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The Constitution and Sikhs in Britain

*Satvinder S. Juss**

“All ages of Belief have been Great;
all of Unbelief have been mean.”

R. W. Emerson.

How well does the British Constitution protect religious freedom? The Sikhs with their uncut hair, beards, and turbans have centrally posed this delicate question to one of the reputedly most liberal and tolerant countries in the world. Sikhism is one of the world's youngest religions, and certainly Sikhs in Britain should have few misgivings, as they are able to practice their faith as well as anywhere else, and in some cases much better. But how much more flexible and accommodating can Britain's unwritten Constitution be? And may there be lessons here for other countries? The question is important both from the perspective of being able to provide a representative analysis of recurrent problems that Sikhs are facing in the world generally, as well as a particular kind of religious problem that Britain is having to face with its minority communities.

There are 17 million Sikhs worldwide,¹ six million of whom are settled outside India in places as diverse as East Africa, Malaysia, Great Britain, Canada and America in distinct communities. In Britain specifically, Sikhs comprise a population of 400,000 inhabitants in an ethnic minority population of just under three million. Although no town in

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1. KHUSHWANT SINGH & RAGHU RAI, *THE SIKHS* (1984).

Britain presently has an ethnic minority population of more than 50 per cent, this population, which makes up 5.6 per cent of the total population, is likely to double to six million in the next 40 years. However, these minorities will still remain very much a minority, according to the latest census report on the subject, and will still be less than 10 percent of the total population.² As a result, their concerns about cultural and religious freedoms are likely to become more—not less—pressing and governments are going to come under increasing pressure to address such concerns.

As a Sikh who originates from India, was born in East Africa, and now lives in Britain, I confess to having a special interest in these issues as issues of civic rights and of the Constitution. Yet, the paradox is that a concept of civic rights and a Constitution are both unknown and unfamiliar to the ordinary person on the street in Britain. The result is that a person may well increasingly wish to retain his cultural and religious identity as the very essence of his being, and yet find no means of articulating or espousing that right through the language or vehicle of the law.

I propose that an answer for such countries as Britain lies in a Religious Freedom Restoration Act similar to the one recently passed in the United States.³ The question of constitutional reform is presently high on the agenda in Britain. Various proposals have been put forth such as a bill of rights, a written constitution and the incorporation of the European Convention of Human Rights into Britain's domestic statutes.⁴ All of these have merit and there is no doubt that some reform is now inevitable.

But no significant voice has been raised for the passage of an ordinary statute in Parliament to deal specifically with the most fundamental concern of the ethnic minority communities:

2. Richard Ford, *UK's Ethnic Minorities 'Will Double in 40 Years'*, THE TIMES (London), January 20, 1994.

3. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et. seq.* (Supp. V 1993).

4. The literature on this subject is burgeoning, but see especially, A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 415-430 (11th ed. 1993); R. DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990); INSTITUTE FOR PUBLIC POLICY RESEARCH, A WRITTEN CONSTITUTION FOR THE UNITED KINGDOM (Robert Blackburn ed., 1993); JOSEPH JACONELLI, ENACTING A BILL OF RIGHTS (1980); JEFFREY JOWELL & DAWN OLIVER, THE CHANGING CONSTITUTION 33-56, 79-108 (3rd ed. 1994); DAWN OLIVER, GOVERNMENT IN THE UNITED KINGDOM 146-168, 187-217 (Milton Keynes ed., 1991).

namely, their right to be themselves and to live by their faith without fear of discrimination. Perhaps this is not surprising because the protection of individuality, of heterodox opinion, or even of eccentric conduct, has not been a fundamental purpose of the British system of government as it is in the American Constitution. Yet it is clear, in my view, that the passage of a simple statute on religious freedoms would be far more consistent with the British system of securing rights through ordinary legislation⁵ than either an entrenched bill of rights or a written constitution which would require a radical overhaul. Incorporation of the European Convention is more appealing and an attempt was made earlier this year to pass it as a British act in Parliament by the foremost advocate of civil rights, Lord Lester of Herne Hill. Introducing the Bill, he referred to the Convention as "the jewel in the crown" of the Council of Europe which had been included in the domestic legislation of every country except Britain and Ireland. Britain stands particularly indicted in this because between 1970 and 1990, the European Court of Human Rights at Strasbourg successfully heard thirty-seven cases against the British government on such issues as free speech, equality and fair trials, a higher rate than against any other European country. Senior judges, including the Lord Chief Justice and Lord Taylor, are now in favor of incorporation, but the move has been consistently resisted by the Government, most recently as being "undesirable and unnecessary in principle and in practice."⁶

There are certainly provisions in the European Convention that would assist the effective protection of religious liberty. Namely, Article 9, which protects "the right to freedom of thought, conscience and religion," and the "[f]reedom to manifest one's religion or beliefs."⁷ It is also the case that incorporation would be less controversial than formulating a domestic bill of rights where agreement between political parties on such issues as the minimum wage and the right to belong to a trade union would be very difficult.⁸

5. See *infra* parts III.B.1-6.

6. Kate Chattaway, *Lord Chief Justice Urges Adoption of Human Rights Law*, PRESS ASS'N NEWSFILE, January 25, 1995.

7. For a recent account of this see W. Cole Durham et al., *The Future of Religious Liberty in Russia, Report of the De Brught Conference on Pending Russian Legislation Restricting Religious Liberty*, 8 EMORY INT'L L. REV. 16-17 (1994).

8. Anthony Lester, *Incorporating the Convention*, LEGAL ACTION, April 1990,

In fact, even the Council of Europe has urged Britain this year to implement the Convention to prevent cases being lodged at Strasbourg.⁹ However, the Convention has been consistently opposed in government as something alien and unnecessary to Britain's Constitutional traditions. Moreover, even its chief proponent, Lord Lester, accepts that it is a "source of general principles" that "is no substitute for detailed and precise legislation on particular topics, such as race and sex discrimination"¹⁰ This has been precisely America's experience, which is why despite the Religious Clauses of the First Amendment, it drifted inexorably to the passage of the detailed Religious Freedom Restoration Act of 1993.

I believe that the argument is even more compelling in the case of Britain, not because it has no protection for such freedoms in its Constitution, but because in Britain this is the accepted way of doing things.¹¹ There is, therefore, no conceptual or intellectual difficulty. The only difficulty is that of *deciding* to legislate and then of deciding *what to include* in the legislation.

I believe that Britain has erred fundamentally in this respect when it comes to legislating to protect the rights of religious minorities, and that unless this error is soon rectified through specific legislation, the demands of religious minorities will get ever more vocal in the next forty years. I will show that what Britain has done is to treat the religious problem as a racial problem that can be resolved through the application of equality and non-discrimination norms. Consequently, it has passed in the last thirty years a series of Race Relations Acts which contain no hint of outlawing discrimination on religious grounds.¹²

Yet, the reality is that whereas racial minorities are often religious minorities, religious minorities are not necessarily racial minorities. Consequently, formally neutral and generally applicable state laws are more likely to lead to offenses against the rights of religious minorities than against racial minorities, who are normally only affected if there has been an express

at 26.

9. Daniel Tarsychys, the Secretary-General of the 34 nation Council of Europe publicly urged the British Government to commit itself to enshrining the Convention into domestic law. See THE TIMES (London), February 15, 1995.

10. Lester, *supra* note at 8.

11. See *infra* parts III.B.1-6.

12. See *infra* parts IV.B.1-3.

breach of non-discrimination or equality principles.¹³ The history of the Race Relations legislation, I shall argue, is woefully deficient in this respect.

The question, however, is why Britain has chosen to proceed thus. I shall argue that the reasons lie in its own sense of insecurity about religion, and in a history strewn with a battle-torn period of constitutional crises, during which Britain's own right to religious belief was very hard won and then confirmed through a series of religious liberty statutes.¹⁴ This sense of religious insecurity is still evident today. For example, recently the British government made the teaching of Christianity a compulsory part of the state school curriculum at the insistence of the House of Lords in an Act that was only intended to lay down the essential elements of educational syllabuses in the national curriculum, even though most people in Britain today would not regard this education to be essential to their lives in a secular society.¹⁵ To demonstrate the reasons for this continued tendency in history, I shall have to take the reader through the relevant parts of British history. This will then help us to see why the simple passage of a detailed religious freedom statute would be the most straightforward and efficacious way of securing rights to religious freedom.

My argument is that America had to pass the 1993 Religious Freedom Restoration Act following the *Smith* decision by the Supreme Court in 1990.¹⁶ Britain should have passed a similar act immediately after the House of Lords' decision in

13. The point has been well made in the pages of this journal. See Douglass Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 221-258.

14. See *infra* parts III.A.B.3.

15. The Educational Reform Act of 1988 which requires all pupils to take part in a daily worship "of a broadly Christian character." See The Educational Reform Act of 1988, §§ 6, 7. This has been criticized because "[w]ith nearly a third of the people in this country having no connection with any church or religion, and with only a minority attending church, compulsory religion in schools is a dishonesty that nobody who has the moral welfare of children at heart should support." See also *Letters to the Editor: Religious Education Offers a Touchstone for Faith*, THE INDEPENDENT, February 2, 1995. Similarly, the Archbishop of York, Dr. John Habgood, the Church of England's second most senior figure has questioned the need for daily religious assemblies in schools. He said, "It is absolutely clear that schools do not create Christians and should not be expected to." John O'Leary, *Habgood Questions Need for Religious Assembly in Schools*, THE TIMES (London), January 6, 1995.

16. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Mandla in 1983.¹⁷ *Smith* cried out for legislation because the Court held that so long as the law is generally applicable, and not discriminatorily aimed specifically at religion, the government may interfere with religion provided that the government interest was legitimate. *Mandla* cried out for legislation (and continues to cry out) for the far more fundamental reason that religious discrimination is not unlawful in Britain. Parliament has not outlawed it in the *Race Relations Act 1976*¹⁸ since such discrimination "does not constitute a severe burden on members of religious groups."¹⁹ Given this, the only way a Sikh boy, barred from attending a private school for wearing his turban, could successfully fight his exclusion from the school by the Headmaster was to show himself to be subject to discrimination on "ethnic or national" grounds. In *Mandla*, the House of Lords held that he could.²⁰ After *Smith* in 1993, American legislation required States to provide religious exemptions from generally applicable laws, and in essence, mandated religious accommodation unless there is found to be a compelling state interest.²¹ Already a Sikh boy in California has been able to successfully rely on this law against a school policy prohibiting the possession of knives on school property. The District Court held that the school's no-knives policy could not be used to ban the possession of *Kirpans* (ceremonial knives) that Sikhs must have on their person as an article of their faith.²² Britain has done nothing, but should now follow that example, particularly as the *Mandla* case has not only failed to protect other religious groups such as Rastafarians,²³ but also other Sikhs in other situations.²⁴

I believe that adopting or adapting Section 3 of the Religious Freedom Restoration Act of 1993 has great potential in securing religious liberties in Britain because it would, under Britain's constitutional principle of parliamentary

17. *Mandla v. Dowell Lee*, [1983] 2 App. Cas. 548.

18. *See infra* part IV.B.3.

19. *Mandla v. Dowell Lee*, [1983] 2 App. Cas. 548, 568 (Lord Templeman).

20. *See facts of Mandla infra* part IV.E.

21. *See Rex E. Lee, The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 90.

22. *See Cheema v. Thompson*, 36 F.3d 1102 (9th Cir. 1994). I am very grateful to Professor Angela Carmella of the Harvard Divinity School for sending me a transcript of this judgement soon after it was given.

23. *Crown Service v. Dawkins*, 22 *Law Society Gazette* R.36 (1991).

24. *See infra* part IV.E.

supremacy which means that Parliament's sovereignty is omnipotent and continuing (at least domestically), impliedly repeal all earlier inconsistent statutory enactments. Section 3 reads:

(a) Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling interest.²⁵

Such an enactment potentially stands to repeal, to the extent of their inconsistency with the enactment, earlier seventeenth century statutes that are anti-Catholic because a later Parliament that is omnipotent and sovereign has legislated against the continuance of such discriminatory religious practices.²⁶ Of course, it may be argued that this cannot be done because those earlier defining statutes of the seventeenth century are fundamental law, such as the Bill of Rights of 1689, the Union with Scotland Acts of 1706 and the Union with Ireland Act of 1800.²⁷ I will address this point in this

25. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et. seq.* (Supp. V 1993).

26. This is the doctrine of "implied repeal" in British Constitutional law, as seen in such cases as *Ellen Street Estates, Ltd. v. Minister of Health*, [1934] 1 K.B. 590, 596, where Lord Justice Maugham said in the Court of Appeal:

The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.

Id. at 597 (Maugham, L.J.).

27. For a discussion of the Union with Scotland Acts see *infra* part III.B.6. It has been argued that since the Union with Scotland Acts were antecedent to the new Parliaments they created, they were constituent Acts bringing into effect a new state and a new Parliament. See J.B.D. MITCHELL, *CONSTITUTIONAL LAW IN NORTHERN IRELAND* Chapter 1 (1968). But a contrary view is taken by another leading constitutional lawyer. See C. MUNRO, *STUDIES IN CONSTITUTIONAL LAW* Chapter 4 (1987). The fact is that provisions of allegedly fundamental statutes

paper,²⁸ but I do not accept that legislation can be fundamental in the conventional sense in a system of government such as Britain's, and even if it could, surely the Religious Freedom Restoration Act is just as fundamental as any other statute, just as the Race Relations legislation is, and just as the European Economic Communities Act of 1972 is, and yet each of these affected important changes and each was passed in an ordinary legislative process.

Clearly, therefore, what this tells us is that fundamental changes can be wrought in the British system through the passing of a statute.²⁹ Since Parliament is continuously omnipotent, it cannot bind the hands of its successors and what it decides goes. It would be different if Parliamentary supremacy was self-embracing and not continuous because then, Parliament could decide each matter only once³⁰ during

have been amended or repealed (e.g. the Universities (Scotland) Act 1853 and the Irish Church Act 1869) and the Union with Ireland was dissolved in 1922 when Southern Ireland was given independence. The nature of the Union with Scotland Acts has been considered in several Scottish cases but has not been decided. In *MacCormick v. Lord Advocate*, 1953 S.L.T. 255, Ct. of Sess., two members of the Scottish public petitioned the Court of Session for a declaration that a proclamation describing the Queen as "Elizabeth the Second of the United Kingdom of Great Britain" was illegal. The Lord President (Cooper) held that

there is neither precedent nor authority of any kind for the view that the domestic Courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not to conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union.

Id.

Similarly, in *Gibson v. Lord Advocate*, 1975 C.M.L.R. 563, Lord Keith declared, "Like Lord President Cooper I prefer to reserve my opinion on what the position would be if the United Kingdom Parliament passed an Act purporting to abolish the Court of Session of the Church of Scotland."

In *Ex parte Canon Selwyn*, 36 J.P. 54 (1872), the question was raised whether the Irish Church Act 1869 was validly passed because this Act disestablished and disendowed the Episcopal church in Ireland, and yet, Article 5 of the Treaty of Union with Ireland in 1800 had established it forever. It was argued that the Act of 1869 was contrary to the Coronation Oath and Act of Settlement 1700 (both discussed *infra* parts III.B.2, III.B.5). Chief Justice Cockburn held that "there is no judicial body in the country by which the validity of an act of parliament could be questioned." In my view, this is all-revealing, for it is clear that Parliament may through its sovereignty repeal any act at any time, and there is no statute that hierarchically ranks above another in the British system of government.

28. See *supra* note 27 and *infra* parts III.B.1-6, where some of the so-called "fundamental" statutes are discussed in detail.

29. See *supra* note 27 and *infra* parts III.B.1-6.

30. H.L.A. Hart explained that the English doctrine of Parliamentary Supremacy is nothing more than a "rule of recognition" employed by the Courts to

its life-time of five years. It is clear, therefore, that religious freedoms in Britain can be secured for the Sikhs by a simple legislative enactment, until such time that more radical constitutional reform arrangements can be brought into effect.

I will now consider why the Sikhs, as a community in Britain, need such legislation. To make out a case for this, we must first consider Sikhism as a religion,³¹ Sikhism in Britain,³² the nature of Britain's constitution,³³ Britain's historical treatment of religious freedom,³⁴ and Britain's contemporary protection of the religious rights of Sikhs.³⁵ Then we can determine what Britain must do to better protect the religious liberties of its Sikhs and other minority religions.³⁶

I. SIKHISM IN BRIEF

Sikhism is an established minority religion in India where it is followed by eleven million people. It is doctrinally distinct as a faith³⁷ from other religions such as Hinduism and Islam

identify valid rules of law. He said:

the formula "Whatever the Queen in Parliament enacts is law" is an adequate expression of the rule as to the legal competence of Parliament, and is accepted as an ultimate criterion for the identification of law. The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is, after all, only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the existence of which can only be enjoyed once. These two questions of omnipotence have their parallel in two conceptions of an omnipotent God: on the one hand, a God who at every moment of His existence enjoys the same powers and so is incapable of cutting down those powers, and, on the other, a God whose powers include the power to destroy for the future His omnipotence. Which form of omnipotence - continuing or self-embracing - our Parliament enjoys is an empirical question concerning the form of rule which is accepted as the ultimate criterion in identifying the law.

Hart has no doubt if the present rule is that of continuing sovereignty, then Parliament "cannot protect its statutes from repeal." See H.L.A. HART, *THE CONCEPT OF LAW* 145-56 (1961). In my view, this reaffirms that those statutes cannot be fundamental under the present system.

31. See *infra* part I.

32. See *infra* part II.

33. See *infra* parts III., III.A.

34. See *infra* parts III.B-III.B.6.

35. See *infra* part IV.

36. See *infra* part V.

37. The best works on Sikhism are JOSEPH D. CUNNINGHAM, *A HISTORY OF*

which have been followed in India for hundreds of years. It is necessary to give a brief description of Sikhism here for two reasons: first, to help explain the basic tenets of the faith to the general reader who may not be wholly familiar with the Sikhs, and in so doing, show how those tenets have, over time, in their history, helped constitute the Sikhs as a distinct people³⁸ and a nation; second, to show from this brief history how important sensitive treatment by the law is to religious minorities who have been so defined by their history and by their culture.³⁹

Such minorities, wherever they are, will by definition not have the means to secure the protection of their religious values through legislative or even judicial process because those two agencies will be subject to the determining influences of the religious, political and social ideologies of the *majority* faiths in society. A minority faith cannot avail itself of the luxury of working through the normal democratic processes. That is what makes it a minority. Yet, there is a critical, individual element of human dignity in those minorities which the law of religious liberty must protect, and which the science of law must perfect if it is to gain both respect and acceptability from precisely those individuals upon whom it impacts.⁴⁰

The history of the Sikhs bears this out, for it is not the culture or the social structure that distinguishes Sikhs from their fellow brethren in the region of their origin, but their faith that stands them apart and defines them. For law, this poses a special challenge. Law has to focus specifically on religion, to give vent to religion as a specific individual freedom

THE SIKHS: FROM ORIGIN OF THE SIKH NATION TO THE BATTLE OF SUTLEJ (1966); MAX A. MACAULIFFE, *THE SIKH RELIGION - ITS GURUS, SACRED WRITINGS AND AUTHORS* (1909); COLE W. OWEN & P.S. SAMBI, *THE SIKHS: THEIR RELIGIOUS BELIEFS AND PRACTICES* (1978); KHUSHWANT SINGH, *A HISTORY OF THE SIKHS* (Princeton rev. ed., 1991). The best recent work in the English language is Terence Thomas, *Old Allies, New Neighbors: Sikhs in Britain*, in *THE GROWTH OF RELIGIOUS DIVERSITY, BRITAIN FROM 1945* 205-241 (G. Parsons ed., 1993). This provides a detailed account of Sikhs in Britain.

38. The existence of Sikhs as a distinct group in their own right is now judicially recognized by the House of Lords, the highest court in Britain. *See infra* text accompanying notes 154-167.

39. Nowhere is this more clear than in the events leading up to the removal of Prince Duleep Singh from the Punjab to England, to his conversion to Christianity, and to the events thereafter. *See infra* part II.

40. The success of law is ultimately dependent on its consensual acceptance by those that it affects. Otherwise, the impact of all law will be limited.

in its own right. However well-meaning the intent, if legal provisions focus simply and purely on non-discrimination or equality norms based on racial categorizations, they are bound to miss the mark. The history of the Sikh religion, rich and varied as it is, demonstrates this point amply.⁴¹

Sikhism originated in Northern India, in a fertile area known as the Punjab, the land of five rivers. The term *Sikh* derives from the ancient Indian classical language, Sanskrit, in which the word *shishya* means "disciple" or "to learn." Sikhs learn from their *Guru*, which means learned teacher. There were ten Gurus during the formative years of Sikhism between 1539 and 1708.⁴² Of these, the first, Guru Nanak (1469-1539), and the last, Guru Gobind Singh (1666-1708), are the most important. Of the ten, only the sixth, Guru Hargobind (1595-1644), and the tenth took up arms. They did so while the developing egalitarian ideals of the faith began to question the existing social and political structure in the Punjab.⁴³ The Moghul Emperors in New Delhi saw this questioning as a threat to their authority and resorted to persecution.⁴⁴ The sixth Guru took up arms after the fifth, Guru Arjan Dev (1563-1606), was burned alive by Emperor Jahangir for refusing to convert to Islam.⁴⁵ The irony is that Jahangir was the son of Emperor Akbar, one of the greatest and most enlightened rulers the world has ever seen and "who made bigotry impossible."⁴⁶ The tenth Guru took up arms after the ninth, Guru Tegh Bahadur (1621-1675), was publicly and ceremoniously beheaded by Emperor Aurungzeb in the center of what is now Old Delhi.⁴⁷ It seems that "the Moghul Empire

41. See *infra* part IV on the limitations inherent in the Race Relations legislation in this respect and in the House of Lords decision in *Mandla*.

42. These were: Guru Nanak (1469-1539); Guru Angad (1504-1539); Guru Amar Das (1479-1574); Guru Ram Das (1534-1581); Guru Arjun Dev (1563-1606); Guru Hargobind (1595-1644); Guru Har Rai (1630-1661); Guru Harkrishan (1656-1664); Guru Tegh Bahadur (1621-1675); Guru Gobind Singh (1666-1708). The term "Singh" means "lion" and after the last Guru every Sikh male has this as his middle name. Every Sikh female has "Kaur" as her middle name and this means "queen."

43. See the excellent account by Sunita Puri. SUNITA PURI, *ADVENT OF SIKH RELIGION* (1993).

44. See M. ALAM, *THE CRISIS OF EMPIRE IN MUGHAL NORTH INDIA, AWADH AND THE PUNJAB 1707-1748* 135, 144, 153, 315 (1986); see also R.P. TRIPATHI, *RISE AND FALL OF THE MUGHAL EMPIRE* (1976).

45. B.S. NIJJAR, *PUNJAB UNDER THE MUGHALS* (1968); J.N. SARKAR, *HISTORY OF AURANGZEB* (1973); GANDA SINGH, *GURU ARJUN'S MARTYRDOM* (1969).

46. K. ARMSTRONG, *A HISTORY OF GOD* 303 (1993).

47. See J.S. GREWAL & S.S. BAL, *GURU GOBIND SINGH: A BIOGRAPHICAL*

never recovered from the destructive bigotry he had unleashed and sanctified in the name of God,⁴⁸ and it was not long before under the tenth Guru, Guru Gobind Singh, the Sikhs defeated the Moghuls.⁴⁹ Aside from this testing period, the faith has remained committed to the pacifist ideals of its founder, Guru Nanak, except for the apparent resurgence of militancy in modern times.⁵⁰

Guru Nanak laid down the essential philosophical foundations of the faith.⁵¹ He set out to simplify and democratize religion. He taught that God was personally knowable to every man, woman and child through personal devotion. He spoke and wrote in the ordinary language of the day. He rejected the select priesthood's ritual incantation of a sacred Sanskrit text that no one else could easily understand or employ and he rejected ritual, icons and sacrifice. He preached personal devotion to a personal God. This devotion was expressed through meditation (*bhakti*), the utterance of the name of God (*Nam*), and the singing of hymns (*shabads*). Any person irrespective of sex, status or creed, could achieve *nirvana* or union with God through such personal acts of devotion. Similarly, any person, whatever his sex, status or creed, could read the sacred text and officiate as priest at religious ceremonies. The sacred text for all Sikhs is called the *Guru Granth Sahib* (literally, the *Revered Book Guru*). The *Granth* is written in the Punjabi language, the spoken language of the Sikhs. It contains 5,894 holy verses in 1430 pages. Its first correct English translation was undertaken by Max Arthur Macauliffe and published by Oxford University Press in 1909.⁵² It has been described by Miss Pearl S. Buck who has said of it that:

STUDY (1967); C.H. LOCHLIN, *THE GRANTH OF GURU GOBIND SINGH AND THE KHALSA BROTHERHOOD* (1971); DALIP SINGH, *GURU GOBIND SINGH AND KHALSA DISCIPLINE* (1992); KARTAR SINGH, *GURU GOBIND SINGH AND THE MUGHALS* (1967).

48. ARMSTRONG, *supra* note 46, at 304.

49. See ALAM, *supra* note 44, for a full account.

50. A thorough account of this is given by the leading writer of Sikh history, Khushwant Singh. KHUSHWANT SINGH, *MY BLEEDING PUNJAB* (1992). See also COLONEL P. BHULLAR, *THE SIKH MUTINY* (1987).

51. J.S. GREWAL, *GURU NANAK IN HISTORY* (1969); S.S. KOHLI, *PHILOSOPHY OF GURU NANAK* (1969); W.H. MCLEOD, *GURU NANAK AND THE SIKH RELIGION* (1975); DEWAN SINGH, *GURU NANAK AND THE INDIAN MYSTIC TRADITION* (1981); GOPAL SINGH, *GURU NANAK* (1967).

52. See MACAULIFFE, *supra* note 37.

Shri Guru Granth Sahib is a source-book, an expression of man's loneliness, his aspirations, his longings, his cry to God and his hunger for communications with that Being. I have studied the scriptures of other great religions but I do not find elsewhere the same power of appeal to the heart and mind as I find in these volumes.⁵³

Written by the first five Gurus until the martyrdom of Guru Arjan Dev in 1606 who completed it in 1604, the *Granth* contains the sacred and divinely inspired Word (*Shabad*) uttered by these Gurus from which the disciple gains all wisdom. Other Gurus often wrote, and sometimes quite copiously, as did the tenth, Guru Gobind, but these writings are not included in the *Granth*.⁵⁴

By the time of Guru Gobind Singh the faith had developed over nearly two hundred years. It had achieved much of its doctrinal objectives. Charity and a sense of communal responsibility had been instilled. Sikh temples had been established.⁵⁵ Sikhs met regularly at the temple to share a common meal (*guru-ka-langar*) whereby all, no matter king or pauper, were bound to sit and eat together on equal terms. In congregational terms, this meal is almost as important as prayer. Guru Gobind Singh did not seek to elevate himself over his disciple Sikhs. He insisted that he was just like them. When he died in 1707, he decreed that there should be no act of remembrance of him and that all future authority should henceforward come from the *Guru Granth Sahib* and the community, with no further living Guru.

Nevertheless, Guru Gobind's achievements are considerable, not the least of which being that he left the Sikhs in their final physical form, the most striking representation of which is the turbaned Sikh male with his uncut hair. Guru Gobind's most significant achievement was his foundation in 1699 of a fellowship of committed devotional believers called the *Khalsa* (or the "Pure Ones"). Each member was initiated into the order, the *Khalsa Panth*, by drinking a sweet nectar (*amrit*) of water and special sugar crystals stirred with a steel sword in a steel bowl, by which the initiates assumed the name

53. G.S. SACHA, *THE SIKHS AND THEIR WAY OF LIFE* 17 (1988).

54. Guru Gobind Singh's writings are contained separately in the *Dasam Granth*.

55. See J.S. GREWAL, *FROM GURU NANAK TO MAHARAJAH RANJIT SINGH* (1982).

Singh (Lion). Initiates were then to carry five symbols on their persons as a continuing affirmation of their faith as the *Khalsa* Sikhs and to ensure that their vows were not forgotten. The symbols were: (i) the uncut hair, *the Kes*, which men must keep covered with a turban; (ii) a small comb, *Kanga*, to keep the hair clean; (iii) a steel wrist bracelet, *Kara*, worn always on the forearm; (iv) a short ceremonial dagger, *Kirpan*, worn discreetly; (v) knee length pants or breeches, *Kaccha*. These five symbols are known as the Five Ks.⁵⁶ They may be interpreted in doctrinal or ethical terms: the steel bracelet may symbolize the completeness of faith or remind a *Khalsa* of his vows as he performs daily tasks, and pants may symbolize chastity. Terence Thomas has also written that "viewed phenomenologically, it is fairly clear that apart from the uncut hair and beard, the signs reflect the military aspect of the Sikh faith, the bracelet being the remnant of the swordsman's wrist protector, the knee-length pants the dress of the infantryman."⁵⁷

According to Alam, the tenth Guru "transformed the character of the Sikh religion" and "converted it into a militant organization."⁵⁸ In truth, Sikh worship begins and ends with someone uttering "*wahe guru ji ka khalsa*" ("the *Khalsa* is dedicated to God"). Moreover, militancy or the military aspect is not a permanent feature of the *Khalsa*. It is only justifiable in the quest for justice when all else fails. Guru Gobind Singh himself viewed the *Khalsa* as embodying the dualism of the saint/soldier (with the saint coming first) both inwardly and outwardly. This view was doctrinally consistent with the teachings of Guru Nanak and it is regretful that the saintliness is far less commented upon these days than the soldierly qualities.

Nevertheless, the *Khalsa* is now synonymous with Sikhism, and the *Khalsa* predominates in orthodox Sikhism, despite the fact that thousands of Sikhs follow Guru Nanak in such sects as the *Nirankaris*,⁵⁹ the *Namdharis*,⁶⁰ and the

56. DALIP SINGH, GURU GOBIND AND SIKH DISCIPLINE (1992).

57. Thomas, *supra* note 37, at 213.

58. ALAM, *supra* note 44, at 135.

59. The *Nirankaris* were founded by Baba Dyal Singh (1783-1854). They were opposed to idolatry, advocated the reform of rituals in birth, marriage and death, and were originally limited to urban Sikhs in the north-west.

60. The *Namdharis* were founded by Bhai Balak Singh (1799-1862). They led simple austere lives, had their own line of Gurus and denounced rituals. They

Radhaswamis.⁶¹ These *Sahajdhari* (those who are connected) Sikhs do not necessarily wear turbans or keep their hair long. They follow a line of living Gurus, unlike the mainstream and orthodox Sikhs that we have described above. Sometimes they may refer to themselves as *Nanakpathis* (Nanak sectarians). This rich diversity in Sikhism shows the influences on Sikhism of both Hinduism and Islam, the two great religions of the subcontinent. Yet, it is crucial to understand that Sikhism is not a synthesis of these older religions but a new religion in its own right expounding a new road to the realization of God.⁶²

simply repeated the name of God, or *Nam*, in prayer (hence *Nam-dhari*) and denounced both the claims of superiority and reverence made by the *Bedi* descendants of Guru Nanak and the caste system.

61. The *Radhaswamis* were led by a Hindu banker, Shiv Dyal (1818-1878), and based their teachings on the lives of the first Gurus in the *Guru Granth Sahib* and rejected the rest. They appealed to the clean-shaven Sikhs in the educated classes who were Hindu-oriented or to the Hindus who were Sikh-oriented.

Each one of these movements started as a reform movement in Sikhism, because in the nineteenth century, Sikhism as a creed was very much in decline. Hinduism threatened to absorb it, and British rule, coming ten years after the death of Maharajah Ranjit, brought with it Christian missionaries. They introduced an aggressive brand of proselytism hitherto unknown in the Punjab, employing professional preachers and the printing press for mass dissemination of their beliefs. See R.A. KAPUR, *SIKH SEPARATISM: THE POLITICS OF FAITH* (1986).

These three reform movements, however, were not mainstream movements, and in 1873 the *Singh Sabha* (assembly) was founded after four Sikh students of the Amritsar Mission School converted to Christianity. In 1879 a second *Singh Sabha* was set up in Lahore. By 1899, there were over 121 *Singh Sabhas* which organized *divans* (religious meetings), preached reform, established schools and orphanages, and used preachers to spread reformist ideology throughout the countryside. Funds came from individual subscriptions and from members of the Sikh intelligentsia. The movement was firmly mainstream with a huge dint of populism about it. It addressed itself to genuine communal grievances, and reached its high-point in the first two decades of the twentieth century. Each *Singh Sabha*, in its own way, generated a robust and flourishing debate about Sikh identity and culture in a way hitherto unknown. The result was that the drift to other faiths was solidly checked. Since the hallmarks of this movement were educational and literary, I have always believed that the protection of Sikh religious freedoms in the West can be maintained through a present adoption of the values and practices of the *Singh Sabha*. See Satvinder Juss, *A Singh Sabha for the Future?*, *KHALSA: A NEWSLETTER OF THE SIKH & PUNJABI SOCIETY, UNIVERSITY OF CAMBRIDGE* 10-20 (Lent Term, 1988). For information on the *Singh Sabha*, the reader is referred to: S.S. GANDHI, *PERSPECTIVES ON SIKH GURDWARAS LEGISLATION* (1993); GANDHA SINGH, *THE SINGH SABHA AND OTHER SOCIO-RELIGIOUS MOVEMENTS IN THE PUNJAB, 1850-1925* (1984); MOHINDER SINGH, *THE AKALI STRUGGLE* (1988).

62. Western writers, such as Ernest Trumpp and W.H. McLeod, have sometimes taken the view that it is. See TRILOCHAN SINGH, ERNEST TRUMPP AND W.H. MCLEOD, *AS SCHOLARS OF SIKH HISTORY, RELIGION AND CULTURE* (1994). Regrettably, some of the language in this work is immoderate. The reader is more readily recommended DARSHAN SINGH, *WESTERN PERSPECTIVE ON THE SIKH*

This can be explained if we look at the social and religious background that caused Sikhism to develop in the beginning.

The roots of Sikhism lie firmly with Guru Nanak. Guru Nanak came from the *Bhakti* movement, which was in turn influenced by the *Sufis*. The *Sufis* emerged in Persia in the tenth century advocating mystical doctrines of union with God achieved through the love of God. The *Sufis* were secretive, aloof and lived in seclusion. In India, they founded three main orders: *Chisti* based around Delhi and the Doab and among whose members figured the historian Barani and the legendary poet Amir Khusrau, *Suhrawardi* based in the Sindh, and *Firdausi* based in the Bihar. All three orders of *Sufis* dissociated themselves from the established centers of orthodoxy because they believed that the *Ulema*, the Muslim Priesthood, misinterpreted the Quran. They felt that the *Ulema* were combining religion and political policy, cooperating with the sultanate and deviating from the original democratic and egalitarian principles of the Quran. Because the *Sufis* remained isolated from the society they opposed, their impact has been less direct and enduring today than it otherwise might have been. The leaders of the *Bhakti* movement, called *Santas* (or saints), traced their lineage to the devotional cults of India and shared common ground with the *Sufis*, but they did not believe in *Sufi* mysticism. Nor were the *Bhakti* saints aloof or isolated from the people; they wanted to make their teaching comprehensible to the less educated. They attacked caste, institutionalized religion that was rigidly controlled by a priesthood and the worship of icons, and encouraged women to join their gatherings where they were taught in the local vernacular. The *Bhakti* saints came from a variety of backgrounds. There were members of lower castes and outcasts such as *Kabir*, the weaver, and *Ravidas*, the leather worker, both of whose writings were incorporated into the *Guru Granth Sahib*. It has been suggested that:

Although Islam predominated culturally in Moghul India, Hinduism remained vital and creative and some Muslims and Hindus co-operated in the arts and intellectual projects. The subcontinent had long been free of religious intolerance and during the fourteenth and fifteenth centuries the most creative forms of Hinduism stressed the unity of religious

aspiration: all paths were valid provided that they stressed an interior love for the one God.⁶³

Guru Nanak himself came from a rural background. He was the son of a village accountant. Although Hindu, he was educated through the generosity of a Moslem friend and was later employed as a storekeeper in the Afghan administration. Subsequently, he joined the *Sufis* and left home even though he was married and had three children. Guru Nanak's most important contribution, however, came when he left the *Sufis* to travel and to teach. He undertook four journeys between 1500 and 1522 ranging from between two to ten years. In these journeys he travelled across the width of India to Bengal, across its length to Sri Lanka, up north through Tibet to what later became the USSR, and finally westward to Mecca in Saudi Arabia. Eventually, he returned to his family and children to settle in India and preach to his disciples.⁶⁴ Historically, Guru Nanak and *Kabir* (1440-1518) are the most important saints of the Bhakti movement. Both provided the turning point for the movement, and both expressed the sentiments of the urban class and of the village artisans, groups that were forward-looking and better off. They neither attempted to reform institutionalized Hinduism by attacking its methods of worship, nor attempted to submerge consciousness in devotion. However, whereas *Kabir* either denied the Hindu and Muslim ideas of God or equated them in harmony, Guru Nanak went further and described God without reference to either. Thus Guru Nanak said: "There is neither Hindu or Mussulman so whose path should I follow? I shall follow God's path. God is neither Hindu nor Mussulman and the path which I follow is God's." The standard and most basic prayer of the Sikhs, a prayer written by Guru Nanak, in fact, thus invokes God in all His unaffiliated greatness:

The True One was in the beginning, the True One was in the
 primal age,
 The True One is now also, O Nanak; the True One shall also
 be,

63. ARMSTRONG, *supra* note 46, at 302. On the Bhakti saints see, F.E. KEAY, *KABIR AND HIS FOLLOWERS* (1931); W.H. MCLEOD, *KABIR, NANAK AND THE EARLY SIKH PANTH RELIGIOUS CHANGE AND CULTURAL DOMINATION* (David N. Lorenzen ed., 1981); J.A. SUBHAN, *SUFISM: ITS SAINTS AND SHRINES* (1960).

64. See K. VERMA, *GURU NANAK AND THE GOSPEL OF DIVINE LOTUS* (1968).

By His order bodies are produced; His order cannot be described.

By His order souls are infused into them; by his order greatness is obtained.

By His order men are high or low; by His order they obtain pre-ordained pain or pleasure.

By his order some obtain their reward; by His order others must ever wander in transmigration.

All are subject to His order; none is exempt from it.

He who understands God's order, O Nanak, is never guilty of egoism.

Thapar states that both *Kabir* and Nanak developed a new concept of God for a new religious group: "This concept was derived from the two existing religious forces, but neither of them consciously tried to combine and reconcile them."⁶⁵ Terence Thomas says of the Moslem and Hindu influence on Sikhism that "Sikhs themselves, however, deny the charge of syncretism and with some justification."⁶⁶ McLeod is more forthright when he states:

[A] common interpretation of the religion of Guru Nanak must be rejected. It is not correct to interpret it as a conscious effort to reconcile Hindu belief and Islam by means of a synthesis of the two. The intention to reconcile was there, but not by the path of syncretism. Conventional Hindu belief and Islam were not regarded as fundamentally right but as fundamentally wrong. Neither the *Veda* nor the *Kateb* know the mystery.

The two are rejected, not harmonized in a synthesis of their finer elements.⁶⁷

In sum, Sikhism (like any emerging religion) evolved against the background of existing religious faiths, namely, the rich traditions of Islam and Hinduism, but it is not a continuation of those religious beliefs.⁶⁸ In fact, with its own particular history, tradition, geographical identity, doctrinal religious belief, and sacred text, Sikhism is more different from

65. R. THAPAR, A HISTORY OF INDIA 311 (1966).

66. Thomas, *supra* note 37, at 210.

67. W.H. MCLEOD, NANAK AND THE SIKH RELIGION 161 (1968).

68. There is an unfortunate tendency to view it as such. See *supra* note 62. For example, Miss Armstrong states that "some Muslims and Hindus formed interfaith societies, the most important of which became Sikhism, founded by Guru Nanak in the fifteenth century." See ARMSTONG, *supra* note 46, at 302.

Islam and Hinduism than Protestantism is from Catholicism. The differences are more akin to the differences between Judaism and Christianity, which, like Sikhism, Hinduism and Islam, also share a common heritage. The fact that the differences between Sikhism and Hinduism and Islam are sometimes obscured is principally due to the focus on Sikhs' physical and marital characteristics, rather than on the philosophical tenets of their faith, a faith which is amongst the most fulfilling and liberating for the individual today.

II. SIKHISM IN BRITAIN

Although a Temple existed in London as early as 1913, Britain did not receive its first large group of citizen Sikhs until the 1950s after India received its independence in 1947 and the post-World War II "reconstruction period" caused severe labor shortages. Later, the Sikh expulsion from Uganda by General Idi Amin in 1972 brought a fresh wave of Sikh immigrants. Sikhs had a special affection for the British Crown. The British also held the Sikhs in high regard. They thought well of their last ruler, Maharajah Ranjit Singh who sat on the throne of Lahore from 1797 until his death in 1839.⁶⁹ The Maharajah had extended his kingdom beyond the Punjab and annexed Kashmir and the North West Frontier, including the treacherous Khyber Pass. In 1846, T.H. Thornton wrote in his *History of the Punjab* that "Ranjit Singh has been likened to Mehemet Ali and Napoleon There are some points in which he resembles both; but estimating his character with reference to his circumstances and position, he is perhaps a more remarkable man than either."⁷⁰ In 1898 Alex Gardner had written in his memoirs that

The Maharajah was indeed one of those master-minds which only require opportunity to change the face of the globe. Ranjit Singh made a great and powerful nation from the disunited confederacies of the Sikhs and would have carried his conquests to Delhi or even further, had it not been for the simultaneous rise and consolidation of the British Empire in India.⁷¹

69. See H.T. PRINSEP, *ORIGIN OF THE SIKH POWER IN THE PUNJAB AND POLITICAL LIFE OF MAHARAJAH RANJIT SINGH WITH AN ACCOUNT OF THE RELIGION, LAWS AND CUSTOMS OF THE SIKHS* (1970).

70. T.H. THORNTON, *HISTORY OF THE PUNJAB* (1846).

71. SACHA, *supra* note 53, at 26; see SIR G.C. NARANG, *THE TRANSFORMATION*

It was indeed the rise of the British Empire that was the most important turning point in Sikh history.⁷² Within four years of his death, by 1843, all the male members of the Royal Family had been killed, with the exception of Ranjit Singh's youngest son, Prince Duleep Singh. He was crowned at the age of six with his mother, Maharani Jind Kaur, acting as his regent. The Anglo-Sikh wars took place in 1845-1846 and 1848-1849. After the defeat of the Sikh armies in 1849 the Punjab was annexed by the British. Prince Duleep Singh was removed from his kingdom in 1850. He was converted to Christianity on March 8th, 1853, and taken to England in 1854.⁷³ There he was made a ward of Queen Victoria who had a special affection for him. Terence Thomas writes that "from being a valiant enemy the Sikhs became fiercely loyal to the British Crown."⁷⁴ They maintained this loyalty at the time of the First War of Indian Independence in 1857 (popularly described as the Indian Mutiny). They formed the major part of the British Indian Army fighting courageously in the First and Second World Wars. Prince Duleep Singh was never able to return to India. Although in adulthood he reconverted back to Sikhism and tried to seek assistance from Russia to reclaim his heritage, he died of a broken heart in Paris on October 22, 1893. He had a majestic residence at Elvedon Hall, in rural Thetford in Suffolk, of which he was squire. Sikhs in England undertake an annual pilgrimage to Elvedon Hall. They are lobbying the British government to have it recognized as a Sikh historic site. For them, the Sikh connection with Britain has royal roots in the special personal relationship between Queen Victoria and Prince Duleep Singh, and this connection predates the modern period of migration which took place a hundred years afterwards.

The Sikhs prospered under the British after the loss of their territories. When the Chenab Canal was opened in 1892, the British offered the Sikhs much land in the Punjab to convert from desert into green pasture through irrigation. Khushwant Singh, the leading Sikh historian, writes that

OF SIKHISM (1969); H. PEARSE, SOLDIER AND TRAVELLER: MEMOIRS OF ALEXANDER GARDNER (1970); H. STEINBACH, THE PUNJAB (1845); THORNTON, *supra* note 70. The sentiments above are echoed in these works.

72. See G.A. HENTY, THROUGH THE SIKH WAR (1970).

73. R.R. CHAKRABARTY, DULEEP SINGH: THE MAHARAJAH OF PUNJAB & THE RAJ (1988) (currently out of print).

74. Thomas, *supra* note 37, at 214.

"[t]he Punjabis became the most prosperous peasantry of India; and of the Punjabis, the Sikhs became the most prosperous of all."⁷⁵ The Sikhs became relatively well educated and literate in English. Aurora considers the Sikhs the fourth most westernized group in India after the Parsis, Jews and Christians.⁷⁶ Terence Thomas writes that "Sikhs display an astonishingly high level of English literacy for a rural community."⁷⁷ The Sikhs' education and westernization made it easier for them to migrate to Britain. Yet, with the significant influx of Sikhs into Britain the question now becomes, how well has Britain accommodated the Sikhs as a religious group and protected their religious liberties?

This question is important for a religious minority such as the Sikhs because no matter how westernized they may be and willing to adapt in the host country, they ultimately have to rely on adequate statutory and constitutional protections if they are to have a measure of security in the practice of their faith which makes them what they are. When faced with an influx of new immigrants after the Second World War, in the 1950s,⁷⁸ such as Baptists from the West Indies, Sikhs and Hindus from India, and Muslims from Pakistan and Bangladesh, Britain did not pass a religious freedom statute.⁷⁹ We will later see that it viewed this new influx as a racial issue and passed a series of Race Discrimination Acts in the hope that this would secure for them an equality of treatment at every level.⁸⁰ Britain, therefore, does not have a religious freedom statute. To determine whether religious freedoms are generally protected in other ways, however, we have to turn to Britain's constitutional arrangements and particularly at how Britain's Constitution has treated religious liberties.

75. SINGH, *supra* note 37, at 116-119.

76. G.S. AURORA, *THE NEW FRONTIERSMEN: A SOCIOLOGICAL STUDY OF INDIAN IMMIGRANTS IN THE UNITED KINGDOM* 30-31 (1967).

77. Thomas, *supra* note 37, at 215.

78. For an account, see SATVINDER JUSS, *IMMIGRATION, NATIONALITY AND CITIZENSHIP* 39-42 (1993) (Foreword by the Honorable Justice Stephen Sedley).

79. This is because race was the overwhelming factor in the public perception. One of the earliest accounts is E.J.B. ROSE, *COLOUR AND CITIZENSHIP* (1969).

80. See *infra* part IV.B.

III. THE BRITISH CONSTITUTION

The United Kingdom does not have the Religion Clauses of the First Amendment over which to debate, because unlike America, the United Kingdom does not have a written constitution that enshrines basic rights. Britain is generally perceived as having an historic constitution that has evolved through its particular history, especially since the English Civil War in the seventeenth century that led to its present-day system of government. This historical development has both a political and a highly religious dimension, although the religious dimension is often overlooked and hardly ever mentioned to students of constitutional law.

Perhaps the religious dimension is not mentioned because the population in general does not regard religion as being of any great personal significance in Britain today, although politically it remains important because Parliament has, since the seventeenth century, secured, through a series of statutory enactments, state preference for the Protestant faith in the form of the Established Church of England, over all other religions (particularly the Catholic religion). This state preference is part of Britain's constitutional tradition but its continuance today acts to the detriment of religions such as the Sikhs' that are newly arrived on the scene. While Parliament promotes and consecrates one particular religious faith, there is not a single constitutional document that underpins such basic rights. It is, therefore, highly debatable whether there is a constitution at all.

The question is particularly important because given the absence of statutory protections for other religious faiths in Britain, it is necessary to consider whether an answer is or can be found in Britain's constitutional arrangements, particularly since common law conceptions of fairness and justice have made an impact not only in America but in former British colonial territories from where the new immigrants came.⁸¹ These very people may, therefore, justifiably look to Britain's constitutional principles for the protection of their religious rights when they are in Britain.

The thesis that I am advancing here, however, is that an examination of this constitutional arrangement leads us

81. See M.C. SETALRAD, *THE COMMON LAW IN INDIA* (1969) (Hamlyn Lectures by the Attorney General of India).

precisely to the realization and conclusion that the way forward in Britain was, most naturally, not in a new constitutional settlement, but in the passing of a new Religious Freedom Restoration Act such as the one passed most recently in the United States, where after all, there was already an existing First Amendment Religious Clause in the Constitution which alone was not effective enough to secure religious freedom for all. In Britain, by contrast, there is not even an established constitution because religious and political struggles contributed in the seventeenth century to prevent the formation of a written constitution in Britain.

To demonstrate these points, we need to first look at the nature of Britain's Constitution, where there is no protection of religious liberties. Next, we will look at a series of highly significant religious enactments that have shaped the character of the state of Britain, but where the protection is solely for one particular faith to the detriment of another, particularly the Catholic faith. I will conclude that Sikh religious rights can be most easily secured by the passing of one modern religious enactment, the Religious Freedom Restoration Act which will secure religious freedoms for all.

Traditionally, it is A.V. Dicey, Vinerian Professor of Law at Oxford University, who is thought to have defined the British Constitution since there is no single document to which one can refer for identification.⁸² Yet, at the very time that he was giving the preeminent exposition of the British Constitution, which has been handed down ever since his *Introduction to the Study of the Law of the Constitution*, written in 1885,⁸³ the very existence of a British Constitution was being questioned by James Bryce. Bryce wrote that the distinguishing feature of a constitution is that "[i]t is enacted not by the ordinary legislative authority but by some higher and specially

82. Thus, Vernon Bogdanor, a leading constitutional expert in Britain, has remarked that "Dicey is Britain's substitute for a codified constitution" and has asked "[I]s there any other academic discipline still dominated by the work of an author who wrote a hundred years ago?" See V. Bogdanor, *Constitutional Law and Politics*, 7 OXFORD J. OF LEGAL STUD. 3 (1987).

83. Dicey said that the British system of government was characterized by the Rule of Law, which he defined as "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, or even of wide discretionary authority on the part of government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for nothing else." A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188, 202 (10th ed. 1965).

empowered body. When any of its provisions conflict with a provision of the ordinary law, it prevails and the ordinary law must give way."⁸⁴ Bollingbroke said in 1773 that "[b]y Constitution we mean . . . that assemblage of laws, institutions and customs derived from certain fixed principles of reasoning . . . that compose the general system according to which the community has agreed to be governed."⁸⁵ Yet, Dicey's perspective prevails today. In fact, it is said "that Dicey's word has in some respects become the only written constitution that [Britain has]."⁸⁶

Dicey identified two principles underlying British constitutional law: parliament supremacy and rule of law.⁸⁷ Parliament supremacy means that Parliament can enact any law, and the courts, in recognition of Parliament's legislative monopoly, will be duty-bound to apply it. Similarly, Parliament's authority exceeds that of the executive. The House of Commons controls the executive branch and thereby prevents the executive from acting in harsh and oppressive ways. It is immediately apparent from the parliamentary supremacy doctrine why Britain does not have a constitutional court like the United States Supreme Court. Under this doctrine, not only is there to be no written constitution but there is to be no judicial guardianship of the constitution. Consequently, Britain does not have judicial review of legislative action, which is a major component of American constitutional law. Parliament is supreme and what it enacts, the courts must apply.⁸⁸

84. F.F. Ridley, *There Is No British Constitution: A Dangerous Case Of The Emperor's Clothes*, 41 PARLIAMENTARY AFF. 340, 343 (1988) (quoting James Bryce).

85. Bolingbroke, *A Dissertation upon Parties*, in 2 THE WORKS OF LORD BOLINGBROKE 88 (1841).

86. JOWELL & OLIVER, *supra* note 4, at v.

87. DICEY, *supra* note 83, Chapter 13.

88. Dicey said:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

Id. at 39-40. This principle was applied by the House of Lords in *Pickin v. British Railways Board*, 1974 App. Cas. 765, and by the Privy Council of the House of Lords in *Attorney-General for New South Wales v. Trethowan*, 1932 App. Cas. 526. See earlier discussions, *supra* notes 26-27 and 30.

Although British courts cannot question legislation, they can still question the departments' and public officials' discretionary mode of implementing the legislation. Here is where Dicey's second principle, rule of law, comes into play. Dicey disliked special rules and distinctive regimes. He believed everyone should be subject to the ordinary law of the realm as propounded by Parliament. Thus, he regarded every act and every institution of the state as subject to the ever-abiding principle of the "rule of law," interpreted as the prevalence of regular law over arbitrary and discretionary power. The content of the "rule of law" remains a decidedly limited one because only Parliament can review legislation, yet the principle has resulted in judicial review of administrative action, as courts evaluate how public officials have exercised their discretion under parliamentary enactments. In this judicial review of administrative acts, some of the most exciting developments in the protection of basic rights have occurred.⁸⁹

Ridley wrote in 1988, however, that judicial review of administrative acts still did not give Britain a constitution, as commonly understood, either written or unwritten. He based his views on those of James Bryce. Ridley stated that "Britain does not really have a constitution at all, merely a system of government, even if some parts of it are more important to our democratic order than others"⁹⁰ He borrowed from James Bryce to say that "there is no test to discriminate between constitutional and less than constitutional elements since labelling has no defined consequence, unlike countries where constitutions are a higher form of law."⁹¹

Ridley argued, based on James Bryce's views, that for a constitution to be properly so-called "in the international sense of the word," it must first establish a system of government so that the system of government depends on the constitution and is not independent from the Constitution. Second, it must set sovereign authority outside the order it establishes, perhaps by reference to "the people," as in America, thereby providing legitimacy for law and the governmental system. Third, it must operate as a form of law superior to other laws, thereby

89. See R. Gordon Q.C., *The Awakened Conscience of the Nation*, COUNSEL, Mar./Apr. 1994, at 8 (arguing that the House of Lords has recently been acting like a constitutional court).

90. RIDLEY, *supra* note 84, at 342.

91. *Id.* at 359.

enabling judicial review of legislation by the courts. Lastly, it must be entrenched so that its status as an authority is safe from political intervention.⁹²

These characteristics are, of course, arguably missing from the British Constitution. There is much talk in the common law of fundamental rights and fundamental law,⁹³ but where in the Constitution does it say what is fundamental and where is the higher status ascribed to such alleged norms? Where, indeed, is the Constitution if it is not simply a state of mind emanating from the common law folklore of the constitutional struggles of the seventeenth century?⁹⁴ Where in the British Constitution is there a legal definition of government? What exists is a framework of conventions.⁹⁵ However, a conventional framework is far too loose and conventions are too easily swept aside by a simple refusal to abide by them.⁹⁶ If this is a system of government according to law, how can the government be made to comply with fundamental law? In short, does the British system comport with the notion of constitutionalism—limited government wherein power is located in and checked by an organizational framework of legislative, executive, and judicial functions, properly apportioned by the Constitution itself, as is widely understood from the written constitutions of the world's leading, modern democracies—or is the British system quite simply one of governmentalism where the state is, for all intents and purposes, equated with the towering power of the government?

If Britain evinces the specter of the unconstitutional state, why has modern Britain failed to adopt a written constitution? This question is important from a religious rights point of view, where there is a common misconception that since the state

92. *Id.* at 342-43.

93. Especially, see J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH HISTORY* (1955).

94. Satvinder Juss, *Silent Rights*, *NEW L. J.*, August 4, 1989, at 1069; see also Satvinder Juss, *Reason, Natural Justice and the Common Law*, 14 *LITIGATION* 145-149 (No. 4, 1995).

95. G. MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* (1984).

96. Thus it is now clear that the convention of Ministerial Responsibility is not being observed. See DIANA WOODHOUSE, *MINISTERS AND PARLIAMENT: ACCOUNTABILITY IN THEORY AND PRACTICE* Chapters 3-6 (1994); Diana Woodhouse, *Ministerial Responsibility in the 1990s: When Do Ministers Resign?*, 46 *PARLIAMENTARY AFF.* 277 (1993).

has nothing to say about religion in a constitution that does not exist, the state is neutral about such matters.

There are two reasons why Britain does not have a written constitution. First, British history has been characterized by stability. There have not been many upheavals. Normally, countries adopt constitutions when they are about to make a fresh start. Unlike other European countries, Britain has not been invaded since the Norman Conquest of 1066 and has remained a sovereign state since then. England has, in consequence, not had to adopt a formal written constitution upon gaining independence, unlike most states of the common world. Its life has been characterized by a general inertia, by insularity, and by pragmatism in its approach to the handling of religious and political questions.⁹⁷

Second, while there was an opportunity for Britain to formulate and establish a written constitution in the seventeenth century at a time of great national strife and instability, this opportunity did not materialize, as we shall later see.⁹⁸ Yet, this period is critical to our understanding of the quality of religious freedoms in Britain today because religion was a central contention during the constitutional struggles between Parliament and the Crown at this time, in what became a defining moment for the British state.

The struggle was resolved in Parliament's favor, and subsequently not only did Britain have a constitutional monarchy, but that monarchy was required to protect and safeguard the Protestant faith as the state religion. The result is that Britain's official faith is its essential identifying hallmark. Clearly, therefore, the fact that there is no religious preference stated or secured in a written constitution does not mean, in this case, that the state is neutral about its religious orientation.

Inevitably then, state policies are directed towards that orientation.⁹⁹ Other religions, like the Sikh religion, will never fare as well in this climate of officially sanctioned forms of state preference and discrimination of religious faiths.¹⁰⁰

97. The classic work to note here is SIR KENNETH WHEARE, *MODERN CONSTITUTIONS* (2d ed. 1966).

98. See *infra* part III.B.

99. A recent example of this has been the making of Christianity a compulsory part of the state school system. See *supra* note 15.

100. See *infra* part III.C. discussing disabilities for other religious denominations.

What has to be recognized in any religious freedoms debate in Britain is that without the preservation of its faith as its central attribute, England is not England. The English state has been defined by its religion.

A more complete case for passing a Religious Freedom Restoration Act that would assist the Sikhs in Britain to attain fuller expression of their faith can be made by looking at the historical development of English identity with faith and the Constitution that evolved from it. This is an especially useful exercise because we find that whereas England was unique in defining important questions of the state early (thus defining itself, for the state, long before written constitutions became fashionable elsewhere), in the process it "restored" to itself religious freedoms that it felt it was losing through encroachment from the outside. Britain clearly needs to restore these freedoms again in the context of its present multi-cultural society.

I will therefore evaluate, by running through the salient features of the seventeenth century struggles, the historical development of English identity through faith and the constitution that evolved from it. I do so especially because constitutional history is much neglected in British law schools today and thus, this analysis may be useful to British readers as well as others. In the seventeenth century struggle, the Stuart kings staked their claim to rule autocratically as the appointees of God—a situation carrying fundamental religious implications in itself, but especially if that God turned out to be someone else's God. Oliver Cromwell squashed this claim by defeating the Royalists in battle, but began ruling autocratically himself when he was appointed Lord Protector. Disillusioned, Parliament summoned the King back again, and "restored" his position as monarch of the realm. Then, through a series of enactments—the Convention Parliament Act, the Coronation Oath Act, the Bill of Rights, and the Crown and Parliament Recognition Act which were passed in 1688 to 1689—Parliament constitutionalized the position of the monarch as the protector of the state religion. This process was consecrated fully in the Act of Settlement of 1700 and extended to Scotland in the Union of Scotland Act of 1706. Through this process, which has never been reversed, Parliament disadvantaged other religious faiths. The passage of a Religious Freedom Restoration Act would reinstate equality of treatment

for other faiths such as the Sikhs. But the process must first be explained.

The seventeenth century struggles¹⁰¹ are the most important period of political and religious upheaval in British history. As a result of these struggles, kings and queens lost their crowns, and some even their heads. We see the unmistakable link between politics and religion early in this struggle with the overbearing Charles I and the concomitant rise of the Puritans.¹⁰² For both, politics and religion were indistinguishable. In describing this struggle, I look first at the *English Civil War* and then at the *Glorious Revolution*, and then make out a case for *Disestablishment* that would pave the way for a Religious Freedom Restoration Act and would serve to protect the rights of all religions.

A. *The English Civil War (1642-1648)*¹⁰³

Charles I, who assumed the English throne in 1625, like his father James I, who ruled between 1605 and 1625, believed the "divine right of Kings" to mean that he was only answerable to God, not to Parliament.¹⁰⁴ Three times between 1625 and 1628, Charles tried to raise money by taxation without the consent of Parliament; each time Parliament objected and each time Charles dissolved the assembly. Charles then summoned Parliament in 1640 after he realized that even the illegal taxes he was collecting were insufficient. Opposition to Charles had become implacable, however. An important element in this opposition were the Puritans, so-called because they wanted to purify the Church of England. They wanted a simpler prayer book. They also wanted to do away with bishops. They believed in the power of individual faith, and they did not believe in the divine right of kings. They particularly opposed Charles I be-

101. M. JUDSON, *THE CRISIS OF THE CONSTITUTION* (1949).

102. Dominic Grant writes that "[t]he constitutional crisis of the seventeenth century was religious as well as political." However, most law students are not told this. See Dominic Grant, *By Law Established: The Church of England and its Place in the Constitution*, in *CONSTITUTIONAL STUDIES* 168, 175 (R. Blackburn ed., 1992).

103. For background reading, see C.V. WEDGWOOD, *THE KING'S PEACE, 1637-1641* (1955); B.H.G. WORMALD, *CLARENDON: POLITICS, HISTORY, RELIGION* (1951). For the Civil War period, see C.V. WEDGWOOD, *THE KING'S WAR, 1641-1647* (1958). However, the best in-depth analysis of this period remains the ten volume work S.R. GARDNER, *HISTORY OF ENGLAND, 1603-1642* (1883-4). See also its four volume sequel, S.R. GARDNER, *THE HISTORY OF THE GREAT CIVIL WAR, 1642-1649* (1893).

104. A highly readable account is found in J.P. KENYON, *THE STUARTS* (1958).

cause his wife Henrietta Maria was Catholic and they strongly suspected the king of favoring Catholicism. Law, religion, and politics were plainly and inextricably intertwined in this struggle, and any solution had to be a resolution of, not one, but all three of these issues.

Led by Cromwell the Puritan,¹⁰⁵ Parliament went to war in 1642, with its famous battles of Edgehill (1642), Marston Moor (1644) and Naseby (1645), and culminating in Charles I's defeat in 1648 and his trial for tyranny before a court at Westminster. On January 30, 1649, Charles I was executed.

Subsequently, Cromwell set out to establish a republic. This may in time have provided an answer to the problems of religious toleration and constitutional government. Cromwell's rule was not popular however, because like the king, he ruled autocratically, not in the name of democracy, but in the name of God. During Cromwell's reign, Charles I's son was crowned as Charles II in Scotland.¹⁰⁶ In 1660, two years after Cromwell's death, Parliament invited Charles II to take the throne. The old order was reinstated. Charles II did not control taxation like his father, but he still appointed all the ministers and he still controlled the army. Little had changed.

An opportunity to adopt a written constitution evaporated as Cromwell's *Instrument of Government* of 1653 was discarded as the revolution fizzled out. This prevented the development of a system of proper constitutional government in Britain. The *Instrument of Government* was a genuine written constitution intended by Cromwell to be the basis of his republican form of government. No British schoolboy troubles himself to learn of it now. But, it was later to become very influential in the North American Colonies' struggle for independence from the Crown as they set themselves on the road to becoming the most constitutional state on earth.

B. *The Glorious Revolution (1688)*¹⁰⁷

From the perspective of English constitutionalism and religious liberty, the first bloody revolution was much less significant than the second more peaceful revolution of the

105. The best examination of Puritanism as a religious and intellectual movement is E.W. HALLER, *THE RISE OF PURITANISM* (1938).

106. See D. OGG, *ENGLAND IN THE REIGN OF CHARLES II* (2d ed. 1955).

107. See D. OGG, *ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III* (1955).

seventeenth century. This was the *Glorious Revolution of 1688*, the revolution that defined Englishness, English nationalism and the character of the English state. This event precluded the recognition of religious diversity in Britain. Charles II was succeeded by his son James II in 1685,¹⁰⁸ but James ruled only three years before being deposed in 1688 because he favored Roman Catholics. Fearful of James' Catholic bias, Parliament invited the Protestant ruler of the Netherlands, William of Orange, who had married Mary in 1677, the Protestant daughter of James II, to invade England. He landed at Torbay with an army drawn from the low countries and from Protestant Europe on November 5, 1688. The Protestant link is obvious. In December 1688 James II fled to France, William and Mary gave terms on which they were accepted as King and Queen by Parliament and these terms are laid out in a series of statutes.¹⁰⁹ It is important to note here that these statutes are the leading statutes of English constitutional law, and that if there was a specific right to religious freedom in the British Constitution for such groups as the Sikhs, the discriminatory and offending parts of these statutory provisions would today be subject to repeal. These aspects of the statutes may now be considered.

1. *Convention Parliament Act (1688)* 1 *William & Mary*
Chapter 1

For Parliament, the most important matter was that there should never again be any question mark raised about its right to assemble and sit as Parliament. The first thing William and Mary had to agree to was to "An Act for Removing and Preventing all Questions and 'Disputes' Concerning the Assembling and Sitting of this Parlyament." Passed on January 22, 1688, the Act declared that there be two Houses of Parliament. No religious issue was involved, and thus, there is no discriminatory or offending position here. However, even though not controversial, this statute is hardly known to law students in England.

108. The best biography on James II is F.C. TURNER, *JAMES II* (1949).

109. The series of statutes are laid out in the subsequent discussion. Despite its Whig bias, a good account of this period is MACAULAY, *HISTORY OF ENGLAND* (Sir Charles Firth ed., 1913-15).

2. *The Coronation Oath Act (1688)* 2 *William & Mary Chapter 6*

A second statutory enactment by Parliament focused on the King and Queen and how they were to conduct themselves in preserving the realm. The Coronation Act was "An Act for Establishing the Coronation Oath" whereby the King was required on assuming the throne to "solemnly promise and sweare to governe the people of this Kingdome . . . according to the statutes in Parlyament agreed on and the laws and customs of the same" and required to "maintaine the laws of God the true profession of the Gospell and the Protestant reformed religion established by law" and required to "preserve unto the bishops and clergy of this realme and to the churches committed to their charge all such rights and privileges." Under this statute Parliament has made the Crown the protector of one faith only, which faith the Crown must maintain with strict accordance to its true principles and whose churches and spiritual leaders the Crown must also preserve. This is discriminatory because it lends state sanction to one faith only. Sikh leaders cannot turn to the Crown, or for that matter to Parliament, to ask for similar protections under this statute.

3. *The Bill of Rights (1689)* 1 *William & Mary Session 2 Chapter 2*

The most important statute of this period is however, the Bill of Rights. In the Bill of Rights of 1689 (which is unlike the bill of rights of any other country and which, again, no school-boy troubles himself unduly over), Parliament for the first time forbade the succession of Roman Catholics to the throne and the monarch's marriage to a Roman Catholic. There is an undoubted hostility here to another religious faith which under a modern system of government would be considered unnecessary and unconstitutional. The Bill charged that "James the second . . . did endeavour to subvert and extirpate the Protestant religion and the lawes and liberties of this Kingdome." He did so, *inter alia*, "[b]y causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and imployed contrary to the law."

This Act is worth quoting extensively because of its implacable hostility to the Catholic Church. It is significant more today because it detracts from a principle of religious diversity and tolerance which we expect to be the hallmark of contempo-

rary liberal democracies, and which ironically, is a principle that many people generally believe can be easily observed in Britain today. Given that this is so, a statute such as this is harmful to the aspirations of a multi-cultural society and harmful to the interests of a mature democracy and should be amended. Parliament need only pass a Religious Freedom Restoration Act to do this.¹¹⁰

The Bill dictated that "the two Houses of Parlyament should continue to sitt and with their Majesties royall concurrence make effectuall provision for the settlement of the religion lawes and liberties of this Kingdome soe that the same for the future might not be in danger againe of being subvert-ed"¹¹¹ To this end, it concluded that

*whereas it hath beene found by experience that it is inconsis-
tent with the safety and welfaire of this protestant Kingdome
to be governed by a popish prince or by any King or Queene
marrying a papist the said lords spirituall and temporall and
commons doe further pray that it may be enacted that all and
every person and persons that is or are shall be reconciled to
or shall hold communion with the see or church of Rome or
shall professe the popish religion or shall marry a papist shall
be excluded and be forever uncapable to inherit possesse or
enjoy the crowne and government of this realme*¹¹²

Not trusting the King any longer to not "subvert and extirpate the Protestant religion and the lawes and liberties of this Kingdome," Parliament also made it illegal for a monarch to suspend laws, to keep an army in peacetime or to impose taxes of his own volition.¹¹³ The effect of this law was far-reaching in that Parliament and the legislative process was manifestly committed henceforward to the protection of religious freedom, but because this form of protection had evolved in a way that was reactive rather than proactive, Parliament had only given protection to the Protestant faith (against the Catholic faith) and not to all other faiths as well. In its determination to uphold the right to its faith, Parliament utilized the office of the crown in the circumstances.

110. *See supra* pp. 6-8.

111. 1 W. & M. sess 2 ch. 2 § 1 (1688).

112. *Id.*

113. *Id.*

4. *Crown and Parliament Recognition Act (1689) 2 William & Mary Chapter 1*

To place this palpable transfer of power from monarchy to Parliament beyond question, the Crown and Parliament Recognition Act was passed in 1689, which was "An Act for Recognising King William and Queene Mary and for avoiding all Questions touching the Acts made in the Parliament at Westminster the thirteenth day of February one thousand six hundred and eighty eight."¹¹⁴ This Act emphasized that "all and singular the acts made and enacted in the said Parlyament were and are statutes of this Kingdome and as such ought to be reputed taken and obeyed by all the people of this Kingdome."¹¹⁵ Not even British law students must learn about the significance of this Act. Yet, thus was the constitutional doctrine of parliamentary sovereignty solidified in Britain and by this doctrine Parliament alone obtained the authority to legislate on religious liberty matters. Remarkably, notwithstanding Britain's earlier experience in legislating on these issues during this period, this is an authority that it has in modern times scarcely exercised on religious liberty issues. So traumatic it seems has been the experience of the seventeenth century upheavals that legislative initiative in the matter of religious freedoms is not easily countenanced by the British Parliament, particularly where such an initiative has the effect of enfranchising the religious rights of new religious groups such as the Sikhs. Instead, protection for such groups takes the form of other non-discriminatory statutory enactments, which are manifestly unsuited, as we shall see.

The Bill of Rights of 1688 contains the first sanction of hostility to the Catholic Church in Britain's constitutional arrangements, although Catholics were banned from sitting in either House of Parliament in 1678. The Bill of Rights also inaugurated the establishment of a religion of the state, by the state, for the state, in the form of the Protestant faith. As such, the Bill of Rights augured badly for the quality of religious freedom in Britain today. That deficient quality continues to this day and affects the religious rights of Sikhs and other new groups in Britain. Within, the Bill of Rights's establishment provisions were the inevitable product of England's constitu-

114. *Id.*

115. *Id.*

tional struggles. Without, Protestant establishment was encouraged by England's sustained opposition to Catholic Spain, France and Ireland, which opposition was at its height at the time the Bill of Rights was enacted.

5. *The Act of Settlement (1700) 12 & 13 William 3 Chapter 2*

The process of Protestant establishment continued in the next incumbent of the throne when twelve years later Princess Sophia, Electress and Duchess dowager of Hanover, succeeded to the monarchy. The Act of Settlement 1700 was passed as "An Act for the *Limitation of the crown* and better securing the rights and liberties of the subject."¹¹⁶ The Act acknowledged her succession "in the *protestant line to the imperiall crown*"¹¹⁷ and emphasized "that every King and Queen of this realm *who shall come to and succeed* in the imperiall crown of this Kingdom by virtue of this Act *shall have the coronation oath administered* to him or her at their respective coronations . . ."¹¹⁸ The supreme importance of the Coronation Oath cannot be overemphasized, for it established a symbiotic link between the monarch and the established church which the monarch and all those in line to the throne were duty-bound to uphold. Thus, as the crown became a constitutional monarchy, the protection of the established church became a *raison-d'être* of that monarchy.

6. *Union with Scotland Acts (1706) 6 Anne Chapter 11*

Consolidation of this process continued into the reign of the last Stuart monarch, Queen Anne, who reigned from 1702-1714, when the established church was extended to Scotland. The core of Britain's constitutional relationship between church, state and people was established in the Union of Scotland Act of 1706 which was passed when England entered into a union with the independent State of Scotland. The two parliaments were merged into a new Parliament of the United Kingdom when they both passed separate Union with Scotland Acts ratifying the Treaty of Union that had been negotiated between the two kingdoms to make it into one. One Act was passed in London, the other in Edinburgh, to unite Scotland

116. 12 & 13 Will. 3 ch. 2 (1700).

117. *Id.*

118. *Id.*

with England. Curiously, though adopted in a system of government where Parliament was always free to amend or abolish prior laws, the Act of Union with Scotland, passed in London, bears all the hallmarks of a fundamental law or constitution, for it declares that "this Act of Parliament . . . shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms without any alteration thereof or derogation thereto in any sort forever."¹¹⁹ It also states that "all laws and statutes in this Kingdom so far they are contrary to or inconsistent with the terms of these articles . . . shall from and after the union cease and become void."¹²⁰ The Act further provides "for establishing the Protestant religion and Presbyterian Church government within the Kingdom of Scotland" and makes similar provisions for England. The Act prohibits "any alteration of the worship, discipline and government of the Church of this Kingdom as now by law established" and requires that "the worship discipline and government of this Church should be effectually and unalterably secured . . ."¹²¹ One modern writer has explained that the Union with Scotland Acts, designed to merge the two Parliaments, "provided a rudimentary framework of a written constitution."¹²²

Yet, whether the Acts established a framework in which Britain could develop a written constitution or not, the acts did nothing to promote the religious freedom that is required in the modern pluralist state; indeed, the acts entrenched the religious establishment of Protestantism. They have been positively harmful to the cause of religious freedom because they are simply deemed to be fundamental to the existence of the United Kingdom as constituent Acts and as such, taking priority over the other statutes. The perception of their fundamentality is not something that need detain legislators today, however, and I have at the outset shown that the constitutional obstacles in disregarding these Acts are not insurmountable.¹²³ What is necessary today is legislation that promotes the objectives of religious pluralism.

119. Union with Scotland Acts, 6 Anne ch. 11 (1706).

120. *Id.*

121. *Id.*

122. S. DE SMITH & R. BRAZIER, CONSTITUTIONAL & ADMINISTRATIVE LAW 9 (7th ed. 1994).

123. See *supra* pp. 6-8.

C. *A Case for Disestablishment*

The foregoing analysis has attempted to provide a sketch of the salient features of Britain's religious history. This history has determined, and continues to determine to this day, Britain's response to the questions of religious liberty. There is a marked absence of legislative initiatives taken to help other religious groups, or even to recognize the existence of other religious groups. Thus, whereas it may be said that Britain has placed a high premium on the right of its inhabitants to observe the Protestant faith without any fear whatsoever, it cannot be said that it has demonstrated the same commitment to the observance of other faiths by other peoples. Whatever may have been the exigencies of the moment in the seventeenth century, the situation in the modern era, has produced a profound imbalance in the Constitution.

Originally, this imbalance became most readily visible with the Roman Catholics. It is true that the ban on Roman Catholics entering Parliament was lifted in the nineteenth century, but this only happened after the conversion to Rome of John Henry Newman, a Protestant priest, who in 1833 launched the Tractarian (Anglo-Catholic) movement and made English Catholicism respectable again. It is also true that Roman Catholics were henceforward allowed to vote at elections and were eligible for state offices. Yet only in 1974 was it made clear that an adherent of the Roman Catholic faith could stand for the Lord Chancellorship.¹²⁴ This demonstrates that the ties between the church and the state continue to the present day. These ties affect the religious liberty of the individual in Britain and they are not compatible with the concept of the individual in the modern state.¹²⁵

The requirement that the sovereign be a Protestant is not just a limit on the liberties of those who may succeed to the throne. This requirement also implies that the sovereign should be a Christian and represent an ideal. This offends not only religious minorities who are not Christian but also most Christians who do not aspire to a Christian ideal. The non-Christian religious groups see in this imposed ideal not just a country

124. Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, § 1 (1974).

125. See Joan Bakewell, *Search for the Secular Soul*, THE GUARDIAN (London), November 26, 1993 at 24; Walter Schwarz, *Church Has Failed in the Marketplace*, THE GUARDIAN (London), December 13, 1993, at 4.

that is Christian in its attitudes, but Christian in its moral aspirations, which aspirations the non-Christians may not share.

Yet their own faith, by which they strive to live in these difficult circumstances, does not have the sanction of the state as does the imposed value system of the Protestant Christian faith. The sovereign takes a special interest in that established faith, but he takes none in other faiths. Thus, the sovereign must approve by law the Church's choice of bishops, twenty-six of which may then automatically be members of the upper House of Parliament,¹²⁶ the House of Lords, and no such right exists for senior members of other faiths. Unsurprisingly, advocates of constitutional reform argue that in a reformed Parliament, the major religions of the country may well be given a similar voice in the second chamber.

The chilling effect of the established Church of England on those not of the established faith seeps vertically downward into the lower echelons of society in even more practical ways. Thus, every person in a parish (the traditional unit of civil government for such purposes as poor law administration; each parish has its own church and clergyman) and not just the signed members of the Church of England, has the right to ask for the services of the parish church. Furthermore, the state has the right to appoint financial officers to supervise the endowments of the Church of England. No such rights exist for other faiths. This was far more significant in the days before the Second World War. The system of poor law related to the public (compulsory) relief of the indigent poor. By the Poor Relief Act of 1601, overseers of the poor were appointed in every parish to provide for the relief of paupers settled there, and to levy a rate on property therein. Although the National Assistance Act of 1948 transferred to the state many responsibilities, even today, the state can appoint officers to manage the churches' resources in these circumstances. In the same way, the state funds the Church of England's state schools. Muslims and Sikhs have applied for their schools to be so supported, but there is currently not a single such school. In 1920, the Anglican Church in Wales was disestablished because of the sheer strength of nonconformist churches in Wales which

126. Grant, *supra* note 102, at 169.

led to the Welsh Church Act of 1914. In the next few years, similar pressures may force a change in England as well.¹²⁷

IV. PROTECTION OF SIKHS' RELIGIOUS LIBERTIES IN BRITAIN

Having, in the preceding two sections, described the Sikhs and their religious beliefs, as well as the distinctive characteristics of evolving British religious and constitutional history, we must now consider the device that Britain adopted to protect the religious rights of Sikhs who arrived in the late 1950s and early 1960s. A new religious faith such as Sikhism was not going to be assimilated easily into Britain's complex historical arrangement. Sikhs suffered discrimination, but what was noteworthy about this discrimination in relation to that suffered by other minority groups newly arrived in Britain was that it was preeminently religious. There was discrimination in jobs, and still is.

Many Sikhs cannot not find employment in Britain unless they first remove their turbans and shave their hair. Brown writes that "more than one Sikh, when told that a job was taken, has returned home, shaved, and successfully re-applied for the same job."¹²⁸ In 1964, a London Transport guard was suspended from work for forty days because, after obtaining his job, he grew his hair again and wore his turban. Many also discarded their *Kirpan* for fear of offending British laws. In the late 1960s a famous dispute arose between male Sikh bus employees and the Wolverhampton Council over the right of Sikhs to wear turbans rather than peaked caps. The Sikh busmen eventually won the dispute in April 1969 after a two-year battle and were allowed to wear their turbans. In December 1969, the Race Relations Board (RRB), established under the 1965 Act, found Wolverhampton Council to be guilty of racial discrimination.

Yet, the discrimination had plainly been religious and not racial since unturbaned, clean-shaven Sikhs were readily able to gain employment with the council. The discrimination was

127. This pressure became most evident in the wake of the Satanic Verses affair, when Muslims in Britain were unable to successfully bring blasphemy actions in the courts against Salman Rushdie. See *R. v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, 1 All E.R. 306, 318 (1991) (Watkins, L.J.). For an excellent account of this, see also A. Bradney, *Taking Sides: Religion, Law and Politics*, NEW L.J., March 26, 1993, at 434, 443.

128. J. BROWN, *THE UNMELTING POT* 116 (1969).

treated as racial, because no other potentially applicable category existed in the law of racial discrimination, which was the device that Britain used to tackle the problems of all minorities living in Britain. No affirmation of the right to religious freedom exists in British law, save in respect to the established Church of England. Yet, to wrongly categorize discrimination as racial when it is in fact religious, can cause more harm than good.

In this section, therefore, I will develop the theme of the insufficiency and unpredictability of British law in protecting religious freedoms, which makes the case for a detailed and specific religious freedom legislation compelling and unavoidable. I will do this by noting first the inadequacy of the common law; second, the inadequacy of each of the three Race Relations Acts passed by Parliament to curb religious discrimination; third, the way in which Parliament consciously decided not to include a religious freedom category in the legislation; fourth, I will consider the leading case under this legislation to date, namely, the *Mandla* decision and the meaning of "ethnic origins" given to it by the House of Lords; and finally, I will bolster the case for a Religious Freedom Act by looking at the threat posed by generally applicable laws.

A. *The Inadequacy of the Common Law*

British politicians saw immigration and race relations "as emotional, irrational and intractable matters, not amenable to the reason, negotiation and compromise which characterized economical and class issues."¹²⁹ Consequently, they wished "to avoid or suppress"¹³⁰ such issues instead of confront them. As politicians avoided immigration and race relations issues, the inadequacy of the common law as an instrument of social justice became apparent. The common law was the law of freedom; it allowed the individual, subject to the restrictions of criminal law, to act as he or she would. Thus, under the common law, an individual was free to discriminate. As Lord Simon said in the House of Commons, "The Common law before the making of the first Race Relations Act (1965) was that people could discriminate against others on the ground of colour, etc . . . to their heart's content. This unbridled capacity

129. Z. LAYTON-HENRY, *THE POLITICS OF RACE IN BRITAIN* xiv (1984).

130. *Id.*

to discriminate was the mischief and defect for which Common law did not provide."¹³¹ Because the common law did not bar discrimination, it was left to Parliament to confront the discrimination problem.

B. *The Inadequacy of the Race Relations Legislation*

1. *The Race Relations Act (1965)*

In 1965, Parliament enacted the first Race Relations Act which outlawed discrimination in certain places of public resort, such as dance halls and public houses, and in the disposal of tenancies where there was much discrimination by landlords, and created the offence of incitement to racial hatred. It also established the Race Relations Board (RRB) to operate conciliation procedures in the form of conciliation committees, with resort to the Attorney General to bring the case to court as a final option.¹³² Yet the Act did not go far enough. It did not prohibit discrimination based on religion.

2. *The Race Relations Act (1968)*

In 1968 the second Race Relations Act was passed, expanding the prohibition against discrimination to the provision of goods, facilities and services as well as employment, housing and advertising.¹³³ However, the legislation was still defective. Only discrimination based on color, race, or ethnic or national origins was prohibited. Discrimination based on religion was not proscribed. The RRB was empowered to take cases to court if conciliation failed, instead of taking them to the Attorney General. A Community Relations Committee (CRC) was also established to promote good race relations. This second Act was much influenced by U.S. race legislation and was passed partly because of the violent riots in Watts in Los Angeles and the other American cities in the mid-1960s. The limitations of this second Act became apparent when in the 1972 *Zesko*¹³⁴

131. *Applin v. Race Relations Board*, 1975 App. Cas. 259, 286 (Lord Simon).

132. Discrimination "in places of public resort" was defined in Section 1 and "in the disposal of tenancies" in Section 5. The prohibition of incitement to racial hatred is found in Section 6. Section 2 of the Act established the Race Relations Board and Conciliation Committees, while proceedings for enforcement by the Attorney General were laid out in Section 3. The entire Act only had eight sections with a total length of five pages.

133. Race Relations Act, 1968, ch. 71.

134. *London Borough of Ealing v. Race Relations Board*, 1972 App. Cas. 342.

case, the House of Lords considered the meaning of the phrase "national origins" in a situation where a Housing Authority had refused to put a person of Polish nationality on the council's housing waiting list because he was not, as their rules required, a British subject.

The House of Lords held that the Race Relations Act had not been infringed because discrimination based upon nationality was not discrimination based on "national origins." Lord Simon declared that "the Acts of 1965 and 1968 do not provide a complete code against discrimination or socially divisive propaganda. The Acts do not deal at all with discrimination on grounds of religion or political tenet."¹³⁵ Even Lord Cross, who recognized that "[t]here is no definition of 'national origins' in the Act and one must interpret the phrase as best one can," interpreted "national origins" in such a way as to reach the same result as his brethren.¹³⁶ Even within its own limited terms, therefore, the relief provided by the Act was not reliable relief. It had surely been open to their Lordships to have construed "national origins" more liberally with parliamentary intention clearly in mind, than to construe it as narrowly as they did.

3. *The Race Relations Act (1976)*

This is the third and current race relations statute in Britain. Under the 1976 Act, the Race Relations Board was replaced by the Commission for Racial Equality, and the limitations of "national origins," made so apparent in the *Zesko* case, were corrected by proscribing discrimination based on nationality as well. The Act thus prohibited discrimination due to "colour, race, nationality or ethnic or national origins."¹³⁷ The Act remains a race relations act, however, banning discrimination, whether direct or indirect, only on racial grounds. The Act contains no prohibition against discrimination on religious grounds. Thus, to the extent the Act remains similar to the 1968 Act, the judgements of their Lordships in the *Zesko* case are still relevant today.

135. *Id.* at 362-3.

136. *Id.* at 365-6.

137. Race Relations Act, 1976, ch. 74.

C. *The Threat from Facially Neutral and Generally Applicable Laws*

Laws exist for the people. People do not exist for the law. Laws should make exceptions for the people. People should not have to make exceptions for the law. For laws should only be an instrument for the better living of mankind. In my final section, I argue that law must protect human rights as its fundamental purpose. If it does not do this it will become oppressive. Generally applicable laws that are not specifically targeted at individuals in the practice of their faith may become oppressive for an individual if it restricts him or her from living according to his or her beliefs. The international community is increasingly calling upon religious faiths to recognize and respect human rights. Religion should be about the expression of individuality and about individual self-fulfillment. If, to that end, faiths have to be democratized, then they have to be democratized to keep up with the times.

Yet, by the same token, a state cannot ask this of a faith if it is in violation of human rights itself, whether inadvertently or not. If a religious faith must devise and imbue itself with a theory of human rights, then so must the state. Unless and until a Religious Freedom Act is passed, exempting the application of generally applicable laws to the Sikhs, the state in Britain will remain in infringement of the basic human rights of religious expression.¹³⁸ Broadly, I will consider here, by way of example, two generally applicable laws which have threatened Sikhs. One is the threat posed by the requirement to wear crash helmets when riding motor-cycles; the other is the requirement to wear hard hats when working in a dangerous environment. One was a domestic threat posed by British laws which Sikhs eventually won; the other is a European Community law threat which shows, as yet, no signs of abating for the Sikhs.

In 1972, the British government passed the Road Traffic Act, Section 32 of which required any person riding a motorcy-

138. It has not been the purpose of this paper to consider the basic human rights laws on religious freedoms, but reference may be made to such important international instruments as: Article 18 of the *UN Declaration of Human Rights*; Articles 18, 20 and 27 of *The International Covenant on Economic, Social and Cultural Rights 1966*; the *Convention on the Elimination of Racial Discrimination 1965*; and Article 9 of the *European Convention on Human Rights 1950*.

cle to wear a crash helmet.¹³⁹ No exemptions were provided. Sikhs affected by this well-intentioned legislation saw it as an assault on their religious beliefs, since wearing any headgear other than the turban defiles their uncut hair. Under the direction of the Sikh temples, the Sikhs organized a protest. The route they chose was renowned for its success. They chose passive protest, courting arrest. Sikhs rode on motorcycles and scooters without crash-helmets and paid the penalty prescribed by law. Though lacking a supreme court in which to have this legislation reviewed, the Sikhs were able to take their protest to Parliament where Sidney Bidwell M.P. advocated their cause, arguing, as did the Sikhs, that if it was acceptable for the Sikhs to fight for the British Empire and again for Britain in two World Wars, far more perilous situations, wearing their turbans and not steel helmets, it should surely be acceptable for them to wear turbans when riding bikes. After three years, the *Motor-Cycle Crash Helmets (Religious Exemptions) Act 1976* was finally passed, Section 1 of which amended Section 32 of the original Act to read: "A requirement imposed by regulations under this section (whenever made) shall not apply to any follower of the Sikh Religion while he is wearing a turban."¹⁴⁰

Such a dispensation is, unfortunately, still awaited by Sikhs who work on building sites. In this area, the threat has come from Europe with its European Convention on Human Rights, which recognizes the right to religious freedom in Article 19 (akin to a written constitution and the closest document Britain has to such), and its Court at Strasbourg (akin to a constitutional court). Ironically, the legislation is once again well-intentioned. The legislation, laid down by the European Council, sets minimum requirements for personal protective equipment at work. Included is a requirement that everyone on nonconstruction sites wear helmets. The British government, in sections 11 and 12 of the Employment Act of 1989 provided exemptions for Sikhs from the construction helmets mandate. The EC Directive, however, forced Britain to require, in its Personal Protective Equipment at Work Regulations of 1992, the wearing of helmets in non-construction sites.¹⁴¹

139. Road Traffic Act, 1988, ch. 52 § 16 (1988).

140. For a full account, see SYDNEY BIDWELL MP., *THE TURBAN VICTORY* (2d ed. 1987).

141. The regulations were necessary to implement six European Community directives on health and safety at work. They were also part of a continuing modern-

The British Sikh community is seeking exemption on non-construction areas, where the risk of injury is obviously lower than construction areas. Conferences have been ordered by city Sikh Temples.¹⁴² The concern is not just over the impact of the new safety rules on the wearing of the Sikh turban, but over reduced chances of promotion, job losses, and even limited career choices for those who refuse to comply with the new rules. Despite these concerns, the regulations went into effect on January 1, 1993. This example clearly illustrates the need for specific religious freedom legislation. In fact, it is now abundantly clear that even *Mandla* does not provide protection for the Sikhs.¹⁴³

D. *The Absence of a Specific Religious Freedom Category*

The foregoing analysis begs the question, why was a specific religious freedom category not included in the Act? This is especially so given that some categories that do exist in the act, such as color and national origins, have no necessary natural affinity with each other. In fact, it would have been no difficult matter to have inserted a religious clause as well. At least that would have had the merit of ascribing to the Act some consistency or integrity of purpose.¹⁴⁴

Lord Templeman, in the *Mandla* case discussed below, supposed that Parliament chose not to include religious discrimination in the Race Relations Act because Parliament "considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups."¹⁴⁵ Yet, it is clear from this essay that religious dis-

ization of existing United Kingdom law. The EC directives themselves formed part of a program of action on health and safety in the move towards a single European market. They had been developed under Article 118A which was specially added to the Treaty of Rome for this purpose.

142. Over 500 delegates attended, from Sikh temples in London, Birmingham, Bedford, Luton, Leeds, Bristol, Cardiff, Leicester and Maidenhead, a British Sikh Federation Conference in Slough on November 29, 1992 to discuss this matter. Also City Councillor Piara Singh of Leicester has spoken out. See Vasant Kalyani & Deepa Pathi, *Sikh Job Fear Over EC Rules: Government Action Call Over Rules*, LEICESTER MERCURY, November 3, 1992, at 1.

143. *Mandla* is the leading case on Sikh religious rights and is discussed *infra* part IV.E.

144. For instance, in many international instruments on discrimination, racial and religious discrimination go hand in hand.

145. *Mandla v. Dowell Lee*, [1983] 2 App. Cas. 548, 568 (Lord Templeman).

crimination does severely burden members of religious groups today.

An unsuccessful attempt had been made in Parliament to prohibit religious discrimination in the 1976 Act but the government argued that issues peculiar to religion would arise and that religious discrimination should be addressed in a separate bill.¹⁴⁶ No separate religious discrimination bill has ever been passed, however.

E. *Mandla and "Ethnic Origins"*

The inadequacy of the current race relations legislation, in the absence of a special religious freedom law, to protect rights that are not racial but quintessentially religious, became strikingly apparent in what is generally regarded as the most important case on religious freedom in modern Britain: the *Mandla* case.¹⁴⁷ It demonstrates that the "ethnic origins" category, although the most elastic in the race relations legislation, is in the long-term, ill-suited to protecting religious freedoms because race is an element of ethnicity and thus, only a few minority religions will qualify as races, even though the Sikhs did in this case.

In *Mandla*, the Commission for Racial Equality brought proceedings against the headmaster of a private school for refusing admission to a Sikh boy, Mandla, who, contrary to school rules, would have had to wear a turban. The case was based on the new Race Relations Act 1976. The *Mandla* case could, legally, only be dealt with under race relations legislation. The inappropriateness of this became plain as the headmaster of the school argued that he had not meant to discriminate on racial grounds. His school had 300 pupils

of whom over 200 were English, five were Sikhs, 34 Hindus, 16 Persians, six Negroes, seven Chinese and 15 from European countries. The reasons for having a school uniform were largely reasons of practical convenience—to minimize external differences between races and social classes, to discourage the "competitive fashions" which he said tend to exist in a teenage community, and present a Christian image of the school to outsiders.¹⁴⁸

146. See HOUSE OF COMMONS, STANDING COMMITTEE A, April 29, 1976 and May 4, 1976, at cols. 84-118.

147. *Mandla* [1983] 2 App. Cas. 548.

148. *Id.* at 566 (Lord Fraser).

The High Court upheld the boy's right to be admitted to the school. The Court of Appeal, with Lord Denning presiding, overturned the High Court on the grounds that the headmaster was not guilty of racial discrimination.¹⁴⁹ The House of Lords overturned the Court of Appeal.¹⁵⁰

The House of Lords decision was not based on any general right to religious liberty (because none exists in English law) but on the fact that the "no turban rule" violated the RRA 1976 requirement that such a rule must be justifiable "irrespective of the color, race, nationality or ethnic or national origins of that person to whom it is applied."¹⁵¹ The headmaster had argued, in the words of Lord Fraser, that, "the turban is objectionable just because it is a manifestation of the . . . appellants ethnic origins."¹⁵² The headmaster also regarded the turban "as an outward manifestation of a non-Christian faith. Indeed he regarded it as amounting to a challenge to their faith." Even though Lord Fraser sympathized with the headmaster's argument and "would have been glad to find that the no-turban rule was justified within the meaning of the statute," he felt that it could not be justified under existing legislation.¹⁵³

The importance of this decision for religious liberty lies in the elastic meaning that the House of Lords gave to "ethnic origins" to enable the Act to give protection to religious minorities. This at once demonstrates the artificiality of these categories as far as religious freedom is concerned. Lord Fraser found that the Sikhs would qualify as an ethnic group because the term "ethnic" has come to be commonly used in a sense appreciably wider than the strictly racial or biological. According to Lord Fraser, this wider definition is "consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word 'ethnic' still retains a racial flavour but it is nowadays used in an extended sense."¹⁵⁴

For a group to be ethnic, continued Lord Fraser, it must be regarded by others "as a distinct community by virtue of certain characteristics" of which some are essential and others are

149. 1983 Q.B. 1.

150. *Mandla*, [1983] 2 App. Cas. 548.

151. This is the provision of "indirect discrimination" in section 1(b)(ii) of the 1976 Act. It is to be noted that the wearing of turbans is *de regur* for orthodox Sikhs. See *supra* text accompanying note 56.

152. *Mandla*, [1983] 2 App. Cas. at 566 (Lord Fraser).

153. *Id.*

154. *Id.* at 562.

not.¹⁵⁵ The essential characteristics are "(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive [and] (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance."¹⁵⁶ Nonessential but relevant factors include:

(3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of the neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community.¹⁵⁷

Based on these factors, Lord Fraser expressly endorsed the finding of the judge of first instance that:

[t]he evidence shows that Sikhs are a distinctive and self-conscious community. They have a history going back to the 15th century. They have a written language which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than Hindus. They were at one time politically supreme in the Punjab.¹⁵⁸

In adopting this conclusion, Lord Fraser was influenced and "greatly strengthened" by the decision in the New Zealand Court of Appeal in the case of *King-Ansell v. Police*, in which Judge Richardson held that, "a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed past."¹⁵⁹

Under this definition of "ethnic", Sikhs were given "the protection which Parliament evidently intended the Act to afford to them."¹⁶⁰ Lord Templeman agreed that the Sikhs qualified as an ethnic group protected by the Act, but noted

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 565.

159. *King-Ansell v. Police*, [1972] 2 N.Z.L.R., 531. It is interesting how often the British Courts look to other jurisdictions for assistance on these matters.

160. *Mandla*, [1983] 2 App. Cas. at 565 (Lord Fraser).

that "ethnic" includes racial elements. He thus demonstrated some of the elusive difficulties of using a racial discrimination act to proscribe religious discrimination. He observed,

for the purposes of the [Race Relations Act] a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin and a group history. The evidence shows that Sikhs satisfy these tests. They are more than a religious sect, they are almost a race and almost a nation. As a race, the Sikhs share a common color, and a common physique based on common ancestors from that part of the Punjab which is centered on Amritsar. They fail to qualify as a separate race because in racial origin prior to the inception of Sikhism they cannot be distinguished from other inhabitants of the Punjab. As a nation the Sikhs defeated the Moguls, and established a kingdom in the Punjab which they lost as result of the first and second Sikh wars; they fail to qualify as a separate nation or as a separate nationality because their kingdom never achieved a sufficient degree of recognition and permanence. The Sikhs qualify as a group defined by ethnic origins because they constitute a separate and distinct community derived from the racial characteristics I have mentioned.¹⁶¹

Lord Fraser similarly noted that the term "ethnic" includes a racial element. He recognized that the Oxford English Dictionary (1897) defined "ethnic" as "[p]ertaining to race" and that the term "conveys a flavour of race."¹⁶² He also acknowledged that "the briefest glance at the evidence . . . is enough to show that, within the human race, there are few, if any, distinctions which are scientifically recognized as racial."¹⁶³ The Sikhs, for example, are no more a racial group than the Jews, which illustrates that the "ethnic origins" analysis is distinctly unhelpful. The Jews have been the most persecuted minority in history on account of their alleged race, yet Jewish tradition maintains that the Messiah will come through David, whose mother, Ruth, was a Moabite convert to Judaism—the clearest evidence that racial purity is no part of Judaism.¹⁶⁴

161. *Id.* at 569 (Lord Templeman).

162. *Id.* at 562 (Lord Fraser).

163. *Id.* at 561 (Lord Fraser).

164. In *Seide v. Gillette Indus.*, 1980 I.R.L.R. 427, 430, the absence of discrimination on religious grounds from the 1976 Act had raised the question whether Jews were protected by it. In debate on the first 1965 Act, the Home Secretary

It is submitted that what distinguishes Jews from others is what distinguishes Sikhs from others, and that is their faith and the history of their faith. Jews bear the physical characteristics of their place of origin. Scandinavian Jews look like Scandinavians, Chinese Jews look like Chinese, Moroccan Jews look like Moroccans and Indian Jews look like Indians. Similarly, the Sikhs look like other people from the Punjab with whom they share a common ancestry. Clearly neither the Jews or the Sikhs are a race. Consequently, they cannot rely on the race relations legislation for protection against discrimination. Though the Race Relations Act was intended to shield Sikhs from discrimination, because the Act did not intend to proscribe religious discrimination, the Act provides only unreliable security for Sikhs' religious liberties.

Cases subsequent to *Mandla* have permitted discrimination against Sikhs, thus illustrating the inadequacy of the protection afforded by the Race Relations Act. For example, an Industrial Tribunal recently held that British Steel General Steels, could lawfully dismiss an orthodox Sikh for refusal to wear a hard hat over his turban,¹⁶⁵ and a Sikh employed at a British Rail Engineering Workshop was demoted for failure to wear a bump-cap.¹⁶⁶ Both these cases have echoes of a pre-*Mandla* case where the Court of Appeal held that a rule forbidding the wearing of beards in a chocolate factory was justifiable

was clear that "[i]t is certainly the intention of the Government that people of Jewish faith should be covered." See HOUSE OF COMMONS DEBATES, May 3, 1965, at cols. 932-3. However, Mr. N. St. John-Stevas (a constitutional expert and now a peer) believed that "the Jewish identity is essentially a religious one." See HOUSE OF COMMONS, STANDING COMMITTEE B, May 27, 1965, at col. 70. When the Home Secretary, Sir Frank Soskice, was asked what the word "ethnic" contributed to the expression "color, race or ethnic or national origins," he replied:

We have chosen that connotation of words to try to ensure that we include every possible minority group in the country . . . We hope, by the use of the word 'ethnic' to cover everybody who is neither of a particular national origin nor of a particular racial origin but who would be distinguishable by color.

Id. While the Act thus intended to protect Sikhs from discrimination, the Act clearly did not intend to proscribe religious discrimination, whether ethnically defined or not.

165. *S.S. Dhanjal v. British Steel General Steels*, Industrial Tribunal Case No. 50740/91 (December 11, 1993) (unreported).

166. *Safety Rules Justify Turban Discrimination: Kuldeep Singh v. British Rail Engineering Ltd.*, THE TIMES (London), August 6, 1985. It was after this case that the British Sikh Federation was able to get an exemption from the Government in section 11 of the Employment Act 1989 which required the wearing of hard hats on construction sites.

under the RRA on hygienic grounds even though it affected Sikhs more directly than others.¹⁶⁷ Clearly *Mandla* and the racial relations legislation have proved an insufficient barrier to infringements on religious liberties.

V. CONCLUSION

Britain urgently needs an express affirmation of the individual's right to religious liberty. Britain needs this in the form of a religious freedom statute that places the onus upon the state to show a compelling interest for any encroachment upon a person's religious expression.¹⁶⁸ Such legislation would be compatible with Britain's tradition of effecting constitutional change through ordinary statutes passed in Parliament.¹⁶⁹ The Sikh right to religious freedom will not be secure unless such legislation is passed. Britain's experience with the three Race Relations Acts demonstrates that race relations legislation is of little avail unless it is coupled with legislation to protect religious liberty.¹⁷⁰

Racial and ethnic justice must go hand in hand with religious justice. Without the one, the other will be less effective. Racial and ethnic minorities are often also religious minorities. In this, Britain's experience has mirrored that of America. *Smith* concerned Native Indians;¹⁷¹ *Yang* in 1990 concerned the Hmong,¹⁷² and *Munn* in 1991 involved African-Americans.¹⁷³ In Britain, ethnic minority groups, such as the Sikhs, have figured prominently in religious freedom cases.¹⁷⁴ However, the comparison between these two countries also shows that if the device of a Religious Freedom Restoration Act (RFRA) was deemed necessary in a country like America, it is deemed doubly necessary in Britain.

In America the RFRA applies a uniform standard to all faiths, conferring no particular advantage or disadvantage on any faith or any state interest.¹⁷⁵ In Britain, the inequality is

167. *Panesar v. Nestle Co.*, 1980 I.C.R. 144.

168. See *supra* introduction.

169. See *supra* parts III.B.1-6.

170. See *supra* parts IV.C-E. (discussing difficulties and uncertainties).

171. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

172. *Yang v. Sturmer*, 750 F. Supp. 558 (D.R.I. 1990).

173. *Munn v. Algee*, 924 F.2d 568 (5th Cir.), *cert. denied*, 112 S. Ct. 277 (1991).

174. See *supra* notes 163-165.

175. The reader is referred again to the wording of the RFRA. See *supra* note

already formally enshrined in law.¹⁷⁶ One faith is already favored over another. State interest already predominates over religion.¹⁷⁷ In these circumstances, the need for religious freedom legislation is far greater in Britain. The Sikh example is a testament to that. Britain has had a long and illustrious history. It has contributed handsomely to the constitutional rights and liberties of many countries. But the Sikh experience shows that seams in the fabric of British constitutional law are beginning to separate.

To counteract this trend, Britain will inevitably need for the long term to reduce to writing its unwritten rules, and in the process, modernize its system. This would be a perfectly logical step in Britain's historical progression—unless history is to be allowed to stand still. Britain had a Bill of Rights in 1688 that suited the exigencies of its day, and Britain had a constitutional framework in Cromwell's Instrument of Government in 1653 and still has such a framework in the Union with Scotland Acts. The logical step is to update the Bill of Rights and build on the constitutional framework as Britain moves to closer union with the European Communities on an entirely new footing.

In Britain's present system, it is easier to pass religious freedom legislation. The RRA is not able to do this work. For the Sikhs, *Mandla* was the high-point of protection of their religious freedom. Yet as a vehicle for promoting their religious rights, *Mandla* was, and still remains, defective even though the language of their Lordships was an accolade to the Sikhs as a people. What is needed is specific legislation on religious liberty in Britain like the RFRA in America. Law is a precise science and the precise recognition of legal rights is important in this area. Race relations legislation is a poor substitute, and its tortuous extension into this area only underscores the state's inability to distinguish between racial issues and religious issues in a country where one religion alone has the full sanction of the law as the established church of the state.

25.

176. The clearest example of this is the Union with Scotland Acts. See *supra* part III.B.6.

177. The state in Britain will never have to justify why it has taken action that indirectly infringes religious rights. There is no onus on it to show a compelling interest. An example of this is seen in the discussion of the Road Traffic Act 1972. See *supra* pp. 43-44.

As for the Act of Settlement of 1700, this is bound to be repealed one day, and that day is likely to be sooner rather than later. What makes the Act impossible is not simply the fact that Britain now has a political system that makes religious discrimination by the state unacceptable, but the fact that a natural heir to the throne may become ineligible purely for reasons of religious faith if he marries a Catholic.¹⁷⁸ Ironically, this issue is far more likely to catalyze change in Britain than any concern over Sikh religious rights.¹⁷⁹ Yet it is clear that constitutional reform is inevitable in Britain and it is inevitable for purely practical reasons of this kind.

178. This is proscribed for in a series of statutes from the seventeenth century. See *supra* parts III.B.1-4. The separation of Prince Charles from Princess Diana and the divorce of Mrs. Camilla Parker-Bowles, a Catholic, from her husband—with whom Prince Charles has been linked—lays open the possibility that the Prince may eventually want to marry her. This is something which under existing law he cannot do. The severest restraint on the right of any member of the Royal Family to marry, divorce and re-marry is imposed by the Royal Marriages Act 1772 (12 Geo. 3 ch. 1).

179. There has been widespread concern in the British media about the possibility of a potential monarch marrying a Catholic. See *THE INDEPENDENT* (London), December 10, 1993; *THE TIMES* (London), December 8, 1993; and *THE GUARDIAN* (London), January 7, 1995.