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# Law & the Accommodation of Sikh Religious Emblems

***Hukuk ve Sih Dini Sembollerinin Tanınması***

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# LAW & THE ACCOMMODATION OF SIKH RELIGIOUS EMBLEMS*

## *HUKUK VE SİH DİNİ SEMBOLLERİNİN TANINMASI*

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## ABSTRACT

How should the state stand in relation to securing the rights and freedoms to which all its citizens are entitled? Should it exhibit State neutrality and impartiality? If so, are these traits in themselves guarantors of the practice and observance of religion by a minority faith? It is often overlooked how the issue has arisen repeatedly in western democracies in the striking case of the Sikh religion because of the religion's requirement of emblems. These consist not only of the external headwear, the turban, but also the Sikh Kirpan, a blade, which may be worn internally or externally, as well as the Sikh bangle, the kara, worn both my men and women alike signifying the importance of righteous living. Western thinking is apt to misconstrue such emblems. This is because its understanding of an object is rooted in a particular philosophical thinking about what a 'thing' normally is in the physical world. It is a form of thinking that goes back to antiquity and derives from Aristotle's definition of things in terms of their 'essences', with a certain property which defines its 'nature'. Such reductionist thinking is ill-suited for the complexities of the modern world where ethnically diverse communities now inhabit virtually every western democracy. Yet, the Aristotelian form of thinking persists in suggesting that a Sikh Kirpan can only be a common 'blade' or a 'dagger' or a 'sword', and the Sikh Kara can be nothing more than an ordinary bangle on a wrist because of their innate essential qualities by which we all know them. Yet, leading court cases such as Multani, Sarika Angel and Athwal have in recent times challenged the concept of essences in a way that needs to be more widely appreciated, although a case like Jaskeerat Singh Gulshan suggests that there are still limitations to how far minority religious rights can be protected.

**Key words:** Sikh Kirpan, Kara, religious freedom, Athwal, Multani, Sarika Angel, Jaskeerat Singh Gulshan.

## ÖZET

Devlet, tüm vatandaşlarının hakkı olan özgürlükleri ve hakları güvence altına almak konusunda nasıl bir tutum sergilemelidir? Devlet tarafsız ve objektif mi olmalıdır? Eğer öyle kabul edilirse bu nitelikler, azınlıktaki bir inancın dini uygulama ve geleneklerini yerine getirebilmesi için tek başına garanti oluşturur mu? Bu mesele, Batılı demokrasilerde sıkça göz ardı edilmekle birlikte, özellikle Sih dini bağlamında dikkat çekici vakalarla tekrar tekrar gündeme gelmiştir. Bunun nedeni, Sih dininde çeşitli dini sembolleri taşıma gerekliliği olmasıdır. Bu semboller yalnızca görünür bir başlık olan sarık

* This article is a further developed version of the author's earlier blog post, 'The Sikh kirpan as a spiritual, religious and moral sanction' (Law & Religion UK, 20 November 2024) <https://lawandreligionuk.com/2024/11/20/the-sikh-kirpan-as-a-spiritual-religious-and-moral-sanction/>, and the article 'Kirpans, Law, and Religious Symbols in Schools' (2013) 55(4) Journal of Church and State 758.

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ile sınırlı değildir; aynı zamanda Kirpan olarak bilinen bir bıçak (hem içte hem dışta taşınabilir) ile hem kadınlar hem erkekler tarafından takılan, dürüst bir yaşamın önemini simgeleyen bileklik (Kara) de buna dahildir. Batı düşüncesi, bu tür sembolleri çoğu zaman yanlış anlamaya eğilimlidir. Bunun sebebi, nesneleri algılayış biçimlerinin, bir nesnenin yalnızca fiziksel dünyada normalde olduğu 'şey' olarak algılanmasına dair bir felsefi düşünme geleneğine dayanmasıdır. Bu, kökeni Antik dönemlere uzanan ve şeyleri belirli bir özelliğe dayanarak, onların 'mahiyet'i yani 'doğası' üzerinden tanımlayan Aristotelesçi anlayıştan türeyen bir düşünme biçimidir. Ancak bu indirgemeci düşünme tarzı, günümüzün karmaşık ve etnik olarak çeşitlenmiş toplum yapıları için uygun değildir. Günümüzde neredeyse her Batı demokrasisi, çok kültürlü topluluklara ev sahipliği yapmaktadır. Yine de, Aristotelesçi düşünce biçimi etkisini halen sürdürmekte ve örneğin bir Sih Kirpan'ı yalnızca sıradan bir bıçak, hançer ya da kılıç olarak, Sih Kara'sı ise bileğe takılan sıradan bir bileklik olarak görülmektedir. Çünkü bu nesneler, bilinen ve tanımlanan mahiyetleri üzerinden değerlendirilir. Ancak Multani, Sarika Angel ve Athwal gibi önemli mahkeme kararları, son yıllarda bu mahiyet algısına meydan okumuş olup bu tür kararlar, aslında çok daha geniş bir şekilde değerlendirilmeyi hak etmektedir. Buna karşılık, Jaskeerat Singh Gulshan vakası ise, azınlık dini haklarının korunmasında halen sınırlamalar olduğunu ve bu korumanın ne kadar mümkün olduğunu sorgulatmaktadır.

**Anahtar kelimeler:** Sih Kirpan, Kara, dini özgürlük, Athwal, Multani, Sarika Angel, Jaskeerat Singh Gulshan.

# 1. INTRODUCTION

Religious freedom is primarily a matter of individual conscience. It carries 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 in which the manifestation of one's religion or belief may take are specifically listed to include "practice and observance."[1] So how should the state stand in relation to securing the rights and freedoms to which its citizens are entitled? Should the State, for example, allow the free wearing of an article of faith which may raise issues of safety and general well-being? The orthodox liberal view emphasises the State's role as the neutral and impartial organiser of faiths and beliefs. This confines the State's role to ensuring public order, religious harmony and tolerance in a democratic society. The State limits its role because it does not wish to be drawn into assessing the legitimacy of competing religious claims and beliefs.[2] If it must be drawn, this must be only to ensure that there is mutual tolerance between opposing groups.[3] In this way, 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.[4] All along, however, the state remains neutral.[5]

This article argues that State neutrality and and impartiality are no guarantors of practice

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1 See *Cha'are Shalom Ve Tsedek v. France* App no 27417/95 (ECtHR [GC], 25 June 2000) para 73.

2 See *Manoussakis and Others v. Greece* App no 18748/91 (ECtHR, 26 September 1996) para 47. Also see, *Hassan and Tchaouch v. Bulgaria* App no 30985/96 (ECtHR [GC], 26 October 2000) para 78. Further see, *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98 (ECtHR [GC], 13 February 2003) para 91.

3 *United Communist Party of Turkey and Others v. Turkey* App no 19392/92 (ECtHR, 30 January 1998) para 57.

4 *Serif v. Greece* App no 38178/97 (ECtHR, 14 December 1999) para 53.

5 Satvinder S Juss, 'Kirpans, Law, and Religious Symbols in Schools' (2013) 55(4) Journal of Church and State 766.

and observance in religion. Sikhs, as the recent judgment in *Athwal*[6] of the Queensland Supreme Court in Australia explains, have to have five articles of faith on their person – the '5-ks'. These are, a *kachera* (a special undergarment), *kanga* (a wooden comb), *kara* (an iron band), *keshas* (unshorn hair) and a *kirpan* (a ceremonial sword). From the wearing of the Sikh bangle[7], to the performance of Sikh funerary rites[8], to the preparation of Sikh food[9], and to the carrying of the Sikh Kirpan,[10] there have been in recent years a spate of legal decisions challenging restrictions on the right of Sikhs to live by the articles of their faith. This article focuses on two types of such cases: those involving the *kirpan* and those involving the Sikh *kara*. The *kirpan* is chosen because being akin to a knife, it is percevied to raises immediate concerns over the safety of citizens; and the *kara* because being akin to a bangle, it is percived to be the most obtrusive external symbol challenging instituitional policies on unifrom and student discipline. The kirpan is the most controversial of the 5'ks from viewpoint of the secular state; the kara the symbol that is most common external identifier of Sikhism.[11]

This article also argues that although human rights law refers to the 'rights and freedoms of others' religious questions are not always best formulated as rights questions. It is true that the liberal state wants to remain neutral in matters of individual faith and religion. However, not only is neutrality not the best way for a state to resolve its religious tensions,

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6 *Athwal v State of Queensland* [2023] QCA 156 (1 August 2023)

7 See *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin) (29 July 2008).

8 *Ghai, R (on the application of) v Newcastle City Council & Ors* [2010] EWCA Civ 59 (10 February 2010).

9 In one case a restaurateur who catered for wedding feasts was held liable for serving food which contained egg resulting in the death of a Sikh man. Lord Justice Moore-Bick giving judgment 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" (at 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.

10 The tribunal in one case recently had to consider whether 'Amritdhari Sikhs' (ie baptised 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, 18 May 2011). See <http://www.eordirect.co.uk/default.aspx?id=407123> accessed 11 February 2025.

11 See *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7) para 64.

but the State is often not neutral and it is artificial to expect it to be so.[12] The challenge of how to 'to manifest one's religion' can best be met not through the language of rights but by a contextually attuned approach to understanding religious practice. The language of rights posits the individual against the State. The State, however, proclaims a neutral stance on religion. This article accordingly demonstrates that where individual claims have succeeded with respect to the 5-ks they have done so through Expert written evidence that have focused on the understanding of religion as a practice. Whether this is from a Sikh Chaplain in *Multani*[13] or a Professor of Religion in *Sarika Angel*[14] it is the lived experience of the practitioner of the sikh faith that matters rather a bland focus on the *kirpan* or the *kara* as a object in common currency. Take the example of the *kirpan*. In 2008 a Sikh employee at an Asda Supermarket in the UK was told that he could return to work after being asked by managers to either remove his Kirpan or risk losing his job.[15] The following year, British media reported how, "in Sikhism the Kirpan is an instrument of non-violence that should be used to prevent harm from being done to a defenceless person."[16] Not only do these two separate events not focus on rights *per se*, but they do not focus on the object in question either. Instead, their focus is on the understanding of the object in religion. Yet, western thinking remains on the whole rooted in conceptualising an object as it exists in the physical world. The kirpan claim succeeded in *Athwal,*[17] but where it has failed as in *Jaskeerat Singh Gulshan*,[18] this is because it has been seen in terms of its essentialism. Yet, the reason why eastern religious thought accommodates such religious symbols so easily is because it is based on anti-essentialism.

## 2. THE CONCEPT OF ESSENCES

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

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[12] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001), where 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 (at para 11):

*"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…"*

[13] *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6.

[14] *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7).

[15] See <http://www.sikhsangat.com/index.php?/topic/38514-discrimination-of-sikh-employee-at-asda-comes-to-an-end/> accessed 11 February 2025.

[16] BBC News, 'Boy's Sikh dagger in school ban' (13 October 2009) <http://news.bbc.co.uk/1/hi/england/london/8304088.stm> accessed 11 February 2025.

[17] *Athwal v State of Queensland* (n 6).

[18] *Jaskeerat Singh Gulshan* [2023] EWCA Civ. 306.

Aristotle's definition of things in terms of their 'essences'.[19] 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.[20] According to this philosophical construct, a thing has a certain property or metaphysical characteristic which is necessary to possess it with a 'nature' that helps us to distinguish it from sets of attributes which are simply contingent or merely accidental to the thing.[21] For they do not define the thing with its essential nature. In western thinking the Kirpan is invested with the same essences and attributes as a 'blade', a 'dagger' or a 'sword' and a Kara is invested with the attributes of nothing more than an ordinary bangle on a wrist. 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 or the kara could be defined in terms of their essences. Such certainty had much to commend it, and Aristotle's thinking had such a profound effect in western philosophical traditions, that it continued virtually unchanged during the Scholastic period.[22]

What the courts need to do is to note, as they have done in *Multani* and in *Sarika Angel*, how in recent times the concept of essences has been challenged. One influential philosopher of the twentieth century, Edmund Husserl (1859-1938), who is accredited with founding the phenomenological movement, suggested that the search for essences can only be meaningful when applied to a specific category of human experience.[23] 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 them.[24] If this is right then one can see the meaning of the Kirpan or the kara having a very different meaning from that of a knife or a bangle respectively. This is because just as the Kirpan is not used to threaten, molest or to harm anyone, but stands as an article of faith for the Sikh people, so is the kara not an emblem of personal jewellery for a school child but a reminder to her of her commitment to her God. Metaphysical assertions should, therefore, not be used to describe an essence as the necessary property of real objects because if we do this we ignore our experience of the object in question – which in the case of both the Kirpan and the Kara is entirely benign. Eastern thinking takes exactly

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[19] J. L. Ackrill, *Aristotle's Categories and De Interpretatione* (OUP 1975). Also see, David Charles, *Aristotle on Meaning and Essence* (OUP 2002). Further see, Charollette Witt, *Substance and Essence in Aristotle: An Interpretation of Metaphysics VII –IX* (Cornell Univ Pres 1989).

[20] Aristotle, *Metaphysics* (Penguin Books 1998) 168.

[21] Steven K. Strange, *Porphyry: On Aristotle, Categories* (Cornell University Press 1992).

[22] Though see N. Kretzmann, Anthony Kenny and Jan Pinborg, *Cambridge History of Later Medieval Philosophy* (Cambridge University Press 1982). Also see D. Chalmers, '*Is there Synonymy in Occam's Mental Language*?' in Paul Vincent Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge University Press 1999).

[23] See Jitendranath Mohanty, *The Philosophy of Edmund Husser* (Yale Univ. Press 2008); also see Edmund Husserl, *Crisis of European Sciences and Transcendental Phenomenology* (Northwestern University Press 1970).

[24] Willard Van Orman Quine, *Word and Object* (MIT 1960).

that view, and these modern philosophical tenets are actually more akin to the different forms of eastern thought which believe that all phenomena are devoid of essence. Indeed, a Sikh would be surprised – if not alarmed – at any suggestion that the Kirpan or Kara had any malign connotations because the very root of eastern thought rejects anti-essentialism. From the perspective of the religiously observant, a Sikh who wears a Kirpan is not wearing it because it is a weapon. A person who wears a Kara is not wearing a personal jewellery. 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 wholly differently as something already known in the physical world.

To say that the Kirpan is intrinsically dangerous or a Kara an emblem of fashion is, however, to continue to subscribe to Aristotle's philosophy of essences, which no doubt still retains an enduring affect on western thought. It is, however, apt to lead to serious misunderstandings of religious artefacts. 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 do they 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' or 'kara' can only be understood in the context of its religious, cultural, and historical use. Without this context, they are apt to be misunderstood. To ban them 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.

## 3. THE *KIRPAN*

### 3.1. ATHWAL

A recent decision from an Australian court has given the most fullsome explanation. In *Athwal*[25] the Court explained how, "Sikhism is a monotheistic religion that was founded in the Punjab region of South Asia in the 15th Century by Guru Nanak" and whose followers "share a religion, language, heritage and tradition" so that, " Sikhs have a distinct appearance as men and some women wear a turban" and "Sikhs have unshorn hair and men have a beard."[26] The Court explained how orthodox Sikhs undergo an initiation ceremony, an "Amrit Sanchar" and "which can occur at any age when a person has the maturity to understand the Sikh code of conduct" known as the "Rahit Maryada" when that person "is ready to commit themselves to living as an initiated" Sikh known as an "Amritdhari Sikh." The solemnity of the initiation ceremony is such that it "is conducted by five initiated Sikhs"

[25] *Athwal v State of Queensland* (n 6).

[26] ibid para 64.

who are known as "the five 'Beloved Ones'".[27]

And, herein lies the problem for the liberal secuar State. This is because, as the Court explained, "[o]nce a Sikh is initiated, they are required at all times to wear or possess the five articles of faith, which collectively symbolise that the person has dedicated themselves to the Sikh way of life."[28] But then what are these such as to provoke such controversy? They are, "a *kachera* (a special undergarment), *kanga* (a wooden comb), *kara* (an iron band), *keshas* (unshorn hair) and a *kirpan* (a ceremonial sword)." Prior to becoming an initiated "Amritdhari Sikh" a Sikh will live as a "Sehajdhari Sikh" and it remains the case that, "[o]ften Sehajdhari Sikh also wear or possess the five articles of faith in preparation for the commitment they will make when initiated.[29] Of the five articles of faith, the kirpan is the most controversial, as the Court explained because it "is a small ceremonial sword made of either steel or iron" although "[i]t comes in a variety of different shapes, sizes and degrees of sharpness/bluntness." Its huge importance for "Amritdhari Sikh" lies in the fact that, "[t]he kirpan represents spiritual, religious and moral sanctions and rights and responsibilities of an initiated Sikh" a significance which has never been expolicated by a judicial tribunal in quite the same manner before. However, potential as a damgerous article is considerable diminished by the fact, as the Court explained, by the fact that "the kirpan is worn sheathed and typically concealed beneath clothing and is not publicly on display" and "is usually worn on a cloth sling called a *Gatra,* which holds the kirpan tightly and usually has a cloth loop to keep the kirpan within its sheath." Indeed, in an observation of even greater significance, the Court pointed out how, "[t]he use of the kirpan in a non-ceremonial manner would be inconsistent with the Sikh code of conduct."[30] So much so that, "approximately 80 - 90% of kirpans worn by initiated Sikhs in Australia are short and blunt without a cutting edge."[31] It is unsurprising, therefore that "[i]t is a breach of religious faith and counter to the beliefs of an initiated Sikh to remove or have removed any of the five articles of faith," so that, "[i]f any one or more of the five articles of faith is removed from an initiated Sikh, they must go through a lengthy and rigorous absolution process."[32] Against that background, the court explained how the issue of Sikh religious practises was not likely to go away anytime soon for western society because "[o]ther than a few converted Sikhs around the world, nearly all Sikhs originate from the Punjab region" and "[n]early all Sikhs continue to have a link with family in Punjab, practice elements of Punjabi culture and speak the Punjabi language" and "[n]early all Sikh places of worship (Gurdwaras) outside of India have a Punjabi language school to keep their respective communities connected to Punjabi language and culture." Today one finds that, "[m]illions of Sikhs have migrated from their homeland of Punjab over the last century" and "[o]ut of the 30 million adherents, it is estimated over 5 million

[27] ibid para 65.

[28] ibid para 66.

[29] ibid.

[30] ibid para 67.

[31] ibid para 68.

[32] ibid para 69.

reside outside of Punjab."[33]

*Athwal*[34] itself concerned a an initiated Sikh school-girl brought proceedings against the State in the Supreme Court of Queensland, claiming that Section 51(5) of the Weapons Act, operated in a discriminatory manner to prevent Sikhs from entering a school while adhering to their religious beliefs, and so was inconsistent with the *Racial Discrimination Act 1975*, making the former invalid. The Court referred[35] to the seminal 1982 British decision, where an 11-year old was refused admission to a private school because he insisted on wearing his turban over his uncut hair contrary to school uniform rules, of *Mandla v Dowell Lee.*[36] The House of Lords held that Sikhs were a group of persons defined by ethnic origins for the purposes of an anti-discrimination provision contained in the *Race Relations Act 1976* (UK). As the Supreme Court of Queensland now pointed out "[t]he judgment records and rejects an argument to the contrary, that Sikhs 'were essentially a religious group, and they shared their racial characteristics with other religious groups, including Hindus and Muslims, living in the Punjab'"[37] and that "[t]his was discussed in terms of cultural practice rather than religion," whereas the question before the Queensland Court was a religious one. Section 51 (4) provided that it is *not* a reasonable excuse to physically possess a knife in a school for genuine religious purposes. The court entered into a discussion as to whether a 'kirpan' was a knife[38] and concluded that it was because it was "unlikely that Parliament would have objectively intended" this "to depend on the particular degree of sharpness of the blade of the instrument said to be a knife" and not least because "[s]harpness is a relative term, and there is no statutory test for the degree of sharpness required…"[39] The Court then asked itself whether a knife sewn into a pouch was still a knife[40] and held that it was because, "[a]s a matter of ordinary language, a knife remains a knife even though it is located in a place that is difficult to access,"[41] especially given that definition in Weapons Act is one which, "refers to a thing which is reasonably capable of being used to wound or threaten to wound anyone…."[42]

However, its conclusion in this regard that, "[t]here is nothing in the text, context or purposes of the Weapons Act which indicates that a knife sewn into a pouch ceases to be a knife for the purposes of the Act"[43] is problematic. It is the sort of error that lawyers not infrequently fall into. Sikh students wanting to wear the 'Kirpan' in schools has been an

33 ibid para 70.

34 *Athwal v State of Queensland* [2023] QCA 156 (1 August 2023)

35 ibid para 15.

36 *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7 (24 March 1982)

37 Which the House of Lords did at page 561 of its judgment.

38 ibid paras 96-99.

39 ibid para 98.

40 ibid paras 100-102.

41 ibid para 100.

42 ibid para 101.

43 ibid para 102

issue across countries as diverse as Canada,[44] the USA,[45] Great Britain, Australia, and New Zealand. Often described as "a small, curved ornamental steel dagger"[46] or " a sword,"[47] that is " commonly 7.5 centimetres long" and "is carried in a sheath and strapped to the body, usually under clothing,"[48] Court decisions have failed to capture its true essence while still expressing liberal society's commitment to multiculturalism, pluralism, tolerance, and broad-mindedness that is the hallmark of the western liberal democratic state.[49]

Finally, in *Athwal* the Court asked itself whether the possession of a kirpan for religious purposes is a use for a lawful purpose.[50] After noting how "[t]hese provisions as to the physical possession of a knife are made in an Act which has the object of preventing the misuse of weapons"[51] it then made the interesting observation of how, "[t]he physical possession of a concealed kirpan as a symbol of a religious commitment would, at least ordinarily, constitute a use of the knife for a lawful purpose (namely, religious observance)."[52] However, although there was a "specific provision that physical possession of a knife in a public place for genuine religious purposes is a reasonable excuse" in Section 51(4) which, " removes any doubt about that question in relation to the physical possession of a kirpan in public places other than schools"[53] the fact was that "section 51(5) specifically provides that genuine religious purposes are not a reasonable excuse for physically possessing a knife in a school"

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[44] See the decision of the Supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6, under under the Canadian Charter of Rights and Freedoms, where safety measures were for the kirpan to be worn under a school boy's clothes, for its sheath to be made of a material (wood not metal) which meant that it would not cause injury to anyone, and it was then to 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* [2006] UKHL 15.

[45] 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), where 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 at <http://www.sikhcoalition.org/LegalUS1.asp>. Also see, <http://www.hg.org/judges.html> accessed 11 February 2025.

[46] 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 16th 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, 13 October 2009) <http://www.times-series.co.uk/news/topstories/4679126.Sikh_dagger_banned_by_Finchley_school/ > accessed 11 February 2025.

[47] <http://www.nydailynews.com/news/national/2011/02/01/2011-02-01_michigan_school_district_allows_students_to_wear_daggers_to_class.html#ixzz1DSGsnj5g> accessed 11 February 2025.

[48] The Sydney Morning Herald, 'Sikh Knives should be allowed in schools' (10 February 2010) <http://www.smh.com.au/world/sikh-knives-should-be-allowed-in-schools-20100209-npsy.html> accessed 11 February 2025.

[49] In *Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005), the Court explained how, "Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'" (para 108). Also see, *Kokkinakis v. Greece* (1993) Series A no 260-A/17 para 3; and see, *Buscarini and Others v San Marino* [GC] App no 24645/94 (ECtHR, 18 February 1999) para 34.

[50] *Athwal v State of Queensland* (n 6) paras 103-106

[51] ibid para 104

[52] ibid para 106

[53] ibid para 106

and therefore the "physical possession of a kirpan by a Sikh in a school will constitute an offence"[54] under the Weapons Act. For this reason the Court was clear, and made a declaration to the effect that,

Section 51(5) was inconsistent with Section 10 of the Racial Discrimination Act 1975, which prohibits discrimination on grounds of "race, colour or national or ethnic origin." That being so it was unconstitutional under s 109 of the Australian Constitution Act for 'Inconsistency of laws.' The Court rejected the argument that people of other religions were not put in an advantageous religion because in the words of Dalton J., "[t]here is nothing before the court indicating the presence of any other significant group in the community whose religious beliefs require members to carry a knife" and "carrying a knife is only a feature of the religious observance of Sikhs." The plain fact was that, "[a] law which prohibits a person from carrying a knife in a school for religious purposes impacts on Sikhs by preventing them from lawfully entering schools while adhering to their religious beliefs" and "[t] hat law has no impact on the practice of religion or freedom of movement of other persons." For this reason, "[a]ccount must be taken of the different practical impact which the law directed to a particular ethnic group has on e exercise of freedom of religion and freedom of movement by members of that targeted group"[55] Mitchell AJA agreed, concluding that "the only question raised by this appeal is whether a Sikh necessarily commits a criminal offence against s 51 of the Weapons Act by having physical possession of a kirpan at a school for religious purposes …" and because the restriction was incompatible with the Constitution, " the answer to the question raised by this appeal is 'no'".[56]

## 3.2. MULTANI

The Canadian case of *Multani*,[57] where is even more interesting. This was a case where school entry was not being denied to the pupil, Gurbaj Singh Multani, for wearing a kirpan but only that it be subject to a 'reasonable accommodation." The Court began from the presmise that "[t]he risk of G using his kirpan for violent purposes or of another student taking it away from him is very low…." but on the other hand, "[t]he interference with G's freedom of religion is neither trivial nor insignificant…" in circumstances where "the appellant had proven that his son's need to wear a kirpan was a sincerely held religious belief and was not capricious."[58] The school board, the Commission scolaire Marguerite-Bourgeoys ('CSMB'), sent the parents a letter requiring "reasonable accommodation" requiring them to authorize their son "to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing" and both Gurbaj Singh and his parents agreed to this arrangement."[59] Whilst the Court recognised that, "freedom of reli-

[54] ibid para 107

[55] ibid para 36 of *Athwal*

[56] ibid para 122.

[57] *Multani v. Commission scolaire Marguerite-Bourgeoys* (n 12).

[58] ibid para 11.

[59] ibid para 3.

gion is not absolute and that it can conflict with other constitutional rights,"[60] and "that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others,"[61] it also noted[62] how "[t]his Court has on numerous occasions stressed the importance of freedom of religion." To demonstrate this, it observed, "it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp 336-37 and 351:

> *"'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.*
>
> *. . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.'"*

Crucially, what this meant was that, "it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise."[63] Importantly, it explained that, "[t]he fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed" because "[w]hat an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion," so that, "[t]he religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice."[64] The Court was in no doubt that "[n]o one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times." Moreover, it had evidence before it:

> *"that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation."*[65]

Yet, what the CSMB had based its argument on was once again, the Aristotleian search for essences arising from a specific category of human experience, namely, that, "the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others." To this the Court responded by noting that, "[w]ith respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol." Indeed,

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60 ibid para 30.

61 ibid para 26.

62 ibid para 32.

63 ibid para 32.

64 ibid para 35.

65 ibid para 36.

as "Chaplain Manjit Singh mentions in his affidavit that the word 'kirpan' comes from 'kirpa', meaning 'mercy' and 'kindness', and 'aan', meaning 'honour'" so that although "[t]he there is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan."[66] Such a decision displays considerable judicial sagacity and acumen and not least because, "the standard that seems to be applied in schools is reasonable safety, not absolute safety" which were it to be the case would mean that, "[t]he application of a standard of absolute safety could result in the installation of metal detectors in schools, the prohibition of all potentially dangerous objects (such as scissors, compasses, baseball bats and table knives in the cafeteria)."[67] However, it then added the observation which other judicial tribunals would do well to emulate, namely, that "[t]here is no evidence that kirpans have sparked a violent incident in any school."[68] In the end this was why, "the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it."[69]

The decision of the Court was in line with the views of the local state authorities. Whilst the Surrey School District spokeswoman was clear that, "[w]e have a strict zero-tolerance policy on weapons or something that could be used as a weapon or taken to be a weapon, like a fake gun," the kirpan itself was a religious symbol, not a weapon and that, "[t]he key is how things are used" because "a pen could be used as a weapon, but we're not saying, 'No pens in schools'."[70] Of course, "it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified."[71] As for the idea that, "other students who learn that orthodox Sikhs may wear their kirpans will feel the need to arm themselves so that they can defend themselves if attacked by a student wearing a kirpan"[72] the court held that such an argument, "is purely speculative."[73] The Court concluded by deciding that, "[t]he argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail" because "[n]ot only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.'[74]

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66 ibid para 37.

67 ibid para 46.

68 ibid para 60.

69 ibid para 53.

70 ibid para 61.

71 ibid para 67.

72 ibid para 68.

73 ibid para 69.

74 ibid para 71.

## 3.3. JASKEERAT SINGH GULSHAN

The values of multiculturalism have not always trumped concerns over the safety of the public. This is clear from a recent British case of *Jaskeerat Singh Gulshan*.[75] Sikhs living in Britain have had religious exemptions[76] from facially neutral and generally applicable laws to which the general population as a whole is subject.[77] These exemptions are long-standing. They extend to health and safety regulation. One of the oldest, and the most hard-won exemptions, was the 30-year old Motor Cycle Crash Helmet (Religious Exemption) Act 1976[78] which exempts a turbaned Sikh from wearing a crash helmet when riding a motor-cycle.[79] [80] This exemption was confirmed some fifteen years later by the Road Traffic Act 1988.[81] Since then other exemptions have followed and after 1988 Sikhs can now carry a Kirpan[82] (a blade) of more than 3 inches long in public as a religious symbol under the Criminal Justice Act 1988.[83] This is despite the fact that specific provisions in the Criminal Justice Act 1988 refer to any article which has a blade or point or is sharply pointed[84], except for a folding pocket-knife. A folding pocket-knife is one which has a cutting edge of no more than 3 inches in length and which must be readily foldable at all times.[85] Further,

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[75] Jaskeerat Singh Gulshan (n 18).

[76] Consider the Equality and Human Rights 'Guidance On the Wearing of Sikh Articles of Faith in the Workplace' and public Places: available at <http://www.equalityhumanrights.com/uploaded_files/publications/sikh_articles_of_faith_guidance_final.pdf> accessed 11 February 2025.

[77] For a measure see Tom Peterkin, 'Symbols of Controversy' (*The Telegraph,* 30 July 2008) <http://www.telegraph.co.uk/news/2471337/Symbols-of-controversy.html> accessed 11 February 2025.

[78] Section 2 (A) of the Act Section 2A *"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 4th October 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 at Sikh Missionary Society UK, "Third Reading: House of Lords" <http://www.gurmat.info/sms/smspublications/theturbanvictory/chapter3/> Also see <http://www.justice.org.uk/data/files/events/17/for.pdf> accessed 11 February 2025.

[79] Juss (n 5) 779.

[80] What is evidently not permitted one assumes is the wearing of both a turban and a crash helmet!

[81] See, Section 16(2) of the Road Traffic Act 1988 which reads that, "*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 at <http://www.legislation.gov.uk/ukpga/1988/52/section/16>. Also see <http://www.opsi.gov.uk/acts/acts1988/ukp… > accessed 11 February 2025.

[82] For a history of the Kirpan see <http://www.sikhism101.com/node/235> accessed 11 February 2025.

[83] Section 139 deals with *"Offence of having article with blade or point in public place."* Available at <http://www.legislation.gov.uk/ukpga/1988/33/section/139> accessed 11 February 2025.

[84] Section 139 (2) states *"this section applies to any article which has a blade or is sharply pointed except a folding pocket knife".*

[85] Under s139 (3) *"applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches."* Available at <http://www.legislation.gov.uk/ukpga/1988/33/section/139 > accessed 11 February 2025.

under the Offensive Weapons Act 1996[86] it is permissible for a Sikh to carry a kirpan with a blade, for religious reasons.[87] The Kirpan exemption is all the more remarkable given that the definition of offensive 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."[88] In this way, the state in Britain in recent years has fostered communal harmony by taking active steps to respect the religious traditions of faith communities, that are not framed as 'rights'.[89]

In the *Jaskeerat Singh Gulshan* the Claimant attended Ealing Magistrates Court in order to support a relative who was appearing there.[90] The court described him as "an observant Sikh" and "in accordance with the tenets of his faith he always wears a kirpan.."[91] However, under the Courts Act 2003, court security officers have the power to exclude persons from court buildings and to require the surrender of various articles, including knives.[92] The published guidance for security officers was the Security and Safety Operating Procedures Guidance, version 11 (published in 2018) issued by HMCTS. Section 4 (e) of the Guidance provided that: "Where a member of the Sikh community wishes to enter a court building, they can bring in a Kirpan that meets the following requirements: Overall length is no more than six inches, Blade is no more than four inches in length." The Guidance went onto say that, "If the Kirpan exceeds these lengths, permission to enter may be refused but the senior person onsite must be consulted before any decision is taken." In the Court of Appeal, Underhill LJ explained that the final sentence gave officers a discretion, if they judged appropriate to allow a person to bring in a kirpan of more than the prescribed length.[93]

However, what the claimant argued was "that guidance issued by the Scottish Courts and Tribunals Service is in different terms from HMCTS's Kirpan Guidance."[94] The Scottish guidance reads:

> *"Wearing a Kirpan*
> *A Kirpan may be carried for religious reasons under Section*

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[86] The preamble of the this statute states that it is, *"An 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 "*Increased penalty for offence of having article with blade or point in public place" whereas section 4 makes provision for an "Offence 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 > accessed 11 February 2025.

[87] Under s.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 at <http://www.legislation.gov.uk/ukpga/1988/33/section/139 > accessed 11 February 2025.

[88] See section 1(4) which is available at <http://www.legislation.gov.uk/ukpga/Eliz2/1-2/14/data.pdf > accessed 11 February 2025.

[89] Juss (n 5) 781.

[90] *Jaskeerat Singh Gulshan* (n 18) para 2.1

[91] ibid para 2.2

[92] Sections 52-55A of the Courts Act 2003.

[93] *Jaskeerat Singh Gulshan* (n 18) para 2(3).

[94] *Jaskeerat Singh Gulshan* (n 18) para 14.

> *49(4) of the Criminal Law (Consolidation) (Scotland) Act 1995.*
> *Informing the Court*
> *An initiated Sikh attending court should inform court officials in advance when possible, or on arrival, that a Kirpan is worn. Normal security procedures will be carried out, and the Sikh will be able to wear the Kirpan in court and the court environment.* In the court and its vicinity, the Kirpan must always be sheathed and worn out of sight. If you have any questions regarding the wearing of the Kirpan please contact the court concerned.*
> **there may be exceptional circumstances when this will not be possible and those circumstances will be discussed on application."*

What the claimant argued was that the Scottish guidance contains no restriction on the length of the kirpan that may be worn, although the right is reserved not to permit the wearing of a kirpan in "exceptional circumstances".[95] Although in *Athwal* the Queensland Court had observed that, "[k]irpans come in a variety of shapes and sizes and may or may not have sharp blades,"[96] Underhill LJ gave the argument short shrift, pointing out:

> *"That argument has no prospect of success. Different authorities may reasonably form different views about the risk posed by the wearing of a kirpan in court and how to address it. It is to be noted that even in Scotland the right is not absolute: Sikhs wishing to wear a kirpan in court still have to declare that fact, in advance where possible, and the authorities reserve the right, albeit in exceptional circumstances, to decline permission."*[97]

Insofar as it was argued (at §21) "that the restriction on the right to wear a kirpan of more than six inches in length (albeit subject to a discretion) violates the Claimant's rights under articles 9 and 14 of the European Convention on Human Rights and is accordingly unlawful by virtue of section 6 (1) of the 1998 Act," that argument too was rejected.[98] The rule was not disproportionate to the rights of Sikhs. As Underhill LJ explained, "[i]t is important to appreciate that there is a clear basic rule which enables observant Sikhs to regulate their conduct: they know that they will be permitted to wear a kirpan in court, provided it is no more than six inches long." The result is that, "[b]y definition, any departure from that policy will be exceptional, and it is neither possible nor necessary for guidance of this character to specify in advance what such exceptional circumstances may be….'"[99]

## 4. THE KARA

[95] ibid para 15.

[96] *Athwal v State of Queensland* (n 6) para 36.

[97] *Jaskeerat Singh Gulshan* (n 18) 16.

[98] ibid para 21.

[99] ibid para 25.

The legal cases on the 5 K's have not just been confined to the *kirpan* but have also extended to the *kara*. In the words of Silber J. in *Sarika Angel*[100] *"[i]n recent years, a number of school girls have sought unsuccessfully to challenge rules made by their schools which prevented them from wearing items which they considered necessary as part of their religious faith…."*[101] *One such here was "the wearing of a Kara, which is a small plain steel bangle worn by Sikhs as a visible sign of their identity and faith." This is "5 millimetres wide and is therefore much narrower than a watch strap and many ordinary bangles" and furthermore, "it cannot be seen when the claimant is wearing a long-sleeved sweater."*[102] *Sarika Angel,* a 14 year-old Sikh school girl of Punjabi-Welsh heritage, challenged a decision made by her school, preventing her from wearing a Kara at her school.[103] A teacher at the school had observed the claimant wearing it and asked that it be removed "because it contravened the school's uniform policy; which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils." Interestingly, the Court noted how the claimant "was and remains an observant, although a non-initiated, Sikh."[104] The success of such cases is as is well known often dependent to a very high degree on the quality of the Expert evidence before the Court. In this case, it was assisted, in evaluating "the significance of the Kara to Sikhs"[105] Professor Eleanor Nesbitt, Professor in Religions and Education. She explained the significance of the kara with a depth that had not been done before in a judicial tribunal:

> "The 5 Ks are important as they are intended to distinguish Sikhs from both their Muslim and Hindu contemporaries. In their origin they are closely associated with armed combat and the Sikhs' history of struggle. When Sikhs learn about these martyrs of Sikh identity, they are told about the readiness of some Sikhs to lose their lives rather than to sacrifice their kesh, and this courage-to the point of martyrdom – is emphasised. Thus, the five Ks are regarded as demonstrating both loyalty to the Gurus' teaching and the bravery to be counted at times when even their lives are endangered by this visibility."[106]

However, more importantly, she explained how the significance of the kara extends beyond the tradition of armed combact and into the very realm of a connectedness with God:

> 'The Kara is in origin likely to have been a defence for the sword arm. Sikhs explain its symbolism as a circle that reminds them of God's infinity and speak of their being linked ("handcuffed") by it to God. For many it is a reminder to behave in accordance with religious teaching. Hiding the five Ks is a matter of deep sensitivity. It is important that the Ks be visible, but even more important

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[100] *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7).

[101] ibid para 2.

[102] ibid para 4.

[103] ibid para 6.

[104] ibid para 10.

[105] ibid para 23.

[106] ibid para 25.

> (even if circumstances necessitate that the Kara be temporarily hidden from view) that the Sikh concerned continues to wear it on his/her right arm/wrist."[107]

In fact, the kara is not confined to baptised 'Amritdhari Sikhs' because although "[i]n practice, it is the initiated or amritdhari Sikhs, who observe all 5 Ks" the fact is that "there are of course different levels of devoutness and observance amongst Sikhs" and that "[o]nly a small minority of Sikhs undergo the initiation ceremony or ever intend to." This is why the kara is unique in "that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism."[108]

Given that, "it has never been suggested that the claimant insisted on wearing the Kara merely because she was engaged in challenging the authorities at her school" Silber J. in the High Court was quite clear against the background of the expert evidence before him that, "I can reject the possibility that she is insisting on wearing the Kara in order to be rebellious or just to defy authority." The judge even held that, "I do not believe that the claimant would have taken the stand which she did if she had not come to the considered decision that wearing the Kara was of exceptional importance to her."[109] Referring to "[t]he evidence of Professor Nesbitt" which the Judge held not only "stresses, …, the significance of wearing the Kara to Sikhs" but also "that hiding the Kara is a matter of deep sensitivity" in just the same way, "as is the question is of removing it from the wrist" the Judge went onto refer once again to Professor Nesbitt, who had concluded in her Report that:

> "in my extensive experience of working with and studying Sikhs, of the 5 Ks the Kara is a symbol most commonly worn by Sikhs as an external identifier of Sikhism".[110]

In an emphatic affirmation of the values of pluralism, tolerance and broad-mindedness, which undergird contemporary liberal democratic society, Silber J. went onto point out how, "there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes" because "[w]ithout those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multi-cultural society can be built in this country."[111] The result was that "the school should not have sought to remove the potential cause of tension by refusing to allow the claimant to wear the Kara but second that instead it should have taken steps to ensure that the other pupils understood the importance of wearing the Kara to the claimant and to other Sikhs so that they would then tolerate and accept the claimant when wearing the Kara."[112] Accordingly, "the decision of the defendants not to grant a waiver to the claimant to permit her to wear the Kara

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[107] ibid para 26.

[108] ibid para 27.

[109] ibid para 62.

[110] ibid para 64.

[111] ibid para 84.

[112] ibid para 85.

constitutes indirect discrimination on grounds of race" and also "on grounds of religion." For Silber J., there could be no fear of the floodgates opening because, "[i]f the claimant is permitted to wear the Kara at school, this will be creating an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception…" There were two reasons for this. The first was "the belief of the pupil justified by objective evidence that the wearing of the article is a matter of exceptional importance as an expression of her race and culture." The second was "the unobtrusive nature of the Kara being 50 mm wide and made of plain steel" which put paid to any "fears of the school that by permitting the claimant to return to school wearing her Kara, it will make great inroads into its uniform policy" which were "unjustified."[113]

## 5. CONCLUSION

What the decided cases on religious freedom tell us is that the orthodox idea of state neutrality in matters of religion must be modified to become more pragmatic and community based. This is because it is one thing to say that the State keeps an equal distance between itself and each one of its faith communities because neutrality stops the State from favouring one religion over another. However, it is quite another thing to say that just because state should remain neutral it has no positive obligation to promote the cause of religious freedom in it community, in the interests of public order, public harmony and public harmony. The State must not stand by the side-lines. It is not for the State to judge. That does not mean to say that the State should not be a facilitator of democratic norms and religious values and freedoms.

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