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Article 9 of the European Convention on Human Rights and Protected Goods

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Article 9 of the European Convention on Human Rights protects manifestations of religion or conscience from interference under Article 9(1) except insofar as such interferences can be justified under Article 9(2). This analysis asks when Article 9 will protect believers who are forced to choose between religious observance and pursuit of secular 'goods' and offers some conclusions about how the protection of believers from forced choices compares with the protection of manifestations of religious belief. It also considers whether cases where believers are asked to choose between religious obligations and protected goods raise particular issues under 9(2). Finally, the conclusions arrived at are applied to an illustrative hypothetical example. The objective is to demonstrate the potential reach of 9(1), and to explore the 9(2) analysis specific to protected-good cases.[2]

THE PROTECTED-GOOD ANALYSIS

The place of religious acts in the overall life of the religious believer is a complex one. The place of religious believers in a largely secular or areligious society is just as complex. A crucial part of understanding how Article 9 of the European Convention on Human Rights, which protects manifestations of religion or conscience, navigates both of these complexities, is understanding what choices it will ask believers to make. Answering this question necessarily begins with looking at Article 9(1), which decides whether a religious manifestation has been interfered with.

Fitting into Article 9(1)

Article 9(1) reads as follows:

> Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to

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> manifest his religion or belief, in worship, teaching, practice and observance.

As a matter of simple logic, to rely on Article 9 two boxes must be ticked. You must show yourself to be carrying out an activity which comes within its scope,[3] and then show an interference with that activity. Three categories of case will be fitted into this simple structure. It will be apparent that the first two categories could be analysed in the same way in relation to the other ECHR Articles; the third category, perhaps, could not.

First is the paradigm Article 9 case. The easiest and most obvious example of an interference with religious liberty is when a particular religious practice is made impossible. Imagine, for example, that the government passes a law banning private prayer. It is not difficult to see how such a case fits into the structure outlined above. There is an activity within Article 9(1)'s scope (prayer), and an interference with that activity (a ban).

Second, a religious manifestation might not be banned altogether, but merely made more difficult. For instance, anyone who wishes to pray might be required to register. This introduces a forced choice. The believer must accept the inconvenience or abandon the manifestation. Unlike the forced choice which will be seen in the next category, though, fitting into Article 9(1) is straightforward. It is clear what is being protected: the religious manifestation. The only question is whether the degree of inconvenience imposed is sufficient to constitute an interference with that manifestation.

Lord Bingham, in *R (Begum) v Governors of Denbigh High School*, noted 'a coherent and remarkably consistent body of [European] authority which our domestic courts must take into account and which shows that interference is not easily established'.[4] His lordship stopped short, however, of endorsing the test promulgated by the European case law, which stipulates that 'alternative means of accommodating a manifestation of religious belief' have 'to be "impossible" before a claim of interference under Article 9 could succeed'.[5] To be confident of coming within Article 9(1), then, a very serious inconvenience must be postulated: for example, a requirement to re-register every five minutes while praying.

Third, a religious manifestation might neither be banned nor made more difficult; but the believer could be forced to give up pursuit of some secular 'good', some desirable end whose denial marks one out from the vast bulk of other people in our society, if he wishes to observe his religion in the relevant way.

3 This stage is not as straightforward as it sounds. For instance, not every religious manifestation counts. In *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, HL, Lord Nicholls requires consistency 'with basic standards of human dignity or integrity' (at para [23]).

4 *R (Begum) v Headteacher and Governors of Denbeigh High School,* [2007] 1 AC 100, HL, at para [24].

5 Ibid.

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For instance, a believer may be obliged to recite prayers at fixed times. If he is only able to vote in an election by turning up at one of these times, he is not prevented from practising his religion. He is forced to choose between the good he seeks (voting) and his religious obligations.

When dealing with a forced choice between manifestation and good, what will Article 9 protect? The first instinct is to go for the religious manifestation alone. On this analysis, the inability to vote can be significant only insofar as it places pressure on the believer not to carry out the manifestation of religious belief. If it does not exactly make that manifestation more difficult, it does make it less attractive.

This is the only approach which makes any sense when similar questions are posed of other ECHR Articles. It seems clear that even an Article like Article 10 (freedom of expression), which is geared towards the guaranteeing not merely of individual rights but of a pluralist society,[6] seeks to protect or foster particular acts. So, for example, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*[7] the House of Lords held that it was a clear interference under Article 10 to ban an organisation from transmitting a particular television advertisement. A specific attempt at expression (a television advertisement) was in issue, and clearly the only way to analyse the forced choice between the content of the expression and the forum (television) which was sought for it is that withholding the forum was a direct attack on the particular expression. This is only obvious because Article 10 protects particular acts. It does not seek to protect the ability of a person defined by his observance of particular practices to pursue certain goods in conjunction with his observance of those practices. If it did, it would, by definition, be passing the baton to Article 9, which in its full scope protects those who passionately subscribe to non-religious beliefs and practices ('freedom of thought, conscience, and religion'). Those academics who see Article 9 as primarily protecting particular discrete actions,[8] like Article 10, will presumably assume that a forced choice is only of interest insofar as it places pressure on the relevant action.

However, another approach would make the combining of religious manifestation and pursuit of a good (being able to vote and pray) itself what Article 9 is protecting. Why might this be? Presumably it is because the pluralist society which Article 9 envisions[9] involves giving everyone a presumptive right to

6 See, for example, E Komorek, 'Is media pluralism? The European Court of Human Rights, the Council of Europe and the issue of media pluralism' (2009) EHRLR 395.

7 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, HL.

8 See, for example, S Knights, *Freedom of Religion, Minorities and the Law* (Oxford, 2007), p 43: 'The terms of Article 9(1) suggest that it primarily relates to the positive right of the individual to exercise a particular belief'.

9 See, for example, *Refah Partisi (The Welfare Party) v Turkey* (No. 1) (2002) 35 EHRR 3, at para [49]. Detailed probing of why Article 9 might endorse this approach is beyond the scope of this article.

pursue certain goods. Those goods, on this view, are too important to ask people to give up simply because they adhere to a particular religion. According to this approach, the courts would decide whether a particular good should be protected by Article 9. Where a combination of manifestation and protected good is being made inconvenient, the default assumption must be that the court will protect the combination just as it would protect a manifestation alone. So the European test will demand that combining manifestation and good is made impossible before an interference is found; and the UK test will be a little more lenient.

Turning to the case law, it will become apparent that it follows this approach. The courts pick out protected goods, and will only find an interference if combining manifestation and good is impossible (or near-impossible). Lord Bingham's reference to 'alternative means of accommodating a manifestation of religious belief' is discouraging – it implies that the impossibility test, or his watered-down version of it, is only protecting the manifestation itself. In fact, both the impossibility test and Lord Bingham's variant on it were, in the very cases where they were formulated, actually concerned with protecting combinations of manifestation and good.

Meat

The source of the impossibility test is the European Court of Human Rights' decision in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*.[10] A group of French ultra-Orthodox Jews complained that being prevented from slaughtering meat in accordance with their religious beliefs interfered with their Article 9 rights. The Court decided that there was no interference because they had alternative options. They could import meat from Belgium, or have the meat slaughtered by making arrangements with other, licensed, slaughterers:[11] '[T]here would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable'.[12]

Why, though, would even this be an interference? After all, it was not suggested that the Jews were religiously obliged to eat meat. Had it been impossible to access meat slaughtered according to their requirements they could have become vegetarians. Yet the Court makes it very clear that it would find an

See, though, M Malik, 'Minority protection and human rights' in T Campbell (eds) *Sceptical Essays on Human Rights* (Oxford, 2001), pp 277–294: '[W]ithin the generic term "liberalism" which is associated with the ECHR, there is a vast difference between the neutrality-based arguments of anti-perfectionists and the appeal to the "wellbeing and the good" which underlies the work of perfectionist liberal writers'. Trying to bring about a society of positive pluralist participation is, in these terms, 'perfectionist'.

10 *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, ECHR.

11 Paras [81]–[83].

12 Para [80].

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interference in such a case. Meat-eating is clearly a good worthy of protection. Having decided that this good is protected, the Court applied the impossibility test. Accessing both meat and manifestation was not impossible, so there was no interference.

Education

It must be admitted that the English case law has not always clearly followed this approach. *R (Williamson) v Secretary of State for Education and Employment*[13] concerned parents and teachers who wished to assert the right of private Christian schools to administer corporal punishment. It was part of their Christian faith that such punishment should be administered when necessary. They therefore argued that section 548 of the Education Act 1996,[14] which forbade any teacher in any school from administering corporal punishment, interfered with their right to manifest their religious beliefs. The House of Lords held that there was an interference (albeit a justified one).

The parents could be perceived as pursuing a good and seeking simultaneously to manifest their religion. That good might be either education or, more specifically, school-education. Lord Nicholls was prepared in principle to countenance telling the parents to educate their children at home (although he dismisses this as being beyond most parents' capabilities).[15] He did not suggest that education might be abandoned altogether. This indicates that education, though not school-education, is a protected good.[16]

Unfortunately, there are two problems with this conclusion. The first is that Lord Nicholls did not give the only judgment. Baroness Hale avoided discussion of alternative ways for the parents to access education alongside corporal punishment, focusing instead on justification under 9(2).[17] Lord Walker's judgment did not address the point, and his lordship joined Lords Bingham and Brown in agreeing with both Lord Nicholls and Baroness Hale. These judgments, taken as a whole, do not provide a convincing endorsement of the protected-good approach.

The second problem is that it is not entirely clear that there is a separate protected good here at all. For the Jews in *Cha'are Shalom*, eating meat had no religious significance. That the ECtHR would have refused to simply tell them to become vegetarians therefore treats meat-eating as a protected good. The beliefs of the claimants in *Williamson* are rather loosely described.[18] It does

13 *R (Williamson) v Secretary of State for Education and Employment*, [2005] 2 AC 246, HL.
14 As amended by the School Standards and Framework Act 1998.
15 At para [41].
16 The objection that guaranteeing access to education is required by Protocol 1 Article 2 of the ECHR, and that Article 9 is therefore not picking out the good as deserving of protection, is dealt with below (in the discussion of *Begum*).
17 At para [78].
18 Per Lord Nicholls, at para [10].

seem, though, that they believed that children must be educated and, as part of that education, physically disciplined.[19] If so, they cannot be told simply to give up on educating their children in order to conform to their religious beliefs. In insisting that the children have some access to education, the court would be protecting not a secular good but rather part of a religious manifestation.

However, *Begum* is now the leading authority on this point,[20] and it moved English law firmly towards the protected-good approach. The case involved a Muslim girl who wished to wear a jilbab. Her school, pursuant to its uniform rules, insisted that she should not. In finding that there was no Article 9 interference, the majority emphasised that there were other schools in the area which did allow the wearing of the jilbab to which Miss Begum could transfer.[21] Lord Hoffmann said that 'there is nothing to show that Shabina would have even found it difficult to go to another school'.[22] Lord Nicholls said that there might be an interference, and that the school ought therefore to be 'called upon to explain and justify its decision'.[23] He thought the majority 'may overestimate the ease with which Shabina could move to another, more suitable school and under-estimate the disruption this would be likely to cause to her education'.[24]

Crucially, this discussion centred on whether Miss Begum could access school-education while wearing a jilbab, not whether she could access this particular school, or, at the other end of the spectrum, access home-education. So the court implicitly held that school-education (though not education in a particular school) was a protected good. Then, with Lord Nicholls disagreeing and Baroness Hale not addressing the point, it applied the watered-down impossibility test cited above and decided that the inconvenience Miss Begum would suffer in accessing that good was not excessive.[25]

It might be objected that a failure to provide a school-education to a girl in a jilbab would constitute a breach of Protocol 1 Article 2 of the ECHR (the right to education), so that it is not Article 9 which has selected this good as worthy of protection. However, the discussion of Protocol 1 Article 2, while also coming to the conclusion that the requirement placed on the State is to provide an education somewhere,[26] was in parallel to the discussion of Article 9. There was no indication that the one fed into the other. Even if there is an implicit link, the objection is not fatal. It would simply mean that *Begum* cannot be used to argue that Article 9 will protect a good unless that good is itself a human right.

19 His lordship refers to a perceived need 'to train children according to biblical principles'.
20 Applied in, for example, *R (X) v Headteachers and Governors of Y School* [2007] HRLR 20.
21 Lord Bingham at para [25]; Lord Hoffmann at para [50]; Lord Scott at para [89].
22 Para [52].
23 Para [41].
24 Ibid.
25 Lord Bingham, as above, at paras [23]–[25], Lord Hoffmann at paras [51]–[52].
26 See, for example, Lord Hoffmann at para [69].

In any case, this objection is banished by the discussion in *Begum* of a European case with very similar facts. *Sahin v Turkey* involved a medical student whose university did not allow her to wear a headscarf. The ECtHR Chamber[27] (and then the Grand Chamber[28]) found an interference. Lord Hoffmann distinguished *Sahin* on the ground that no other Turkish university would allow her to continue her studies while wearing the headscarf.[29]

Gibson comments:

> [E]ven assuming Ms Sahin could not study elsewhere in Turkey, Turkey's regulations would not necessarily constitute 'interference' with Ms Sahin's rights according to Strasbourg's 'choice' test. For example, Lord Hoffman's [*sic*] reasoning does not explain why 'choosing' studies outside medicine (or to cease studying) were not valid alternatives for Ms Sahin, while Messrs Konttinen and Kalac and Ms Stedman had to 'choose' other jobs. Moreover, his reasoning diverges from *Cha'are Shalom* in which it was deemed an acceptable 'choice' for applicants to seek the same services in another country. It was clearly not 'impossible' for Ms Sahin to do so, for this is what she did.[30]

The complaint that Lord Hoffmann (when distinguishing the ECtHR's decision) does not explain why Miss Sahin should not opt for non-medical studies or simply 'cease studying' is nothing to the point. His lordship understands that studying medicine is a protected good. Requiring Miss Sahin to move abroad imposes an unacceptable level of inconvenience on accessing that good. Interestingly, this demonstrates that even the ECtHR will not always insist on 'impossibility' of access before an interference is found. This is presumably because the more significant the good – becoming a doctor as opposed to being able to eat meat – the greater the protection it deserves.

Employment

Thus far, movement from one good to another (and from one jurisdiction to another) has been on the tacit assumption that the various decisions form part of a unified whole. However, it ought to be noted that in employment cases the courts, while clearly assuming the appropriateness of the protected-good analysis, have taken a discordantly narrow attitude to which goods will be protected.

27 *Sahin v Turkey* (2005) 41 EHRR 8, at para [71].
28 *Sahin v Turkey* (2007) 44 EHRR 5, at paras [71] and [78].
29 At para [59]. His lordship's analysis of *Sahin* has been disputed: see G Davies, 'The House of Lords and religious clothing in *Begum v Headteacher and Governors of Denbigh High School*' (2007) 13 EPL 423, 428. The crucial point for the purposes of this article, though, is not what *Sahin* said, but what the discussion of *Sahin* reveals about the reasoning of the majority in *Begum*.
30 N Gibson, 'Faith in the courts: religious dress and human rights' (2007) 66 CLJ 657, 668.

Copsey v WWB Devon Clays Ltd[31] is the leading English authority. Mummery LJ was clear in his criticism of the harshness of the choices that the European cases have forced on employees by making them switch jobs for the sake of their religion.[32] But he was also clear that the authority represented by those cases was binding.[33] In his view, *Ahmad v UK*,[34] *Konttinen v Finland*,[35] and *Stedman v UK*[36] establish that 'article 9 is not engaged where an employee asserts article 9 rights against his employer in relation to his hours of working', because 'the employee is free to resign in order to manifest his religious beliefs'.[37] Mummery LJ was unsure whether the European jurisprudence demands that a worker should accept unemployment when no other job is on offer.[38] Employment itself, therefore, might be a protected good; keeping one's current job certainly is not.

Rix LJ held that the European case law only precluded any finding of interference in cases where the employee had agreed to a contract which left him potentially having to work at religiously prohibited times.[39] Where the employer is seeking to change the contract to require such work, there is apparently an interference unless the employer offers the employee some 'reasonable solution'.[40] For Rix LJ, then, keeping one's job is sometimes a protected good.

So a worker may not be able to insist on retaining employment of any kind. Even if he can insist on this, he may not be able to insist on keeping his current job (and will certainly not be able to if he is contractually committed to abandon the relevant religious manifestation). If his current job is unprotected, he will have to access alternative employment in whatever form it offers itself. This is not analogous to asking someone in Miss Begum's position (who may have made a similar commitment[41]) to move to another, broadly equivalent, school. It is like asking her radically to alter the way in which she is educated – for example by being educated at home. In a choice between approaches, the

31 *Copsey v WWB Devon Clays Ltd*, [2005] EWCA Civ 932, [2005] HRLR 32.
32 Para [35]. It should be noted that some of this criticism is out of date following the House of Lords' decision in *Begum*.
33 Para [36].
34 *Ahmad v United Kingdom* (1981) 4 EHRR 128.
35 *Konttinen v Finland* (1996) 87 D & R 68.
36 *Stedman v United Kingdom* (1997) 23 EHRR CD #168.
37 Para [31].
38 At para [35], in comments agreed with by Rix LJ at para [62].
39 Paras [65]–[66]. Neuberger LJ, at para [90], thought Article 9 was irrelevant, so there is no conclusion on whether keeping one's job can ever be a protected good.
40 Para [69].
41 Implicit initial acceptance of the uniform code was emphasised in *Begum*, but only by Lord Bingham (at para [25]) and Lord Scott (at paras [76]–[78]). Counsel in *R (X) v Headteachers and Governors of Y School* [2007] HRLR 20 attempted to interpret *Begum* as making such a commitment necessary (not, as in employment cases, sufficient) to preclude any finding of interference in education cases. He failed: Silber J at paras [26]–[40].

relative liberality of *Begum* is surely preferable to the harshness of the criticised European employment jurisprudence.[42]

Excluding goods

In discussing what goods will be protected, it is clear that protection must end somewhere. Some rejected goods, for example, keeping a place at a particular school, are presumably simply not weighty enough to deserve protection. More generally, avoidance of inconvenience is not a protected good. Inconvenience is a concern only when it reaches such levels that it threatens the relevant manifestation/combination of manifestation and protected good, making it impossible or near-impossible. This might be because inconvenience is insufficiently weighty to deserve protection. More specifically, it is tentatively submitted that a negative benefit like avoiding inconvenience is unlikely to attain protection. The point is best explored through another, more self-contained, example.

Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints[43] concerned the interpretation of paragraph 11 of schedule 5 to the Local Government Finance Act 1988, which exempts a 'place of public religious worship' from paying non-domestic rates. It was argued that, under section 3 of the Human Rights Act, paragraph 11 should be construed as including places of worship which are restricted to patrons of the religion. The Mormon religion confines access to patrons, so if the statute was not so construed Mormons would be unable to take advantage of it.

A majority of their lordships held that this did not even come within the 'ambit' of Article 9 for the purpose of engaging Article 14 (the non-discrimination provision of the ECHR).[44] Lord Hoffmann explained the majority's reasoning as follows:

> In the present case, the liability of the temple to a non-domestic rate (reduced by 80% on account of the charitable nature of its use) would not prevent the Mormons from manifesting their religion. But I would not regard that as conclusive. If the legislation imposed rates only upon Mormons, I would regard that as being within the ambit of article 9 even if the Mormons could easily afford to pay them. But the present case is not one in which the Mormons are taxed on account of their religion. It is only that their religion prevents them from providing the

42 Attacked by Rix LJ, even in the more moderate form in which he accepts its binding force, at para [60].

43 *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] 1 WLR 1852, HL.

44 This rather vague requirement will be discussed more fully in due course. For present purposes, the point is that it is easier to come within the 'ambit' of an Article than directly within the Article.

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> public benefit necessary to secure a tax advantage. That seems to me an altogether different matter.[45]

Lord Hoffmann was explaining why, having established that there is no interference with Article 9, this was not even within that Article's ambit. (Had the law been aimed at Mormons it would have been.) This reasoning does not explain, however, why there was no interference with Article 9 taken alone. Nobody in *Williamson* suggested that the law's neutrality was relevant. Miss Begum's school uniform rules were not aimed at her as a Muslim.[46] Miss Begum could not attend her school because she would not abandon her jilbab. The Mormons could not avoid paying rates because they exclude non-patrons. The only relevant difference is that school-education is a protected good, whereas rates-free status is not.

It is unfortunate that his lordship did not explain why rates-free status is not a protected good. Still, avoiding rates is surely the sort of good that a pluralist society would be least interested in guaranteeing; it lacks the positive force of being able to eat meat or get a medical education. Paying money to the government sits easily with inconvenience as a general unpleasantness people would rather avoid, but whose existence hardly threatens normal participation in society.

ARTICLE 9(1) – CONCLUSION

It has been demonstrated that courts will look for a protected good and then demand the same protection for the combination of manifestation and good as for a manifestation alone (albeit, as *Sahin* shows, with some flexibility depending on the good at stake). The interferences contemplated in *Cha'are Shalom*, *Begum* and *Sahin* did not make any religious manifestations impossible or near-impossible. While these cases might have creatively explained why the forced choices exert pressure on the manifestation equivalent to the imposition of great inconvenience, they did not. Instead, there is the impossibility test and its UK offshoot, applied to protect more than mere manifestations. The protected-good analysis is the only convincing way to explain why these were interferences.

It was acknowledged at the outset that it would only be possible to develop a crude sense of which goods will be protected. It seems safe to conclude that the good must be positive. As both the impossibility test and its UK counterpart make plain, avoiding inconvenience is not itself a good worthy of protection.

45 Para [13].

46 See Lord Bingham in *Begum*, para [6]. The European case law on this point is inconclusive: see S Stavros, 'Freedom of religion and claims for exemption from generally applicable, neutral laws: lessons from across the pond?', (1997) 6 EHRLR 607.

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A rates exemption also failed to make the grade. Meat-eating provides the baseline as to the necessary weight of the good protected – in view of its relative triviality other goods can be endorsed by arguing *a fortiori*. The right to a medical education, because it is neither an everyday need nor something to which more than a tiny percentage of the population aspires, also forms a useful reference point. Beyond that, the difficulty lies in the lack of openly reasoned decisions about why any particular good should be protected.

Article 9(2)

Article 9(2) reads as follows:

> 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.

In protected-good cases, Article 9(1) requires the crossing of a threshold. A good must be sufficiently important to have access to it protected. Article 9(2) asks whether, however important the protected good may be, the interference could still be justified. The process is a familiar one. Despite the consideration of moral and axiological questions involved in adjudging whether to deem a good protected under Article 9(1), this is conceptually no different to deciding a case under Article 5 (protection of liberty) by first working out whether a certain number of hours confined to your house constitutes an interference (Article 5(1)), then whether an interference of that type is justified (Article 5(2)).[47]

The above analysis of Article 9(1) largely relied on uncovering reasoning implicit in the case law. Unfortunately, moving to 9(2) also moves into the realm of outright speculation. Given that the courts did not explicitly acknowledge that they were picking out certain goods as worthy of protection, it is hardly surprising that they did not discuss what difference dealing with a protected-good interference might make when they came to 9(2).

Three suggestions can be offered, though, for how 9(2) analysis could look different. First, there is a difference between forced-choice cases in general (whether the choice is between manifestation and convenience or between manifestation and good) and cases where a manifestation is made impossible. Sometimes the inconvenience will be very heavy, and sometimes the good will be very important. In such cases justification will have to be particularly convincing. But even a serious inconvenience or lost good leaves the believer some

47 *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, HL.

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room to choose. It will generally be worse to leave a claimant no room whatsoever for his religious practice than to leave him some. Given that the courts refuse to consider some religious practices as more important than others,[48] forced-choice cases should be consistently easier to justify than cases where a religious practice is made impossible.

Second, and with special reference to protected-good cases, the position of those who are asked to facilitate access to the good (for example, the school authorities) must be borne in mind. The courts may be uncomfortable continually asking those on the secular side to give ground. Preserving simultaneous access to manifestation and good will almost invariably involve more extensive demands than preserving access to a manifestation alone.

The clash between religious and secular brings us to a third suggestion. Society may wish to force religious people to make certain choices. Deciding whether such a choice is being dealt with is likely to raise vexed political questions, which will require taking a position both on the merits of different forms of societal integration and on how best to achieve such integration. As far as the latter, tactical question goes, there is plainly a risk that desisting from forcing such a choice will allow a drift away from the mainstream. On the other hand, if courts do force the choice they may not like what the claimant chooses. While these sorts of decisions are usually considered too 'political' for the courts,[49] the Human Rights Act does not allow judges to avoid them. A decision, one way or the other, must be made.[50]

A HYPOTHETICAL EXAMPLE

A hypothetical example can demonstrate the scope of the principles set out above (particularly those tentatively set forward in the section on 9(2)). It is selected from a recent controversy about the role of religion in our society. If the Human Rights Act 1998 is a comprehensive attempt to 'bring rights home', it must follow that Article 9 should be the first port of call in deciding

48 See, for example, Lord Walker in *Williamson*, at para [60]. Exceptionally unappealing practices will be excluded from Article 9 protection as explained by Lord Nicholls in *Williamson*: see footnote 3 above.

49 See *A v Secretary of State for the Home Department* [2005] 2 AC 68, HL: 'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution . . . Conversely, the greater the legal content of any issue, the greater the potential role of the court.' (Lord Bingham at para [29]). Particularly inappropriate for judicial decision are 'matters of social and economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature' (Lord Hope at para [108]). See also *Bellinger v Bellinger* [2003] 2 AC 467, HL, where a decision about the definition of gender was 'altogether ill-suited for determination by courts and court procedures' – 'Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced' (Lord Nicholls at para [37]).

50 Perhaps the courts could make a decision on narrow legal grounds, and leave Parliament to correct what it does not like. But this seems rather a stunted role to give the Human Rights Act in general and Article 9 in particular.

whether to grant people rights based on their religion (although further legislative intervention cannot, of course, be ruled out). A secondary motivation for choosing this hypothetical example is therefore to demonstrate that, once the full scope of Article 9 is appreciated, the cases it is capable of engaging with are likely to include major controversies about the position of the religious in our society. Such controversies are liable to boil down to the choices that believers are to be asked to make.

In February 2008 the Archbishop of Canterbury argued for 'an increased legal recognition of communal religious identities'.[51] Whether or not he intended to advocate religious legal pluralism, that was the issue raised. A full account of Article 9's position on religious legal pluralism cannot be achieved here. Such an account could only be constructed by positing a multitude of scenarios like the one about to be introduced. For now, a partial revelation of Article 9's position, and the demonstrable validity of the reasoning used to achieve that revelation, would be reward enough.

Successive Arbitration Acts have made provision for arbitration tribunals, religious or otherwise,[52] and the courts enforce their awards as a matter of course.[53] Exceptionally, though, a court may refuse to enforce an award. Imagine a contractual dispute between two Orthodox Jews. The contract raises a possible issue of illegality.[54] They have taken their dispute to the Beth Din, or Jewish Court arbitration tribunal. The successful party asks the English court to enforce the award. The court decides that, human rights considerations aside, it should refuse enforcement because of the illegality. Should Article 9 change this decision, and thereby in effect stretch the powers of the religious arbitration tribunal?

Illegality in arbitration awards

As noted above, awards made pursuant to a valid arbitration agreement are enforced by the courts as a matter of course. However, when the contract which underlies the dispute involves an illegality, the courts can refuse, for reasons of public policy, to enforce an award which disregards that illegality.[55]

The key authority on this point is *Soleimany v Soleimany*.[56] In that case Waller LJ said that where an arbitration tribunal expressly ignored an illegality no

51 The speech is reproduced as 'Civil and religious law in England: a religious perspective', (2008) 10 Ecc LJ 262. Quote at p 270.
52 Currently under section 1 of the Arbitration Act 1996.
53 Under section 66 of the 1996 Act.
54 It is not necessary to be too specific about what this might be. Suffice it to say that the law on illegality is brimming with difficult cases (which will be discussed in due course) even before any ambiguities in the contract are allowed for.
55 Under section 68(2)(g) or section 81(1)(c) of the Act.
56 *Soleimany v Soleimany* [1999] QB 785, CA. This was decided under the pre-Arbitration Act law. However, as was clear from the court's straightforward citation of *Soleimany* in *Westacre*

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English court could enforce its award.[57] Obiter, he added that if there was prima facie evidence of illegality but the tribunal rejected that evidence, the enforcement judge should consider whether the tribunal was competent to conduct the inquiry, and whether there might have been 'collusion or bad faith'.[58]

The wisdom of this has been doubted by Mantell LJ in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*.[59] His lordship applied Waller LJ's test, holding that it made no difference to the result.[60] However, he said that 'for my part I have some difficulty with the concept [of this test] and even greater concerns about its application in practice'.[61] His lordship did not indicate which test, if any, he would prefer.

The halakhic position

The relevant halakhic or Jewish law prohibition has two limbs. The first limb prohibits one Jew from taking another Jew to a secular court when a Beth Din is available. This is clearly recorded in the Talmud[62] and codified in the Shulhan Arukh, the most authoritative compendium of halakha.[63]

The prohibition's second limb stipulates that a Beth Din must not apply any aspect of non-Jewish law in a dispute between Jews, except as dictated by halakhic conflict of laws rules.[64] Those rules will not allow application of a non-Jewish doctrine of illegality.[65] The only halakhically acceptable option is therefore to apply halakha's own position, which is that an illegality will not void a contract.[66]

Application of the protected-good analysis

The Orthodox Jews in the hypothetical example wish to litigate their dispute while abiding by their halakhic obligations, much as they will only eat meat which has been slaughtered in a particular way, and, if they were to be

Investments Inc v Jugoimport-SPDR Holding Co Ltd [2000] QB 288, CA, on this point the Act merely codified existing law.

57 [1999] QB at p 800.

58 Ibid.

59 *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288.

60 pp 316–317. RH Kreindler, 'Aspects of illegality in the formation and performance of contracts', (2003) 6 Int ALR 1, 18–19, notes that (despite Waller LJ's dissent in *Westacre*) the decisions in *Soleimany* and *Westacre* do not contradict each other.

61 p 316. It should also be noted that Sir David Hirst agreed with Mantell LJ's judgment.

62 Babylonian Talmud (hereafter 'BT') *Gittin* 78a.

63 *Shulhan Arukh* section *Choshen Mishpat* (hereafter '*Choshen Mishpat*') 26:1.

64 This is because non-Jewish law will not be recognised in a dispute between Jews where halakha has taken a position on a question (see gloss 39 of the *Shach* to *Choshen Mishpat* 73).

65 See especially a very prominent recent authority, Rabbi A Karelitz (1878–1953), in section 15:4 of his commentary on BT *Sanhedrin*, and in Essay 16 of his commentary on *Choshen Mishpat*.

66 Although there is no obligation to commit an illegal act to fulfil a contract, the mere fact that a contract requires the commission of an illegal action does not make it void. So, for example, when a transaction is prohibited – to both lender and borrower – because of usury, the lender cannot demand payment of interest as per the contract, but the borrower can claim back interest he has already paid. The contract is valid. The lender is demanding that an offence be committed; the borrower is not. See BT *Bava Metzia* 61a.

transformed into religious Muslim schoolgirls, they would wish to go to school while conforming to their obligations regarding modest dress. As a result, they cannot use the secular court system. The Beth Din will be prevented by halakha from holding that the contract is void for illegality. It could find that there is no illegality; although expressed in terms dictated by English law, this award would come to the only conclusion endorsed by halakha (that the contract is valid). But such a finding would plainly involve arbitrators who were 'incompetent to conduct such an inquiry',[67] given that there is only one conclusion that they have any interest in reaching. As such, it would fail Waller LJ's test.[68]

If the court follows Waller LJ in refusing to enforce an award that disregards illegality, Orthodox Jews in a dispute involving a possible issue of illegality must choose either to contravene a very serious prohibition, or to give up the opportunity of participating in and gaining from the secular legal system. What, specifically, do they lose? It is possible that one party loses the chance to get a contract which the court would find to be illegal upheld. Somebody other than an Orthodox Jew could take that contract to an arbitration tribunal and get the tribunal's award enforced by the court on the basis that the tribunal, in finding that there was no illegality, had met Waller LJ's requirements.

More broadly, and more convincingly, both parties lose the opportunity to have their dispute settled with any degree of certainty. The Beth Din's decision will always be subject to challenge in a secular court, which will have to make its own judgment on illegality.[69] The ordinary person can have a possibly illegal contract adjudicated on with a full measure of certainty, whether by the courts or by an arbitration tribunal. The Orthodox Jew cannot. He must choose between the good he would obtain and his religious obligations, just like a hypothetical Miss Begum without an alternative school to go to, or hypothetical Orthodox Jews in a Cha'are Shalom-type situation without alternative ways of obtaining appropriately slaughtered meat.[70]

All that remain are simple, quantitative, questions. Is there a good being sought which ought to be protected? Is access to such a good made either

67 Waller LJ in *Soleimany*, at p 800.

68 One might ask what, in this situation, halakha would have the secular court do: even if it upholds the contract, by offering its services to the litigants it is enabling them to contravene Jewish law. The answer is simple. Halakha concerns itself with relations between Jews and the secular courts, but not the reverse. It seeks to impose no obligations on those courts and asks for nothing from them.

69 To avoid complications, the assumption will be made that it is clear under the contract that one of the parties must be paid, and that the only difficulty is working out which one. There would be nothing wrong with an award which ignored illegality but decided against a payout on other grounds.

70 Of course, the secular court faced with an appeal of this kind against a Beth Din arbitration award is also unable to cut the Gordian knot presented by halakha; a refusal to uphold the contract enables the circumventing of the Beth Din decision through the secular court, but upholding the contract would also endorse use of a secular court, albeit to affirm the Beth Din's decision. In halakha's own view, though, this is not an issue: obligations are imposed on Jews in their relationship with secular courts, but not the reverse.

impossible or unacceptably difficult? The trend noted is to protect even relatively trivial goods, such as meat-eating; keeping one's job forms a (criticised) exception to the rule (albeit possibly only subject to a binding initial commitment). If goods are to be protected because they are too important to ask people to give up in a pluralist society, litigation-capable-of-achieving-certainty surely deserves to stand ahead of meat-eating as a good which is worthy of protection. Arguably (although here comparisons do become difficult) enabling all to obtain a certain verdict by litigating is more central to a pluralist society than allowing access to a medical education. Doctors are important, but preventing a Miss Sahin from studying medicine does not threaten the supply of doctors. It merely prevents her from educating herself for a particular vocation.

As for alternative ways to access that good, the only possibility mentioned in *Soleimany* is that '[it] may be that the plaintiff can enforce [the award] in some place outside England and Wales'.[71] There are enormous practical problems with this suggestion,[72] but even if a foreign court is prepared to enforce, and assets have been found to enforce against, it is submitted that this should not make any difference. Requiring the litigants to go abroad unquestionably makes accessing the good very difficult. The significance of the good protected means that even the strict European test would, as in *Sahin*, not insist that it is impossible to access it before an interference is found. In any case, the UK test is not quite so demanding. In sum, there is a strong case for finding an interference. If the approach taken assumes a right to manifest one's religion in an area where none had previously been thought of, it is submitted that this is precisely the approach endorsed by Article 9. There has been a movement away from mere negative freedom, with religion permitted by default, 'from the indulgence of permissive tolerance to the militant exercise of a specific right'.[73]

The scope of Article 9(1)

Finding an interference in the scenario chosen is counter-intuitive. This is partly because of the nature of the religious manifestation in question: settling civil disputes in prescribed ways. Article 9 gives examples of the manifestations it wishes to protect: 'worship' and 'teaching'. These are the kinds of activities people naturally associate with religion. They take place either entirely separately from non-religious activities or in parallel to them. That said (and it may prove a

71 Waller LJ, at p 800.

72 Assets to enforce against must be found. The signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards generally come down against enforcing illegal contracts (see D Di Pietro and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (London, 2001), pp 184–185).

73 M Hill and R Sandberg, 'Is nothing sacred? Clashing symbols in a secular world' (2007) PL 488, 506. See also P Cumper, 'The protection of religious rights under section 13 of the Human Rights Act 1998' (2000) PL 254, 254: 'Incorporation of the ECHR . . . means that the principle of religious freedom has, for the first time, been codified as a cardinal feature of British law'.

guide as to where judges' instincts will take them) neither the full wording of the Article, which goes on to refer more generally to 'practice and observance', nor the case law, restricts protection to such manifestations.[74] For its part, halakha treats civil law with the same reverence as ritual law.[75]

In part, though, surprise at this application of Article 9 can be voiced in an objection: 'The enforcing court is being asked to enforce a contract as part of people's beliefs, not merely to tolerate or leave space for those beliefs!' It is arguable whether the hypothetical claim examined really is a demand for positive action. The theoretical status of arbitration within the judicial system is a matter of some debate,[76] but there is clearly a strong presumption (recognised in *Soleimany* as backed by public policy) that awards will be enforced. Sections 68 and 81 of the Arbitration Act 1996 allow for that presumption to be overridden, but such a response could be characterised as positive action at least as easily as the enforcement of the award. The more important point, though, is that the court is not being asked to be part of the manifestation. It is being asked to develop the common law in a Convention-compliant way, so as not to force the claimant to choose between his religion and pursuit of a good. The counter-intuitive scope of Article 9 is fully earned.

Article 9(2)

If a gross illegality like that in *Soleimany* were being considered, the requirements of Article 9(2) would presumably be easily satisfied, on the basis that the interference would be 'necessary. . .for the protection of public. . .morals'.[77] However, in other situations the public policy problems presented by illegality are more debatable. So, for example, the Law Commission's Consultation Paper No 189 of 2009 observes 'a complex body of case law with technical distinctions that are difficult to justify'.[78] It is often very difficult even to know what the law is.[79]

74 *Refah Partisi (The Welfare Party) v Turkey (No 2)* (2003) 37 EHRR 1 does, at paras [127]–[128], seem to distinguish between matters of 'individual conscience', which are 'primarily' the focus of Article 9, and 'the field of private law, which concerns the organization and functioning of society as a whole'. This emphasis is neither conclusive ('primarily'), nor argued in detail or from principle. See also J Rivers, 'Law, religion and gender equality', (2007) 9 Ecc LJ 24, especially p 44.

75 See M Elon, 'The legal system of Jewish law', (1985) 17 *Journal of International Law and Politics* 221, 222. On the specific importance of the lack of a doctrine of illegality, and its connection to broader themes in halakha, see M Silberg, 'Laws and morals in jewish jurisprudence', (1961–62) 75 Harvard LR 306, 320–321.

76 For a relevant discussion, see Hong-lin Yu, 'Explore the void – an evaluation of arbitration theories: Part 1', (2004) 7 Int ALR 180.

77 For a curt dismissal of a Human Rights Act challenge to application of the illegality doctrine, see *Mahmud Al-Kishtaini v Fakhry Ibrahim Shanshal* [2001] 2 All ER (Comm) 601, paras [50]–[59]. The Court of Appeal said that the public interest exception to the operation of Protocol 1 Article 1 (the right to property) was satisfied.

78 Para 3.55.

79 See, for example, para 3.57.

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So a refusal to enforce might be convincingly justified with reference to the importance of the doctrine of illegality. But, if one of these murky, borderline cases is being dealt with, it might not. If not, are there any reasons of principle to insist on treating enforcement of Beth Din awards in the same way as those of other tribunals? At this stage it is useful to recall the special issues which were noted above as likely to arise when justifying an interference which forces a choice between religious observance and a protected good. The factors mentioned there are all relevant here: that forcing a choice is in general less serious than directly interfering; that avoiding protected-good choices could impinge excessively on other people; and that there may be a lot at stake politically in deciding whether to force such a choice. They will be addressed in reverse order.

'[L]egal centralism is not a legal doctrine but a political one.'[80] Ordinarily this would be discussed in a political context. As such, arguing for any movement away from it raises a host of interlocking political questions. Is a neutral public sphere free from the dictates of religious law desirable?[81,82] Is it fair for Orthodox Jews to be part of our common debate about what the law should be, whilst retaining the right to give their religious civil law presumptive ability to override English law?[83] Should accommodation between the State and religious groups take place on an individual level, through these kinds of court cases, or through broader communal agreements?[84]

Alongside these theoretical questions sit more practical ones. Would allowing presumptive enforcement of religious legal decisions encourage some religious courts to shed their unofficial status, and is this desirable? Will members of religious communities be more likely to feel coerced by their co-religionists to use religious tribunals if those tribunals are given a special status in English

80 SA Jackson, 'Legal pluralism: between Islam and the Nation-State: romantic medievalism or pragmatic modernity?' (2006–2007) 30 *Fordham International Law Journal* 158, 162.

81 See PG Danchin, 'Suspect symbols: value pluralism as a theory of religious freedom in international law', (2008) 33 *Yale Journal of International Law* 1, esp. pp 14–15 and p 57. See also C Kukathas, 'Liberalism and multiculturalism: the politics of indifference', (1998) 26 *Political Theory* 686, 695. He argues that liberalism 'cannot accommodate views that insist a state be dedicated to the pursuit of some substantive goal that is to be embodied in the structure of that political society'. How would the version of legal pluralism portrayed here meet this test?

82 Incidentally, this question is canvassed by the European Court of Human Rights in discussing a much more direct and ambitious form of legal pluralism than this article has mooted: *Refah Partisi (The Welfare Party) v Turkey (No 1)* (2002) 35 EHRR 3 and *(No 2)* (2003) 37 EHRR 1 (in the Grand Chamber). Concerns about such a system were emphasised by the Chamber at para [70], and by the Grand Chamber at para [119].

83 Albeit within the framework of the Human Rights Act 1998, a United Kingdom Statute. See A Tucker, 'The Archbishop's unsatisfactory legal pluralism' (2008) PL 463, 469.

84 J Habermas, 'Struggles for recognition in the democratic constitutional state' (trans by S Weber Nicholsen) in A Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition* (Princeton, 1994), pp 107–148. See also J Packer, 'Problems in defining minorities', in D Fottrell and B Bowring (eds) *Minority and Group Rights in the New Millennium*, (The Hague, 1999), pp 223–273, especially at p 241, for a discussion of whether there is a sharp distinction between group and individual rights.

law?[85] Are different approaches needed for different communities, and is distinguishing between communities feasible?[86]

It is submitted that judicial reluctance to wade into such political questions can supply motivation to refuse enforcement, but nothing more. The court is not being asked to break new ground. In such a case, deference on broad policy questions would be absolutely appropriate. However, as the law stands the legislature has left decisions on enforcement of awards to the common law. Parliament has also decided, by enacting the Human Rights Act, to require the courts to act in a Convention-compliant way. It is therefore for the courts to decide whether to refuse to enforce the award, and for them to make their decision Convention-compliant. A decision must be made, either to enforce the award or not to enforce it, and the fact that enforcement would mean a great change from the current political status quo is not a good reason to refuse to enforce. The argument in favour of enforcement is precisely that this is what the current legal status quo, in the form of the Human Rights Act 1998, demands.

A convincing legal reason to refuse enforcement is found, however, by looking to the other party to the contract. It was observed in the first part of this article that the scope of protected-good Article 9 claims means that there will be clashes with the interests of those who are expected to make concessions to allow access to the good. The hypothetical example chosen supplies a particularly potent example of this. The other party to the dispute is having an award enforced against him. This would not have happened if the Article 9 claim had not been made. An Article 9(2) justification for interference might be fashioned out of this threat 'to the rights and freedoms of others'. Reassuringly, the matter can be approached more specifically and concretely. This is a concern that is squarely dealt with by the Human Rights Act 1998. The court should find that enforcement would involve a straightforward interference with the rights of the enforced-against party under Article 14 taken together with Article 9 or, alternatively, Article 6.

Article 14 states that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as. . .religion[.]' If the enforced-against party had not been Jewish there would have been no religious obligation to use the Beth Din or have the dispute governed by halakha, and the analysis put forward in the main body of this

85 See A Shachar, 'Privatising diversity: a cautionary tale from religious arbitration in family law', (2008) 9 *Theoretical Inquiries in Law* 573, esp. p 588 and S Bano, 'In pursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the "Sharia debate" in Britain' (2008) 10 Ecc LJ 283, esp p 303, raising this concern, albeit specifically in the context of tribunals dealing with family law.

86 See Shachar, p 603. One, perhaps unsurprising, lesson of the Canadian Sharia Tribunal saga is that it is very difficult to justify giving different religious groups different arbitration opportunities.

article would not have been applicable. There would have been no interference and so no reason to consider enforcement because of the requirements of the Human Rights Act 1998. It follows that, in enforcing the award to protect one party's Article 9 rights, the court would be imposing a burden on the other party which would not be imposed on a non-Jew. Nor is there anything indirect about this discrimination; the different treatment is imposed because the court is dealing with Jews. That is at the heart of the Article 9 analysis attempted above.

Article 14 claims must come within the 'ambit' of one of the other provisions; it is not a freestanding provision. This requirement, though, is a vague one: 'The Strasbourg case law does not, and could not, spell out any simple bright-line test for determining how close must be the link between the alleged discrimination and the rights granted by the substantive article.'[87] Lord Nicholls went some way towards pinning down a definition: '[T]he approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article'.[88] His lordship acknowledged that this is a "value judgment".[89] Lord Bingham has noted that the 'ambit' requirement will be satisfied in 'a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed'.[90]

Article 9 exists to protect freedom of religion and conscience. Given that the enforced-against party does not believe himself religiously obliged not to have the contract enforced against him, it is hard to see how a decision to enforce would be an interference with his Article 9 rights. But since the effect is to force him to comply with a religious obligation, this is surely sufficient to satisfy the 'ambit' requirement.[91]

The Article 6 route is slightly more complex. Article 6 entitles everyone to 'a fair and public hearing' in 'the determination of his civil rights and obligations'. Waller LJ in *Sumukan Ltd v Commonwealth Secretariat* affirms that Article 6 rights, including the right to appeal against an award, can be waived in the arbitration context.[92] However, he reminds us that sections 67 and 68 of the Arbitration Act 1996 remain in place, so that no waiver will result in 'a total

87 *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, HL, per Lord Walker at para [58].
88 Ibid, at para [14].
89 Ibid.
90 *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, HL, at para [13].
91 The requirements set out by Brooke LJ in *Wandsworth London Borough Council v Michalak* [2002] 4 All ER 1136, [2003] 1 WLR 617, CA, at para [20] would therefore be satisfied. The discrimination would be within the ambit of a Convention provision (Article 9), and the treatment of a non-Jew in an analogous situation would have been different. Whether there is a 'legitimate aim' pursued in a proportionate way is considered shortly.
92 *Sumukan Ltd v Commonwealth Secretariat* [2007] Bus LR 1075, at para [57].

exclusion of the court'.[93] The hypothetical case chosen involves a judgment on enforcement that could have gone either way, even without a Human Rights Act: it is by no means certain that Waller LJ's test in *Soleimany* is good law. Taken by itself, a judgment to enforce would not constitute an Article 6 interference, any more than the ordinary common law, if it developed in this way, would be interfering with Article 6. But the case is analogous with *R (Clift) v Secretary of State for the Home Department*.[94] Lord Bingham said there that early release from prison was not required to comply with Article 5 (which protects liberty of person).[95] However, if some prisoners are released early, in part because there is 'no continuing interest' in depriving them of their liberty, Article 14 is triggered to make sure that all have their liberty equally protected.[96] The doctrine of illegality, as noted above, has little to do with concern for individual justice. However, the purpose of sections 67 and 68 of the Arbitration Act 1996 is in part to ensure that parties to arbitration, as Waller LJ notes, cannot waive their Article 6 rights altogether. On this basis, it is an interference with Article 14 taken with Article 6 for the section 68 opportunities of a Jew to be different to those of a non-Jew in an analogous situation.

Theoretically, the court could decide that there is no Article 14 interference because any discrimination is justified to avoid interfering with the original party's Article 9 rights,[97] but that would be a surprising decision for two reasons. First, the concern with discrimination rings constitutional alarm bells. The other party would be asked to give up ordinary judicial process, the only 'good' which he seeks. That would be objectionable even if there were no Article 14 interference (for example because the discriminatory treatment did not come within the ambit of any substantive right). The other party is being asked to accept less favourable judicial treatment than he would otherwise receive for the sake of the claimant's Article 9 rights.[98] This undermines equality before the law in just the way that many fear when they contemplate religious legal pluralism.[99]

93 At para [59].
94 *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, HL.
95 Para [17].
96 Para [18].
97 A legitimate aim and proportionate measures to achieve that aim are looked for. These are the same requirements made under 9(2). At this stage, opposing legitimate aims cannot both be accommodated; pursuit of one must be disproportionate in that it forces us to abandon the other.
98 See TRS Allan's discussion of the rule of law in *Law, Liberty, and Justice: the legal foundations of British constitutionalism* (Oxford, 1993), pp 44–45: 'I have suggested that the common law requirement that like cases should be decided alike may be understood to embody a fundamental component of its underlying philosophy – the idea of equality. . .That fundamental idea of political morality is violated by laws which treat people differently when their different treatment cannot be justified in principle'.
99 See P Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination', (2006) 4 *International Journal of Constitutional Law* 488, 489–490.

Second, the most basic factor prompting us towards justifying an interference which consists of a forced choice should be recalled. The courts are likely to prefer allowing an interference that retains an element of choice to one that does not. This may involve asking a claimant to give up more for the sake of his religion than is desirable. But that interference is surely almost always less weighty than a direct interference with someone's right not to be discriminated against in the enjoyment of his ECHR rights.[100]

CONCLUSION

This article has contended that Article 9 will protect religious believers from having to choose between their religious beliefs and pursuit of key secular goods. Appreciation of the breadth of the Article demonstrates that it is capable of tackling many situations where religious and secular worlds collide, even though no religious practice is directly threatened. A particular, prominent, example of such a collision, when religious legal process cannot be accommodated within the ordinary legal system, was analysed. The person, perhaps even the human rights lawyer, on the Clapham omnibus, might react with surprise to the suggestion that a court should enforce an arbitration award to avoid interfering with a claimant's right to religious freedom. However, he or she should be reassured by the strong factors pulling towards justification of any such interference. It is submitted that it is truer to the spirit of a comprehensive Human Rights Act 1998 to recognise the impact of the forced choice on a believer even if it will be readily justified, rather than to ignore it altogether. Happily, this is the approach that the case law has (very quietly) taken.

100 This may be the most striking inequality between the two claims, but it is not the only one. A protected-good Article 9 claim is being pitted against the other party's desire to be left free to challenge enforcement of an arbitration award. This might be phrased, with reference to Hohfeld, as the difference between a 'right', which places a duty on the other party to the contract to pay, and a more basic 'privilege', which simply means that that other party is allowed to challenge the award, and does not place any specific duty on the original party. See WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, edited by D Campbell and PA Thomas (Aldershot, 2001), pp 11–21.

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