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Dynamic self-determinism, the right to belief and the role of collective worship

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Abstract

The practice of collective worship remains mandatory in state schools throughout the UK. What justification exists for this practice? This paper employs Eekelaar's 'dynamic self-determinism' model to explore the connection between collective worship and the child's human right to belief.

The paper first extrapolates the basic, developmental and autonomy interests protected within the right to belief as encapsulated within the tapestry of international legal instruments. It argues that school worship could serve the child's interest in development of the capacity for spiritual and philosophical thought. However, the absence of clear policy on the type of capacity schools seek to develop prevents worship from fulfilling this role effectively. It also argues that the child's autonomy interest demands that 'mature minors' have the choice to 'opt-out' of worship on conscience grounds.

The paper concludes with recommendations for reform of school collective worship to ensure compliance with the UK's international rights obligations.

What is the purpose of collective worship in UK schools? The practice of collective worship, most commonly taking the form of participation in assemblies where hymns are sung and passages from religious texts discussed, remains mandatory in state schools throughout the United Kingdom. In most areas, statute provides that worship must be ‘wholly or mainly of a broadly Christian character’. Today the rationale and justification for ‘the practice of collective worship’ (a phrase originally taken from the Education Reform Act 1988, ss. 6-7, which applied to England and Wales) is less than clear. Teaching is no longer the province primarily of the clergy, and members of the Christian church no longer form the majority of the UK population. Despite this, collective worship retains its place, and parents and governments continue to express support for its inclusion. What justification can be found for this practice in a religiously plural society?

In this chapter, I argue that collective worship can contribute to the fulfilment of the child's right to belief, by developing her capacity for religious or philosophical thought. The right to belief is analysed through the lens of John Eekelaar's model of dynamic self-determinism. Eekelaar, a former director of the University of Oxford Centre for Family Law and Policy, proposed a normative framework in which children's rights are understood as a means of protecting and promoting a child's basic, developmental and autonomy interests (Eekelaar, 1986). These interests should be ordered as a hierarchy, so that the autonomy interest need only be satisfied where it does not conflict with the child's basic or developmental needs (Eekelaar, 1994). Adopting this framework in relation to the child's right to belief allows me identify the interests collective worship might serve, the methods by which it might do so, and the extent to which current law and practice meet these ambitions.

The chapter is divided into three parts. In the first, I outline the dynamic self-determinism model. Eekelaar developed this model in response to two ostensibly conflicting theories of human rights, combining elements of both to produce a theory which gives

recognition to the evolution of capacity over the course of childhood. In the second part, I use the dynamic self-determinism model to unpick the interests comprised within the child's right to belief. In the third part, I make some suggestions as to the role school collective worship might play in protecting or promoting these interests, and explore whether, as currently practised, collective worship does play that role. In closing, I make three principal recommendations for reform of collective worship applicable in each country in the UK: first, that the government of each sets out a clear policy statement as to the type of capacity for belief that the school system intends to develop; second, that schools adopt a practice of worship that develops that capacity in line with international human rights obligations, which is likely to require a secular approach in non-faith schools; and thirdly, that the autonomy interest of mature minors be respected through the ability to opt-out of worship which conflicts with their beliefs or values.

The term collective worship is used throughout the United Kingdom other than in Scotland, where the term religious observance is preferred. In this chapter, for the sake of brevity, the term collective worship will be used to mean the practice in all four countries. Where specific jurisdictional practices are relevant, this will be made clear in the text and the correct terminology will be used.

Children's rights and dynamic self-determinism

Eekelaar's model of children's rights, which he termed 'dynamic self-determinism', arose from a larger debate about the normative underpinning of human rights in general (Choudhry and Herring, 2010, 97-139). The discussion focused on two competing justifications for human rights. Will theorists focused on autonomy, asserting that the purpose of human rights was to protect the choices made by an individual in respect of her own life. Interest

theorists, by contrast, focused on welfare, arguing that rights existed to protect the interests of the holders by placing duties on others to respect those interests.

The position of children became central to this debate following Neil McCormick's argument to the effect that children, as non-autonomous actors, are incapable of making choices in most spheres of life. Accordingly, in his view, if the will theory of rights were correct, children would not be able to benefit from human rights protection. Interest theory should therefore be preferred, since children undoubtedly have interests that merit protection. Although a child would be unable to enforce the duties placed on others in recognition of her interests, enforcement could be carried out on her behalf by another person, such as a parent (MacCormick, 1976).

A central critique of interest theory, which carries particular weight where children are concerned, relates to how the protected interests are identified. Who has the right to decide? This was of concern to Eekelaar, who warned:

Powerful social actors could proclaim what they deem to be in the interests of others, establish institutional mechanisms for promoting or protecting those interests, and claim to be protecting the rights of others, whether or not the others approved or even knew their interests were being constructed in that way. (Eekelaar, 2007, 336)

With this concern in mind, Eekelaar set out to develop a model that incorporated aspects of both potential normative underpinnings of children's rights. Key to this model was his proposition that supporting children to develop the capacity for autonomous decision-making is, in itself, an interest deserving of protection. Eekelaar (1986, 169) started from the premise that, if rights are intended to protect interests, they must only protect 'the interests that the subject might plausibly claim in themselves'. He identified three categories of interest that a

child might claim. In the first place, a child would seek protection of her basic interests, meaning general physical, emotional and intellectual care within the social capabilities of her caregivers (Eekelaar, 1986, 170). This would include such things as food, shelter and clothing along with love and nurturing. The primary provider in respect of basic interests would likely be the child's parents or guardians. In the second place, the child would seek protection of her developmental interests, which are defined as the opportunity to have her capabilities developed to their best advantage within the constraints imposed by the economic and social structure of society (Eekelaar, 1986, 170). This would include chiefly the provision of education and training, and as such these interests would be fulfilled by the state or society as a whole in conjunction with the child's parents. Lastly, the child would claim protection of her autonomy interest, meaning the freedom to choose her own lifestyle and to enter social relations according to her own inclinations uncontrolled by the authority of the adult world, whether parents or institutions (Eekelaar, 1986, 171).

The potential for these interests to conflict is obvious. An infant child may refuse to wear warm clothes when going outside in winter. To support the child's autonomy interest in choosing her own clothes here would likely harm her basic interest in physical health. Eekelaar recognised this potential for conflict, and proposed that it be resolved by ordering the three categories of interests in a hierarchy:

The problem is that a child's autonomy interest may conflict with the developmental interest and even the basic interest. While it is possible that some adults retrospectively approve that they were, when children, allowed the exercise of their autonomy at the price of putting them at a disadvantage as against other children in realizing their life-chances in adulthood, it seems improbable that this would be a common view. We may therefore rank the autonomy interest subordinate to the basic and developmental

interests. However, where they may be exercised without threatening these two interests, the claim for their satisfaction must be high. (Eekelaar, 1986, 171).

If we accept that the development of autonomy forms part of a child's interests, albeit a part that, at times, must be subordinated to more fundamental interests, what effect should that have on the treatment of children within the law? Eekelaar's view was that legal assessments of the best interests of the child did not do enough to take into account the development of childhood autonomy. He proposed that a dynamic self-determinism model be adopted by decision-makers to ensure that all three categories of interest were appropriately recognised in their decisions (Eekelaar, 1994). Within this model, the goal of the decision is to ensure that the child is placed in an environment that is reasonably secure, but which exposes her to a wide range of interests (Eekelaar, 1994, 47-48). As she develops, the child would be encouraged to draw on these influences in such a way that she contributes to the outcome. The overarching ambition is for the child to reach adulthood fully equipped to make autonomous choices for herself (Eekelaar, 1994, 48).

For assistance in determining the extent to which a child should be viewed as legally competent to make autonomous decisions, Eekelaar (1994, 50) looked to the understanding of autonomy elaborated by Joseph Raz (1986, 369) in his monograph *The Morality of Freedom*. In Raz's theory, first, an autonomous decision is viewed as one wherein the desires chosen to be followed are (intentionally) consistent with the individual's ultimate goals. The goals in which these desires are realised must be achievable within attainable social forms. Finally, a decision may be autonomous even if inconsistent with the decision maker's self-interest (Eekelaar, 1994, 55-56).

Eekelaar was cognisant that applying this definition to decisions made by children would not always be straightforward. The requirement that a decision be reconcilable with the

individual's life goals might be hard to assess for children, since the child's personality or identity might not yet be fully formed. As a solution, Eekelaar (1994, 55) suggested that we may say a decision is not autonomous if it reflects a feeling or aspiration which is so seriously unstable, or where there is such a grave disjunction between it and others held by the child, that to give effect to the decision risks serious conflicts within the individual at a later stage of development. For example, a five-year-old child may wish to exist on a diet of chips and chocolate, but may also wish to be sufficiently nourished to play with her friends, grow tall, and become a champion athlete in adult life. To accept the child's decision on her diet would conflict so gravely with her other ambitions that it could not be considered an exercise of autonomy. The social form requirement provides a safeguard that is easier to apply. Children's decisions may be considered non-autonomous because whatever goal they aspire to may simply be unrealistic, at least at present. Assessing the probability of an outcome may be beyond the cognitive capacity of a child at that point (Eekelaar, 1994, 55). For example, a child may wish to live in an ice palace with an animate snowman for companionship, but the prospect of achieving such an ambition must be vanishingly small.

Eekelaar's desire to marry protection of welfare and promotion of autonomy within a single justification for children's rights is not unique amongst academic commentators. Michael Freeman (1983) developed a typology with similar ambitions, which he described as 'liberal paternalism.' Here, the interests of children are divided into four categories – the right to welfare, the right of protection, the right to be treated like adults and rights against parents – which broadly cover the same ground as the three interests in Eekelaar's model (Freeman, 1983, 57). Freeman also recognised the need for balance between protection of welfare and promotion of autonomy.

The question we should ask ourselves is: what sort of action or conduct would we wish,

as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings? We would choose principles that would enable children to mature to independent adulthood. One definition of irrationality would be such as to preclude action and conduct which would frustrate such a goal. (Freeman, 1983, 57).

Joel Anderson and Rutger Claassen (2012) conceptualised the issue somewhat differently in their exploration of a 'regime of childhood' which recognised that the status of being a child plays out within a certain set of rules. They explain a regime as being a normative status, constituted by institutionally and culturally backed understandings of what this status licenses bearers of the status to do, and obligations and prohibitions it places on others. Their focus is on four distinct but interlocking aspects of the modern regime of childhood, namely: (i) an orientation towards autonomy development; (ii) limited liability for children; (iii) parental supervisory responsibilities and (iv) age-based demarcation (Anderson & Claassen, 2012, 508-512). When determining the appropriate limits to be placed on individuals participating in certain activities based on age, the question to ask is what scheme of supervisory responsibility on the part of parents and what duration of the period of childhood tutelage best serves to realise the fundamental interest in autonomy development? (Anderson & Claassen, 2012, 511). They describe situations in which individual children may be exempted from a general prohibition on making autonomous decisions prior to the age of majority, for example in relation to medical treatment, as examples of 'local emancipation' (Anderson & Claassen, 2012, 512). In determining whether such emancipation should be allowed, they suggest it is necessary to consider the current and future welfare of the child, and the current and future agency interests of the child (Anderson & Claassen, 2012, 512-513).

Other models offering a synthesis of protection of interests and promotion of autonomy could no doubt be proposed. In the context of the discussion in this chapter, however, I have preferred Eekelaar's approach, not only because it is arguably the most influential within discussion of children's rights in the UK, but also because it offers the most useful insights into the right to belief and its relationship to the practice of collective worship. It is to that discussion that the chapter will now turn.

The child's right to belief and dynamic self-determinism

In Eekelaar's model, children's rights in general are designed to protect their basic, developmental and autonomy interests. In this part of the chapter, that general outline will be applied in relation to the specific example of the child's right to belief. What basic, developmental and autonomy interests can we identify within this right?

The first step in answering this question is to define what is meant by 'the child's right to belief'. It is not possible to find a definition by simple reference to one international treaty or piece of domestic legislation. Children's rights are contained within a number of overlapping instruments which vary in their content, their jurisdictional extent and their enforcement mechanisms. Additionally, rights designed to protect the interests of the child at this complex intersection of belief, education and family life may be held by the child's parents rather than the child herself, in recognition of the age-related limitations on the child's capacity to enforce her own rights. The detail of the various rights and freedoms accorded in relation to children's beliefs is set out in full in chapter X, and I will not rehearse that material again here. However, a short summary of the key protections is necessary before Eekelaar's basic, developmental and autonomy interests can be identified.

As a general point, it is helpful to clarify that the rights of the child in relation to belief

are not confined to religious belief in a strict sense. Article 9 of the European Convention on Human Rights provides for freedom of thought, conscience and religion. The European Court of Human Rights has understood this to cover, in essence, all spiritual and philosophical convictions (*Kokkinakis*, 1993), including atheism (*Angelini*, 1986), pacifism (*Arrowsmith*, 1978), veganism (*W*, 1993) and political value systems such as communism (*Hazar*, 1991). The same approach was adopted in the United Kingdom by the House of Lords (*R (Williamson)*, 2005, especially Lord Nicholls at [15] and Lord Walker at [55]). Accordingly, the right of the child under discussion here is not necessarily a right to adhere to a particular religion, but the right to identify with a system of values that allows her to understand the world and her place in it. That understanding may emerge partially or wholly through the child's membership of a religious faith, but it may equally emerge through atheism or a non-theological set of philosophical convictions.

Several specific rights can be enumerated in relation to children's beliefs. In common with all human beings, the child has an absolute right to freedom of thought, conscience and religion, together with a qualified right to manifest those beliefs, limited on various public interest grounds including public safety and protection of the rights and freedoms of others (ECHR, art 9; UNCRC, art 14). The United Nations Convention on the Rights of the Child explicitly recognises the right of parents to be free from state interference in directing the child in the exercise of this right in line with her evolving capacities (UNCRC, art 14(2)) – a proviso not included in respect of other specific rights where a parent might be expected to offer direction, such as the rights to freedom of expression or freedom of assembly. The child also has a right to determination and preservation of her identity, including nationality, name and family relations (UNCRC, art 8 [right of the child to preserve her identity]; United Nations International Covenant on Civil and Political Rights, art 1(1) [right to self-determination]; Mair, 2015). Although belief is not specifically mentioned in the provisions related to identity, both

international and domestic legal instruments (UNCRC, art 20; United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, art 5(4); Adoption and Children Act 2002, s 1(4)-(5); Adoption and Children (Scotland) Act 2007, s 14(4)(b)) do recognise that the child's religious identity should be taken into account when, for example, she is to be adopted or otherwise separated from her birth family. Although a child has an independent right to education (ECHR, Protocol 1, art 2; UNCRC, art 28-30), the State must respect the right of parents to ensure that education is in conformity with the parents' religious and philosophical convictions (ECHR, Protocol 1, art 2. This does not provide a positive right to have a child educated in accordance with parental beliefs at state expense, but a parent must have the ability to withdraw a child from teaching which conflicts with parental religious or philosophical convictions.)

Identifying the interests of the child protected by these various belief rights is complicated by the fact that the rights often serve more than one master. This is so both in cases where the child holds a right directly, and where a right is held by the parent in respect of their child. Take, for example, the right of a parent to direct their child in the exercise of her right to freedom of thought, conscience and religion. To some extent, this right can be seen to derive from the child's interests. A young child has no capacity to guide the early formation of her values, but such values will inevitably form – even a toddler can understand basic moral ideas, like the fact it is generally wrong to hit others. It is in the interests of the child to be assisted in forming these values, which we might consider a type of intellectual and emotional nurture. The unarticulated assumption within the human rights instruments is that parents are the appropriate people to perform that role in the interests of the child. They are provided with the right to direct the child's exercise of her right to belief to protect them, and in turn their child, from unjustified interference by a state that might seek to impose values of its own. However, this parental right does not derive solely from the child's interests. Parents have an independent

interest which is also protected through this provision.¹ As Rachel E Taylor notes:

For devout parents, the proper religious upbringing of their children is often a core religious obligation of the parent themselves and a protected manifestation of the parent's own right to religious freedom. (Taylor, 2015, 18).

A further level of complexity may be added by the interests of specific religious communities. Anat Solnicov notes that parental rights in respect of religious education were not initially based on the interests of either the parent *or* the child, but intended rather for protection and preservation of religious minorities, by helping to ensure their continued existence into the next generation (Solnicov, 2007, 10).

A further difficulty with identifying the interests of the child protected by the various belief rights is that the interests protected by the right to religious freedom for adults can be disputed. The primary justification relied upon in the jurisprudence of the European Court of Human Rights is the promotion of autonomy. In the leading decision of *Kokkinakis v Greece*, the court found:

Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. (*Kokkinakis*, 1994, at [31]).

¹ It should be kept in mind, however, that this parental right under ECHR, article 9 to manifest religious belief is relative, and can be limited where necessary, amongst other things, to protect the rights and freedoms of others.

Support for autonomy as the relevant normative value can also be found in the academic literature (Evans, 2001; Laycock, 1996). However, doubt has been cast on whether autonomy can provide a complete explanation for the full range of activities protected by this right (Ahmed, 2017), and competing justifications, such as liberty of conscience, have also been put forward (Koppelman, 2009; Nussbaum, 2008).

For children, the argument that the interests protected by belief rights must include more than simply the promotion of autonomy is of particular relevance. This is, of course, because children are not autonomous for much of their childhood. This reality does not render autonomy irrelevant as an interest during childhood (LaFolette, 1989) – all children have an interest in developing the capacity for autonomy, and some children (‘mature minors’, discussed further below) will be capable of autonomous decision-making in relation to belief prior to reaching the age of majority. Sylvie Langlaude argues, however, that to focus solely on the autonomy aspects of the child’s right to belief is to misunderstand the important family and community interests which are also protected by this right (Langlaude, 2008, 494-497). Children brought up within a system of values are nurtured by families and communities that care about the transmission of those values. The interest of the child, in her view, is ‘to grow up as a religious being and to be nurtured into a religious faith by parents and religious community’ (Langlaude, 2008, 477). Since the right to belief protects all systems of values, religious and non-religious, this assertion can perhaps be opened out. The interest of the child is to be nurtured in her development as a moral or philosophical person, regardless of whether that system of values is theologically based.

How, then, does this complex web of rights around children’s beliefs map onto Eekelaar’s dynamic self-determinism model? In the first place, I would argue that the child has a basic interest in the initial formation of her religious or philosophical identity. Since it is not

possible to avoid forming an identity of some kind, protection and nurturing of this aspect of her identity may be considered to fall within Eekelaar's category of emotional needs, best fulfilled by her parents or caregivers (Eekelaar, 1986, 170). Conceptualising the child's basic interest in this way is coherent with the rights of the child herself, and with the legal rights of parents in respect of their children in this context: parents have a right and responsibility in respect of her religious or philosophical nurture just as they would do in respect of her physical and emotional nurture.

Secondly, I would assert that the child's developmental interest might best be summed up, to paraphrase Eekelaar's terms, as the opportunity to have her capacity for religious and philosophical thought and action developed to its best advantage (Eekelaar, 1986, 170). This includes the development of the capacity for autonomous religious and philosophical thought and action. As an essentially educational interest, it might be expected that both the child's parents and the state would play a role here. Again, this conceptualisation is consistent with the international rights framework described above.

Finally, I would argue that the child's autonomy interest requires that she has the maximum freedom possible to make her own choices in terms of her religious and philosophical beliefs. It is worth reiterating at this point that the dynamic self-determinism model posits these interests as a hierarchy, meaning that the child's freedom of choice in relation to belief must be subordinated to her developmental and basic interests where they would otherwise be harmed. However, where the exercise of a child's autonomy would not be harmful, her interest in doing so should be respected by both her parents and the state (Eekelaar, 1986, 171). Additionally, where a child's capacity for religious and philosophical thought has been developed to the level of maturity of a competent adult, in Eekelaar's model, there can be no basis on which to argue that she should be prevented from exercising that autonomy (Eekelaar, 1994, 47-48). When a child reaches this stage, the role of the state may be most

accurately characterised as protecting her interests from interference *by her parents*.

The dynamic self-determinist right to belief and the role of collective worship

In the second part of the paper, I set out the basic, developmental and autonomy interests that are, in my analysis, served by the child's right to belief. In this section of the paper, I analyse how the practice of school collective worship does or could contribute to the protection or promotion of these interests. In short, I argue that collective worship can play a role in fulfilling aspects of the child's developmental and autonomy interests in relation to the formation and exercise of a personally meaningful system of religious or philosophical beliefs. However, reforms to current practice are needed before collective worship can play that role effectively. Specific recommendations for reform are included within my concluding section.

My focus is on the developmental and autonomy interests served by the right to belief. By the time the child reaches school age and takes part in collective worship for the first time, around the age of five or six, she will already have a basic understanding of the world and her place in it. This may include understanding of a supreme being, or an alternative philosophical take, but the roots of some system of values – an ability to tell 'right' from 'wrong', perhaps – will be present. I would assert, then, that collective worship has no real role to play in fulfilling the child's basic interest here. Once at school, the developmental interest of the child comes to the forefront. Just as the academic elements of school are intended to develop the child's intellectual capacity, I would argue that collective worship is one mechanism for developing the child's capacity for religious or philosophical thought. Finally, collective worship can be seen as having two roles in relation to the autonomy interest. First, it should assist the child in becoming an autonomous actor in matters of religious and philosophical belief. Second, it should respect her existing autonomy where it is possible to do so without harming her

developmental interest.

In this section, the role of collective worship in relation to the child's developmental and autonomy interests in religious or philosophical belief will be considered.

The Developmental Interest

How can collective worship contribute to the child's developmental interest in the right to belief?

This question is at the heart of much of the debate around the place of religion in the context of education. In terms of academic education, there is basic consensus within society about the type of adult we want the school system to help develop – an adult who has key literacy and numeracy skills, for example. In terms of religious or philosophical belief, however, the nature of any consensus is unclear.

Eekelaar's model helps to define the parameters within which consensus must be achieved. He argues that the developmental interest of a child demands that she be placed in an environment which is reasonably secure, but which exposes her to a wide range of interests, with the aim of her becoming a good 'chooser. (Eekelaar, 1994, 47-48). Liberal philosophy tends to the argument that, in the context of belief, development towards autonomy demands that the child be furnished with the ability to reflect critically on the beliefs with which they were raised, alongside exposure to other modes of belief or ways of understanding the world (Arneson & Shapiro, 1996; Macleod, 1997). An alternative argument can be made that this approach to development of autonomy during childhood actually results in closing off certain choices. Devotion and constancy towards one system of values in the formative period of our lives can provide the option of a form of adult religious life that is not otherwise possible, in the same way that dedication to the practice of a sport or musical instrument during childhood can provide the option of elite performance in adulthood which is otherwise virtually

impossible (Callan, 2002, 134-135). In this conceptualisation, development of the capacity for autonomous revision of inherited beliefs should be subordinated to the opportunity to develop the devotion which will allow for autonomous *adherence* to a belief system in adult life (Callan, 2002, 137-139).

Reasonable people may well disagree about the form of capacity for autonomy that should be preferred in relation to belief, in much the same way as they may disagree about the developmental goals of our school system in relation to other types of capacity. These disagreements are socio-political and cannot be resolved by law. What is needed is a statement of governmental policy which makes clear the ambitions underlying collective worship in the UK. Do we, as a society, seek to develop adults with the capacity for autonomous revision, or the capacity for autonomous adherence? Are there other aspects of this capacity we seek to develop?

Any such policy must, however, adhere to the limitations placed on it by our human rights obligations. As discussed in more detail at chapter X above, the European Court of Human Rights has broadly taken the view that, in a society with a plurality of religious and philosophical beliefs such as the United Kingdom, the state may choose to provide faith schools in line with parental demand, but is not under an obligation to provide a school of any particular religious or philosophical character (*X*, 1978; followed in the UK courts by *R (on the application of K)*, 2002; *R (on the application of R)*, 2006). Outwith the faith school sector, the Court has tended increasingly to the view that the state's duty of neutrality requires education to be secular. Aspects of education which could be considered to have a proselytising or indoctrinating effect, such as participation in religious activities, run counter to this duty in the eyes of the court (*Lautsi*, 2012). An accommodationist model, by which children (or their parents on their behalf) may opt out of activities which do not accord with their beliefs, has been accepted by the court as an appropriate mechanism for respecting the religious rights of

all parties in a school where various belief systems are represented (*Kjeldsen, Busk Madsen and Pedersen, 1979-80; Folgero, 2008; Zengin, 2008; McCarthy, 2011*), although difficulties arise where confessional religious aspects of education cannot easily be separated out from the remainder of the curriculum (*Folgero, 2008*). The jurisprudence here, in particular the extent to which secularism is equated with neutrality, is not uncontroversial (*Leigh and Adar, 2012; Kyritsis and Tsakyrakis, 2013; Neha, 2013*). It does, however, represent the current position on interpretation of human rights in this context.

Taking the previous paragraphs together, two models of rights-compliant collective worship which serve the developmental interest present themselves. First, for advocates of the autonomous adherence approach, confessional religious worship in a particular faith would fulfil the child's developmental interest without contravening human rights requirements, provided that all children in the school shared the same faith. Alternatively, for advocates of the autonomous revision approach, a non-confessional, secular practice of philosophical belief would again meet the child's developmental interest without contravening human rights, on the assumption that the beliefs of a religious child are not disrespected by participation in non-confessional activities. (As *Leigh and Adar (2012)* note, this assumption may not be correct in all cases.) A model that is arguably ruled out, however, is an accommodationist approach to collective worship, whereby a child whose beliefs do not allow her to participate in confessional activities simply opts out. This model may be appropriate by the time the child has sufficient capacity to make an autonomous decision on participation in worship – in other words, once the child is a mature minor whose developmental interest, at least in so far as belief is concerned, has been fulfilled – which I will return to below. For a less mature child, however, the difficulty is that her developmental interest is neglected if she simply opts out of the activities designed to improve her capacity for religious or philosophical thought, assuming that a meaningful alternative is not provided (*Mawhinney, 2006*).

Does the current practice of collective worship serve the child's developmental interest?

To what extent does law and practice in UK schools match up with the models of collective worship outlined above? In faith schools throughout the UK, where collective worship takes the form of confessional practice in line with the religious character of the school, the child's developmental interest is arguably satisfied on the autonomous adherence model.

In relation to non-faith schools, the position varies across the three jurisdictions. Scotland may come closest to realising a non-confessional model of development of the capacity for autonomous revision. Scottish Governmental policy guidance makes explicit that the overall goal of religious observance is to ensure that every child 'reaches his or her potential' through personal search that allows her to develop her own values (Scottish Executive, 2004). It is explicitly noted that non-denominational schools must support the development of children of all faiths or none through religious observance, with the suggestion that 'time for reflection' may be a more apposite title for the practice (Scottish Government, 2011, para 10). As discussed in chapter X above, however, it is not always clear that this guidance is followed in practice, where schools may tend to fall back on primarily Christian activities.

In both England and Wales, schools without a religious character are under a statutory obligation to provide acts of worship 'of a broadly Christian character' (School Standards and Framework Act 1998, s.70 and sched 20, para 3(2) and 3(3)), with policy guidance elaborating that acts of worship 'must contain some elements which relate specifically to the traditions of Christian belief and which accord a special status to Jesus Christ' (for England, see Department for Education, 1994, para 62; for Wales, see Welsh Office Education Department, 1994, para 65). As discussed in chapter X above, the policy guidance as to the purpose of including collective worship within the school day is inconsistent and contradictory. It is difficult to see

how this can appropriately fulfil the child's interest in development of her religious or philosophical capabilities on either the adherence or revision model, other than, perhaps, where a child has been raised as a member of the relevant Christian faith. The position in Northern Ireland is perhaps even more confused since the legal provisions on collective worship and guidance on its implementation in practice have been elided with the provisions and guidance on religious education (Education and Libraries (Northern Ireland) Order 1986, art 21(1)). What is clear from chapter X above, however, is that worship is intended to be both Christian and confessional, which again suggests that the developmental interest is not being satisfied at least for non-Christian children.

In summary, the current provision of collective worship in the UK outside of the faith school sector does not, as a general rule, serve the child's developmental interest in relation to belief, where development is understood, as in Eekelaar's terms, to have the goal of producing an autonomous adult. To remedy the issues here, what is needed in the first place is a clear statement of the policy goal collective worship seeks to serve – for example, whether the school system aims to produce adults capable of autonomous adherence or autonomous revision. Only then can meaningful consideration be given to moulding the practice of worship in line with these goals and in compliance with international human rights obligations.

The Autonomy Interest

How should collective worship respect the child's autonomy interest in relation to belief?

In the previous section, I discussed the role of collective worship in developing the child's capacity for belief, including the development of autonomy in relation to belief. Once a child's capacity has been sufficiently developed – that is to say, once the child's capacity for autonomous decision-making on belief is equivalent to that of an adult – the child's

developmental interest can no longer be harmed. At this stage, when the child becomes a 'mature minor', respect for the child's autonomy interest demands that she be entitled to withdraw from participation in worship where it conflicts with her independently determined religious or philosophical beliefs.

In the United Kingdom, the general rule is that individuals are viewed as autonomous actors on reaching the age of majority. However, in recent times the law has begun to recognise that children may also have the capacity for autonomous decision making in certain contexts, with the age at which such capacity is obtained varying from child to child. The leading authority for this concept is *Gillick v West Norfolk and Wisbech Area Health Authority* (1985). The case arose when Victoria Gillick applied to the English courts for a determination as to whether a notice issued by the Department of Health and Social Security was lawful. The notice advised doctors that when persons under sixteen sought contraceptive advice and treatment, it was desirable for their parents to be consulted; however, in exceptional circumstances, a doctor might treat such a child alone so long as she did so in good faith and with regard to the child's best interests. Mrs Gillick argued that a child under sixteen had no common law right to consent to treatment. The only person competent to consent was the child's parent or guardian by virtue of their parental rights. Accordingly, she argued that a doctor would be acting illegally if he treated a child without the consent of her parent or guardian.

By a narrow margin, the House of Lords disagreed with Mrs Gillick. It was held that children under sixteen could consent to receiving medical treatment, including contraceptive treatment, provided they had reached a certain degree of maturity and understanding. The exact criteria for such '*Gillick*-competence' did not emerge clearly from the judgment. Lord Scarman expressed the view that, for a child to be competent, she should understand the nature of the medical treatment and have sufficient maturity to understand what was involved, including moral and family questions and the risks to health and emotional stability. Lord Fraser, on the

other hand, emphasised that along with other factors, a doctor should only regard a child as competent *if the treatment requested was in that child's best interests*. The difference in these two approaches has the result that *Gillick* cannot be said to have unambiguously recognised the autonomy of the child in law (Eekelaar, 1986b; Bainham, 1988; Gilmore, 2009; Fortin, 2011), but as has been noted, it 'undeniably placed the idea of children's autonomy rights in the legal consciousness in a way that had not previously existed' (Gilmore, Herring and Probert, 2009, 6).

Subsequent legal developments have varied in the different UK jurisdictions. In Scotland, the Age of Legal Capacity (Scotland) Act 1991 gave specific statutory recognition to the autonomous capacity of children in relation to writing a will (s 2(2)), instructing a solicitor (s 2(4A)) and consenting to medical treatment (s 2(4)), amongst other things. This exceptional capacity is usually presumed to arise at age twelve, but in the case of medical treatment, it arises when the child is assessed by the practitioner as capable of understanding the nature and possible consequences of the treatment.² There is no requirement for treatment to be in the child's best interests: the Scottish Law Commission, after extensive consultation on this point, came to the conclusion that if a child was deemed to have sufficient maturity then it should not matter if the treatment was for her benefit or not (Scottish Law Commission, 1987, 3.61-3.77). In the sole Scottish authority commenting on the issue, *Houston, Applicant* (1996), the sheriff was satisfied that a mother could not give consent to medical treatment of her fifteen-year-old son, who had been assessed as capable of understanding the decision and had clearly

² The section reads: A person under the age of sixteen shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.

refused treatment. The decision in the case did not turn on this issue, however, meaning the views of the court have less force than they might have had. Scottish academic commentators tend to the view that the right to consent carries with it the right to refuse (Edwards, 1993; Elliston, 2007, 112) and current National Health Service guidance to medical professionals in Scotland recommends that where a competent person under sixteen refuses treatment, the refusal must be respected (Scottish Executive Health Dept, 2006, ch 2).

In England and Wales, recognition of the potential autonomy of children has been more restricted. *R (Axon) v Secretary of State for Health* (2006) confirmed that the law in *Gillick* should also apply in relation to abortion, but found that treatment without parental consent requires a high level of understanding on the part of the child along with being in the best interests of the child. In *Re R (A Minor)* (1991), Lord Donaldson suggested that a mature minor and her parent were both ‘keyholders’ to consent, and either might use her key regardless of the position of the other. This view was reiterated in *Re W* (1992). Accordingly, although both a child and her parent may have the right to consent, it seems only a parent has the right to refuse treatment on her child’s behalf. It is worth noting, however, that children under sixteen are given a specific statutory right to refuse medical procedures ordered by the court in relation to a child protection order (Children Act 1989, s 44(7)), in addition to a more general right to have their views heard when the court is taking decisions in relation to their upbringing (Children Act 1989, s 1(3)(a)). Although less developed than in Scotland, then, the concept of autonomy for the child nevertheless has a hold in English and Welsh law.

In Northern Ireland, the position is similar to that of England and Wales. Although the decision in *Gillick* is not directly applicable, there is no reason to think that it would not be followed there. It is not clear how subsequent decisions such as *Re R* would be viewed. Children under sixteen are again given a specific statutory right to refuse medical procedures ordered by the court in relation to a child protection order (Children (Northern Ireland) Order

1995/755, art 62(8)), and have a right to be heard in relation to decisions affecting their upbringing (Children (Northern Ireland) Order 1995/755, art 3(3)(a)).

Although recognition of the autonomy of the child within the UK jurisdictions remains restricted, I would argue that the existing precedents support the requirement of respect for the child's autonomy in relation to collective worship. The position in relation to medical decisions is particularly salient. In this area, two significant, related concerns animate constraints on the exercise of autonomy. First, the consequences of a child's decision can be extremely serious. Refusal of medical treatment may result in death. By contrast, refusal to participate in collective worship cannot cause harm where the child's developmental interest is already fulfilled, and even if a child who was not sufficiently mature was in error permitted to excuse herself from worship, the harm caused would be limited. In the second place, decisions taken in the medical context may be irreversible. Even where the outcome of a medical decision is less dramatic than death, it may still represent a door being closed on a line of treatment that was only available at a particular time or in particular circumstances, for example if a child were to refuse an organ transplant. By contrast, refusal to participate in worship at one time by no means precludes a change of heart at a later time. The nature of religious or philosophical identity is that it evolves over the course of a lifetime. At least in the UK, it is common to hear of adults leaving and returning to faiths at different life stages. The decision taken by a child here is far from determinative or irreversible. In fact, the opportunity to visit and revisit beliefs is an integral aspect of autonomous adult life.

In assessing whether a child has reached the level of maturity required to allow her to make an autonomous decision on participation in worship, some guidance can be gleaned from current practice in the courts. Throughout the UK, children have the right to be heard in court proceedings where the outcome will have an effect on their lives, with the most common examples being residence and contact disputes (Children Act 1989, s 1(3)(a) (England and

Wales); Children (Scotland) Act 1995, s11(7)(b); Children (Northern Ireland) Order 1995/755, art 3(3)(a)). The court will consider the child's views subject to the child's age and level of understanding. In Scotland, a presumption of maturity at age twelve is contained in statute (Children (Scotland) Act 1995, s11(10)). Research into the various mechanisms by which the child's capacity is assessed and her views recorded (Parkinson and Cashmore, 2008, ch 4; Barnes, 2008; Barnes, 2008b; Raitt, 2007; Kay, Tisdall et al, 2004) tends to suggest that, for most children, the best approach is through face-to-face conversation with the person who will make the decision on her capacity, preferably in a neutral venue (Barnes, 2008, 141). The purpose of the conversation should be made clear to the child, and all children should be treated in the same way (Barnes, 2008, 140). Decision-makers should be given appropriate training on working with children and assessing their maturity relevant to the particular context (Raitt, 2007, 218). It seems reasonable to suggest that a teacher tasked with assessing the maturity of a child in order to determine whether the child has sufficient maturity to opt out of collective worship is in a stronger position than a judge or other professional making such assessments in court: teachers have extensive training in dealing with children and may have had the opportunity to come to know the child in question fairly well over several years of school. Against that background, there seems no reason to doubt that a teacher would be capable of making an assessment of the child's maturity in this context.

Does the current practice of collective worship respect the child's autonomy interest?

I argued in the preceding section that, where a child is sufficiently mature to make her own decisions on matters of religious or philosophical belief, respect for her autonomy interest demands that she be entitled to opt out of worship where it conflicts with her values. Support for the argument that an opt- out is necessary to meet our international obligations in terms of

the child's right to belief can be found in the United Nations Committee on the Rights of the Child's *Concluding Observations on the Fifth Periodic Report of the United Kingdom*, published in July 2016. To what extent is an opt-out already available in the various UK jurisdictions?

The position varies. Scotland, in contrast with its approach in relation to medical treatment, offers the child no real autonomy here. Parents have the right to withdraw their children from religious observance (Education (Scotland) Act, s 9), but the child has no independent entitlement to do so (McCarthy, 2017). The position is the same in Northern Ireland, where parents can withdraw their children 'on grounds of conscience' (Education and Libraries (Northern Ireland) Order 1986, art 21(5)). Parents in England and Wales may also withdraw their children from collective worship, in addition to which, sixth-form children in these jurisdictions have an independent entitlement to do so without the need for parental agreement (School Standards and Framework Act 1988, s 71).

Conclusion and recommendations

My intention in this chapter was to offer a novel understanding of the role of collective worship by using Eekelaar's model of dynamic self-determinism as a mechanism for breaking down the different elements of the child's right to belief. I have argued that collective worship, or at least some form of religious or philosophical practice, may make a valid and important contribution to the development of a child's capacity for autonomous religious and philosophical belief. However, reform of current law and practice is necessary to ensure that collective worship does so in a way that protects the child's developmental and autonomy interests to the maximum extent possible whilst also adhering to international human rights standards.

In the first place, I consider it critical for a clear governmental policy to be articulated as to the type of religious or philosophical capacity we, as a society, seek to develop in our children. This will be no easy task. However, it is clear that the historical reasons for the practice of collective worship have become outdated and without clear guidance on what we, as a society, consider the child's developmental interest to be here, it is not possible to ensure that interest is being met.

With that policy statement in place, I argue that the practice of worship should be revised to meet those policy ambitions within the human rights framework. At present, the primarily Christian practice of worship in non-faith schools does not appear to support the development of autonomy on either the adherence or revision models, in addition to which it contravenes the European Court of Human Rights guidance on neutrality in the classroom. These difficulties are not insurmountable, and Clare's Cassidy's discussion of philosophy with children in chapter X offers a useful starting point for consideration of models of collective worship (or 'time for reflection') which might meet these tests.

Finally, where the practice of worship contradicts the values of a Gillick-competent child, I have argued that respect for the child's autonomy interest in relation to belief demands that an opt-out be made available to her. A right to withdraw here would not impact on the child's developmental interest, since for a Gillick-competent child, this interest has already been met. It is worth noting, however, that an inclusive model of worship, such as the practice of philosophy suggested above, is likely to avoid the need for an opt-out to be exercised since the practice is unlikely to conflict with any child's particular beliefs.

With these reforms in place, a clear answer can be given to the question posed at the start of this chapter. Collective worship (or time for reflection) will contribute to the fulfilment of the right to belief of every child within a religiously plural society.

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