their duties to realise the right to education. The obligation of progressivity may allow states to justify taking longer to implement certain aspects of the right. The distinction between ESCRs and civil and political rights has also created problems for monitoring and enforcement. In particular, Katarina Tomaševski has argued that while the Office of the United Nations High Commissioner for Human Rights (OHCHR) has labelled the Commission on Human Rights as "the premier global forum for debate of human rights issues and denunciation of abuses", this is not working in reality.⁹⁹ Katarina argues that the Cold War:¹⁰⁰

colours much of what the Commission does in economic, social and cultural rights. Most importantly, it has prevented the Commission from performing its key task of denouncing abuses. Thus, violations of the right to education committed through governments' imposition of education incompatible with human rights continue unchallenged, as do denials that education is a human right through its conversion to a freely traded service.

Another issue that arises from the distinction between ESCRs and civil and political rights is whether ESCRs impose a positive duty or a negative duty on States Parties to realise the rights. As this part will later explain, the literature is making it increasingly clear that the right to education imposes both positive and negative obligations on States Parties to protect a child's right to education. Moreover, the distinction between these two classes of rights is collapsing generally, with both types of rights requiring positive and negative obligations from states to uphold them.¹⁰¹

⁹⁸ Aoife Nolan "Children's Economic and Social Rights", above n 96, at 249.

⁹⁹ Katarina Tomaševski "Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004", above n 84, at 209.

¹⁰⁰ At 209.

¹⁰¹ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 255.

D Defining the Right to Education

1 Barriers to defining the right

Joel Spring would argue that the largest problem with the right to education is that there is no justification for the right of education and there is no universal concept of education.¹⁰² Katarina Tomaševski would agree. As alluded to above, one of the main failings is that the OHCHR has never defined what the right is and is not. The issue according to Tomaševski is that it is impossible to denounce a right if it has not been operationalised first.¹⁰³ She argues that there is a lack of connection between the United Nations' human rights work and their policy on education and that the right to education has not been mainstreamed through the UN's work.¹⁰⁴ Clearly defined standards for the right do not exist and most of the Commission's work focuses on primary education.¹⁰⁵

These problems are highlighted by the events at the World Conference on Education for All. Some delegates believed the right to education should be focused on individual liberation and democracy, while others thought that education should emphasise spiritual and moral values.¹⁰⁶ There was debate around the economic purposes of education, including whether a basic education should include skills for living and increasing national economic growth in addition to basic literacy and numeracy.¹⁰⁷ Others thought that economic outcomes should not define education, because doing so may run contrary to education for liberation and democracy. There were also significant cultural and political differences between delegates.¹⁰⁸ While it is not clear where New Zealand stood, when discussing the Convention New Zealand seemed to take a more holistic view of education, stating that "the school is only one educational force in society and that the influence of the

¹⁰² Joel Spring *The Universal Right to Education: Justification, Definition and Guidelines* (Routledge, 2000) at 3.

¹⁰³ Katarina Tomaševski "Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004", above n 84, at 207.

¹⁰⁴ At 208.

¹⁰⁵ At 212.

¹⁰⁶ Joel Spring, *The Universal Right to Education: Justification, Definition and Guidelines*, above n 102, at 4.

¹⁰⁷ At 4.

¹⁰⁸ At 4.

home, mass media, the peer group and other models can overwhelm the force of the school".¹⁰⁹

At that conference, delegates came up with a definition of education. Clause 1 of Article I of the World Declaration on Education for All defines education as:¹¹⁰

1. Every person—child, youth and adult—shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic content (such as knowledge skills values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

Spring argues that this is not an adequate and complete justification of the right to education, nor a good definition of education.¹¹¹ He argues that a sufficient justification of education would firstly protect the right to education for all people, notwithstanding differences in culture, language and religion. Secondly, and more relevant to this paper, a sufficient definition of education would be appropriate to all cultures, languages and religions.¹¹² Tomaševski believes we need a UN policy on the right to education, which the Commission would be best placed to come up with.¹¹³

¹⁰⁹ Office of the United Nations High Commissioner for Human Rights "Legislative History of the Convention on the Rights of the Child", above n 41, at 660.

¹¹⁰ World Declaration on Education For All *Adopted by the World Conference on Education for All* (Jomtien Thailand, 5 – 9 March 1990).

¹¹¹ Joel Spring, above n 102, at 5.

¹¹² At 6.

¹¹³ Katarina Tomaševski "Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004", above n 84, at 209.

General Comment No 13, the relevant comment on the right to education, is similarly unhelpful.¹¹⁴ The first paragraph sets out a definition that is arguably just as vague as the one from the World Declaration:¹¹⁵

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

The rest of the comment is riddled with contradictions and vague statements. At paragraph 12 the Comment explains that while the content of secondary education will vary among States Parties, over time it includes completion of basic education and consolidation of the foundations for life-long learning and human development.¹¹⁶ It states that education will prepare students for vocational and higher educational opportunities.¹¹⁷ Secondary school is to be "generally available", yet the right to higher education is slightly less – it is to be available "on the basis of capacity".¹¹⁸ In accordance with art 13(4), everyone, including non-nationals, has the liberty to establish and direct educational institutions.¹¹⁹ States Parties must uphold that right, whilst ensuring that this liberty does not lead to extreme disparities of educational opportunity for some groups in society.¹²⁰ It is also a violation

¹¹⁴ Committee on Economic, Social and Cultural Rights *General Comment No 13: The right to education (article 13)*, above n 96.

¹¹⁵ At [1].

¹¹⁶ At [12].

¹¹⁷ At [12].

¹¹⁸ At [19].

¹¹⁹ At [29].

¹²⁰ At [30].

to fail to ensure private educational institutions conform to the “minimum educational standards”.¹²¹

2 *What is the purpose of education?*

Therefore, the large question remains – what is the purpose of education, and should it prepare children for life in society generally, or should it be tailored to the specific circumstances, beliefs and values the child is raised with? This difficult question is summed up in *Education, Law and Diversity: Schooling for One and All*, where Neville Harris referred to the "No Outsiders" dispute.¹²² 400 Muslim parents at a Birmingham school signed a petition calling for an end to the "No Outsiders" campaign led by the assistant headteacher. The campaign promoted equality for lesbian, gay, bisexual and transgender people and discouraged homophobia. Harris summed up the issue as:¹²³

The No Outsiders dispute... reminds us that, at the national level, modern Western democratic states have to reconcile the obligation to respect individual and group rights to religious and cultural freedom and autonomy with the national need to promote social cohesion and manage social risks, while also identifying and protecting the independent interests of the child and their education rights.

One argument is that the purpose of education is the perpetuation of society.¹²⁴ While this does not mean that society should remain unchanged, there should be a "core of shared values" which remain intact if society is to survive.¹²⁵ According to this idea, there are two functions of education. Firstly, education should preserve the "values, beliefs, customs, rites, rituals, and the knowledge that make the long-term survival of a society possible". Secondly, education should provide for change.¹²⁶ Randall Bass, the proponent of this idea, argues that all educators who assume the responsibility of preparing students for a changing

¹²¹ At [29].

¹²² Neville Harris *Education, Law and Diversity: Schooling for One and All* (Bloomsbury Publishing, 2020).

¹²³ Above n 122.

¹²⁴ Randall Bass "The Purpose of Education" (1997) 61 *The Educational Forum* 128 at 129.

¹²⁵ At 129.

¹²⁶ At 130.

world must take the approach of striving to develop an individual's abilities, creativities and curiosity. However, the problem with this argument is that some educators may not want to assume that responsibility. Moreover, some educators, presumably like those in exclusive (and usually conservative) religious communities such as Gloriavale, will probably not want change in their societies. To them, perpetuation of society might mean discouraging change and ensuring that their traditions and beliefs survive across generations. To this, Bass would argue that "no student's education is complete without significant exposure to both functions of education".¹²⁷

This view of the right is fairly consistent with what may be described as a "rights-based view" of education. Some scholars view the right to education as a way of promoting other rights. As put in the *Human Rights Quarterly*:¹²⁸

the right to education remains one of the most important, universal, yet complex rights in international human rights law. The right to education is a "multiplier" or "empowerment" right as well as an essential means to promote other rights, the enjoyment of which enhances all rights and freedoms while its violation jeopardizes them all. The denial of the right to education "leads to compounded denials of other human rights and perpetuation of poverty".

Katarina Tomaševski emphasises the complexity of rights-based education, pointing out that it means to "fully protect the right to education and human rights *in* education and enhance human rights *through* education".¹²⁹ This would mean upholding rights when educating children, including ensuring that the right is applied equally and with no discrimination.¹³⁰ This may include giving equal educational opportunities to boys and girls and to all ethnicities. However, it also would mean educating children about their human rights. For example, informing them of their other rights and teaching them skills

¹²⁷ At 130.

¹²⁸ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 260.

¹²⁹ Katarina Tomaševski *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers, 2006) at 139.

¹³⁰ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 268.

about how they can enforce these. This requirement is a lot harder to fulfil and is probably the part that is most at risk of being overlooked. As seen in the rights framework given above, children do not have a specific right to be educated about the Convention or their rights. However, this essay will later argue for rights education as a way to uphold children's rights within ERCs.

There is a question of whether the right to education involves preparing children for tertiary education should they wish to study further. Aside from the fact that General Comment No 13 says education will prepare students for vocational and higher educational opportunities, this question has not been well traversed. It is more helpful to refer to individual examples. In the case of *H v F*, the New Zealand High Court talked about how there are respects in which the views by the Exclusive Brethren community are incompatible with children's rights principles as articulated in the Convention. In particular, the Court referenced:¹³¹

the accessibility of higher education to all on the basis of capacity (art 28), and education being directed to the preparation of the child for responsible life in a free society in the spirit of ... tolerance and friendship among all peoples and ... religious groups (art 29).

The Committee has also noted that governments should monitor Koranic schools and that those schools should respect national curricula, the aims of education and ensure that religious instruction is not prioritised to the detriment of professional or scientific learning.¹³²

However, remembering Neville Harris' problem, we must reconcile these obligations with the obligation to respect individual and group rights to religious and cultural freedom. Sylvie Langlaude is extremely critical of the Committee's approach to the question of the extent of education where religion is concerned. She says that the Committee's statements

¹³¹ *H v F* [1993] 10 FRNZ 486 (HC) at 499.

¹³² United Nations Committee on the Rights of the Child "Concluding Observations: Ivory Coast" UN Doc CRC/C/15/Add.155 (2001) at 51; "Summary Record of the 739th meeting: Gambia" UN Doc CRC/C/SR.739 (2002) at 83 and "Summary Record of the 882nd meeting: Morocco" UN Doc CRC/C/SR.882 (2003) at 50.

on the aims of education, tolerance, non-discrimination and pluralism shows that the Committee is "almost redefining what the child should or should not be taught in religious education lessons".¹³³ Further to this, she argues that the Committee has an "impoverished" understanding of religion.¹³⁴

This is obvious as it insists so much on freedom of choice, on the child leaving the religious community they have been brought into by their family, on choosing whether to attend religious education classes, and on the freedom not to have a religion. This gives the impression that the Committee objects to the idea of the child being a religious believer, as if there was something slightly harmful in having a religion. This is repeated when the Committee deals with the aims of education, and it sometimes seems to consider that there is something inherently biased and intolerant in religions that the child should not be taught about.

This is an important view which recognises the fact that it is easy to impose the Western and mainstream ideals of the majority onto minority groups. Regarding the issue of education for children in religious minority groups, Tamara Tolley would argue that education should be about preparing children for life within their community, not for life in society generally. The basis for her view is that as established in *Re L (Care: Threshold Criteria)*, "children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it".¹³⁵ Similarly, Leona Okakok comes from the Northwest Alaskan community of the Iñupiat. Writing for the *Harvard Educational Review*, she said that "to me, educating a child means equipping him or her with the capability to succeed in the world he or she will live in".¹³⁶

However, Okakok differs from Tolley in that she acknowledges a number of children choose to remain in their community after finishing school. Therefore, "providing an adequate education for these children involves teaching Arctic survival skills as well as the

¹³³ Sylvie Langlaude "Children and Religion under Article 14 UNCRC: A Critical Analysis" (2008) 16(4) *IJCR* 475 at 500.

¹³⁴ At 499.

¹³⁵ Tamara Tolley "Hands Off or Hands On?: De-constructing the 'Test Case' of *Re G* within a Culture of Children's Rights" (2014) 77(1) *MLR* 110 at 112 – 113.

¹³⁶ Leona Okakok "Serving the Purpose of Education" (1989) 59(4) *Harvard Educational Review* 405 at 411.

academic skills needed for success in the Western world".¹³⁷ Ultimately, Okakok still sees the value of education preparing children for higher education and life in society generally, should they so wish to seek it. However, it must also ensure that they have the skills to remain within their society if that is the decision they make.

It is clear that there is no simple definition for the right to education, nor a clear consensus on what it entails. However, synthesising the various arguments outlined above, it is likely that the purpose of education is to enable children to make informed choices about their lives when they come to do so. This involves making sure children are aware of their rights and that there are many views, religions and ways of living in the world. However, it does not mean shutting out the beliefs of the child's family and religion. Rather, the right to education should encourage the child to gain the skills and knowledge required to thrive in their own community, should that be what they pursue.

3 Minimum standards and guidance on the right to education

It is easy to forget that as an ESCR, the right to education must only be realised progressively and is subject to States Parties' "maximum available resources".¹³⁸ General Comment No 13 sets out the minimum obligations in relation to the right to education. These include:¹³⁹

- i. To ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
- ii. to ensure education conforms to the objectives set out in article 13(1) [of the Covenant];
- iii. to provide [free and compulsory] primary education for all;
- iv. to adopt and implement a national education strategy which includes provision for secondary, higher and fundamental education; and
- v. to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (arts. 13(3) and (4)).

¹³⁷ At 414.

¹³⁸ Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR", above n 85, at 267.

¹³⁹ At 272.

As further guidance, Katarina Tomaševski has set out the "4-As approach" to the right to education, arguing that governments have to make education available, accessible, acceptable and adaptable.¹⁴⁰ The most relevant requirements for the purposes of education in ERCs are the requirements of accessibility and acceptability. This is because governments are obliged to ensure access to education for all children in the compulsory age range, and that the education made available is of good quality. This includes having minimum standards for teachers, health and safety standards but also obligations such as ensuring that school textbooks are not censored.¹⁴¹

E Case Study: Gloriavale

1 Education within the community

The 2016 Charities Services Report once again provides some useful information. Former members have alleged that they were denied any choice or opportunities to pursue further education or to follow a desired career path.¹⁴² This is consistent with the Document, which the Charities Services has said corroborates that at age 15, young people are expected to finish their education and begin work.¹⁴³ Former members have also alleged that there are issues with testing procedures, being that some students were given the answers to tests at school.¹⁴⁴

The Herald on Sunday received documents revealing the NCEA results at the Gloriavale Christian Community School.¹⁴⁵ Not only are only 17 subjects offered in comparison to an average of 35 at a typical state school, but the subjects on offer are concerning. Maths and English is only taught to Level 1 standards and girls are excluded from science. Level

¹⁴⁰ Katarina Tomaševski "Human Rights Obligations: Making education available, accessible, acceptable and adaptable" *Right to Education Primers No 3*, at 13.

¹⁴¹ At 13 – 14.

¹⁴² Paul Budd "The Christian Church Community Trust: Charities Services Investigation", above n 7, at [7.57].

¹⁴³ At [7.58].

¹⁴⁴ At [7.59].

¹⁴⁵ Lynley Bilbey "Gloriavale's woefully inadequate curriculum" *New Zealand Herald* (online ed, 20 September 2015).

3 subjects are trade-related and separated by gender. Where boys take subjects based in agriculture and construction, the subjects for girls are based in "cooking, pattern-cutting and childcare".¹⁴⁶ Sandy Pasley, the president of the Secondary Schools Principals' Association, described the curriculum as "woefully inadequate".¹⁴⁷

Nevertheless, Education Review Office (ERO) reports on the Gloriavale Christian Community School have been positive. A previous ERO report has said that:¹⁴⁸

Students are well prepared to learn the necessary literacy and mathematical skills and appropriate relationships for a life of faith and practical service within the community.

The most recent ERO report, conducted in 2015, provides that the school's curriculum "reflects the community's philosophy" and teaches students the appropriate skills for life in the community.¹⁴⁹ Neither report expresses concern about the limited curriculum or early end to education for children at the school. Members of the Education and Science Select Committee, which met to look into the education provided at Gloriavale, felt that going to the school was the parent's choice and therefore there were no grounds for investigation.¹⁵⁰

2 *Rights issues*

The first obvious difficulty comes back to the tension raised by Tamara Tolley – should children within Gloriavale receive an education which prepares them for life within their community, or life in society as a whole? The principal of Gloriavale Christian School, Faithful Pilgrim, said "our aim is prepare our own students from our community for a life of practical service, a life of faith within the community", further stating "We're not preparing our students for a life in your society, we are preparing them for a life in our society. Otherwise it wouldn't be sensible, would it?"¹⁵¹

¹⁴⁶ Above n 145.

¹⁴⁷ Above n 145.

¹⁴⁸ "No inquiry into Gloriavale education" *Otago Daily Times* (online ed, Otago, 19 August 2015).

¹⁴⁹ Education Review Office *Gloriavale Christian Community School* (28 May 2015).

¹⁵⁰ "No inquiry into Gloriavale education", above n 148.

¹⁵¹ Kirsty Johnston "Bible clear: Separate roles for men and women – Gloriavale teacher" *New Zealand Herald* (online ed, 1 May 2015).

While the scholarship and international guidance set out above provides that children should be given a sufficient education to prepare themselves for life within their community, arguably, it is sufficiently clear that their education should prepare them for more than that if they should wish. Children should be taught about their religion and consistent with Langlaude's argument, should not be prevented from receiving an education consistent with their religion. However, they should also receive an education which prepares them for another life should they wish to choose it. A school such as the Gloriavale Christian School, therefore, should ensure that it teaches students English, Maths and Science beyond just Level 1 and that its focus is not purely on vocational subjects which prepare them for life in the community. This would be most consistent with a rights-based approach as advocated for by the likes of Leona Okakok.

Another concern is that the education within the Gloriavale Christian Community school is not equal. There is clear discrimination if girls are excluded from science and taught different Level 3 courses to boys. This is something that ex-Green MP, Catherine Delahunty, has been particularly concerned about.¹⁵² It is clear from the literature above that the right to education should be applied equally. It should be concerning that in New Zealand, there is the potential for discrimination within education based on sex.

The Gloriavale Christian School did not wish to disclose documents or further information about their curriculum upon my Official Information Act request via the ERO. To analyse the standard of education within the community reliably, it would be necessary to have such information. While the ERO reports have been largely positive, there has also been recent criticism about this and suggestions from former members of the community that the ERO reports are not reflective of the realities.

¹⁵² Lynley Bilby "Gloriavale under fire over sexist curriculum" *New Zealand Herald* (online ed, 2 August 2015).

F Conclusion

While the right to education is difficult to define, it seems that an education in New Zealand should offer children the opportunity to pursue life either within their chosen community according to their beliefs, or within wider society. More information needs to be provided by Gloriavale, but if the educational standards are not providing adequate opportunities for children to pursue a life other than within the community, then their right to education may be being breached.

IV Recommendations for Better Protection of Children's Rights

A Introduction

Given that there is a risk to children's right to religion and right to education in ERCs, as outlined above, more needs to be done to protect these rights of children in New Zealand. The difficulty is providing targeted protection without discriminating against these groups and threatening their right to exercise their chosen religion.

Possible options for reform include increasing Charities Act requirements for ERCs to get charity status to ensure that children's rights are upheld before charity status is granted. Secondly, mandatory rights education could be imposed in New Zealand schools. This would ensure that children know about their rights under the Convention. From a judicial perspective, the only time the Courts will hear issues relating to children's rights in this sphere is in guardianship disputes. Therefore, the Courts could also adopt a rights-based approach when considering guardianship disputes of this matter. These approaches are intended to act as discussion points to encourage further consideration of what might be done, rather than as finite options.

B Tightening of Charities Act Requirements

1 Introduction

While acknowledging that not all ERCs are set up in a structure similar to that of the Gloriavale Christian Community, this part of the essay will assume that this is a viable structure many communities may use. This means that they are set up as a Trust and

registered as a Charitable Entity under the Charities Act. Other exclusive communities, such as the Centrepont Community, have operated under a Trust model similar to Gloriavale.¹⁵³ While tightening the requirements under the Charities Act would not prevent communities from operating under a trust model alone, it may encourage them to adhere to requirements due to the benefits that come with being registered as a Charitable Entity, such as tax exemptions.

2 *Current requirements*

In order to be a charitable entity under the Charities Act, the entity must advance a charitable purpose. This is defined as including "every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community".¹⁵⁴ The Act further specifies that the purpose of a trust, society, or institution is a charitable purpose if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.¹⁵⁵ This is key for ERCs, where members are likely to be related.

A Charitable Entity may be removed from the register if it has been found to have engaged in "serious wrongdoing" or if a person engaged with the entity has engaged in serious wrongdoing. This is defined as:¹⁵⁶

- (a) an unlawful or a corrupt use of the funds or resources of the entity; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or
- (c) an act, omission, or course of conduct that constitutes an offence; or
- (d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

Other options also exist where serious wrongdoing has occurred, such as a warning under s 54. A warning notice may include reasons for giving the warning and actions required to remedy the matters which caused the warning.

¹⁵³ Sunday Star Times "Centrepont – losses add to misery" *Stuff* (online ed, 31 January 2009).

¹⁵⁴ Charities Act 2005, s 5.

¹⁵⁵ Section 5(2)(a).

¹⁵⁶ Section 4.

3 *Gloriavale*

The Charities Services investigation into Gloriavale provides a useful outline for what is required by an ERC to attain and maintain their registration as a charity. The investigation was conducted after a question raising doubts about whether Gloriavale satisfied the public benefit requirement due to its inward focusing activities and way of life.¹⁵⁷ It found that in order to maintain its status as a Charitable Entity, the trust must provide a sufficient benefit to the public through its operations and activities.¹⁵⁸ It found that the Trust did demonstrate sufficient public benefit.¹⁵⁹

The investigation also looked into whether there had been serious wrongdoing as defined under the Act. Although there were allegations into sexual abuse within the Gloriavale community, there was no evidence to substantiate the allegations. The report noted that if there was evidence in the future to back up the claims, there may then be serious wrongdoing which could allow for "further compliance action" to be taken against the Trust. However, the most recent investigation in 2016 focused solely on the issue of whether there was serious wrongdoing within the Gloriavale community.¹⁶⁰ It found that both "Trustees' conduct towards members of the Gloriavale Community does not constitute good governance or management and would not promote public trust and confidence in the charitable sector" and that:¹⁶¹

Trustees may have acted in a manner that may constitute serious wrongdoing under the Act. This is especially so when it comes to the Trustees responsibilities regarding handling of members who wish to leave the Gloriavale community, members breaching the rules of the community, handling of allegations of physical and sexual assaults within the community as well as dealing with breaches of the rules of the community.

¹⁵⁷ Liam Sumpter Beashel "Investigation Report: The Christian Trust Community Church (Gloriavale)", above n 8, at 2.

¹⁵⁸ Liam Sumpter ""Investigation Report: The Christian Trust Community Church (Gloriavale)", above n 8, at 3.

¹⁵⁹ Paul Budd "The Christian Church Community Trust: Charities Services Investigation", above n 7, at [1.2].

¹⁶⁰ At [1.3] and [4.1].

¹⁶¹ At [8.2].

Nevertheless, the Trust maintained its status as a charitable entity and was not given a s 54 warning.¹⁶² The Charities Services provided a number of reasons for this, notably that by keeping the Trust as a charitable entity, Charities Services can engage with the Trust and monitor their obligations, which will be more beneficial for people within the Community.¹⁶³ However, there are some issues with this approach. The underlying problem is that the Charities Services investigation did not mention children's rights once. Therefore, even with ongoing engagement and monitoring, there could be significant rights breaches occurring within the community. If this is the case, allowing the Trust to maintain its status as a charitable entity has a number of issues.

Firstly, it sends the wrong message about what it means to be a charity by allowing entities which may be committing rights abuses to continue to have that status. Not only does this diminish public trust and confidence in the Charities Services and thus charitable entities in New Zealand, but it also diminishes the status of rights and mechanisms such as the New Zealand Bill of Rights Act by effectively ignoring breaches of them. This is harmful to people whose rights are being breached and to those who are at risk of being breached. Secondly, it means that the Trust gets the benefit of being a charity while possibly committing rights breaches. Not only is this inherently wrong, but it also means that there is no incentive for the Trust to uphold and protect rights within the community.

4 Amendments

There are some things the Charities Services could do to attempt to better protect children's rights when determining whether to grant charitable status to an entity, or when asking whether there has been serious misconduct. Firstly, it could be required that if there are allegations of rights-breaches, an official investigation into those allegations must be undertaken before the entity can maintain its charitable status. This is different to the current approach demonstrated in the Gloriavale investigation, where the Charities Services referred certain allegations to different agencies, claiming it was outside their

¹⁶² At [8.6] and [8.7].

¹⁶³ At [8.8].

ambit..¹⁶⁴ Requiring an investigation to be completed first would ensure that an entity would not be able to benefit from ongoing charitable status while rights breaches are occurring, thereby encouraging them to uphold rights from the beginning.

Secondly, an additional requirement could be added to the criteria, requiring a rights-based test to be met before status as a charitable entity is granted. This would ensure that no entities which may be committing rights breaches are granted charitable status, once again incentivising groups to protect and uphold rights to benefit from charitable status.

5 Conclusion

Both of these options would encourage ERCs to uphold rights in order to get the benefit of being a registered charitable entity. Neither of these approaches would encroach on an ERC's right to freedom of religion, as they do not discriminate based on the type of entity in question and are not centred on the purpose of the entity.

C Better Education within Exclusive Religious Communities

1 Introduction

Another way to protect children's rights within ERCs would be through education. Either, children could be educated children about their rights through rights-based education, or educational standards within ERCs could be increased in order to compensate for the fact that children from these communities may be disadvantaged by their education if they were to seek employment in wider society.

2 Rights education

Firstly, educating children about their rights would both give children the knowledge they need to try and protect their own rights, as well as acting as a way to keep more senior members of the communities accountable. This is something that could be provided to

¹⁶⁴ At [8.6].

children across New Zealand, not just those in ERCs. The Child Rights Education Toolkit describes child's rights education as entailing:¹⁶⁵

teaching and learning about the provisions and principles of the Convention on the Rights of the Child (CRC) as well as the 'child rights approach' to help empower both children and adults to take action and put children's rights into practice in their day-to-day lives – at home, at school, in the community and, more broadly, at the national and global levels.

If children can see what their rights are and therefore notice if they are not being upheld, it may help them to either fight for their rights or make an informed decision later on as to whether they would like to remain in the community or not. This would enhance their autonomy and strengthen their ability to exercise their rights.

Further consideration would be required as to how this rights education would be administered. It could be formalised as part of the curriculum, which would ensure that it was ongoing and consistent. However, this would mean that the community itself would be teaching it, requiring ongoing monitoring to ensure that it was taught sufficiently. Alternatively, external providers could provide one-off sessions for children across New Zealand. While this is likely to be more expensive and provide a more limited view for children on their rights due to the one-off nature, it would ensure standardised information was conveyed to all children, regardless of their school.

3 Raising educational requirements

Another option would be to increase the requirements required by schools in these communities, recognising that in order to give them a legitimate choice on whether to remain within the community or to live in wider society as advocated for by Leona Okakok, they need certain educational foundations. This may involve measures such as stipulating course requirements, for example by requiring all children to complete Level 2 English and

¹⁶⁵ UNICEF "Child Rights Education Toolkit: Rooting Child Rights in Early Childhood Education, Primary and Secondary Schools" (1st ed, Geneva, 2014) at 6.

Mathematics. Placing additional requirements on these communities would recognise and compensate for the factors outlined at the beginning of this paper, namely, that children are not exposed to any outside beliefs or thought processes by nature of the communities they reside in. These factors may set them at a disadvantage when competing for jobs in wider society, especially if their education has been tailored to life within the community. Ensuring higher standards in core subjects may even out that disadvantage and give them a more legitimate choice.

However, there is a clear problem with this approach, in that it singles out and discriminates against ERCs. It may reemphasise the impression that Sylvie Langlaude believes the Committee is putting out, namely, that it "objects to the idea of the child being a religious believer, as if there was something slightly harmful in having a religion".¹⁶⁶ It may also go against the rights of parents and community members to educate their children according to their own conviction.¹⁶⁷ Taking this approach would require careful evaluation of educational standards across schools in New Zealand and a balancing of the right to education against parental rights, bearing in mind the dual purpose of preparing children for life in their community while leaving them with choices.

4 Conclusion

Ultimately, rights education is likely to be the better approach as it does not discriminate or target certain communities and would benefit children across New Zealand. While implementation is likely to be limited by practical constraints and the status of the right to education as an economic and social right which can be progressively implemented, it is something that New Zealand should strive for.

D Rights-based Judicial Approach

1 Limitations

The question of a child's religion usually only arises in the context of guardianship disputes in the Family Court. Most cases of children's rights issues, such as where a child disagrees

¹⁶⁶ Sylvie Langlaude "Children and Religion under Article 14 UNCRC: A Critical Analysis", above n 133.

¹⁶⁷ International Covenant on Civil and Political Rights, above n 19, art 18.

with the religious views they have been brought up with, are unlikely to come before the Court. This is because the only way for a child to challenge the decisions of their parents as guardians would be to apply for a court-appointed guardian under s 27(a) of the Care of Children Act (COCA).¹⁶⁸ Realistically, it is unlikely that a child in an ERC like Gloriavale would know about this mechanism. Moreover, as discussed above, the nature of how some ERCs treat those who leave may deter a child from challenging their parents or leaving the community. Therefore, this part of the essay will focus on disputes between parents, such as when one parent joins the community or where one wishes to leave.

2 *When do these scenarios come before the Courts?*

The first scenario that could occur is where parents have competing interests and ideas on the child's involvement in a particular religion. For example, one parent may wish to join an ERC and disputes may arise where one parent wishes to involve the children in the religion. This can be described as "the *Moore* situation". In *Moore v Moore*, the parents of two children separated. Shortly after, the mother became a Jehova's Witness and introduced the children to the faith. The father sought changes to the parenting order and interim guardianship orders to limit the children's involvement in the religion.¹⁶⁹ The case of *Henderson v Henderson* is similar, where the father joined the Gloriavale community and sought to bring three of his daughters with him, which the mother contested.¹⁷⁰

The second scenario that may occur is when there are competing interests between parents and other family members who may have interests in the parenting of the children. For example, in *H v F*, the family was part of the Exclusive Brethren community. The parents left the children in the care of their grandparents while they worked through their marriage difficulties, before coming to the decision to leave the Exclusive Brethren community. An ongoing dispute ensued, where the grandparents tried to keep the children within the religion.¹⁷¹

¹⁶⁸ Care of Children Act 2004, s 27.

¹⁶⁹ *Moore v Moore* [2014] 2 NZLR 787.

¹⁷⁰ *Henderson v Henderson*, above n 78.

¹⁷¹ *H v F* [1993] 10 FRNZ 486 (HC).

3 *Guardianship generally*

In guardianship disputes, if a child is *Gillick* competent the New Zealand Bill of Rights Act will apply and their wishes will be the determining factor in the dispute.¹⁷² A child is considered *Gillick* competent when they achieve a sufficient understanding and intelligence to enable them to understand the issue at hand fully.¹⁷³ However, if the child is not *Gillick* competent, the Court's decision must be based solely on the welfare and best interests of the child, which is provided for in the COCA as the paramount consideration.¹⁷⁴ In considering the welfare and best interests of the child, the Court must protect the child's safety.¹⁷⁵ Other considerations are the parent's role in the care, development and upbringing of the child, consultation and cooperation between parents and guardians, continuity for the child, the child's relationship with their parents and whānau and the child's identity (including culture, language and religious denomination and practice).¹⁷⁶

Unlike the Oranga Tamariki Act, there is no reference to the Convention when considering the welfare and best interests of the child in the COCA, nor anywhere else in the COCA. While cl 6 of the Family Court (Supporting Children in Court) Legislation Bill would implement art 12 of the Convention, which assures a capable child the right to express those views freely in all matters affecting them, this would still raise the problem of capacity and does not ensure that any other rights under the Convention are protected.¹⁷⁷

Therefore, if a child is not *Gillick* competent, their rights are not guaranteed under the law. Not only does the common law laid out in *Moore* provide that their rights under the New Zealand Bill of Rights Act are insignificant, but the COCA does not place any obligation on the Courts to consider children's rights under the Convention. In most situations, an outcome which is in the best interests of the child will also protect their rights. However, due to the COCA's emphasis on continuity and parental care, there may be some situations where it is held to be in the best interests of the child for the child to remain in an ERC

¹⁷² *Moore v Moore*, above n 169, at [136].

¹⁷³ *Gillick v West Norfolk AHA* [1986] AC 112 at 189.

¹⁷⁴ *Moore v Moore*, above n 169, at [136] and Care of Children Act 2004, s 4.

¹⁷⁵ Care of Children Act, s 5(a).

¹⁷⁶ Section 5.

¹⁷⁷ Family Court (Supporting Children in Court) Legislation Bill (323–1), cl 6.

where their rights are breached. For example, in *Henderson*, the children were ordered out of Gloriavale and back into the care of their mother. However, this was primarily based on the conduct of the father which included previous abuse and attempts to isolate the children from each other and their mother.¹⁷⁸ If the conduct was reversed, the children may have been ordered to stay with their father within the community. If such a decision was to be made, a rights analysis of the community should be conducted.

4 *Judicial neutrality*

Where religion is relevant to a guardianship dispute, the general approach of the judiciary is to not make judgment calls on the merits of religions. Brown J sums up the position as "If there is one axiom in the custody and access cases involving disputes over religion, it is that the law must remain strictly neutral on matters of religion".¹⁷⁹ This position is consistent with and ultimately derives from case law from the United Kingdom. In *Re T (Minors) (Custody: Religious Upbringing)*, Scarman LJ held:¹⁸⁰

It does not follow that, because one parent's way of life is more acceptable to most of us, it is contrary to the welfare of the children that they should adopt the way of life of the other parent that is acceptable only to a minority, and a tiny minority at that.

Over thirty years later, Hedley J made clear that:¹⁸¹

Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it.

We may question whether this approach is acceptable by today's standards. While we must be able to tolerate diverse standards of parenting, accepting "barely adequate" parenting is

¹⁷⁸ *Henderson v Henderson*, above n 78.

¹⁷⁹ *Moore v Moore*, above n 169, at [149].

¹⁸⁰ *Re T (Minors) (Custody: Religious Upbringing)* [1981] 2 FLR 239 at 248.

¹⁸¹ *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 at [50].

unlikely to be in the best interests of the child. Nevertheless, religious neutrality on behalf of the judiciary is vital to protect minority religions and prevent discrimination, cultural stereotyping and oppression. As society is becoming increasingly secular, it is more and more important to protect the belief systems of others.¹⁸² Laws LJ explained the point as:¹⁸³

We do not live in a society where all people share uniform religious beliefs. The precepts of any one religion—any belief system—cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens, and our constitution would be on the way to a theocracy.

This approach not only protects those with different belief systems, but it also legitimises judicial decisions, both in principle and appearance.¹⁸⁴ Similar to the principle of judges remaining apolitical, judgments are more likely to be respected and adhered to if they are not based on the personal beliefs of the decision-makers.

While religious neutrality is not a principle which should be eroded, in guardianship disputes where children's rights may be at risk, it is wrong for judges to ignore potential rights breaches altogether. Consideration of the best interests of the child should necessarily involve a consideration of children's rights because they do not exist in a vacuum, rather, they are there to enhance the lives of children. It is difficult to understand how something could be in a child's best interests but breach their rights.

Therefore, it is hard to reconcile Judge Lindsay's comment in *Henderson* that "The focus at hearing is not the established rules or lifestyle choices of the Gloriavale community", with his subsequent comment that "The focus of the evidence is on the tension over safe care and the differences in parenting styles". If rights breaches are occurring at Gloriavale,

¹⁸² Gabe Bullard "The World's Newest Major Religion: No Religion" *National Geographic* (online ed, 22 April 2016).

¹⁸³ *MacFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 at [22].

¹⁸⁴ Howard Kislowicz "Judging Religion and Judges' Religions" (2018) 33 *Journal of Law and Religion* 42.

the established lifestyle of the Gloriavale community would necessarily impact the children's safe care.

5 *Why is a rights-based approach best?*

A rights-based approach to guardianship disputes involving children in ERCs would allow judges to look at whether children's rights will be upheld if a particular decision is made, while avoiding exercising judgment on the quality of the religion. Although this distinction is slightly nuanced, it would mean that judges can uphold a base right, rather than engaging in value-based judgments. Moreover, despite the principle of judicial neutrality, absolute neutrality is never actually achieved. Judges inevitably make their decisions based on their own experiences and views on the world, even if claiming to be neutral.¹⁸⁵ For example, although Judge Lindsay in *Henderson* said that the focus of the case was "not the established rules or lifestyle choices of the Gloriavale community", he went on to analyse the community, saying that:¹⁸⁶

[once in Gloriavale] there were some benefits to Mr [Henderson] in his care of the children. It also opened up the children's world to other children and young people but the disadvantages for these children far outweighed any advantages. Primarily it served to further isolate the children from their mother and [Jane]. Moreover, it enabled their father to act in a controlling and violent way towards them without intervention or restraint from the immediate community around them.

It would be better for judges to refer to established rights and principles recognised in the Convention, rather than drawing on their own experiences and personal views. This would also ensure that the principles behind religious neutrality are not eroded. Not only would the Courts have to consider a child's right to religion alongside their other rights, but the Convention would be just one factor amongst the raft of other considerations in the COCA. The Courts would have to undertake a balancing act between the various rights as well as the interests of the child as set out in s 5.

¹⁸⁵ Howard Kislowicz "Judging Religion and Judges' Religions", above n 184.

¹⁸⁶ *Henderson v Henderson*, above n 78, at [52].

6 *Judicial consideration of the Convention*

One way to use a rights-based approach would be for judges to consider the Convention when making decisions about guardianship issues involving children in ERCs. While the COCA does not refer to the Convention, the Convention has been ratified and is referenced in the Oranga Tamariki Act.¹⁸⁷ In *C v Holland*, Whata J held that New Zealand case law should be developed consistently with ratified international conventions affirming, even if not incorporated by statute.¹⁸⁸ Although not specifically incorporated into the COCA, case law in the area of guardianship should be developed consistently with the rights set out in the Convention as ratified and recognised in other pieces of domestic legislation.

H v F, outlined at the beginning of the essay, is one of the first cases to consider the Convention in a guardianship dispute and highlights why a rights-based approach is needed. The Court held that the children should remain with their parents.¹⁸⁹ However, while children's rights were acknowledged, they were not the determining or even a significant factor in the Court's reasoning. If the parents wanted to stay, the Court would have left the children within the community despite acknowledging that a number of their rights under the Convention would be breached. Moreover, *H v F* did not set out any principles to help determine what would happen if the facts were varied. For example, we do not know what would have happened if the grandparents were legal guardians and wanted to remove the children, or if the parents wanted to stay but the children wanted to leave. It is concerning that the Courts have begun to acknowledge the existence of children's rights, pointing to them in a dispute involving an ERC, without setting up a mechanism to protect them.

7 *Incorporation of the Convention in the COCA*

A more effective way to require the Courts to consider children's rights would be by including the Convention as a s 5 consideration, similar to how it is in the Oranga Tamariki Act. After recommendations from the Select Committee, the COCA was strengthened

¹⁸⁷ Oranga Tamariki Act 1989, s 5.

¹⁸⁸ *C v Holland* [2012] 3 NZLR 672 (HC) at [69].

¹⁸⁹ *H v F*, above n 171, at 501.

around the area of children's rights.¹⁹⁰ Section 3 sets out that a purpose of the Act is to recognise certain rights of children and the s 5 principles aim to reflect the relevant children's rights in the Convention. Nevertheless, the Select Committee recommended excluding an explicit reference to the Convention, due to it covering a much broader set of rights and obligations than what COCA does.¹⁹¹ However, it is clear from the case law referred to in this essay that issues such as education, religion and freedom of association are now falling within the COCA's jurisdiction as part of guardianship disputes. Incorporating the Convention as a s 5 consideration would allow judges to look at whether children's rights will be upheld within the religion when making their decision about the welfare and best interests of the child, while avoiding exercising judgment on the quality of the religion.

8 Conclusion

As seen in *H v F*, the Courts are beginning to recognise this and are starting to look towards children's rights in the context of religion and guardianship disputes, but still have no clear mechanism to protect them. Incorporating the Convention as a factor to consider in guardianship disputes under the COCA is one way in which children in ERCs can be protected. Doing so is the best way to protect children without risking the principle of judicial neutrality where religion is concerned.

V Conclusion

New Zealand's current approach to children's rights poses a real threat for children in ERCs. Currently, ERCs can become charitable entities without having to uphold rights, New Zealand has no rights-based education and the Judiciary does not have to consider children's rights in guardianship decisions, even where ERCs are involved. This means there is no incentive or onus on ERCs to protect and uphold children's rights.

The rights to religion and education are particularly threatened due to the nature of ERCs, as evidenced through the case study of Gloriavale. The right to religion includes the right

¹⁹⁰ (21 October 2004) 621 NZPD 16415 (Care of Children Bill – Second Reading, Tim Barnett).

¹⁹¹ Justice and Electoral Committee *Care of Children Bill* (29 June 2004) at 3.

to change religions and the right to education includes the right to be prepared for life inside or outside the community. However, children in these communities may be prevented from exercising their right to change religions and it is unclear whether education within ERCs in New Zealand is truly preparing children for life in wider society. These potential rights breaches may be the tip of the iceberg for rights abuses in ERCs, where allegations have been made of other serious problems. By doing more to protect children's rights, further rights abuses may be avoided.

VI Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 14,994 words.

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