Scottish Limitations to Testamentary Freedom and Freedom of Religion under Article 9, ECHR

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Abstract

The writing of a Will may be regarded as an action in life carrying with it the reasonable expectation that its contents will be adhered to. Whilst, in general, anybody with the capacity to do so may leave a Will distributing the entire or part of his estate as a mortis causa trust on his death, testamentary freedom in Scotland is subject to certain limitations. Some manifestations of religious belief require specific observances on death which could be prevented by these limitations. Three such limitations to testamentary freedom, namely restrictions arising from the concept of legal rights, immoral Will conditions and the regulations surrounding the disposal of the corpse, have the capacity to affect directly the freedom to manifest religion which is protected under Art.9(1) of the European Convention on Human Rights (the 'ECHR'). This paper will contend that whilst limits to testamentary freedom may interfere with the freedom to manifest religious belief, such restrictions are justifiable under Art.9(2), ECHR. It is, therefore, concluded that while interference may occur, the three limitations to testamentary freedom do not contravene Art.9, ECHR.

1. Introduction

Freedom of testamentary disposition is an established right within Scots law and, theoretically, anybody with the capacity to do so may leave a Will distributing the entire or part of his estate as a mortis causa trust on his death.¹ It is assumed that as part of the right of ownership, a person may dispose of his property as he sees fit.² The freedom of testation is, however, subject to certain limitations. As some manifestations of religious belief require specific observances on death, these limitations on testamentary freedom have the potential to conflict with freedom of religion, a right protected by Art.9(1), ECHR. This provides that a person has the right to believe in, and manifest their religion. For those with a strong religious belief, the laws of that religion are absolute, ranking even higher than those of the

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¹ A person has no legal capacity until he reaches the age of 12 as per the Age of Legal Capacity (Scotland) Act 1991. Similarly, a Will made by a person without the capacity to understand the nature of the act, such as a person suffering from a psychiatric disorder or mental illness, will be void: see Boyle v Boyle’s Executor 1999 SC 479 (OH). These are matters regarding the essential validity of the Will.

state in which they live. The freedom to manifest religion is not, however, absolute. This paper will contend that while limits to testamentary freedom may interfere with the freedom to manifest religious belief, such restrictions are justifiable under Art.9(2), ECHR. It will be argued that whilst interference may occur, limitations to testamentary freedom in Scotland do not contravene Art.9, ECHR.

This paper will be structured as follows. In Part II, limitations to testamentary freedom in Scotland will be examined and three limitations which relate specifically to the freedom of religion will be identified: (i) legal rights; (ii) immoral conditions contained in a Will; and (iii) Will conditions relating to the disposal of Mortal Remains. In Part III, the nature of the right protected by Art.9(1), ECHR will be examined and the class of justifiable restrictions on this right under Art.9(2) will be determined through examination of the case law of the European Court of Human Rights (‘ECtHR’). In Parts IV, V and VI, the operation of each of the three limitations to testamentary freedom identified as affecting freedom of religion will be examined against specific religious practices and observances to determine: (i) whether they breach the Art.9(1) protection regarding the manifestation of religion; and (ii) whether the limitation to testamentary freedom falls within the class of justifiable exceptions to this freedom under Art.9(2).

2. Limitations to Testamentary Freedom

A. General Limitations

Scots law accepts that a testator is not free to distribute his estate in an unrestricted manner. Freedom of testamentary disposition is subject to certain limitations which arise through a variety of mechanisms and find their justification in numerous aspects of the law of property. A common class of restriction arises in connection with the fundamental nature of the property over which the testamentary disposition seeks to deal. An example of this is the right of servitude which provides that a person may make use of another’s property for their own ends. This right can arise either through deed or passage of time and can be lost if it is not exercised. As the servitude is inseparably linked to the dominant tenement, the legacy of a servitude cannot be separated from that of the dominant tenement. This is due to the impossibility of separating the servitude from that to which it is attached. It, therefore, arises out of practicality, among other reasons. Additionally, further limitations to testamentary freedom arise due to the nature of croft property. A person cannot leave a bequest of his croft to more than one person. Additionally, where a bequest of a croft is made to someone who is not a member of the testator’s family, the provision is null and void unless it is endorsed by the Crofters Commission. These limitations have arisen due to the desire to preserve the croft land and the crofting way of life.

3 As defined in the Succession (Scotland) Act 1964.
4 Crofting is a way of life unique to Scotland which finds its strongest continuation in remote areas of the West Coast.
5 Crofters (Scotland) Act 1993, s 10(1). The definition of ‘family’ is set out in s 61(2).
Many other limits to testamentary freedoms exist in Scotland, not least those dealing with entails,6 successive liferents7 or general accumulations of income.8 Even the drafting of the disposition can lead to the failure of the testator’s wishes through uncertainty. This is an intrinsic constraint arising from the impossibility of deducing the intention of the testator. Such uncertainty can lead to a single clause or indeed the whole disposition being challenged. For example, if a deed seeks to appoint another person to determine the distribution of property such a clause will not stand. This is due to the fact that only the testator has the power to bequeath his property.9 Similarly, if a bequest is considered to be repugnant to ownership then the clause containing the repugnancy, or perhaps the entire deed, can be open to challenge. Repugnancy arises, for example, when a testator bequeaths property subject to a restriction, condition or contradiction which renders the term inconsistent with a right of full ownership.

B. Limitations of Religious Consequence

If a Will based upon religious belief fails on any of the grounds set out above then this has the potential to thwart a religious desire. However, none of the limitations mentioned previously directly impinge upon religious freedom; any restriction to religious freedom that may arise as a result of them is indirect. It is the case, however, that some limitations do arise in direct conflict with the rules of certain religions and, therefore, do have the potential to directly restrict religious freedom. Three such restrictions arise as a consequence of: (i) legal rights; (ii) public policy relating to immoral Will conditions; and (iii) laws dealing with the manner in which the corpse of the deceased may be disposed of. The direct nature of these limitations’ restriction of religious freedom arises due to the fact that many religions have traditions or rules as to a person’s property and corpse on death.10

The division of property on intestacy in Scotland is standardised11 and does not discriminate between people of different religions. This means that, excepting where all potential beneficiaries are in agreement, there is no way for religious preferences to be incorporated into the rules of intestacy. Consequently, the only way of ensuring that such beliefs will be honoured following death is to make a Will. It is, therefore, understandable why testamentary limitations which may interfere with

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6 The Entails (Scotland) Act 1914 prohibits the creation of new entails over land.
7 Successive liferents over moveables were restricted by the Trusts (Scotland) Act 1921, s 9. The modern law governing both land and moveables is found in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 18 which affects deeds executed after 25 November 1968. This limits the endurance of a liferent to a person who is in utero at the time of execution so that it does not extend past his 18th birthday. See Stewart’s Trs v Whitelaw 1926 SC 701 (IH) 718 (Lord Sands).
8 Statutory restrictions are found in the Trusts (Scotland) Act 1961, s 5 and in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 6. These provisions are retrospective.
10 For example, Islamic Quranic legislation on inheritance stems from the pre-Islamic customary laws of tribal Arabia which preserved the patrimony by limiting inheritance to the male line: see DS Powers, ‘The Islamic Inheritance System: a Socio-Historical Approach’ (1993) 8 Arab Law Quarterly 1 13.
11 Succession (Scotland) Act 1964.
the Will are likely to be challenged. With religious diversity comprising an important part of a multicultural society, it is important that it is protected. One of the methods for ensuring this protection is through the medium of Art.9, ECHR. In order to determine whether the three limitations to testamentary freedom which restrict religious activity contravene Art.9, they must be examined against its provisions. It is, however, important to first discern the scope of the protection offered by Art.9.

3. Freedom of Religion

A. Freedom under Art.9(1)

Article 9(1) of the ECHR states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

If read in isolation, the wording of Art.9(1) suggests that the freedom of thought, conscience or religion is not open to limitation. Art.9(1) also bestows the right to manifest religion through ‘(…) worship, teaching, practice and observance’. However, the right to manifestation is subject to limitations justifiable under the circumstances defined within Art.9(2). Accordingly, the meaning of manifestation must be determined. It would perhaps be assumed that acts purporting to represent a manifestation would be interpreted widely.

In deciding whether an action amounts to manifestation of a religion, two tests have arisen in the case law. The first, stemming from the need to consider whether the ’act gives expression to a religion or belief’, only appears in a small number of decisions. The second deals with whether the action is a necessary aspect in the adherence to that religion. The latter, being the one which the ECtHR appears to favour, for the purposes of determining manifestation, it will be the test used in this paper.

The necessity approach is one which the ECtHR will consider if the action is one that would otherwise fall within the class of justifiable restrictions. For example, in X v Austria, a prisoner converted to Buddhism while incarcerated. He contended that his freedom to manifest his religion was restricted as the prison authority would not let him grow a chin beard, perform yoga exercises, obtain a prayer chain or subscribe to a religious periodical. He also argued that their refusal to stock the prison library with relevant texts further obstructed his freedom to manifest his

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12 X v Austria App no 1753/63 (1965) 8 ECHR Yearbook 174, 184. It has been said that ‘(…) when the actions of individuals do not actually express the belief concerned they cannot be as such protected by Article 9(1), even when they are motivated or influenced by it’: Arrowsmith v UK (1981) 3 EHRR 218 [71].
13 X v Austria (n 12)
14 ibid 184.
15 ibid.
religion. While the court rejected three of the submissions on the grounds that they fell into the class of justifiable restrictions, it rejected the fourth on the grounds that a prayer chain was not, ‘(…) an indispensible element in the proper exercise of the Buddhist religion.’\textsuperscript{16} This demonstrates that the importance of a certain thing or action within a religion is fundamental in deciding whether it represents a manifestation of that religion and, as such, whether it falls within the parameters of protection. It would seem, therefore, that the real difficulty in interpretation lies in the diversity of religions and the practices required by them. In order to be protected, an action must be proved, through the necessity test, to be a manifestation of a religion. Many people of the same religion will show different levels of commitment and adherence to their religious texts. While it is recognised that this causes a problem in determining the necessity of an action in more extreme cases, it will not be contested here. Rather, for present purposes, it will be accepted that the case law is permissive of the fact that some religious sects may be more liberal than others so that something one person may find essential may be a matter of preference to another.\textsuperscript{17} Similarly, rather than attempting to solve this inconsistency through a more rigid definition of religion, the ECtHR has taken the approach of applying Art.9(2). If something is protected under Art.9(1) due to the fact that it is a manifestation of a religious belief, rather than determining the legitimacy of that belief, the court can apply the justifiable limitations laid out in Art.9(2).\textsuperscript{18}

B. The Class of Justifiable Restrictions

Prior to analysing the interpretation of Art.9’s limitations, it should be noted that their use as regards testation has not been widely discussed due to the perceived unlikelihood of a person having human rights after death.\textsuperscript{19} Testation is, however, carried out during life; only its effects take place after death. Therefore, the act of writing a Will with religious implications is an attempt to exercise Art.9 rights during an individual’s lifetime, meaning that it does fall within the ambit of the protection if the limitations do not apply. Article 9(2) of the ECHR provides:

\begin{quote}
Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.
\end{quote}

The approach to limitation shown here is not exclusive to Art.9. Similar exceptions exist in relation to Arts 8, 10 and 11 as well as Art.2 of Protocol 1. Therefore, in

\textsuperscript{16} ibid.
\textsuperscript{18} X v Austria (n 12) 184; Arrowsmith v UK (n 12).
approach at least, these are comparable rights. The exceptions are justified by a balancing of individual and public rights within each contracting state. It is now accepted that the limitations to ECHR freedoms only exist in narrow circumstances and that there are two key principles of application.\(^{20}\) The first principle directs that only the express limitations enumerated in the second paragraph of each article are allowed.\(^{21}\) This is not stated specifically but can be presupposed from the nature of the convention. The second principle is stated in Art.18: ‘[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.’\(^{22}\)

In applying Arts.8-11, the courts have similarly adopted a narrow approach.\(^{23}\) It is arguable that this is necessary in order that the protections fulfil their purpose: if it were possible to interpret the restrictions in the second paragraph broadly then the provisions would offer little or no protection. There has, however, been diversity in the treatment of cases dealing with limitations suggesting that individual findings are fact specific.\(^{24}\) Indeed, decided cases would suggest that each set of circumstances is examined against a tripartite test: first, it must be determined whether the restriction is in accordance with the law; second, the purpose of the interference must be legitimate; and finally, the interference must be necessary within a democratic society.\(^{25}\) It should be noted that in some limited cases it is not necessary to require proof of all three parts. For example the answer to the first part may be admitted and not require proof.\(^{26}\) In attempting to determine whether a law breaches Convention rights it is important to understand fully the nature and application of these tests.

As regards the requirement that a restriction must be in accordance with the law, the ECtHR has developed a second tripartite test. Firstly, it must be demonstrated that the restriction has a basis in the law of the contracting State.\(^{27}\) Secondly, the law must be readily available to anyone who wants to find it.\(^{28}\) Thirdly, the law must be laid out in such a way that anyone choosing to access it can reasonably foresee the consequence of an action. This is known as the foreseeability test.\(^{29}\) Additionally, the ECtHR can only disagree with the interpretation of national law by national courts if there is a very good reason to.\(^{30}\) Moreover, it is not essential

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\(^{21}\) That the clearly expressed limitations were the only ones that could exist was not always accepted. It was previously suggested that some situations, especially relating to prisoners, could lead to wider limitations of rights: see James Fawcett, *The Application of the European Convention on Human Rights* (OUP 1987) 232-3. This idea was abandoned when the ECtHR failed to follow the Commission on this matter.

\(^{22}\) ECHR, Art 18.

\(^{23}\) Klass v Germany (1979-80) 2 EHRR 214.


\(^{25}\) Otto-Perninger Institute v Austria (1995) 19 EHRR 34

\(^{26}\) An example of when only the third point was considered occurred in Christian Democratic People’s Party v Moldova (2005) 40 EHRR 76.

\(^{27}\) For example, the court could find no relevant law and, therefore, dismissed the case of Djavit An v Turkey (2005) 40 EHRR 1002.

\(^{28}\) White and Ovey (n 20)


\(^{30}\) See Roche v United Kingdom (2006) 42 EHRR 599. This was a case dealing with access to court under Art 6 ECHR, but the same principles must apply to Art 9.
that the law be contained in legislation; presence in the common law is perfectly acceptable.31 The second question that the court will consider in deciding whether an interference with a Convention right is justifiable is the need for specific legitimate aims.32 Case law shows that it is usually straightforward for a State to bring its action within a legitimate aim, as evidenced by the fact that this aspect is rarely contested by applicants.33 Moreover, there is no case law in which the ECtHR has found a violation of an Art.8-11 right simply because a State has failed to satisfy the need for a legitimate aim. This is due to the fact that laws, whether from precedence or legislation, tend to arise due to a social need and as such are legitimate in their aim to meet this need.

As a final point in determining whether there has been a violation of a Convention right, the court must rule as to whether the limitation imposed is necessary in a democratic society. This involves a proportionality test in which the court weights the severity of the restriction against whether it is in the public interest.34 This is an area in which the State’s margin of appreciation can influence the outcome – what may occur within the public interest in one State may be against the public interest in another due to extenuating factors such as social and cultural differences.35 A State’s margin of appreciation allows that State to give varying levels of protection to Convention rights in order that these differences are catered for. For example, in some cases contracting States may deal with a problem in very different ways with both approaches being deemed acceptable.36 Moreover, the breadth of the margin can alter depending on the nature of the rights in question and the importance of the competing rights.37 As such, a definition that will apply to all cases cannot be reached; the application of the concept will depend upon the circumstances. Certainly it appears that the ECtHR deems pluralism, tolerance, broadmindedness, liberty, equality and the encouragement of self-fulfilment to be

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31 Sunday Times v United Kingdom (1979) 2 EHRR 245.
33 Sunday Times v United Kingdom (n 31); Silver v United Kingdom (1983) 5 EHRR 347.
34 Silver v United Kingdom (n 33).
36 In contrast to England, Scotland does not currently accept the doctrine of adverse possession. Despite the fact that such a doctrine could be argued to interfere with property rights, the ECtHR deemed it permissible in J.A. Pye (Oxford) Ltd v United Kingdom App no 4430002/02 (ECtHR, 15 November 2005).
37 See, for example, the discrepancy between Von Hannover v Germany [2005] 40 EHRR 1 and Campbell v MGN Ltd. [2004] UKHL 22, both dealing with breach of privacy and freedom of expression. Von Hannover found that due to the fact Princess Caroline was not fulfilling a public duty, the fact that she was in a public place did not mean the public had a legitimate interest in her whereabouts and that, therefore, publication of photographs of her in such a situation was a breach of her right to privacy. Campbell, however, found that to publish the details of Miss Campbell’s drug treatment, as confidential information akin to medical records, would require specific justification which was not present. It was confirmed that the English courts recognised no tort of breach of privacy.
important qualities of a democratic society. These are in addition to the rights explicitly protected by the Convention.

With an understanding of what constitutes a violation of Convention rights, it will now be determined whether the limits to testamentary freedoms in Scotland fall within the provisions of Art.9(2). The three limitations on testamentary disposition which could affect freedom of religion will now be separately examined so as to assess their effect under Art.9(1) and their permissibility under Art.9(2).

4. Legal Rights

A. Legal Rights as a Limit to Testamentary Freedom

Legal rights provide a surviving spouse and any children of the deceased, irrespective of legitimacy, with an automatic claim on part of the deceased’s moveable estate. They can be likened to a narrower kind of forced heirship as seen in many continental legal systems. Unlike many Commonwealth jurisdictions, including England and Northern Ireland, however, an application to the court need not be made for these rights to be available. Legal rights cover two thirds of the deceased’s moveable estate, provided he is survived by spouse and issue, and one half if only survived by one of these classes of people. While the exact origin of legal rights is unclear, they cannot be defeated by a will. Legal rights, therefore, operate as a limit to testamentary freedom in that the testator is, in actual fact, only free to make provision over the dead’s part of the moveable estate comprising the remaining third, or half, of moveables. Any provisions regarding the rest of the moveable property have the potential to be struck down or greatly reduced by someone claiming their legal rights, as legacies can be reduced in order that legal rights are fulfilled.

It should be noted, however, that as a limit to testamentary freedom, legal rights are not insurmountable. It is possible for a person to manage his estate in such a way as to ensure that legal rights cannot be claimed from it after his death. Indeed,

40 This comparison is made in Hilary Hiram, The Scots Law of Succession (2nd edn, Tottel Publishing 2007).
41 The Family Law (Scotland) Act 2006 permits application from cohabitants to inherit on the death of their partner.
42 Succession (Scotland) Act 1964 ss 3, 5 and 6 and the Civil Partnership Act 2004, s 131.
44 Bankton, Institute, 3.4.4.
45 Succession (Scotland) Act 1964 (n 42) and Civil Partnership Act 2004 (n 42).
46 ibid s 1(2).
it has been noted that as regards the legal rights of children, ‘(…) legitim is a right in succession which a father may lawfully and effectually defeat if he takes the right way of doing so’.\(^{47}\) Despite the legislative changes to the law since this statement was made in 1916, this is still the case and means that a claim to legal rights can be prevented. Such is the situation due to the fact that legal rights are, by their nature, going to be limited since they apply only to moveables. In the main, the most valuable property a person may own will be heritable. Moreover, legal rights only apply to a proportion of the moveables meaning that their value may be very small. This value can, in theory, be reduced to nothing through the medium of \textit{inter vivos} transactions disposing of moveable property. If there is no moveable estate on death, then legal rights cannot be claimed.\(^{48}\) Similarly, the moveable estate from which legal rights fall due to be paid may be reduced by debt accumulated in the testator’s lifetime. This is because legal rights are paid after ordinary debts but before other rights in succession. Despite this, it would be a very unusual situation in which a deceased left no moveable property at all. Therefore, legal rights operate, if only to a very limited extent in some cases, as a restriction on testamentary freedom and as such have ramifications regarding freedom of religion.

B. Legal Rights and Art.9(1)

Legal rights have the potential to conflict with any religious belief that rules on the division of a deceased’s estate.\(^{49}\) However, for the purposes of discerning if legal rights breach freedom of religion in Art.9(1), the focus will be on the Quranic law within the Islamic faith. According to the traditional Sunni law, on the death of a Muslim, the following four duties must be carried out: (i) the funeral expenses must be paid; (ii) any debts must be repaid; (iii) the deceased’s Will must be executed; and (iv) the remaining estate must be distributed among relatives in accordance to Shari’a law.\(^{50}\) This, \textit{prima facie} seems to present little problem in relation to Scots law. However, conflicts do emerge. It should be noted that for Shari’a law to apply to the estate in the first place, a Will must be made stating as such. It will not occur automatically.\(^{51}\) Under Shari’a law, a testator is only permitted to bequeath one third of his total estate other than to those whom Shari’a law dictates as his beneficiaries.\(^{52}\) The remaining two thirds must be distributed as outlined by Islamic inheritance law. For Muslims, this is of great importance. Indeed, it is said that, ‘[i]t is not for a

\(^{47}\) Hutton’s Trustees v Hutton’s Trustees 1916 SC 860 (IH) 881 (Lord Skerrington).

\(^{48}\) Agnew v Agnew (1775) M 8210; Hogg v Lashely (1772) 2 ER 1278.

\(^{49}\) For example, Judaism or to a lesser extent Christianity.


\(^{51}\) In any case where a person dies intestate the estate will be divided according to the rules on intestacy contained within the Succession (Scotland) Act 1964.

\(^{52}\) Ahmad Thomson, ‘The Importance of Writing an Islamic Will’ (The Association of Muslim Lawyers) <http://www.muslimpersonallaw.co.za/importance%20of%20writting%20a%20Will.pdf> accessed 12 June 2012.
believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any opinion in their decision.\textsuperscript{53}

The Quran has only three verses\textsuperscript{54} dealing with inheritance law but, when taken together with the traditions of the Prophet Muhammad, Muslim jurists have succeeded in laying down specific instructions for the distribution of a deceased’s estate.\textsuperscript{55} The problem lies in the fact that a potential beneficiary can claim legal rights under Scots law rather than follow a Will. Such an occurrence will lead to property being disposed of other than in the way Shari’a law demands. In the context of inheritance law, the Quran states that: ‘(…) whosoever disobeys Allah and His Messenger, and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.’\textsuperscript{56} Many Muslims, therefore, believe that there are serious consequences for a failure to follow this aspect of religion, meaning that its observance and practice are necessary manifestations of their religion. In Scots law, there is no method through which a testator may ensure that no legal rights may be claimed, short of obtaining signed documents from each potential beneficiary renouncing legal rights.\textsuperscript{57} That a person may do this, especially if they do not hold the same religious laws in such high regard, is very unlikely. That religious Will provisions can be defeated by legal rights would, therefore, seem to be a breach of the freedom of religion, through limiting the manifestation of that religious belief, contained in Art.9(1).

C. Legal Rights and Art.9(2)

Whilst the freedom to hold a religious belief is unqualified, the freedom to manifest one’s religious belief is limited under Art.9(2). Therefore, although it is established that legal rights have the potential to breach the freedom to manifest one’s religion through testation and indeed do appear to do so in relation to Islamic inheritance law, if legal rights fall within the allowable exceptions to that freedom contained in Art.9(2), then no contravention can be said to have occurred. It has already been established that in dealing with the exceptions to Arts 8-11, the ECtHR has established a tripartite test. This test must, therefore, be applied to the case of legal rights.

The ECtHR’s first test to determine whether a limitation of rights is justifiable is that there has to be a legal basis for the interference. As already shown, this is itself determined through a tripartite test. Firstly, it is unquestionable that legal rights have a basis in national law.\textsuperscript{58} Secondly, the law must be accessible. If one is to type into an internet search engine\textsuperscript{59} ‘succession in Scotland’, the first hit is a link to the Scottish Government site explaining rights on succession, including the operation of legal

\textsuperscript{53} Quran 33:36.
\textsuperscript{54} 4:11, 4:12 and 4:176.
\textsuperscript{56} Quran 4:13-14.
\textsuperscript{57} This was the case for five out of the six surviving children in Hogg v Lashley (n 48).
\textsuperscript{58} Succession (Scotland) Act 1964, Part II.
\textsuperscript{59} For these purposes, Google was used. Information was correct as at 8 June 2012.
rights.\textsuperscript{60} The fifth hit is a link to the legislation itself. Therefore, it must be concluded that information as to the nature and operation of legal rights is readily accessible to anyone who wishes to know about it. Thirdly, the result of the limitation must be readily foreseeable. The Scottish Government’s guidance under the heading ‘Where the deceased left a valid Will’ states that, ‘(...) the legal rights described in note 2 may be claimed by a surviving spouse or civil partner or a child.’\textsuperscript{61} This guidance as to the continued operation of legal rights where a valid will exists could not be much clearer. Therefore, the operation of legal rights has to be considered as foreseeable. On this evidence, it can be concluded that the concept of legal rights, as a limit to testamentary freedom, passes the first test in determining whether they are a justifiable restriction under Art.9(2).

To satisfy the second test to determine whether legal rights are a justifiable violation of Art.9(1), it must be proved that they have a legitimate aim. Legal rights ‘(...) have long been recognised in Scots law as a means of providing family protection for both the surviving spouse (...) and children.’\textsuperscript{62} They protect certain categories of people from disinheritance and have been held to be ‘(...) a very important check on capricious or unjust testaments.’\textsuperscript{63} Consequently, they can be argued to fall within the definition of a justifiable restriction by ‘protecting the rights and freedoms of others’.\textsuperscript{64} It would seem likely that the ECtHR would be satisfied with the legitimacy of the aims of legal rights. It, therefore, seems that legal rights pass the second test in determining whether they are a justifiable limitation to freedom of religion.

The final point which the court will have regard to and which is itself a justification of limitation,\textsuperscript{65} is whether the restriction is necessary in a democratic society. First, it should be noted that the term ‘necessary’ in these circumstances is not the same as ‘indispensable’.\textsuperscript{66} The severity of the restriction must be weighed against the social need for its existence. It is not enough to say that legal rights are similar to the doctrine of forced heirship that many other contracting Member States have. It is, however, true that the acceptance of the doctrine by the majority is suggestive. In the Evans case,\textsuperscript{67} since the Grand Chamber found that there was no standard approach taken by the majority of contracting States to the issue in question, it deferred to the pre-legislation consultation that the United Kingdom undertook prior to passing the relevant legislation. This implies that if a uniform approach had been in existence, the Grand Chamber may have found it very persuasive. Thus, due to their similarity with forced heirship, legal rights may fall within the category of justifiable limitations. Additionally, it would appear from Evans that if consultation and monitoring has been carried out in respect of legislation, it is more likely to be considered to fall within the State’s margin of

\textsuperscript{61} ibid.
\textsuperscript{63} Hutton’s Trustees (n 47) 870 (Lord Salveson).
\textsuperscript{64} ECHR, Art 9(2).
\textsuperscript{65} ibid.
\textsuperscript{66} Silver v United Kingdom (n 33).
\textsuperscript{67} Evans v United Kingdom (2008) 46 EHRR 34.
appreciation.\textsuperscript{68} This is significant as succession is an area of law which has been subject to rigorous examination by the Scottish Law Commission.\textsuperscript{69} Moreover, in answering the question as to whether the restriction is proportionate to the legitimate aim previously established,\textsuperscript{70} it could be argued that there is a social need for the protection offered by legal rights from disinheritance. In the case of legal rights, the protection of a whole class of people, over the right of one person to manifest his religion in one way should take priority, especially when considering the other arguments previously mentioned. This argument has added weight given that it is possible for a testator to defeat legal rights. As regards the third test, therefore, it would appear that the restriction on the manifestation of religion caused by legal rights is proportionate to the aim it is trying to achieve.

D. Conclusion on Legal Rights

Legal rights operate as a limit on testamentary freedom in that they can defeat any part of a Will that seeks to make provision over more than one third or one half of the testator's moveable estate. They can be construed as a restriction on a person's freedom to manifest his religion under Art.9(1) as wherever religion seeks to deal with inheritance laws, as is the case with Islam, legal rights have the potential to prevent full observance. Despite this, on application of the tripartite test for determining justifiable restrictions on Convention freedoms, legal rights fall within the category of the allowable contraventions within Art.9(2). Accordingly, legal rights, operating as a limit to testamentary freedom, do not contravene Art.9, ECHR.

5. Immoral Will Conditions

A. Immorality as a Limit to Testamentary Freedom

Immorality will usually act as a limit to testamentary freedom through the medium of an invalid potestative condition. This is a condition that is within the beneficiary's power to perform but whose requirement is immoral and is known as being \textit{contra bonos more}. It has been said that:\textsuperscript{71}

No person can lay himself under an obligation to (...) do any immoral or unlawful action, which is said to be legally impossible; because what is forbidden, either by rule of reason or by positive institution is, in the consideration of law, out of our power.

\textsuperscript{68} ibid [63]-[69].
\textsuperscript{69} See, for example, Scottish Law Commission, \textit{Intestate Succession and Legal Rights} (Scot Law Com CP 69, 1986) and Scottish Law Commission, \textit{Report on succession} (Scot Law Com No 215, 2009).
\textsuperscript{70}Silver \textit{v} United Kingdom (n 33).
\textsuperscript{71} Erskine, \textit{Institute}, 3.3.84. For these purposes, the term ‘impossible’ will be interpreted as ‘impossible within the law.’
It should be noted that any legacy which is coupled with an unlawful condition will still be effectual. The condition will simply be treated either as having been satisfied or as pro non scripto. While some conditions are impossible through illegality, it is more often the case that conditions are considered as conflicting against morality as they represent an unacceptable abuse of the testator’s power. If this is the case, the condition will not be enforced. This limits testamentary freedom as it acts to stop a condition of a legacy which was considered to be important by the testator. It may relate to the type of person the testator feels suitable to be rewarded by remembrance in a Will. Such conditions usually focus on an unreasonable attempt to restrain a beneficiary’s freedom. For example, if a condition attempts to prohibit marriage altogether it will not be carried out on grounds of immorality. The condition will be considered illegal. Many English cases exist on the prohibition of marriage. Most concerned a condition which attempted to dictate the religion of a future spouse of the beneficiary. There is no Scots authority dealing directly with this issue although it has been argued that Scottish courts would give such conditions the same treatment as that given by their English counterparts. Similar to cases of restriction of marriage are those dealing with conditions regarding residence with certain people. The validity of such a condition will depend on the possibility of the condition, the nature of the condition and the degree of the relationship. Thus considerations of morality act as a limit to testamentary freedom in that conditions attached to legacies may be considered unenforceable if the court deems the condition to be contra bonos mores. Such a limitation to testamentary freedom again has the potential to breach freedom of religion as protected by Art.9(1) of the ECHR.

B. Immorality and Art.9(1)

Immorality through legal impossibility will not be contested here. Instead, the focus will be on the borderline cases regarding something that a beneficiary could legally achieve. For example, the preservation of the institution of marriage is important in many religions. For the purposes of determining whether immorality as a limitation to testamentary freedom contravenes Art.9(1), the concept of marriage within the faith of Judaism will be examined.

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73 As discussed for example in Brown v Gregson 1920 SC (HL) 87.
74 Hiram (n 40).
75 Bell, Prin § 1785.
76 MacLaren (n 72) para 1096. See also Ommanney v Bingham (1796) 3 Pat 448; Aird’s Executors v Aird, 1949 SC 154 (IH); Young v Johnston and Wright (1880) 7 R 760 (IH).
77 See Perrin v Lyon (1807) 103 ER 538; Re McKenna [1947] IR 277; Clayton v Ramsden [1943] AC 320 (HL) and Re Selby’s Will Trusts [1965] 3 All ER 386.
79 MacLaren points out that it can be difficult to determine the exact meaning of the term ‘reside’ within individual cases although cases dealing with residence will be allowable in many cases: (n 72) para 1095.
80 For example, in Reid v Coates 5 Mar 1813 FC, a condition which stated that the beneficiary must not reside with his mother was held to be valid. Whilst in Fraser v Rose (1849) 11 D 1467, a condition that the beneficiary could not live under the influence of his mother was held to be against morality.
In the first chapter of the Kedushah, the tractate of the Mishnah dealing with Holiness, the rules regarding interfaith marriage are prescribed. It is forbidden for Jews to have sexual relations with a person of a different faith as it is said, ‘[y]ou shall not intermarry with them; you shall not give your daughter to his son nor take his daughter for your son.’\(^{81}\) This prohibition was extended by Rabbinic law to include non-marital relations as well.\(^{82}\) This can be said to include cohabitations or more casual relationships.\(^{83}\) Similarly, homosexuality, especially between women, is forbidden.\(^{84}\) This demonstrates why it may be important to a testator that his property does not pass to either someone outside his faith or married to someone he does not deem suitable. Jewish laws of inheritance regarding distribution of property on death are contained within the eighth and ninth chapters of the Baba Bathra, the section of the Mishnah that deals with the ownership of property.\(^{85}\) The observation of such laws is a manifestation of religious belief through observance and practice. Preventing such manifestation through prescribing the means by which property could pass to the correct person\(^{86}\) would, therefore, seem to be in breach of Art.9(1).

Whether the condition attaching to the legacy is for the protection of the property or to give incentive to the beneficiary to conform, will be irrelevant in the law.\(^{87}\) It may, however, be relevant to the protections offered by Art.9(1). One of the manifestations of religion that is protected is the teaching of religious doctrines. The making of a legacy that is conditional on the observance of a specific aspect of religious law could be construed as a method of teaching that law. This is an argument contingent upon a technical interpretation. Less controversially, observance is a protected manifestation and in many cases a conditional legacy with religious connotations is seeking to ensure observance. This may be through the securing of a suitable marriage partner or through attempting to ensure that non-marital conjugal relations do not occur. These concepts fall within the required aspects of Judaism and, as such, someone of that faith would argue that it was immoral not to observe them. \textit{Prima facie} it would seem, therefore, that the interpretation given to immorality as a limitation to testamentary freedom breaches Art.9(1) ECHR.

\(^{81}\) Deut 7:3.
\(^{82}\) Ishus 12:1-2.
\(^{83}\) Lev 18:6, “No man shall come near to uncover nakedness.”
\(^{84}\) Lev 18:3.
\(^{85}\) This gives an interpretation to Numbers 27:1-8 which excludes all female heirs excepting only daughters in the cases where no son is alive to claim.
\(^{86}\) As property cannot pass out with the faith in the main.
\(^{87}\) The decisions in \textit{Fraser v Rose} (n 80) and \textit{Young v Johnston and Wright} (n 76) demonstrate that it is the nature of the condition that renders it illegal. The intentions of the testator in writing it were not considered relevant.
C. Immorality and Art.9(2)

It falls to determine whether immorality, as a limitation to testamentary freedom in Scotland, can be accommodated within one of the restrictions contained in Art.9(2). The previously determined tripartite test will again be applied.

In considering whether there is a legal basis for the restriction on the manifestation of religion caused by the concept of immoral Will conditions, case law demonstrates that it does have a basis in national law. While there is no statutory provision relating to potestative conditions, the common law is accepted as satisfactory inclusion within national law.\(^\text{88}\) This means that the numerous cases concerning immorality are sufficient to prove the first requirement for determining a legal basis for the restriction. However, in cases where rules stem from the common law, accessibility is harder to prove. Simply typing “immoral Will conditions, Scotland” into an internet search engine does not render anything helpful.\(^\text{89}\) It should be remembered, however, that any practitioner in the field of private law should be aware of this limitation as knowledge of succession is compulsory to be admitted as a solicitor by the Law Society of Scotland.\(^\text{90}\) Therefore, the common law is easily accessible to such a practitioner. Additionally, cases dealing with common law have not been seen to automatically fail on grounds of inaccessibility suggesting that access to legal experts, if not the primary source, is enough to prove accessibility.

Finally, in proving a legal basis, it must be determined whether the consequences of immorality are foreseeable. This question is problematic due to the narrow margin by which some cases are considered immoral while others are not. For example, as previously mentioned, a condition prohibiting marriage would be struck down by the courts. Conversely, when conferring a benefit on an unmarried child, if used descriptively i.e. the benefit is conferred on one of two daughters, one of which is married, or purposively i.e. the benefit is conferred if the daughter is still unmarried, then such a provision is allowed to stand.\(^\text{91}\) The difference between those which are allowed to stand and those which are struck down may appear to be marginal. Indeed acceptability may even be down to the quality of the drafting of the Will. This may be said to reduce the foreseeability of the consequences of immoral conditions in that what constitutes an immoral purpose is perhaps not altogether clear on cursory examination. What is made clear by the case law, however, is that immoral conditions will not be required to be carried out.\(^\text{92}\) It is, therefore, foreseeable that if immoral conditions are included in a Will provision, they will not stand. This indicates that the consequence of immorality, if not the immorality itself, is reasonably foreseeable. This is what the legal basis test demands. Immorality, therefore, passes the first test in determining whether it, as a limitation to

\(^{88}\) Sunday Times v United Kingdom (n 31); Barthold v Germany (1985) 7 EHRR 383.

\(^{89}\) For this test the search engine “Google” was used. The search results were correct as at 20 March 2012.

\(^{90}\) Succession is one of the compulsory subjects for entry as a solicitor in Scotland:

<http://www.lawscot.org.uk/becomingasolicitor/students/studying-the-llb/professional-subjects>

last accessed 12 June 2012.

\(^{91}\) Sturrock v Rankin’s Trustees (1875) 2 R 50 (IH).

\(^{92}\) Fraser v Rose (n 80).
testamentary freedom, falls within the justifiable restrictions over the manifestation of religious belief.

The need for a legitimate aim is an interesting problem when dealing with immorality. Many people would argue, especially those of a religious persuasion, that by imposing such a condition on a legacy within a Will they were protecting the morality of the beneficiary rather than themselves acting immorally. However, it should be remembered that each of the potential beneficiaries is awarded the same protection under Art.9 as the testator himself. They have the freedom to manifest their religion in just the same manner as he does. Therefore, in the case of immorality relating to religiously conditional legacies, the legitimate aim in limiting the testator’s freedom is the ‘protection of the rights and freedoms of others’. This is a justifiable reason for the limitation of rights under Art.9(2) and, therefore, must, in these circumstances, be considered a legitimate objective of a restriction.

The necessity of a restriction in a democratic society on testamentary immorality again raises the issue of balancing an individual’s rights and freedoms against those of a whole class of people; the testator’s rights must be balanced against the beneficiaries’ rights. It should be noted that this aspect is complicated by the fact that it is unclear whether the applicant must prove a restriction is unnecessary or whether it is for the State to prove that it is. The legitimate aim in a limitation through immorality is the protection of the rights and freedoms of others. This, however, must be weighed against the severity of the restriction. In Kokkinakis, which dealt with the proportionality of making proselytizing a criminal offence in Greece, when dealing with this very issue, it was said that, ‘(...) freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ (...) The pluralism indissociable from a democratic society (...) depends on it.’ The difficulty in assessing these competing rights was the foundation of a series of cases which attempted to illuminate the issue through examination of the principle of respect for individuals. It is recognised that whether a restriction is justified will depend extensively on the facts of the individual case. However, the decision in Kokkinakis demonstrated that the ECtHR would allow a breach of Art.9(1) for the purpose of protecting the rights and freedoms of others. While this decision has been criticised, the criticisms levelled would not hold in the case of immorality. The distinction here is the absence of a criminal offence. Without such a severe penalty,

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93 ECHR, Art 9(2).
95 Kokkinakis v Greece (1994) 17 EHRR 397.
96 ibid [31].
97 Kokkinakis (n 95); Wingrove v UK (1997) 240 EHRR 1.
98 Malcolm Evans, Religious Liberty and International Law in Europe (CUP 1997).
100 The court held that the creation of a criminal offence was not disproportionate. It should be noted that the court further ruled that Mr Kokkinakis’s conviction was not necessary for the protection of the rights and freedoms of others. This, however, does not undermine the point.
101 Evans, Freedom of Religion (n 99).
102 In Kokkinakis, the State criminalised proselytism. This was held to be proportionate. The levying of much less severe repercussions for the same legitimate aim i.e. the protection of the rights and freedoms of others must also, therefore, be deemed proportionate.
the reasoning in *Kokkinakis* must stand. It can, therefore, be concluded that the restriction imposed on the freedom of religion, through the limitation of testamentary freedom on grounds of immorality, is proportionate to the legitimate aim of the restriction. If the need for such a restriction outweighs the severity of the restriction’s imposition, it follows that for these purposes at least, it is necessary in a democratic society.

D. Conclusion on Immorality

Some conditions attaching to legacies will be considered immoral. This acts as a limitation to testamentary freedom as such immoral Will conditions need not be fulfilled. This has the potential to interfere with freedom of religion in two ways. First, religious laws often dictate who the beneficiaries of the deceased estate should be. This is accompanied by the requirement or assumption that the beneficiary will be of the same faith, as the property should not pass outside the faith. Therefore, in order that the beneficiary falls within both of these categories, the testator may feel that it is necessary for him to place a condition on the legacy. Secondly, a testator may feel that it is his moral duty to aid the spiritual growth and safety of a person by attempting to ensure that religious teachings are adhered to. However, public policy associated with immoral Will conditions has the potential to allow for any such conditions to be disregarded and not carried out. Therefore, the testator’s wishes will not be given effect. Notwithstanding this, immorality falls within the category of justifiable restrictions upon application of the Court’s tripartite test. Therefore, this limitation to testamentary freedom in Scotland does not contravene Art.9, ECHR.

6. Will Clauses Relating to Disposal of the Corpse

A. Disposal of the Corpse and Testamentary Limitation

The ceremonies and beliefs that surround the disposal of bodies is one of mankind’s central characteristics. Consequently, the method of disposal of their corpse is often so important to people that they wish to dictate how it is to be done in a specific condition in their Will. The growth of secularism in British society has altered attitude towards the disposal of the dead which has resulted in a marked departure from traditional Christian burial practices with cremation growing in popularity. However, a person does not have complete testamentary freedom in deciding how they wish their corpse to be dealt with. For example, funeral expenses are a privileged debt charged to the estate. However, the expenses have to have

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105 *Sheddan v Gibson* (1802) Mor 11855.
been reasonably incurred and extravagance is likely to be disallowed.\textsuperscript{106} Similarly, there may be concerns relating to the environment\textsuperscript{107} or public health when dealing especially with the burning or decomposition of human remains.\textsuperscript{108} These concerns act as a limitation to testamentary freedom when it comes to dictating the method of disposal of the testator’s corpse after death. For these purposes, the question of simple extravagance will not be contested but rather the focus will be on alternative methods of cremation.

\textbf{B. Disposal of the Corpse and Art.9(1)}

Many ancient beliefs or traditions require methods for the disposal of the deceased’s remains that some in Western society would consider to be unsavoury.\textsuperscript{109} For the purpose of examining whether the disposal of bodies, as a limitation to testamentary freedom, is in contravention of Art.9(1) of the ECHR, the faith of Hinduism will be examined.

In Hinduism, an important component of the \textit{antyeshti} sacrament, or Hindu last rites, is the concept of open air cremation. These find their basis in \textit{Rgveda}, an ancient Indian collection of Sanskrit hymns which forms the most holy books in the Hindu faith. Here, cremation is viewed as a form of sacrifice to sacred fire, known as \textit{Agni}.\textsuperscript{110} The \textit{Brahmanas} illustrate that sacrifice to \textit{Agni} becomes a three part process whereby mortal remains are purified and thus made capable of integrating with the Divine Plane. The first step is purification whereby \textit{Agni} is invoked to eat the unclean mortal flesh.\textsuperscript{111} The second stage is that of transformation whereby the cremation is ritually demarcated to announce the arrival of \textit{Agni} in the form of \textit{jataveda}, or knower of all things.\textsuperscript{112} Without the correct form of burning, the soul can never be led to its ancestors.\textsuperscript{113} Unlike the extreme heat of cremation chambers the pyre must not be allowed to become too hot. It may be cooled by adding water to the ashes.\textsuperscript{114} The third and final stage is the bestowal of energy. \textit{Agni’s} sacred energy can then be used to propel the spirit towards \textit{pitriloka}.\textsuperscript{115} Traditional Hindus believe that the purpose of \textit{Agni} is to protect the body from evil spirits who wish to disrupt the journey of the soul. Within traditional Hindu belief this is, therefore, a very necessary manifestation

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\textsuperscript{106} \textit{Glass v Weir} (1821) 1 S 163. More recently see Bankruptcy (Scotland) Act 1985, s 51(1)(c).

\textsuperscript{107} Environmental Protection Act 1990.

\textsuperscript{108} There must be authorisation from the Scottish Environment Protection Agency if a corpse is to be buried anywhere other than a cemetery and strict procedure must followed with regards to the marking of the grave on Water Board maps etc.

\textsuperscript{109} For example, the Zoroastrian tradition that considers a corpse to be a contaminate and, therefore, decrees that it must be placed upon a tall tower open to the sunlight and the birds of prey. Such is the only method to prevent contamination by the corpse demons.


\textsuperscript{111} Demonstrated through the lighting of the fire.

\textsuperscript{112} \textit{Taittiriya Samhita} I.1.1.7

\textsuperscript{113} \textit{Rgveda} X.16.1-2

\textsuperscript{114} It must also be cooled through the use of ritualistic chants from \textit{Rgveda} X.16.13-14, \textit{Athurveda} 18.3.6, \textit{Kausika-sutra} 82.26 and \textit{Taittiriya-aranyaka} VI.4.1.

\textsuperscript{115} The Land of the Forefathers and Gods.
\end{flushleft}
of the religion and accordingly, a cremation such as would occur in a British crematorium would not fulfil the purpose required of it by traditional Hindus. The site must be open to the midday sunshine, on fertile ground surrounded by trees and near to running water.\textsuperscript{116} Therefore, the requirements regarding the disposal of a corpse under the rules applying to Hindus are fairly clearly set out. However, this can be seen to come into conflict with national law.

Following problems associated with dealing with cremation under the common law in England,\textsuperscript{117} the Cremation Act 1902\textsuperscript{118} (the ‘Cremation Act’) was passed. The Cremation Act states that a crematorium is defined as ‘(…) any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto.’\textsuperscript{119} This definition has undergone close judicial scrutiny in the recent cases of \textit{Ghai}.\textsuperscript{120} At first instance it was held that the Cremation Act precluded the use of open air funeral pyres under any circumstance. This decision was overturned on appeal through a broad interpretation of the word ‘building’. ‘Building’ was taken to mean any structure with four walls of such height that no part of the funeral pyre could be seen and that no elements of it could escape. Thus the pyre could be in the open air; there was no requirement for a roof.\textsuperscript{121} However, this does not fulfil all the requirements for \textit{anthyesthi sanskara}. It can, therefore, be seen that the law relating to the disposal of bodies, acting as it does as a limitation to testamentary freedom in Scotland, can be said to limit the manifestation of religion, as protected freedom under Art.9(1), ECHR.

C. Disposal of the Corpse and Art.9(2)

Having established that the laws relating to the disposal of a corpse limit testamentary freedom and that they can restrict the manifestation of religion as protected under Art.9(1), it is now necessary to consider whether they fall within the category of allowable exceptions through the application of the tripartite test.

Regarding the legal basis for interference, as previously demonstrated, the restriction has a basis in national law through the medium of the Cremation Act. Whilst a decision of the English courts, \textit{Ghai}\textsuperscript{122} demonstrates that the interpretation of the legislation, while broader than initially thought, does not allow for the full requirements of \textit{anthyesthi sanskara}. As the Cremation Act applies to both Scotland and England, the English court’s interpretation in \textit{Ghai} is likely to be highly persuasive. This law is reasonably accessible to the general public without consultation of a lawyer due to the wide publicity the \textit{Ghai} case has received. If ‘open

\textsuperscript{116} \textit{Satapata Brahmanam}, XIII.8.1 and \textit{Asvalayana-Grihya-Sutra} IV.1.2.
\textsuperscript{117} \textit{R v Price} (1883-84) LR 12 QBD 247.
\textsuperscript{118} Applying to Scotland as well as England and Wales.
\textsuperscript{119} Cremation Act 1902, s 2.
\textsuperscript{121} \textit{R (Ghai) v Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)} [2010] EWCA Civ 59 [35] (Lord Neuberger MR).
\textsuperscript{122} [2010] EWCA Civ 59.
air funeral pyre’ is typed into an internet search engine\textsuperscript{123} wide press coverage of the case is the result. In order to view the Cremation Act or the \textit{Ghai} case report, however, it is necessary to know the exact title of the statute or case. Despite this, the accessibility of the law cannot be questioned as it is an area of law in which it is straightforward to obtain advice. Regarding the foreseeability of a consequence of an action in regards this law, the case of \textit{Ghai} both in first instance and on appeal has made it clear that directions in contravention of the statutes will not be permitted. It can, therefore, be said that it is reasonably foreseeable that if a Will directs that a corpse be disposed of in a way inconsistent with domestic law then such a direction will not be carried out. Consequently, the limitation on testamentary freedom reflected by the law relating to the disposal of bodies passes the first test in determining whether it fits into the class of justifiable restrictions on the manifestation of a religion.

The second stage in this test is ascertaining that the restriction is based on legitimate aims. In the case of \textit{Ghai}, it was originally argued that the legitimate aim of the interference was an environmental one. It was contended that there was a need to protect bystanders and the public generally from the toxins, dioxins, mercury deposits and polycyclic aromatic hydrocarbons that are released on the burning of a human corpse.\textsuperscript{124} However, this was deemed not to be a legitimate aim due to the possibility of preventing these problems through regulation.\textsuperscript{125} In \textit{Ghai}, it was accepted that the legitimate aim was the need to protect the public morals and the rights of others as many might be offended by the burning of human remains in such a manner.\textsuperscript{126} Therefore, the second part of the test to determine whether an interference with a Convention right falls within the category of justifiable restrictions has been passed by the limitation of testamentary freedom dealing with the disposal of the corpse.

Finally, in order to fall within the category of legitimate restrictions, the limitation must be proportionate to the legitimate aim of protecting public morals and the rights of others. Whether or not the restriction is proportionate to the legitimate aim in the case of open air funeral pyres has been criticised on the grounds that, ‘(...) it is questionable whether proscription of otherwise harmless conduct can ever be justified merely on the grounds that it may cause offence’.\textsuperscript{127} Moreover, the proportionality of the restriction may seem questionable especially when it is accepted that arrangements could very easily be made to prevent any person who did not want to attend the cremation from ever seeing it. It seems, therefore, that the restriction exists not due to the possibility of a direct form of offence but rather secondary or hearsay offence. It, therefore, causes offence to those who become aware that such a thing is taking place through information imparted by others, but have no direct contact through the medium of their own senses with the thing that is causing them offence. This, \textit{prima facie}, seems unjustifiable. However, the justifiability

\textsuperscript{123} For these purposes Google was used. Search results were correct as at 24 March 2012.

\textsuperscript{124} \textit{R (on the application of Ghai) v Newcastle City Council} [2009] EWHC 978 (Admin) [61]-[70].

\textsuperscript{125} \textit{ibid}.

\textsuperscript{126} \textit{ibid} [103]-[104].

\textsuperscript{127} Cumper and Lewis (n 17).
of the restriction can be upheld despite this. There are three arguments to support this.

First, in the case of the Otto-Perminger Institute,\textsuperscript{128} it was held that the breach of Art.10 ECHR dealing with freedom of expression was proportionate to the legitimate aim of protecting the public from offence. The case involved the showing of a satirical religious film. The case is on point because despite the fact people could choose whether or not to watch the film, the ECtHR found that the ban on the film was a justifiable restriction due to the fact it was ‘(…) gratuitously offensive to others and thus an infringement of their rights.’\textsuperscript{129} This demonstrates that secondary or hearsay offence would seem, therefore, to be sufficient.

Secondly, it could be argued that legislation is made, reviewed and updated as required by a democratically elected body and that interference with it by unelected courts is to intrude upon democracy and impinge upon the separation of powers. This is a matter dealing with the margin of appreciation enjoyed by contracting States to limit certain freedoms as they see necessary within the expectations of their citizens. Indeed, in the High Court it was stated in Ghai that,\textsuperscript{130}

\begin{quote}
\textit{(…) the present legislative framework is consistent with mainstream cultural expectations of persons living in this country and secures in a practical way the avoidance of likely offence and distress. That calculation is not one on which a judge can speak with any great expertise or authority. The resolution of the various competing interests on this difficult and delicate issue by elected representatives is not one a court should easily set aside.}
\end{quote}

This suggests that the decision not to allow funeral pyres outside a widely defined ‘building’ falls within the margin of appreciation.

Finally, when considering the issue of the proportionality of a restriction forming a criminal charge the Kokkinakis case must again be examined. While it was argued in Kokkinakis that the creation of a vague criminal offence was not proportionate to the aim of protecting a small number of vulnerable people,\textsuperscript{131} the majority holding did not follow this approach. It was found that proselytism was improper because it interfered with the rights and freedoms of others and, therefore, the State had the right to make it a criminal offence. This reasoning may be applied to open air funeral pyres. Following Otto-Perminger Institute, a secondary offence can constitute an interference with the rights of others. Moreover, it would appear from the reasoning in Ghai that the matter falls within the State’s margin of appreciation. On this basis, the reasoning of the majority in Kokkinakis demonstrates that the state has the right to make the interference in the rights of others a criminal offence. It can, therefore, be concluded that the restriction placed on the making of open air funeral pyres is proportionate to the aim of protecting the rights of others. Therefore, the limitation upon testamentary freedom embodied by the law relating to disposal of the corpse, in this circumstance, passes the third test in determining whether it falls into the category of justifiable restrictions.

\textsuperscript{128} Otto-Perminger Institute v Austria (1995) 19 EHRR 34.
\textsuperscript{129} ibid [49].
\textsuperscript{130} Ghai (n 121).
\textsuperscript{131} Kokkinakis (n 95).
D. Conclusion on the Disposal of the Corpse

The disposal of a deceased’s corpse is an important ritual within any society. As a result, many people may be very particular as to what happens to their remains after death. This can lead to inclusion in a Will of a clause giving specific instructions as to the treatment of their remains. However, testamentary freedom is limited in this respect as there is legislation regulating the disposal of the deceased. This can have religious ramifications as evidenced by the problems an orthodox Hindu would have in trying to secure the right to an open air funeral pyre in order to fulfil the requirements of *antyesthi sanskara*. The necessity of this rite in order to move on to the next stage is a deeply held belief among many orthodox Hindus. The restriction can, therefore, clearly be seen to interfere with the freedom to manifest religion as protected by Art.9(1). Despite this, the restriction is justifiable under Art.9(2) as it passes the tripartite test devised by the court for determining whether a limitation to a Convention freedom can be applied. Therefore, as regards the disposal of bodies after death, the limitation to testamentary freedom does not contravene Art.9, ECHR.

7. Conclusion

Whilst freedom of testamentary disposition and religion are both important concepts within Scots law, many limitations to testamentary freedom exist that could indirectly affect the freedom of religion. It has been determined in this paper that three limitations to testamentary freedom have the capacity to affect the freedom to manifest religion protected under Art.9(1). These limitations arise from: (i) the concept of legal rights; (ii) immoral Will conditions; and (iii) the regulations surrounding the disposal of the corpse. By demonstrating the way in which each concept acted as a limitation to testamentary freedom and then comparing the religious laws of Islam, Judaism and Hinduism respectively against the application of these limitations, it was shown that the limitation arose in direct conflict with the prescribed teachings of that particular religion.

However, on separate examination of each testamentary limitation it was found that when the tripartite test for determining justifiability was applied, each restriction was justified under the provisions of Art.9(2). This was because each limitation has a basis in prescribed law, a legitimate and protective aim, and deals with an area of law that required regulation in a democratic society. In each case it fell within the State’s margin of appreciation to create law to regulate the area. It was found that for each circumstance, the limitation was not disproportionate to the mischief it sought to address. This is evidenced by reference to the legitimate aim and other contracting States’ solutions to the same issue.

Accordingly, while these limitations to testamentary freedoms do restrict the manifestation of religious belief protected under Art.9(1), in each of these cases the restriction is justifiable under the terms of Art.9(2), ECHR. Consequently, it is the case that limitations to testamentary freedom in Scotland do not contravene Article 9 of the European Convention on Human Rights.