

Kirpans, Law and Religious Symbols in Schools

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"In Sikhism the Kirpan is an instrument of non-violence that should be used to prevent harm from being done to a defenceless person."¹

To what extent should the right to religious expression prevail over student safety concerns? The issue has arisen most dramatically in recent years with respect to Sikh students wanting to wear the kirpan in schools. It has arisen across the world in countries as diverse as Canada,² the United

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1. "Boy's Sikh Dagger in School Ban," *BBC News*, October 13, 2009, <http://news.bbc.co.uk/1/hi/england/london/8304088.stm>.
2. See the decision of the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeoys*, SCC 6 (2006), under the Canadian Charter of Rights and Freedoms, where safety measures for the kirpan were that it be worn under a school boy's clothes, that its sheath to be made of a material (wood not metal) that meant that it would not cause injury to anyone, and that it be sewn into a sturdy cloth envelope. Also referred to in the UK case of *Begum, R (on the application of) v. Denbigh High School* UKHL 15 (2006).

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States,³ Great Britain, Australia, and New Zealand. This is not unsurprising. The kirpan is not a humble object. It has been described as “a small, curved ornamental steel dagger”⁴ or “a sword”⁵ that is “commonly 7.5 centimetres long” and “is carried in a sheath and strapped to the body, usually under clothing.”⁶ The issue is of importance as one of individual religious expression. But it is also important because it calls into question the commitment to multiculturalism, pluralism, tolerance, and broad-mindedness that is the hallmark of the Western liberal democratic state.⁷

The wearing of the kirpan raises these issues far more acutely than the more familiar examples of religiously ordained dress codes,⁸

3. A case that needs to be better known is the pre-9/11 US case of *Gurdev Kaur Cheema v. Harold Thompson*, 67 F. 3d 883 (9th Cir. 1995), in which circuit Judge Hall held that “the children had to prove that their insistence on wearing kirpans was animated by a sincere religious belief and that the school district’s refusal to accommodate that belief put a substantial burden on their exercise of religion. . . . The children unquestionably carried their burden.” Available online at <http://www.sikhcoalition.org/advisories/7-legal/20-united-states-judicial-opinions-regarding-the-sikh-religious-identity-summary-of-landmark-decisions>; June 24, 2011. Also see <http://federal-circuits.vlex.com/vid/gurdev-jaspreet-thiara-alvarnaz-ayora-38431292>. This article will not, however, further consider the case-law from the United States, as the discussion here is the countries of the British Commonwealth.

4. See http://www.nriinternet.com/NRIsikhs/KIRPAN/Kirpan_wearing_in_Schools/Asia/Australia/Victoria_ALLOWED_KIRPAN.htm. It is said that “[t]he practice of carrying the sheathed scimitar can be traced back to the lifetime of the sixteenth-century Sikh prophet Guru Hargobind, who regularly carried two swords as a symbol of a Sikh’s spiritual as well as temporal obligations.” See Rebecca Lowe, “Sikh Dagger Banned by Finchley School,” *The Times*, October 13, 2009, http://www.times-series.co.uk/news/topstories/4679126.Sikh_dagger_banned_by_Finchley_school/.

5. Michael Sheridan, “Plymouth-Canton School District in Michigan Allows Students to Wear Kirpan Daggers to Class,” *NY Daily News*, February 1, 2011, http://www.nydailynews.com/news/national/2011/02/01/2011-02-01_michigan_school_district_allows_students_to_wear_daggers_to_class.html#ixzz1DSGsnj5g.

6. “Sikh Knives ‘Should Be Allowed in Schools,’” *The Sydney Morning Herald*, February 10, 2010, <http://www.smh.com.au/world/sikh-knives-should-be-allowed-in-schools-20100209-npsy.html>.

7. In *Sahin v. Turkey* - 44774/98 [2005] ECHR 819 (10 November 2005) <http://www.bailii.org/eu/cases/ECHR/2005/819.html>, the court explained that “[p]luralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’” (§ 108). See also, *Kokkinakis v. Greece*, May 25, 1993, § 3, Series A no. 260-A; and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I.

8. In 2008, fourteen-year-old Sarika Singh won a High Court case against her school after it excluded her for breaking its “no jewelry” rule for wearing a kara (a Sikh bangle): see *Watkins-Singh, R (on the application of) v. Aberdare Girls’ High School & Anor* [2008] EWHC 1865 (Admin) (July 29, 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>. But in another case, where there was not only an alternative school available but also a rule

which do not raise concerns of personal safety⁹ in the way that the Sikh kirpan ostensibly does.¹⁰ The obvious question, therefore, is this: Is the wearing of the Kirpan an issue that should be left for determination by individual states given their own specific domestic context? Or do international perspectives have a role to play in defining the contours of religious accommodation in society? The question is not necessarily best left to the realm of rights, because having a right is one thing; being allowed to exercise that right in the midst of others in society is another. Equally, there is no reason why society should not deem it to be in the general public interest to support religious attire by faith groups. Accordingly, the aims of this article are three-fold.

First, it sets out to contrast the relatively liberal approach in Britain to the wearing of the kirpan with that of other jurisdictions and argues that this difference lies in the British familiarity with Sikh traditions given its colonial heritage and the absence of such familiarity elsewhere, leading Britain to take a more pragmatic approach to such questions. This provides a basis for the argument that ultimately rights issues that arise in the context of freedom of religion have to be resolved through intercommunal dialogue in a way that is contextually attuned to the religious meanings of a practice. Second, this article argues that the determination of whether there is a right to wear a kirpan is not best addressed as a question of rights and that the orthodox idea of state neutrality in matters of religion must be modified to become more pragmatic and community based. Third, this is not to say, of course, that there is nothing for national polities to gain from having a transnational court. On the contrary, where a transnational human rights court, of not

prescribing the wearing of jilbabs, Lord Hoffman was less sympathetic: "I say nothing about such cases because Shabina's family had chosen to send her to a school which required uniform to be worn and her wish to manifest her religious belief could not have been accommodated without throwing over the entire carefully crafted system" (§ 54); See, *Begum, R* (on the application of) *v. Denbigh High School* [2006] UKHL 15 (March 22, 2006) <http://www.bailii.org/uk/cases/UKHL/2006/15.html>.

9. Although it is conceivably arguable that the wearing of a kara (a Sikh bangle) in *Watkins-Singh* also raised safety issues.

10. There is evidence of an increased tendency to curb the public manifestation of religious symbols; see, Ben Quinn, "Burqa Wearing Banned in Canada for Those Taking Citizenship Oath," *The Guardian*, December 12, 2011, <http://www.guardian.co.uk/world/2011/dec/12/burqa-wearing-banned-canada>, which reports how Muslim women will no longer be able to cover their faces as they take Canadian citizenship after the country's immigration minister announced a ban on anyone wearing the niqab (the face veil) or burqa (full body and face covering) while taking the oath of citizenship. The immigration minister explained that this was a "matter of deep principle."

inconsiderable expertise, adjudicates on a large number of religious-based claims, as the European Court of Human Rights has clearly done over the years, there is a veritable body of jurisprudence for national polities to draw upon, and which can stand as a benchmark of foundational values for all to see. These are values that domestic systems can in turn themselves take, emulate, and further develop. Many have indeed done so. State systems have gone so far as having internalized these values in their local systems of law and governance. At a practical level, therefore, the striking of fair balance between competing State and Individual interests is a matter that is best left to domestic systems to administer because they are cognizant of local needs and pressures, in the way that a transnational institution is not, and as such can make decisions based on compromises that are more durable and enduring, and therefore, all the more effective and meaningful for that.

The example of the Sikh Kirpan is a good illustration of this thesis, as is evidenced by United Kingdom state practice, where a contextual and pragmatic approach has been taken by local bodies, with the assistance of the law, to the practical resolution of a community issue that has brought into play a variety of different interests. This suggests that whereas a transnational court can provide State bodies with the aspirational ideals of a democratic liberal society, when it comes to the negotiation of a solution to a societal issue, it is individuals, their organizations, and state parties who must ultimately learn to work together effectively. Clearly, therefore, the State must learn to play a more activist and interventionist role towards the achievement of these ends than it has hitherto done.

The British practice is illuminating in all these respects. Religious diversity has been encouraged. This is especially so in the field of education. Educators in the United Kingdom have even recently argued that allowing people to wear what they want on faith grounds would encourage participation in furthering higher education among ethnic minority groups.¹¹ In May 2011, leaders of the University and College Union determined in a debate to pledge their support for the right of people of all faiths “to wear the religious head-dress and other religious attire appropriate to their faiths.”¹² The University and College Union also expressed concern over the “alarming precedent” of Burnley College in Lancashire, England, which decided in 2010 to ban the burqa on security grounds.¹³

11. See, Richard Garner, “Lecturers Back Students Right to Wear the Burqua,” *The Independent*, May 29, 2011.

12. This was to be done on May 30, 2011. *Ibid.*

13. In fact in 2009, it had also refused a student permission to enroll at the college while she was wearing a veil. “Anybody should be free to wear what they choose to follow their beliefs,” said Alan Whitaker, president of the

What is no less significant is a further amendment at the debate,¹⁴ tabled by lecturers at the London School of Economics, to the effect that “an important principle of education is to combat superstition and prejudice”; the London School of Economics lecturers stressed that allowing people of all faiths to wear what they want would help to achieve this. The amendment added: “People of all faiths, or of none, have the right to dress as they personally consider appropriate.”¹⁵ It is unclear whether the participants in this debate had in their mind also the right of Sikh students to wear the kirpan. It is entirely possible that they did, because it would have been fully in conformity with the professed principles of the debate, which express the fundamental principle that allowing people to wear what they want as a matter of faith is in the wider public interest for societies committed to multiculturalism and diversity. Indeed, as Judge Rozakis and Judge Vajic reminded us most recently in the European Court’s judgment in *Lautsi v. Italy* in 2011, “There is no consensus among European States prohibiting the presence of such religious symbols, and few States expressly forbid them.”¹⁶

At the same time, those who oppose the use of religious symbols in the public sphere are not necessarily wrong. What is at stake here is the ownership of public spaces and whether and among whom it is to be shared. Yet, if freedom of religion is to mean anything, it must mean the long established democratic tradition of protecting the human rights of everyone and of supporting diversity. This is easier said than done because Western liberal society is, on the whole, characterized by the rise of secular democracies, in which religious pluralism has been established as a condition of maintaining freedom of religion. The advent of modern religious-based communities in the midst of European society, engaging in conduct that is at best unfamiliar and at worst threatening to the state, poses an important challenge to policymakers at all levels of governance. European values of freedom of religion on the one hand and state neutrality on the other now stand in tension and conflict with each other.

university and College Union. “That has been a principle of the union. We are a secular union but that doesn’t mean we’re anti-religion. We’re in favor of people’s freedom to practice any religion they choose, and to be able to follow the customs of that religion—and that includes what clothing they wear.” *Ibid.*

14. This debate came hot on the heels of the French government’s decision to ban the wearing of the veil in public—a move criticized by the union as evidence of increasing Islamophobia. Other countries, such as Austria, were said to be considering similar moves if the number of women wearing veils grows. *Ibid.*

15. *Ibid.*

16. *Lautsi & Others v. Italy* - 30814/06 [2011] ECHR 2412 (March 18, 2011) <http://www.bailii.org/eu/cases/ECHR/2011/2412.html>.

The result is that governments in all countries now have to decide what restrictions they can legitimately impose on religious-based conduct and practice. The task is all the more difficult because it must be conducted within the framework of secular democracy but in relation to practices, allegiances, and affiliations that are based on religion and belief that may pose a threat to the foundations of secular democracies. This is most obviously the case with the burqa.¹⁷ The example of the Sikh kirpan is a more interesting one, however, because it has so far escaped notice, hidden as it is under the garb, where it is secluded from public view, but it is no less threatening in its own way, than the Burqua is, to mainstream views about how adherents of religious faiths should present themselves in the participation of public space.¹⁸ The example of the kirpan is chosen here to demonstrate that the best approach to the difficult question of harmonious coexistence is a constructive dialogue conducted between policymakers, representatives of civil society from all levels, and religious and secular organizations so as to achieve the pluralistic society for which contemporary liberal European society aims. Central to this question will be an examination by all concerned of what kinds of religious and cultural symbols should be permitted in the public space. The answer may lie in permitting all symbols, some, or none.

It will be necessary to face up to the questions of to whom the public space belongs, who has access to it, and what the role of the state is. This is especially the case in Europe, which is now not only a truly multicultural place but also a place where these

17. Matthew Parris, "Please Uncover Your Face: It's Our Custom," *The London Times*, May 28, 2009. Available online at: http://www.copts.co.uk/index2.php?option=com_content&do_pdf=1&id=1240, where Matthew Parris controversially wrote: "Knowingly to disturb people's feelings is to be offensive. In Western European society, to go out in public with your face masked is (unless done for comic effect) disturbing. Hiding the face is felt to be threatening, and slightly scary, and subliminally this goes way back, and quite deep I think: it certainly frightens children. Would it be wrong to try to convey to communities in Britain who adopt the full hijab that, though it is a woman's legal right to dress as she chooses, she should recognize that she's in a country where many people will find a masked face disturbing, and that (without meaning to) she is acting in a culturally inappropriate manner, which may offend? Do the masked women I see in the street in Whitechapel actually know this? I cannot say, because I've never spoken to them: or, rather, when I do, they look away and walk away. This too, in Britain, is rude. Do they know? Shouldn't they?" See also the editorial comment in "Veiled Threat," *The Times*, June 26, 2009, which asserts that the burqa, a symbol of repression, has no place in a free society.

18. It is perhaps even at first blush more threatening because of the potential for violence that it represents in the minds of those who may be unfamiliar with its true significance.

important social questions are being transmuted into legal ones, with an increasing number of cases going to the courts. The state may choose to develop a more inclusive public space—one where a more liberal and more accommodating approach is taken to education, religious symbols, and religious dress—or it may act in an exclusionary way, choosing to see society in the image of its forefathers. Both approaches will define Europe for the future and the nature of European society for years to come. But one will be a very different Europe from the other. What is clear is that these questions will not go away. On April 12, 2011, four new cases were communicated to the United Kingdom as now pending against it before the European Court of Human Rights. The two cases of Nadia Eweida and Shirley Chaplin concerned the right to wear a small crucifix on a necklace in the workplace.¹⁹ The two cases of Lillian Ladele and Gary McFarlane concerned the right to refuse to serve same-sex couples because of religious beliefs.²⁰

This article considers the issue from the standpoint of the United Kingdom but draws also from the experiences of other English-speaking countries in the Commonwealth—namely, Canada, Australia, and New Zealand—because they offer lessons in how the common-law system can often provide a practical solution to problems that may otherwise appear mired in dogma and ideology and are intractable for that.

The Kirpan as Religious Manifestation

The right to religious belief is an absolute right.²¹ It engages rights of conscience, agnosticism, skepticism, and even nonbelief and

19. Application nos. 48420/10 and 59842/10, which were lodged on August 10 and September 29, 2010. See *Nadia EWEIDA and Shirley CHAPLIN v. the United Kingdom*, no. 48420/10, ECHR 2011.

20. Application nos. 51671/10 and 36516/10, which were lodged on August 27, 2010 and June 24, 2010. See, *Lillian LADELE and Gary MCFARLANE v. the United Kingdom* - 51671/10 [2011] ECHR 737 (April 12, 2011) <http://www.bailii.org/eu/cases/ECHR/2011/737.html>.

21. Article 9 reads as follows: 1. 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. 2. 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. See the Council of Europe website at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> at page 11.

atheism.²² It goes to the “identity of believers and their conception of life.”²³ But the right to the manifestation of religious belief is a qualified right.²⁴ There is good reason for this. The manifestation of one’s religion or belief may take forms of worship, teaching, practice, and observance²⁵ that are not to everyone’s liking.²⁶ Where, in

22. Nowhere is this better expressed than in the seminal case of the European Court of Human rights in *Kokkinakis*, in which the court said, “The Court reiterates that as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion.” Reference may be made to Satvinder S. Juss, “Kokkinakis and Freedom of Conscience Rights in Europe,” *Journal of Civil Liberties* 1, no. 3 (1996): 246–50, discussed in Paul M. Taylor, *Freedom of Religion* (Cambridge: Cambridge University Press, 2005), 68. See also *Buscarini and Others*.

23. *Kokkinakis v. Greece* - 14307/88 [1993] ECHR 20 (May 25, 1993) at para. 31. <http://www.bailii.org/eu/cases/ECHR/1993/20.html>.

24. Article 9(2) states: “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.”

25. *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 73), ECHR 2000-VII.

26. A recent example of this is the case of *Ghai, R (on the application of) v. Newcastle City Council & Ors* [2010] EWCA Civ 59 (February 10, 2010) <http://www.bailii.org/ew/cases/EWCA/Civ/2010/59.html>. I declare an interest. I was counsel in that case. See also, Venkata Vemuri, “The Death Debate,” *Open Magazine*, June 8, 2009. Available at <http://www.openthemagazine.com/article/living/the-death-debate>. As Lord Brodie explained more recently, “I am left in no doubt but that article 8 may be engaged by an act of the state which touches on a family’s freedom to determine what may be described as the place and modalities of burial of a deceased member of that family, to have custody of the body for the purpose of burial and to participate in any funeral ceremony, although as was emphasized at first instance in *R (Ghai) v Newcastle City Council* [2011] QB 591, . . . that can only be the case so long as the particular matters in question remain entirely within the private and family sphere.” See Lord Brodie in *SC, Re Judicial Review* [2011] ScotCS CSOH_124, § 36 (2011). Article 8 cases under “private and family life” have become very controversial in the United Kingdom of late. Not least of these is one where it was reported that “[a]n American woman who worships Norse gods has won the right to stay in Britain because of her ‘family life’ with her boyfriend and his wife. Home Office officials told Emily DiSanto, 25, that they would not grant her permission to stay in Britain because the law bans what are in effect polygamous relationships. But now she has won an extraordinary legal case in which she was allowed to remain here on the basis of her human right to family life. The 25-year-old now shares Alan and Anne-Marie Caulfield’s

modern cosmopolitan democratic societies, several religions coexist with one another in the same polity, it is not infrequently necessary to place restrictions on freedom to manifest one's religion or belief "in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."²⁷ Such an approach is compatible with general international law on religious freedom²⁸ and also helps to ensure that the liberal state can comply with its positive obligation to secure to everyone within its jurisdiction proper rights and freedoms.²⁹

Nevertheless, the fact remains that the law recognizes that religious freedom is primarily a matter of individual conscience and that it does carry with it the "freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares." Indeed, the various forms that the manifestation of one's religion or belief may take specifically include "practice and observance."³⁰ So how should the state stand in relation to securing to everyone within its jurisdiction the proper rights and freedoms to which they are entitled? Should the state, for example, allow the free wearing of an article of faith such as the kirpan, which has a blade and has all the appearances of a dagger? Or should the state judge it to be potentially dangerous to the security and safety of others? The orthodox liberal view emphasizes the state's role as the neutral and impartial organizer of the exercise of various religions, faiths, and beliefs. This confines the state's role to ensuring public order, religious harmony, and tolerance in a democratic society. The state's function is limited in this respect because the state must

marital home in southeast London with his two children—one by each of the women. The American's lawyer told the court that their religious beliefs bar the Caulfields from divorcing. Immigration judges were also told that forcing her to leave the country would affect the wellbeing of Mrs. Caulfield's son, as well as her own young daughter. The case is the latest example of how human rights laws are being used to overturn the decisions of civil servants and ministers in immigration cases in what critics say are dubious circumstances." See, David Barrett and Claire Duffin, "Pagan Wins 'Family Life' Human Rights Case," *The Telegraph* (London), December 18, 2011, <http://www.telegraph.co.uk/news/uknews/immigration/8963019/Pagan-wins-family-life-human-rights-case.html>.

27. *Sahin*, § 106; and *Kokkinakis*, § 33.

28. This is clear from article 9(2), which has been cited above and which qualifies the primary right in article 9(1).

29. Article 1 of the European Convention reads, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Available online at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

30. See *Cha'are Shalom Ve Tsedek*.

not be drawn into assessing the legitimacy of competing religious beliefs or the ways in which those beliefs are expressed.³¹ If it must be drawn, it must be drawn only to ensure that there is mutual tolerance between opposing groups.³² This means that the role of state authorities is not to remove the cause of tension by eliminating pluralism. It is to ensure that the competing groups tolerate each other.³³ All along, however, the state remains neutral.

This orthodox view has been endorsed by the European Court of Human Rights in *Lautsi v. Italy*,³⁴ which involved a challenge to the state policy of Catholic Italy regarding the presence of religious symbols in the classrooms, particularly crucifixes, with a request that they be removed.³⁵ In a judgment handed down on March 18, 2011, the European Court of Human Rights held that “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools... speaks in favor of that approach.”³⁶ This was despite the fact that “it is true that by prescribing the presence of crucifixes in State-school classrooms—a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity—the regulations confer on the country’s majority religion preponderant visibility in the school environment.”³⁷

This orthodox view suggests a limited role for the liberal state that is increasingly untenable given the demands of multiculturalism. It is also a role that fails to recognize the correlation between the individual right to freedom of religious expression and the state obligation to eliminate all forms of discrimination against minority faiths and to advance the religious rights of all its citizens under the European Convention of Human Rights 1950. An understanding of this

31. *Manoussakis & Others v. Greece* - 18748/91 [1996] ECHR 41 (September 26, 1996) <http://www.bailii.org/eu/cases/ECHR/1996/41.html>; also see *Hassan and Tchaouch v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI. Also see *Refah Partisi (The Welfare Party) & Others v. Turkey* - 41340/98;41342/98;41343/98;...[2003] ECHR 87 (February 13, 2003) <http://www.bailii.org/eu/cases/ECHR/2003/87.html>.

32. *The United Communist Party of Turkey & Others v. Turkey* - 19392/92 [1998] ECHR 1 (30 January 30, 1998) <http://www.bailii.org/eu/cases/ECHR/1998/1.html>.

33. *Serif v. Greece* - 38178/97 [1999] ECHR 169 (December 14, 1999) <http://www.bailii.org/eu/cases/ECHR/1999/169.html>.

34. *Lautsi*.

35. *Ibid.*, § 11.

36. *Ibid.*, § 70.

37. *Ibid.*, § 71.

correlation requires the wearing of the kirpan to be understood from the point of view of those Sikh students who would like to follow this religious practice as an article of their faith. For the state to focus on “justification”³⁸ as a common defense for a ban on grounds of “public safety” is to ignore this vital correlation that is at the heart of the modern law of religious freedom.

The case of Sikh kirpan is chosen because throughout the Western world cases are arising on a regular basis involving Sikh religious traditions—from the wearing of the Sikh bangle³⁹ to the performance of Sikh funerary rites⁴⁰ to the preparation of Sikh food⁴¹ to the carrying of the Sikh kirpan.⁴² Most of these have been adequately resolved. The issue of the Sikh kirpan remains outstanding.

The Kirpan, State, and the Law

Western thinking about objects is rooted in a particular philosophical understanding about things in the physical world. Such thinking goes back to antiquity. It derives from Aristotle’s definition of

38. See especially *Williamson & Ors, R (on the application of) v. Secretary of State for Education and Employment & Ors*, UKHL 15, 2 AC 246 (2005), in which Lord Nichols explained, “[T]he legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion” (§ 50).

39. See *Watkins-Singh*.

40. *Ghai*.

41. In one case a restaurateur who catered for wedding feasts was held liable for serving food that contained egg resulting in the death of a Sikh man. Lord Justice Moore-Bick explained that “Mr. Bhamra was entitled to rely on Mr. Dubb [the restaurateur] to ensure that he did not suffer harm as a result of eating food that contained egg” (para. 24) and that “the additional requirement that the food should not contain ingredients that were prohibited by the Sikh religion. In those circumstances he was certainly under a duty to take reasonable care not to serve dishes containing egg in order to avoid offending against Sikh religious principles” (para. 25); see, *Amarjit Kaur Bhamra v. Prem Dutt Dubb* (Trading as Lucky Caterers) [2010] EWCA Civ 13.

42. The tribunal in one case recently had to consider whether Amritdhari Sikhs (i.e., baptized Sikhs) were a separate and distinct group when deciding if there had been indirect discrimination. It held that Sikhs in general were an ethnic group for the purposes of the Race Relations Act, but that under the Religion or Belief Regulations, the Amritdhari Sikhs’ requirement to adhere to a strict code including the wearing of a kirpan was a religious belief that was protected by the regulations. In the event, the tribunal held that the banning of the kirpan was a proportionate means of achieving the legitimate aim of ensuring security of staff, visitors and prisoners in prisons. *Dhinsa v. (1) SERCO (2) Secretary of State for Justice*, ET/1315002/09 (2011). See <http://www.eordirect.co.uk/default.aspx?id=407123>.

things in terms of their “essences.”⁴³ When Aristotle talked about the “essence” of a thing, what he meant was that the essence is the attribute that makes a thing be what it fundamentally is.⁴⁴ According to this philosophical construct, a thing has a certain property or metaphysical characteristic that defines it with its essential “nature.” These are not the same as the thing’s sets of attributes because attributes are contingent or accidental to the thing and⁴⁵ do not give the thing its particular nature. In Western thinking, the kirpan is invested with the same essences and attributes as a blade, a dagger, or a sword. All are possessed of the same essential qualities that enable us to make sense of it as an object. Each of these objects, according to Aristotle, has the same specific power, the same function, and the same internal relations as the other. In this way, each one of these objects is enabled to be the kind of thing that it is. The essence thus defines the thing. It makes it what it is. Consequently, the kirpan could be defined in terms of its essences. Such certainty had much to commend it, and Aristotle’s thinking had such a profound effect on Western philosophical traditions that it continued virtually unchanged during the scholastic period.⁴⁶

In recent times, however, the concept of essences has been challenged. One influential philosopher of the twentieth century, Edmund Husserl (1859–1938), is accredited with founding the phenomenological movement and suggested that the search for essences can only be meaningful when applied to a specific category of human experience.⁴⁷ Other Western philosophers, such as Willard Van Orman Quine (1908–2000), have argued that only in the description of certain phenomena does Aristotle’s notion of defining a thing in terms of its essences actually work. For the most part, objects do not have essential properties that help to define

43. J. L. Ackrill, *Aristotle’s Categories and De Interpretatione* (Oxford: Oxford University Press, 1975). See also David Charles, *Aristotle on Meaning and Essence* (Oxford: Oxford University Press, 2002); Charollette Witt, *Substance and Essence in Aristotle: An Interpretation of Metaphysics VII–IX* (Ithaca, NY: Cornell University Press, 1989).

44. Aristotle, *Metaphysics* (London: Penguin, 1998), 168.

45. Steven K. Strange, *Porphyry: On Aristotle, Categories* (Ithaca, NY: Cornell University Press, 1992).

46. See N. Kretzmann, Anthony Kenny, and Jan Pinborg, *Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982). Also see D. Chalmers, “Is There Synonymy in Occam’s Mental Language?” in *The Cambridge Companion to Ockham*, ed. Paul Vincent Spade (Cambridge: Cambridge University Press, 1999).

47. See especially Jitendranath Mohanty, *The Philosophy of Edmund Husserl* (New Haven, CT: Yale University Press, 2008); Also see Edmund Husserl, *Crisis of European Sciences and Transcendental Phenomenology* (Evanston, IL: Northwestern University Press, 1970).

them.⁴⁸ If this is correct, then one can see the meaning of the kirpan having a very different meaning from that of a knife, a blade, or a dagger because the kirpan is not used to threaten, molest, or harm anyone but stands as an article of faith for the Sikh people. Metaphysical assertions should, therefore, not be used to describe an essence as the necessary property of real objects, such as the kirpan, because if we do this we ignore our experience of the object in question, which, in the case of the kirpan, is entirely benign. Eastern thinking takes exactly that view, and these modern philosophical tenets are actually more akin to the different forms of Eastern thought that believe that all phenomena are devoid of essence. Indeed, a Sikh would be surprised, if not alarmed, at any suggestion that the kirpan had any malign connotations because the very root of Eastern thought rejects antiessentialism. From an Eastern perspective, a Sikh who wears a kirpan is not wearing it because it is a weapon; he or she is wearing it because it is part of their officially prescribed religious uniform. Yet, to an uninitiated Western mind, it may be perceived as a weapon.

To say that the kirpan is intrinsically dangerous is, however, to continue to subscribe to Aristotle's philosophy of essences, which no doubt still retains an enduring effect on Western thought. It is, however, apt to lead to serious misunderstandings of the kirpan. One could argue that a knife is dangerous or that scissors are dangerous, but they are not inherently so. Hands may be dangerous. A knife may be used for cooking purposes, or it may be used to kill. Scissors may be used to cut paper in the classroom, or they may be used to kill. They rarely are. In the same way, our hands may be used to affect greetings, to eat our food, to embrace friends, or to strangle our foes. That does not make our hands inherently dangerous. Neither does it make our hands have an inherent essence, anymore than a pair of scissors do. The fact is that the meaning of an object can only be understood in context of its particular purpose and use. Outside its context, it is devoid of meaning. This is how Eastern thought views an object. The meaning of a kirpan can only be understood in the context of its religious, cultural, and historical use. Without this context, it is apt to be misunderstood as a conventional knife, dagger, or sword. Yet, it is none of these. To ban it on this basis is illiberalism of the worst kind. It does nothing to promote individual freedoms—and certainly not the freedoms of individual believers. One might just as well ban knives in the kitchen, scissors in the classroom, or the use of our hands outside the home.

48. Willard Van Orman Quine, *Word and Object* (Cambridge, MA: MIT Press, 1960).

It is not insignificant that in *Lautsi*⁴⁹ the Italian state, in prescribing the presence of crucifixes in state-school classrooms, argued for a contextually attuned meaning of religious practice, whereby regard must be had “to the meaning it should be understood to convey. It took the view, in particular, that although the crucifix was undeniably a religious symbol, it was a symbol of Christianity in general rather than of Catholicism alone, so that it served as a point of reference for other creeds.” In that case, Italy argued that “the crucifix was a historical and cultural symbol, possessing on that account an ‘identity-linked value’ for the Italian people, in that it ‘represent[ed] in a way the historical and cultural development characteristic of [Italy] and in general of the whole of Europe, and [was] a good synthesis of that development.” If this can be said of the religious artifacts of majority populations, there is no reason why it cannot also logically be said of minority populations. If crucifixes are acceptable because of the “meaning” that they “convey,” then kirpans should also be acceptable because of the meaning that they convey. If there is an “identity-linked value” in crucifixes, the same is the case for the kirpan.

This is not to say that the liberal state should actually encourage particular religious practices. If the liberal state is based on secular ideals, it may have real difficulties in doing so. But it does mean that if particular individuals within the liberal state want to adhere to particularly well-known religious practices within their faith, they should be allowed to follow their traditions unless there is a clear reason for regarding a practice as being harmful to the society in which they live. Wearers of the kirpan in a particular state in the world somewhere may conceivably be prone to “misusing” it and endangering life in general. If this were so, there would be a case for introducing restrictions, including an outright ban, but at present no such case appears to have been made anywhere in the world.⁵⁰

Yet, the kirpan is bound to struggle for legal recognition in society. It will struggle in common law countries such as the United Kingdom, Canada, and Australia. It will struggle in European society. In September 2011, “thousands of Sikhs filled Parliament

49. See *Lautsi*, § 15. For an extensive discussion of *Lautsi*, see Dominic McGoldrick, “Religion in the European Public Square and in the European Public Life—Crucifixes in the Classroom?” *Human Rights Review* 11, no. 3 (2011): 451–502.

50. Indeed, as discussed in Queensland, the anti-discrimination commissioner actually tabled a submission to parliament to the effect that the government had provided no evidence of any school attacks involving a kirpan or other religious knife; see Daniel Hurst, “Sikhs Play Down School Knife Fears,” *Brisbane Times*, May 24, 2011, <http://www.brisbanetimes.com.au/queensland/sikhs-play-down-school-knife-fears-20110523-1f0gu.html#ixzz1fQdLnaHT>.

Square in London yesterday for a protest against the ‘intimidation and disrespect’ of their faith at European airports.”⁵¹ The reason that the Sikh kirpan is deemed unacceptable in these Western societies is that its contextual significance is not always appreciated in that society. Many choose to see it as nothing more than an ordinary blade or a dagger. Yet, the kirpan is not unique as an example of a manifestation of belief. All religious beliefs struggle from time to time. This is because, as the European Court of Human Rights, which enshrines the aspirational and foundational values of the European community, has said, “It is not possible to discern throughout Europe a uniform conception of the significance of religion in society.”⁵² This makes it difficult for the state to devise overarching principles of universal application for the regulation of religion. This is why the rights language with respect to religious claims often fails to yield solutions and why a pragmatic and culture specific approach is often called for.

The difficulty is also unsurprising given that the meaning or impact of the public expression of a religious belief will differ according to time and context.⁵³ Thus the European Court of Human Rights has taken the aspirational view that the national decision-making body must be given a “special importance” in cases in which questions concerning the relationship between state and religions are at stake because these are matters on which opinion in a democratic society may reasonably differ widely.⁵⁴ The contribution of a transnational court like the European Court of Human Rights of values, which are not only foundational but can be applied in a detached and disinterested way from afar, can be all the more effective for that. These values can also help inform the resolution of the religious dispute by a national court because of the jurisprudence that has been developed over long years. It is for this reason that European societies have thrown up a number of cases for consideration by the European Court of Human Rights, some no more than a parody and bordering on the ridiculous. They nevertheless help demonstrate the difficulty that a liberal democratic state may have in regulating religion. One in July 2011 involved an Austrian, Niko Alm, who won the right to be photographed wearing a pasta strainer for his driving license on grounds of

51. Ellen Branagh, “Sikhs Protest at ‘Disrespect’ of Turban Searches at Airports,” *The Independent*, September 26, 2011.

52. *Otto-Preminger-Institut v. Austria* - 13470/87 [1994] ECHR 26 (September 20, 1994) <http://www.bailii.org/eu/cases/ECHR/1994/26.html>.

53. See, for example, *Dahlab v. Switzerland* decision of February 15, 2001 (no. 42393/98, ECHR 2001- V).

54. See, for example, *Cha'are Shalom Ve Tsedek*, § 84. Also see *Wingrove v. the United Kingdom*, no. 17419/90, § 58, ECHR 1996.

religious freedom. Alm said he belonged to the Church of the Flying Spaghetti Monster, which lampooned religion.⁵⁵

When it comes to regulating the wearing of religious symbols in educational institutions, authorities face a special challenge because schools will invariably adhere to a strict uniform code that is designed to deter gang culture and to create a safe environment for all its pupils. Laudable as such a policy is, its strict application by a school authority may still infringe equal treatment laws. Such was the case of the 11-year-old boy in 2009 in *G v. St. Gregory's Catholic Science College*.⁵⁶ He was turned away on his first day at secondary school in London for wearing his hair in cornrows,⁵⁷ when the school only allowed "a conservative 'short back and sides' hairstyle for boys amid concerns that other styles could encourage 'gang culture.'" In June 2011, the boy won his case at the High Court after a judge ruled the school's policy resulted in "indirect racial discrimination," with Justice Collins ruling that although the school's "short back and sides" policy was "perfectly permissible," it should have taken into account individual pupils' family traditions. The boy had not cut his hair since birth and wore his hair in cornrows as part of a family tradition in which all the male members of his family wore their hair in cornrows. The judge observed that "there is evidence that there are those of African-Caribbean ethnicity who do for reasons based on their culture and ethnicity regard the cutting of their hair to be wrong and so they need it to be kept in cornrows."⁵⁸

This ruling was given despite the headmaster asserting in court that "haircuts were often 'badges' of gang culture."⁵⁹ This was not so, however, for the boy himself, who explained, "I really like my hair and it's been that way all my life. This problem at school was

55. Matthew Day, "'Pastafarian' Wins Religious Freedom Right to Wear Pasta Strainer for Driving Licence," *The Telegraph*, July 13, 2011, <http://www.telegraph.co.uk/news/newstopics/howaboutthat/8635624/Pastafarian-wins-religious-freedom-right-to-wear-pasta-strainer-for-driving-licence.html>. It would appear that the Spaghetti Church was founded in 2005 in opposition to pressure on the Kansas school board in the United States to teach the theory of intelligent design in biology class as an alternative to evolution. Key beliefs of pastafarians state that the world was created by the Flying Spaghetti Monster, but, owing to the monster being inebriated at the time of creation, it has a flawed design. Pastafarians also believe heaven has a beer volcano and a factory producing strippers.

56. *G v St Gregory's Catholic Science College (Rev 1)* [2011] EWHC 1452 (Admin) (June 17, 2011) <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1452.html>.

57. *Ibid.* § 2.

58. *Ibid.* § 32, 57–58.

59. *Ibid.* § 23.

the first time me and my mum ever talked about my hair, it's so normal to us ... I really like my hair, my brother and dad have cornrows and we all like it. I really don't want to cut it off. This was the first time I had to ask the question, 'what's wrong with my hair?'"⁶⁰ The case was widely reported.⁶¹ Given that the tradition of wearing long uncut hair also exists in other cultures, it is unsurprising that the judge also added that: "Rastafarians or Sikhs who do not cut their hair will be permitted not to conform" to a school policy on hairstyles.⁶²

The reference to Sikhs is interesting. The level of accommodation for Sikh religious rights in the United Kingdom is unmatched in the world. If proof were needed it is found in the UK government's decision to allow Sikh athletes and spectators to wear ceremonial daggers around the London 2012 Olympic sites, even as security will be so tight at all Olympic venues that the authorities will be "prepared to deploy surface-to-air missiles to protect London during the event." The proviso states "that Sikhs will be allowed to take in a sheathed kirpan as long as it is worn beneath their clothing and if they can prove that they are adhering to four other articles of faith."⁶³

Clearly, not all liberal democratic states can afford the same latitude to Sikh rights. There is a large degree of diversity in the approach taken by national authorities to the rights of particular minority communities.⁶⁴ When it comes to something as unfamiliar

60. Ibid. § 33.

61. Matthew Taylor, "School's Ban on Boy's Cornrows Is 'Indirect Racial Discrimination,'" *The Guardian*, June 17, 2011, <http://www.guardian.co.uk/uk/2011/jun/17/school-ban-cornrows-indirect-discrimination>. See also "St Gregory's College Cornrows Rule Discriminated," *BBC News*, June 18, 2011, <http://www.bbc.co.uk/news/uk-england-london-13803106>.

62. *G v St Gregory's Catholic Science College*, § 8.

63. Josie Ensor, "London 2012: Sikhs Allowed to Carry Daggers at Olympics," *The Telegraph*, November 20, 2011, <http://www.telegraph.co.uk/sport/olympics/8902202/London-2012-Sikhs-allowed-to-carry-daggers-at-Olympics.html>. The five articles of the Sikh faith are discussed later.

64. See *Cha'are Shalom Ve Tsedek*, in which the court observed that "even supposing that this restriction could be considered an interference with the right to freedom to manifest one's religion, the Court observes that the measure complained of, which is prescribed by law, pursues a legitimate aim, namely protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance" (§ 84). Even more memorably the court explained this principle in *Wingrove* as follows: "[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious

to the western mind as the Sikh Kirpan, this may be more easily understood in the United Kingdom than in Quebec. This is because the English have a longer association, going back to colonial times, with Sikhs, with the largest Sikh population outside India living in the United Kingdom, leading to a tendency for greater accommodation. Thus domestic rules in the sphere of religion will inevitably vary from one country to another. They will vary according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.⁶⁵

Thus, the European Court of Human Rights in its overarching principles of general applicability has taken the firm view that “the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.”⁶⁶ This approach

convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the ‘necessity’ of a ‘restriction’ intended to protect from such material those whose deepest feelings and convictions would be seriously offended” (§ 58).

65. See *Wingrove*, in which the court explained that “blasphemy legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years. ... Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations—as put forward by the applicant—or that legal mechanisms are inadequate to deal with matters of faith or individual belief—as recognised by the Minister of State at the Home Department in his letter of 4 July 1989. ... However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention” (§ 57).

66. See, *Gozelik & Others v. Poland* - 44158/98 [2004] ECHR 73 (February 17, 2004) <http://www.bailii.org/eu/cases/ECHR/2004/73.html>, in which the court explained, “Likewise, practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances” (§ 67). Similarly,

ascribes a “margin of appreciation” to the State away from the supervising eye of a supranational court like the European Court of Human Rights. The doctrine of the “margin of appreciation,” or an area of discretion, embraces both domestic law and the domestic decisions applying it, and it would apply most widely with the regulation of religious practices in schools and other public places. That is not, however, to say that domestic authorities have *carte blanche* to do as they please. An example of the importance of the contextual approach in the national setting over the supranational institutional structure is seen in the acceptance that the role of the European Court of Human Rights is a residual one to determine whether the measures taken at the national level were justified in principle and were proportionate in all the circumstances of the case.⁶⁷

Whether national measures with respect to the wearing of the Kirpan can be determined as justifiable by the European Court will depend on the way the balance is struck in the context of individual interests, the need to protect the rights and freedoms of others, the preservation of public order, and the public interest in securing civil peace and true religious pluralism—all of which are vital to the survival of a democratic society. Whether it does so will depend on how it regards what is at stake—namely, the need to protect the rights and freedoms of others, to preserve public order, and to secure civil peace and true religious pluralism, which are vital to the survival of a democratic society.⁶⁸

in *Murphy v. Ireland* - 44179/98 [2003] ECHR 352 (July 10, 2003) <http://www.bailii.org/eu/cases/ECHR/2003/352.html>, in which the court upheld the domestic High Court, pointing out “that Irish people with religious beliefs tended to belong to a particular church so that religious advertising from a different church might be considered offensive and open to the interpretation of proselytism. Indeed, the High Court pointed out that it was the very fact that an advertisement was directed towards a religious end which might have been potentially offensive to the public” (§ 73).

67. See *Manoussakis and Others*, in which the court explained, “As a matter of case-law, the Court has consistently left the Contracting States a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it. The Court’s task is to determine whether the measures taken at national level were justified in principle and proportionate” (§ 44).

68. See *Kokkinakis*, § 31. Also see *Manoussakis and Others*, in which the court made it quite clear that “the restrictions imposed on the freedom to manifest religion [by the provisions in that particular case] call for very strict scrutiny by the Court” (§ 44). Moreover, in *Casado Coca v. Spain* - 15450/89 [1994] ECHR 8 (February 24, 1994) <http://www.bailii.org/eu/cases/ECHR/1994/8.html>, which concerned the right of members of the Bar to advertise their

Is it the case, however, that certain religious practices such as the wearing of religious symbols—from the Islamic headscarf to the Sikh kirpan—may be deemed incompatible with societal concerns over civil peace and the rights and freedoms of others? When we speak about the “rights and freedoms of others,” we are in the realm of rights. Religious questions are not always best formulated as rights questions. Where they are, they stand poised against the state. The state traditionally has chosen to be neutral. But neutrality is not always the best way for a state to resolve its religious tensions. Indeed, European human rights law does not prevent individual states from making their own decisions on key areas of social policy because this would normally fall within their “margin of appreciation,” a concept that is similar to the doctrine of subsidiarity in that it gives individual states a measure of freedom to determine some matters as they will, free from the supervising eye of the Strasbourg court. This is because of the differing philosophical, cultural, and historic traditions existing between a member state and a transnational court, thus allowing it to interpret the Convention differently from the European Court of Human Rights. This is a fundamental principle of European law, and it is clear from a number of cases.

The evidence suggests that the state is not always neutral and it is artificial to expect it to be so. In *Dahlab v. Switzerland*,⁶⁹ a teacher’s wearing of a headscarf in front of a class of small children was considered by the European Court of Human Rights to be open to interpretation as a “powerful external symbol” that could have some kind of proselytising effect, given that it was ostensibly imposed on women by a religious precept, a precept that was hard to reconcile

services, the court said, “[T]he country’s courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices” (§ 55).

69. *Dahlab*, in which the court declared inadmissible a complaint by a primary school teacher who had been prohibited from wearing an Islamic headscarf at her school. The court acknowledged the margin of appreciation afforded to the national authorities when determining whether this measure was “necessary in a democratic society,” and explained its role in these terms: “The Court’s task is to determine whether the measures taken at national level were justified in principle—that is, whether the reasons adduced to justify them appear ‘relevant and sufficient’ and are proportionate to the legitimate aim pursued. . . . In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused. In exercising the supervisory jurisdiction, the court must look at the impugned judicial decisions against the background of the case as a whole” (§ 11).

with the principle of gender equality in European societies. The European Court of Human Rights considered that the wearing of the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others, and equality and nondiscrimination that all teachers in a democratic society should convey to their pupils, so the Swiss authorities were right to object to it. In *Karaduman v. Turkey*⁷⁰ specific measures had been taken by Turkish universities to prevent certain fundamentalist religious movements from exerting pressure on students if they did not practice their religion in the required manner or if they belonged to another religion, and the European Court of Human Rights found these measures to be justified under article 9 (2) of the convention.

The principle that these cases establish is that, in the interests of ensuring peaceful coexistence between students of various faiths and to protect public order and the beliefs of others, educational institutions may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation.⁷¹ In this regard, the convention institutions have repeatedly affirmed the idea that in a democratic society the state is entitled to place restrictions on religious practice and conduct if they are incompatible with the specified pursued aims that are necessary for the survival of a democratic society.⁷² This debunks the idea of state neutrality. It also debunks the idea that rights are necessarily the most practical way to protect long-held religious practices. The religious accommodation of the Sikh kirpan shows the importance of local practices to be more

70. *Karaduman v. Turkey*, no. 16278/90, 74 DR 93 (1993). The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The commission found (at p. 109) no interference with her article 9 right because (at p. 108) "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs."

71. This principle was also enunciated in *Refah Partisi and Others*, in which the court explained, "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practice that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others" (§ 95).

72. See also *Sahin*.

important than rights per se. It also shows how the state in the United Kingdom has not been neutral on this issue and has thus helped develop a climate in which the wearing of the kirpan has been accepted by society at large. This we may now consider.

The Kirpan and the Sikhs in the United Kingdom

Sikhs living in the United Kingdom have little to complain about and much to be thankful for. The state has gone out of its way to provide them with religious exemptions⁷³ from facially neutral and generally applicable laws, which the UK government has passed in the public interest and to which the general population as a whole is subject⁷⁴ but to which Sikhs themselves are not. These exemptions are long standing. They go back at least a generation. The question is whether they should apply as much in the field of education as they do in the public sphere in general. When one looks at health and safety legislation, it is clear that already the degree of freedom enjoyed by UK Sikhs (and other minorities) is a departure from what is the norm in most societies. One of the oldest and most hard-won exemptions was the Motor Cycle Crash Helmet (Religious Exemption) Act 1976,⁷⁵ which exempts a turbaned Sikh from wearing a crash helmet when riding a motorcycle.⁷⁶ This exemption

73. Equality and Human Rights Commission, *Guidance On the Wearing of Sikh Articles of Faith in the Workplace and Public Spaces*, http://www.equalityhumanrights.com/uploaded_files/publications/sikh_articles_of_faith_guidance_final.pdf.

74. For a measure, see Tom Peterkin, "Symbols of Controversy," *The Telegraph*, July 30, 2008, <http://www.telegraph.co.uk/news/2471337/Symbols-of-controversy.html>.

75. Section 2(A) of the act "exempts any follower of the Sikh religion while he is wearing a turban from having to wear a crash helmet." As Lord Avebury explained in the House of Lords on October 4, 1976: "The Bill has the very simple purpose of exempting Sikhs from the requirement of wearing crash helmets when riding motorcycles. In considering the Bill there are three questions which we should evaluate: first, is the wearing of the turban an essential article of the Sikh faith? Secondly, if so, what special arrangements have been made in the United Kingdom and in other countries for Sikhs to wear the turban in circumstances where others must wear some other type of headgear? Thirdly, in the light of the answers to the first two questions, should the arguments for religious freedom outweigh those of public policy which led to the compulsory introduction of crash-helmets in the 1972 Road Traffic Act?" See, the relevant debates in the House of Lords at <http://hansard.millbanksystems.com/lords/1976/oct/04/motor-cycle-crash-helmets-religious>. The relevant debates in the House of Commons are available online at <http://www.gurmat.info/sms/smspublications/theturbanvictory/chapter3/>. Also see <http://www.justice.org.uk/data/files/events/17/for.pdf>.

76. One assumes that what is evidently not permitted is the wearing of both a turban and a crash helmet!

was confirmed some fifteen years later by the Road Traffic Act 1988.⁷⁷

Since then other exemptions have followed, including those relating to the wearing of a Kirpan. These also debunk the myth of state neutrality. Since 1988, Sikhs have been allowed to carry a kirpan⁷⁸ of more than three inches long in public as a religious symbol. This is the second generally well-known exemption. It falls under the Criminal Justice Act 1988,⁷⁹ which safeguards the rights of the Sikhs to carry the kirpan on grounds that it is deemed a necessary part of their religion. It is quite clear from this that the recognition of the Sikh kirpan as a necessary part of their faith is already well enshrined in UK domestic law. This is despite the fact that specific provisions in the Criminal Justice Act 1988 refer to any article that has a blade or point or is sharply pointed⁸⁰ except for a folding pocket knife. A folding pocket knife is one that has a cutting edge of no more than three inches in length and that must be readily foldable at all times.⁸¹ Further, under the Offensive Weapons Act 1996,⁸² it is permissible for a Sikh to carry a kirpan with a blade for religious reasons⁸³ (though other reasons are also included under the act if they are cultural or work related). The kirpan exemption is all the more remarkable given that the definition of offensive

77. See section 16(2) of the *Road Traffic Act 1988*, which reads, "A requirement imposed by regulations under this section shall not apply to any follower of the Sikh religion while he is wearing a turban." Available online at <http://www.legislation.gov.uk/ukpga/1988/52/section/16>. Also see <http://www.opsi.gov.uk/acts/acts1988/ukp>.

78. For a history background of the kirpan and its place in British society, see [http://bscf.org/documents/The_Kirpan_Final_version\[1\].pdf](http://bscf.org/documents/The_Kirpan_Final_version[1].pdf).

79. Section 139 deals with "Offence of having article with blade or point in public place." Available online at <http://www.legislation.gov.uk/ukpga/1988/33/section/139>.

80. Section 139(2) states, "This section applies to any article which has a blade or is sharply pointed except a folding pocket knife."

81. Section 139(3) "applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches." Available online at <http://www.legislation.gov.uk/ukpga/1988/33/section/139>.

82. The preamble of this statute states that it is "[a]n Act to make provision about persons having knives, other articles which have a blade or are sharply pointed or offensive weapons," and section 3 makes provision for an "[i]ncreased penalty for offence of having article with blade or point in public place," whereas section 4 makes provision for an "[o]ffence of having article with blade or point (or offensive weapon) on school premises etc." See <http://www.legislation.gov.uk/ukpga/1996/26/data.pdf>. Also see <http://www.legislation.gov.uk/ukpga/1996/26/contents>.

83. Under section 139(5)(b), "it shall be a defence for a person charged with an offence under this section to prove that he had the article with him... for religious reasons." Available online at <http://www.legislation.gov.uk/ukpga/1988/33/section/139>.

weapons under the Prevention of Crime Act 1953 includes “any article made or adapted for causing injury to the person; or intended by the person having it with him/her for such use by him/her.”⁸⁴ Thus, the state in the United Kingdom has fostered communal harmony by taking active steps to respect the religious traditions of faith communities that are not framed as “rights.” The law has been used as an instrument to protect religious beliefs and practices. It is, therefore, hardly surprising in these circumstances that cases involving the wearing of kirpans by Sikhs arise frequently in the public arena in the United Kingdom because the general laws are quite clear: they do not allow knives, blades, or a sharply pointed object to be carried in public. Yet, it is equally clear, although generally not well known, that Sikhs have an exemption to wear the kirpan under local law. Thus, in 2008 a Sikh employee at an Asda Supermarket was told that he could return to work after being asked by managers to either remove his kirpan or risk losing his job.⁸⁵ School, however, involves children. The question, therefore, is if these exemptions in practice should be extended to schools and colleges when students turn up wearing the kirpan. It is not necessarily the case that because there is a more general exemption for kirpans applying to the adult population, that it ought automatically also apply to schools, where the safety of children is an issue. From what follows, it is clear that the challenge for schools is an altogether more difficult one. This challenge can best be met not through the language of rights that stand juxtaposed against a state that is avowedly neutral in stance—but by a contextually attuned approach to understanding the meanings of a religious practice.

The Kirpan and the School

When in 2009, at the start of the new school term, a fourteen-year-old Sikh boy was “banned from wearing a religious dagger” by the governors at his North London school in Finchley, it was not on grounds of religious intolerance. Instead, the boy was “told not to carry the 13 cm kirpan blade ... after governors ruled it was a health and safety risk,” although it needs to be recognized that “[t]hey suggested the boy should wear a 5 cm version of the knife welded shut, but this was rejected by the family on the grounds it would not be a genuine Kirpan.” In a detailed statement,

84. See section 1(4), which is available online at <http://www.legislation.gov.uk/ukpga/Eliz2/1-2/14/data.pdf>.

85. See <http://www.sikhsangat.com/index.php?/topic/38514-discrimination-of-sikh-employee-at-asda-comes-to-an-end/>.

the Board of Governors explained how “[t]he school’s governing body has spent the past two years trying to reach an agreement with the family and to establish the appropriate nature of a religious artifact that can safely be brought into school,” adding how, “[d]uring this period of time, along with the local authority, we have examined potential compromises after looking at how this issue has been dealt with in other schools, education authorities and elsewhere within the Sikh community and taken legal advice.” The case failed to get to court because of funding difficulties. What facts have emerged are as follows.⁸⁶

In August 2007, when the Sikh boy was twelve years old, he took amrit (holy water) and, in a formal Sikh initiation ceremony, was officially baptized. He thereby became a Khalsa Sikh (pure one), and as such he was thereafter required to wear the Five Ks. These are, for a Sikh, both internal and external commitments. They are kesh (uncut hair), kangha (comb), kirpan (sword), kacchera (knee-length cotton breeches), and Kara (steel or iron bangle). After Amrit, the Sikh boy’s family contacted the school to inform them that he had become a baptized sikh and that as such he would be wearing a Kirpan. The school invited the family to a meeting. Following discussions, the family agreed to find a kirpan that was smaller and more discreet than the one the boy had originally worn. A second meeting followed. At that meeting, the school considered whether the boy could wear a symbolic kirpan. Both the boy and his family indicated that this would not constitute a kirpan. This would therefore not be acceptable to them. The boy had undergone baptism, and he had to live and dress appropriately as a Khalsa Sikh. The school agreed, nevertheless, that the boy could continue to play sports including football and rugby, which he did. At yet another meeting the following year, however, the school again raised the possibility that the boy wear a symbolic kirpan. This would be a miniature kirpan worn around the boy’s neck. Both the Sikh boy and his family indicated once again that this would not be acceptable to a baptized Khalsa Sikh. The school then raised the issue of participation in sports and suggested that the boy remove his kirpan during the playing of sports. He could hand the kirpan to a teacher or to the referee for safekeeping. Alternatively, he could participate in a noncontact role, such as a referee. The boy, who was a keen sportsman, could not agree to the removal of his kirpan in any circumstances. He was, therefore, confined to a noncontact role in all sporting activities. At yet another meeting, it was agreed that the boy’s family

86. The facts cited herein have been imparted to the author by the family of the Sikh boy.

would attempt to design a holster in which their son could carry his kirpan in a way that would mollify the school's safety concerns.

The family appears to have submitted an initial design in September 2008. They submitted a second design in January 2009. During these meetings, they proposed a holster made of a toughened nylon D30 material. This would be worn under the boy's clothes and under his arm. During the September 2008 meeting, the boy's family appeared to have shown the school a kirpan sheath that they had had made in India. They hoped that this would comply with the school's requirements that the kirpan not constitute a safety hazard to other children. In the meantime, the boy started to wear his kirpan in this sheath. In April 2009, the chair of governors of the school wrote to the boy's parents to say that the "health and safety and other concerns outweigh the wishes and feelings of [the boy] and his family in relation to the wearing of the kirpan at school" and that his current choice of kirpan could not be accommodated without further modification.

It was clear that none of the parties involved regarded the ultimate resolution to have been a satisfactory one. A letter to the boy's family from Diana Johnson, the parliamentary under-secretary of state for schools, stated, "We expect disputes to be resolved locally. The department does not usually intervene." The best that could be done was to say that "[i]f challenged, it would ultimately be for the courts to decide if the school is justified in restricting the wearing of the Kirpan in this case."⁸⁷ However, if the state has to leave it to litigation in the courts to resolve issues of such fundamental importance, rather than actively help foster conditions for the expression of minority beliefs, then this hardly inspires confidence among its citizenry. The boy had to be taken out of state school and was eventually educated privately.⁸⁸

The case attracted widespread attention⁸⁹ and continued to do so for several months thereafter,⁹⁰ when a major broadsheet helpfully

87. Lowe, "Sikh Dagger Banned by Finchley School." Also see Martha Linden, "School Bans Sikh Pupil over Holy Dagger," *The Independent*, October 13, 2009, <http://www.independent.co.uk/news/education/education-news/school-bans-sikh-pupil-over-holy-dagger-1802007.html>.

88. Useful information is provided on how to deal with future problems in "The Kirpan: A Submission to the Department of Communities and Local Government (UK) April 2009," produced by the British Sikh Consultative Forum. Available online at [http://bscf.org/documents/The_Kirpan_Final_version\[1\].pdf](http://bscf.org/documents/The_Kirpan_Final_version[1].pdf).

89. See Linden, "School Bans Sikh Pupil over Holy Dagger." Also see "Boys Sikh Dagger in School Ban."

90. Matthew Moore, "The Kirpan—Sikh Dagger Banned by Some Schools," *The Daily Telegraph*, February 8, 2010, <http://www.telegraph.co.uk/news/newstopping/religion/7189903/The-Kirpan-Sikh-dagger-banned-by-some-schools.html>.

explained to a largely secular⁹¹ and unsuspecting British public that “[d]espite the military connotations of a dagger, Sikhs insist that the Kirpan is primarily a statement of their commitment to peace as it traditionally discouraged attacks on the defenceless” and that “there are strict limits to their use as a weapon.” It explained that “[t]he daggers were made mandatory for everyone who goes through the Sikh equivalent of baptism in 1699, following a commandment by Gobind Singh, the tenth Sikh ‘guru’ or leader” so that, “[t]ogether with the other four articles of faith—*Kesh* (uncut hair), *Kanga* (wooden comb for holding hair in place under a turban), *Kara* (iron bracelet), and *Kachera* (specific cotton underwear)—the *Kirpan* is an outward symbol of a Sikh’s religious belief.” Thus, the broadsheet set out to give a context and a particular religious dimension to the Sikh kirpan, adding that “[t]he ceremonial daggers can be up to several feet long, but Sikhs in the West generally wear a five-inch iron version that fits unobtrusively beneath outer clothing.” It was further explained that “[t]he daggers are exempt from British laws banning the carrying of knives in public places because of their religious significance.”⁹²

There is controversy as to exactly how a baptized Sikh should carry the kirpan in public. Surprisingly, the controversy exists as much among Sikhs as among others. The well-known retired Sikh judge, Sir Mota Singh QC, publicly supported the case of the fourteen-year-old Sikh school boy remarking, “I wear my Kirpan and I’ve always worn it for the last 35 to 40 years, even when I was sitting in court or visiting public buildings, including Buckingham Palace.”⁹³ Sir Mota Singh QC is fortunate. In February 2011, the legislative assembly of Canada’s French-speaking Quebec province passed a unanimous motion banning the kirpan from its premises, with all 113 members of the assembly, including Premier Jean Charest,

91. It is remarkable how in a generation, Britain has become a secular country. The *British Social Attitudes Survey 2009* recently disclosed that 50.7 percent of the British public did not regard themselves as belonging to any particular religion, despite the fact that 38.2 percent were themselves brought up in the Church of England/Anglican tradition; and that apart from special occasions such as weddings, funerals, and baptisms, 47.5 percent of the population “never or practically never” attended services or meetings connected with their religion. See <http://www.natcen.ac.uk/media/606622/bsa%202009%20annotated%20questionnaires.pdf>, 70–71.

92. Moore, “The Kirpan—Sikh Dagger Banned by Some Schools.”

93. Poonam Taneja, “Sikh Judge Sir Mota Singh Criticises Dagger Bans,” *BBC News*, February 8, 2010, <http://news.bbc.co.uk/1/hi/8500712.stm>. Sir Mota Singh QC is, however, recorded as having “later told BBC Radio 4’s Today program: ‘But on the other hand, I am also conscious of the health and safety position. I accept that, because I think as one realises the increase in crimes of violence involving the use of knives and other offensive weapons, I can see that.’”

voting in favor of the ban on the Sikh symbol.⁹⁴ The ban came after an incident in which four Sikhs invited to take part in a parliamentary hearing were barred from entering the legislature by the building's head of security.⁹⁵ On the other hand, Hardeep Singh Kohli, the British writer and radio and television presenter, who describes himself as a "secular Sikh," and who gingerly remarked, "I tread carefully into the quagmire that is religious belief," disagreed with "Britain's highest-profile Sikh member of the judiciary" on the grounds that he is "simply not comfortable with knives being allowed into school. What if the kirpan were forcibly removed and used?" As he explained, "[t]he practicality of baptised Sikhs carrying kirpans is not a new issue. That is why small, symbolic kirpans are attached to combs that Sikhs keep in their hair. Similarly, small kirpan-shaped pendants are worn around the neck, again fulfilling the criterion of the faith that the dagger be ever-present."⁹⁶ Kohli's observations provide a salutary reminder of human ingenuity in the art of religious compromise, even when matters of principle are at stake. People can make their religion meaningful to them in more ways than one.

That still leaves outstanding the question of what is to be done about adherents of a religion who do not feel able to modify the practice of an important article of their faith. Should not the issue of religious practice be addressed from the viewpoint of the individual in question? This is what Council Directive 2000/43/EC and the principles of European antidiscrimination law now require.⁹⁷ The state cannot just purport to be neutral.⁹⁸

94. Gurmukh Singh, "Canadian Sikhs Angry as Quebec Assembly Bans Kirpan," *Thaindian News*, February 10, 2011, http://www.thaindian.com/newsportal/world-news/canadian-sikhs-angry-as-quebec-assembly-bans-kirpan_100500741.html. See also "Quebec Legislature Bans Kirpan in Unanimous Vote," *iPolitics*, February 9, 2011, <http://ipolitics.ca/2011/02/09/quebec-legislature-bans-kirpan-in-unanimous-vote/>. It is said, however, that "The kirpan motion is the latest twist in Quebec's so-called identity debate—where the opposition has pushed the government to take a stronger stand in defense of the province's secular, francophone character." See "Kirpan banned at Que. national assembly," *CBC News*, February 9, 2011, <http://www.cbc.ca/canada/montreal/story/2011/02/09/pq-kirpan-measure.html>.

95. See "Kirpan Now Banned at the Quebec National Assembly," *The Canada Post* (London), March 2011, 11.

96. Hardeep Singh Kohli, "Mightier than the Kirpan," *The Guardian*, February 8, 2010, <http://www.guardian.co.uk/commentisfree/belief/2010/feb/09/dagger-dilemma-sikhism-kirpan-schools>.

97. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>.

98. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>. "The aim of this proposal is to implement the principle of equal treatment between persons irrespective of religion or belief, disability,

When the issue arose again in 2010, another education authority in the United Kingdom dealt with it rather differently. There was still no rights-based approach, but the matter was dealt with in the context of faith, culture, and society. In that year, new guidance issued to head teachers and governing bodies in Bedford⁹⁹ stated that baptized Sikhs can wear a kirpan with a blade of up to six inches. Given that only a year before, the fourteen-year-old Sikh boy in North London had been excluded from Compton School in Barnet after governors ruled his 5-inch (12.7 centimeter) kirpan was a health and safety risk, this was quite a radical development. One might ask why a kirpan is deemed to be a health and safety risk in one part of the country one year but not so in another part in another year. If the issue is to be left to be resolved in accordance with local domestic context rather than broader principles of the international law on religion, one might expect different educational bodies to decide the issue differently.

In the case of Bedford, the members of Bedford's Standing Advisory Council on Religious Education (SACRE) had agreed that the guidance be developed specifically by members of the Sikh community itself. Clearly, the issue in Bedford had been looked at from the viewpoint of the individual practitioners of the faith rather than the standpoint of the state, which had a right to justify a ban on grounds of "public safety." State authorities in Bedford had considered it to be their duty to find ways in which the right to religious expression could be maintained for a religious minority, even in circumstances where that right involved a practice that some in the majority population may find, at best, unusual and, at worst, disconcerting. However, as Mr. Bhavra of Bedford's SACRE explained, there were around two thousand Sikh children in Bedford but only a few of these would be baptized, and, in any event, "people need to be educated as to why Sikhs have the five Ks."¹⁰⁰

age or sexual orientation outside the labour market. It sets out a framework for the prohibition of discrimination on these grounds and establishes a uniform minimum level of protection within the European Union for people who have suffered such discrimination." It also explained that, "It is based on the principles of non-discrimination, participation and inclusion in society, equal opportunities and accessibility."

99. Bedfordshire Schools, Sikh Pupils: Wearing of the Kirpan. <http://www.schools.bedfordshire.gov.uk/Circulardocs/02/h-02-45a.doc>. "The purpose of this document is to address concerns arising from the Sikh tradition of carrying the Kirpan, a ceremonial sword or dagger."

100. "Sikh Students in Bedford, UK Allowed to Wear Kirpan to School," <http://swns.com/sikh-students-allowed-to-wear-ceremonial-dagger-to-school-150951.html>.

Yet, lest it be thought otherwise, the Bedford advice did not ignore safety concerns because under its agreed guidelines, the “Kirpan should be sheathed and out of sight and should be removed for PE lessons.”¹⁰¹ “Robin Rice, Head of RE at Biddenham Upper School, Bedford, and a member of SACRE, said that the Kirpan was not designed as a weapon,” and that “[i]f you work in a school that isn’t very multi-faith and suddenly a Sikh student turns up with a Kirpan you might think ‘what do I do?’,” adding that “[t]he Kirpan should be hidden and it should never be brought out in an attack.”¹⁰² It is clear that the Bedford guidelines are a measured and sensitive response to the issue of religious freedom of baptized Sikh students in British schools. They are contextually attuned. They are sensitive to the religious meanings of a cultural practice. At the same time, they quite properly do not allow every Sikh student to bring a Kirpan into school. That would be a charter for the frivolous and uncommitted and would raise justifiable concerns of student safety in schools. Indeed, it does not even allow every baptized Sikh student to do so. It only grants this freedom to a baptized Sikh who can demonstrate that he or she is observant of all five requirements of the baptized in the Sikh faith.¹⁰³ In this way,

101. Ibid.

102. Ibid.

103. A large body of academic literature has grown up over the last thirty years on the Sikhs. This has been spearheaded by the late Hew McLeod, who sadly passed away in July 2009. W. H. McLeod lived among the Sikhs for almost a decade and is a foremost historian of Sikhism in the world today. His latest book is *Sikhism* (London: Penguin Books, 1997). Almost all of his books and published articles concern Sikh history, religion, and sociology. The books, including *Guru Nanak and the Sikh Religion* (1968), *The Evolution of the Sikh Community* (1976), *Early Sikh Tradition* (1980), and *Who is a Sikh?* (1989), have all been published by the Clarendon Press in Oxford. His high esteem can be gauged by the fact that in 2004, Oxford University published a series of essays by leading Sikh scholars “In honour of Professor W. H. McLeod” under the auspices of the Sikh Studies Program of the University of Michigan, which described McLeod as having “made a seminal contribution in the field of Sikh Studies,” so much so that “[a]s a leading Western scholar of Sikh religion and history, W. H. (Hew) McLeod has single-handedly introduced, nourished, and advanced the field of Sikh studies over the last four decades. On a number of occasions, he has represented the Sikhs and Sikhism to both academic and popular audiences in the English-speaking world. He appeared as an expert witness in the court-hearing of the ‘Royal Canadian Mounted Police (RCNP) Turban Case’ in Calgary, Alberta in 1994. In 1994 also he appeared for Canadian Human Rights Commission in a hearing involving Sikh *Kirpans* (‘miniature swords’) carried on aircraft.” See “Introduction,” in *Sikhism and History*, ed. Pashaura Singh & N. Gerald Barrier (New Delhi: Oxford University Press, 2004), 5. Others who have followed in his wake are Eleanor Nesbitt, Owen Cole, Roger Ballard, Pashaura Singh, Harjot Oberoi, Nikki-Gurinder Kaur Singh, J. S. Grewal, and Gurinder Singh Mann, among others, all of whom have made quite startling contributions to the growing field of Sikh studies.

the Bedford guidelines set out to preserve the seriousness of religious faith while balancing this against the general public interest concerns of student safety. Clearly, therefore, a sensible, well-balanced, and pragmatic approach is emerging, which seeks to safeguard both the individual interest in religious freedom and the wider state interest in public safety. Thus, the advice from SACRE is expressly that “the Kirpan can only be worn with the four other signs of the Sikh faith and schools will expect to remove it from any student not wearing all five symbols or who unsheathes it.”¹⁰⁴ On this basis, Judge Mota Singh QC can wear his kirpan in public places as a practicing baptized Sikh; Hardeep Singh Kohli cannot as a secular Sikh.

Similar issues have arisen in other parts of the English-speaking Commonwealth. These also help demonstrate that a rights-based approach is not necessarily conducive to the promotion of religious practices. What is more important is the attitude of the state itself. When, in 2007, Victoria’s State Parliamentary Committee in Australia allowed Sikh students to carry the kirpan, it was reported that “this move has outraged principals and teachers” who “had concerns about students carrying the kirpan—which is hidden under the school uniform,” though the committee “recommended that the decision remain with individual schools.”¹⁰⁵ This resulted from an inquiry into dress codes and uniforms in schools in Victoria by the Education and Training Parliamentary Committee, which recommended “that the Department of Education and Early Childhood development require all Victorian schools to accommodate clothing and other items with religious significance where appropriate, within a framework developed by the Department.”¹⁰⁶ What is interesting is that the Sikh Council of Australia took the position that kirpans should not be allowed in schools at all (thus once again demonstrating the disagreement on this issue among Sikhs themselves). Its general secretary, Bawa Singh Jagdev, while recognizing that “approximately 8 percent of the total Sikh population in Australia are initiated or baptized Sikhs,” argued that “[c]hildren can leave the Kirpan at home and go to school, come back and wear

104. “Sikh Students in Bedford, UK Allowed to Wear Kirpan to School,” <http://www.sikhiwallpapers.com/news/1572/bedford-schools-allow-kirpans>.

105. Satnam Singh, “Australia’s Victoria State Allowed Sikh Students to Carry ‘Kirpans’ in Schools,” http://www.nriinternet.com/NRIsikhs/KIRPAN/Kirpan_wearing_in_Schools/Asia/Australia/Victoria_ALLOWED_KIRPAN.htm.

Although the committee also allowed for Muslim students to wear hijabs or veils in the state’s classrooms, it curiously also called for schools to include hats and address sun protection in their dress codes.

106. Satnam Singh, “Kirpan Wearing in Schools,” December 26, 2007, http://www.nriinternet.com/NRIsikhs/KIRPAN/Kirpan_wearing_in_Schools/Asia/Australia/2_Sikh_Council_of_Australia.htm.

it.”¹⁰⁷ Yet, it is significant that when Victoria’s State Parliamentary Committee “received a substantial body of evidence, during its year-long inquiry, addressing the needs of culturally and linguistically diverse communities, particularly with respect to clothing and other items with religious significance for the wearer, the two items most frequently mentioned throughout the inquiry were the hijab (Islamic headscarf) and the kirpan.”¹⁰⁸ This demonstrates how democratically constituted government bodies are often more in touch with the realities on the ground than community groups.

On the other hand, the Sikh Interfaith Council of Victoria in its submission to the committee was of the view that “[s]tudents should be able to wear their significant religious symbols and articles of faith...Christian crosses, hijab, yaramulka (Jewish caps), kirpans.”¹⁰⁹ Although Geoff Howard, chairperson of the state parliamentary committee, is reported to have said that “[w]e accepted that the kirpan could be carried by a small group of baptized Sikhs” and “[w]e are certainly not in favour of banning kirpans as such,” Victoria’s Department of Education was not in favor of allowing kirpans in schools. A spokesperson for the department adopted the all-too-familiar position that “[t]he overarching guideline is that weapons are not permitted in schools, but individual uniform policies are developed by schools in consultation with parents,” adding that “[t]he department is not aware of any government schools in the state that allows the kirpan.”¹¹⁰ An altogether more liberal approach emerged, however, when, in May 2011, a poll of over 7,500 students in Queensland conducted on the question of “Should knives be allowed in school if they are a legitimate expression of faith?” found 57 percent in favor and 43 percent against. Indeed, Queensland Anti-Discrimination Commissioner Kevin Cocks argued in a submission tabled to parliament at the time that the government had provided no evidence that any school attacks had involved a kirpan or other religious knife.¹¹¹

In March 2010, in New Zealand, the Human Rights Commission was also asked to clarify whether a Sikh student should be

107. See “Kirpans should not be allowed at schools at all,” December 26, 2007, http://www.nriinternet.com/NRIsikhs/KIRPAN/Kirpan_wearing_in_Schools/Asia/Australia/Victoria_ALLOWED_KIRPAN.htm. According to the 2006 census conducted by the Australian Bureau of Statistics, there were 26,429 Sikhs in Australia, with the largest number of 11,637 residing in New South Wales, followed by 9,071 in Victoria, 2,636 in Queensland, 1,393 in Western Australia, and 1,226 in South Australia.

108. *Ibid.*

109. *Ibid.*

110. *Ibid.*

111. Daniel Hurst, “Sikhs Play Down School Knife Fears.”

allowed to wear a kirpan.¹¹² Two schools in that country had contacted the commission for advice on how to handle requests to wear the kirpan. In one case, a mother of boys aged thirteen, fourteen, and fifteen, who wear kirpans to school in South Auckland said the 12-centimeter blades were under a shirt and “not hurting anyone.” She visited the schools to explain the significance of the knives, convincing staff they would not be used to hurt others. As in the United Kingdom and Australia, Rawiri Brell from the Ministry of Education said what students wore at school was a matter for the individual boards. Education law expert Patrick Walsh said any school that received a request to wear a kirpan should investigate if it related to a core religious or cultural value, if there were any health and safety concerns, and whether the request was outrageous or rebellious.¹¹³ Clearly, therefore, a sensible, well-balanced, and pragmatic approach is emerging, which seeks to safeguard both the individual interest in religious freedom and the wider state interest in public safety.

Conclusion

It is imperative that the kirpan is not seen as intrinsically dangerous. This is because there is no evidence to support such a proposition. This will help resolve many of the school cases concerning the kirpan. In so far as it is deemed to be dangerous, this is arguably a legacy of times past when the thinking of Aristotle provided a ready-made framework allowing people to understand objects that were unfamiliar to them. It is, however, a view that is much discredited today even in the West. Yet, the legacy has left an uncertainty in this area that is not helpful. The practice of wearing the Sikh kirpan in the democratic world is still in a state of flux. Some states allow it without inhibition. Others are more wary. The major bone of contention that emerges is whether there can be a compromise. Can State bodies insist on a modification in the general interest? After all, religious traditions are apt to change over time and space. The kirpan, however, is a fundamental tenet of the Sikh faith. No practicing Sikh is likely to give that up lightly.

Is the requirement of a fettered kirpan a violation of a Sikh's religious freedom under human rights law? If so, what modifications in particular breach the right to religious freedom? If there are safety concerns, would a period of inspection nevertheless be considered

112. Rachel Grunwell, “Sikh Daggers Testing Schools,” *New Zealand Herald*, March 21, 2010, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10633303.

113. *Ibid.*

so invasive as to violate freedom of religion? Does a state escape responsibility for religious freedom violations if it adopts a decentralized approach to resolving religious disputes that are more alive to local concerns? On the face of it, the answer to all these questions is that the state's right to act in the general interest for reasons of public safety and security trumps the individual right to practice religion in accordance with the dictates of one's conscience. This is because it is well established in democratic societies that where several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.¹¹⁴ Freedom of religion, it is worth recounting, is not an absolute right,¹¹⁵ and it is not to be forgotten that, as far as the European Convention of Human Rights is concerned, the state's positive obligation is not just to guarantee individual rights and freedoms but to secure to everyone within its jurisdiction the rights and freedoms defined in the convention.¹¹⁶ What this would appear to imply is that because freedom of religion principles do not protect every act motivated or inspired by a religion or belief,¹¹⁷ the right of a practicing Sikh to wear the unfettered and unmodified kirpan may

114. See *Kokkinakis*, § 33.

115. As is clear from the qualifying provision in sub-paragraph 2 of article 9.

116. See article 1 of the European Court of Human Rights, which reads, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

117. See *Kalac v. Turkey* - 20704/92 [1997] ECHR 37 (July 1, 1997) <http://www.bailii.org/eu/cases/ECHR/1997/37.html>, which concerned a judge advocate in the Turkish air force who was compulsorily retired for breach of discipline and infringing the principle of secularism. He was charged in particular with membership of a fundamentalist (Muslim) sect and participation in unlawful fundamentalist activities. The commission upheld his complaint that there had been a violation of article 9. The European Court of Human Rights, however, ruled against his complaint on the ground "that his compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion" (§ 31). Similarly, in *Arrowsmith v. United Kingdom* - 7050/75 [1978] ECHR 7 (October 12, 1978) <http://www.bailii.org/eu/cases/ECHR/1978/7.html>, because Miss Arrowsmith's opposition to the presence of the British Army in Northern Ireland did not objectively say anything about and did not manifest pacifism, the commission regarded that as fatal to her case, even though it accepted that pacifism was the motivation for her objective actions, thereby holding that religious motivation was not enough. Also see, *Tepeli and Others* [*v. Turkey* (dec.)], no. 31876/96, September 11, 2001], which confirmed the principle that the Supreme Military Council's order was based not on the applicants' religious beliefs and opinions nor on the manner in which they performed their religious duties but on their conduct and activities in breach of military discipline and the principle of secularism.

be curtailed by the state in the interests of the rights and freedoms of others.

Such a conclusion would be mistaken. It hardly needs reminding that the character and nature of contemporary liberal democracies have a high degree of religious and cultural diversity. Our societies are truly multicultural. That is something of which we in the democratic world may be justly proud. Elsewhere, wherever one looks, the rest of the world is in upheaval with ethno-religious groups juxtaposed against each other, as even the “Arab Spring” revolutions now show. There is a barely concealed hostility about. Of course, it is true that lest we fall into the same pitfalls ourselves as those unenviable illiberal societies, we must act to remove disagreement and distrust between different communal groups in our midst. But the question we have to ask ourselves is: At what cost?

It is not emphasized often enough that the role of democratic state authority is not to remove the cause of tension by eliminating the kind of pluralism that arises if, for example, a Sikh is seen wearing a kirpan in a public place, but it is rather to ensure that the various competing groups tolerate each other.¹¹⁸ That is a tall order for the democratic state. But the State is only neutral with respect to the organization of its religions. It is not neutral on promoting tolerance. It is one thing to say that the state keeps an equal distance between itself and each one of the faith communities within it. That is the kind of neutrality that stops the state from favoring one religion over another. It is quite another thing to say that the state should remain neutral with respect to a positive obligation to promote the religious freedom of all members of its community. For the state to act in a way that is conducive to the attainment of public order, religious harmony, and tolerance, which is the chief attribute of democratic society, it must not stand by the sidelines. It is not for the state to judge. But the state is facilitator of democratic norms and values. Religious freedom is one such value. Indeed, it is now well recognized that the state’s duty of neutrality and impartiality is incompatible with any power on the state’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are

118. *Serif*, in which the court explained, “It is true that the Government argued that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among the Muslims in Rodopi and between the Muslims and the Christians of the area as well as Greece and Turkey. Although the Court recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism” (§ 53).

expressed.¹¹⁹ What state authority must do, however, is ensure mutual tolerance between opposing groups.¹²⁰ That requires the state to take positive steps to develop a better and more informed understanding of the kirpan as worn by devout Sikhs. In the United Kingdom, this process is considerably advanced and has been underway for many decades. Sikh kirpans are courteously checked at security points outside courtrooms and other official buildings by well-trained public servants taking due care and concern not to give offense.¹²¹ Negative comments about the kirpan in Britain are rare. But more can still be done.

There is another important principle here that must be highlighted and this also demonstrates that the state cannot remain completely neutral in matters of religion. Although individual interests must on occasion be subordinated to those of society in general, it is well known that democracy does not simply mean that the views of a majority must always prevail because that would imply taking advantage of one's dominant position. There is a balance to be struck. It must be a proportionate balance.¹²²

119. See *Manoussakis and Others*, in which the court explained, "The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate" (§ 47). Other cases that endorse the same principle include *Hassan and Tchaouch*, § 78 and *Refah Partisi and Others*, § 91.

120. This principle comes across quite clearly in the judgments in *United Communist Party of Turkey and Others*, in which the court explained, "The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned" (§ 57).

121. See, for example, the guidance given in the *Judicial Studies Board: Handbook; Ethnic Minority Issues*. Available online at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C11244093?uri=C11244093-judicial-studies-board-handbook%3B-ethnic-details&descriptiontype=Full>. Also see <http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/ethnic-minority-liaison-judges-annual-report-2005-2006>.

122. Where human rights are concerned, it is well established that "detailed and anxious consideration" must be given to the rights of the individual. See, for example, *SS (India) v. Secretary of State for the Home Department (Rev 1)* [2010] EWCA Civ 388 (April 15, 2010), at para. 40 and para. 50; <http://www.bailii.org/ew/cases/EWCA/Civ/2010/388.html>; *AF (Jamaica) v. Secretary of State for the Home Department* [2009] EWCA Civ 240 (March 26, 2009) at paras. 40–42, <http://www.bailii.org/ew/cases/EWCA/Civ/2009/240.html>; *AB (Jamaica) v. Secretary of State for the Home Department* [2007] EWCA Civ 1302 (December 6, 2007) at para. 1 and para. 18, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/1302.html>.

But it is a balance that ensures the fair and proper treatment of people from a minority group such as the Sikh religion who want to practice their religion in a peaceful manner. Only through this balance can the state avoid any abuse of its dominant position.¹²³ Indeed, only then can one genuinely move toward the pluralism, tolerance, and broadmindedness that are the hallmarks of a democratic society and comprise the foundational and aspirational values of European societies today. Where local schools with young children are involved or where there are accentuated concerns about safety and security, it is not necessarily correct to say that the compromise (in the form, for example, of a fettered or modified kirpan) must come from the individual concerned. This is because our cherished qualities of pluralism and democracy must be based on dialogue, and although that dialogue must also entail a spirit of compromise that will necessarily entail various concessions being made, it is by no means the case that such concessions must be essentially on the part of individual as opposed to the majority group. A balancing exercise must be a proportionate one, one that is proportionate not just to the interests of the state but also to the interests of the individual. Any compromise or concession on the part of the individual can ultimately only be justified if it is in order to maintain and promote the ideals and values of a democratic society.¹²⁴ Where these ideals and values are among those guaranteed by the convention or its protocols, it must be accepted that the need to protect the rights and freedoms of all

123. See, *Young, James and Webster v. the United Kingdom*, nos. 7601/76;7806/77, ECHR 4 1981 (August 13, 1981) <http://www.bailii.org/eu/cases/ECHR/1981/4.html> in which the court explained that “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society.’ Accordingly, mere fact that applicants’ standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court” (§ 63). Further in *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95, and 28443/95, ECHR 22 1999 (April 29, 1999) <http://www.bailii.org/eu/cases/ECHR/1999/22.html>, the court also explained, “Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position” (§ 112).

124. It was made clear in *The United Communist Party of Turkey and Others* that “[d]emocracy is without doubt a fundamental feature of the European public order” (§ 45). In *Refah Partisi and Others*, the court was emphatic in stating, “In view of the very clear link between the Convention and democracy, no one must be authorized to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole” (§ 99).

the state's people can often lead the state to restrict the rights of one individual or group. This is why addressing the issue in terms of rights is not always the most desirable thing to do. What must never be forgotten is that this quest involves a process that entails a constant search for a balance between different interests because it is that which constitutes the foundation of a democratic society.¹²⁵

For the Sikhs, and their Kirpan—that quest is not yet over.

125. In *Chassagnou and Others*, the court said, “It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect ‘rights and freedoms’ not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right” (§ 113).