SECULAR CONSTITUTIONS AND MIGRATION: CHALLENGES TO THE STATUS QUO

DR TONY MEACHAM*

ABSTRACT

Many people migrate to Australia and other parts of the world for many reasons. Modern secular democracies such as ours, the United States, Canada, India and most of Europe hold the promise to potential migrants of freedom of religious practice and speech.

In an increasingly pluralistic world, many states are finding it difficult to interpret their own constitutional provisions to accommodate increasing numbers of migrants, whose numbers are now such that their voices are being heard in their requests for accommodation where once a strong majority religious view held sway and was the only voice heard in the development of public policy.

This paper will explore the new world, particularly in Europe and North America, where migration policies have encouraged, not only new citizens, but new ways of thinking that challenge the long standing status quo. Should secular constitutions, often written long ago in a much different context, change to accommodate the new plurality, or are these constitutions flexible enough to do so already? Are the new diaspora now an agent for change?

Many people migrate to Australia and other parts of the world for many reasons. Modern secular democracies such as ours, the United States, Canada, India and most of Europe hold the promise to potential migrants of freedom of religious practice and speech. In an increasingly pluralistic world, many states are finding it difficult to interpret their own constitutional provisions to accommodate increasing numbers of migrants, whose numbers are now such that their voices are being heard in their requests for accommodation where once a strong majority religious view held sway and was the only voice heard in the development of public policy.

This paper will explore the new world, particularly in Europe and North America, where migration policies have encouraged, not only new citizens, but new ways of thinking that challenge the long standing status quo. Should secular constitutions, often written long ago in a much different context, change to accommodate the new plurality, or are these constitutions flexible enough to do so already? Are the new diaspora now an agent for change?

The American model of a strict separation of church and state is gradually being seen as not being the only viable model for a secular state. Given the absence of an inflexible paradigm, many models have evolved in the last century or so that have met local needs. Pratap Bhanu Mehta,[1] an Indian academic, once suggested in respect of the Indian understanding of the secular state that 'secularism, like cricket and democracy, is a quintessentially Indian game that just happens to have been invented elsewhere.'

Many countries have adapted secularism in a form that, as Mehta suggests, becomes suited to local circumstances and political realities. A number of countries have recently been contesting constitutional cases to determine the contemporary understanding of the role of religion in the public sphere. These 'soft' secular constitutional provisions are actually the true secular states. Although each is different in structure, a common feature is an accommodation of religion in the public sphere, and a recognition of religious diversity.

Many people who have migrated have often sought to escape religious persecution, or at least some form of acknowledgement that they have as much right as anyone in their new community to believe in and practice their religion as those who came before.

However described, the necessity for such rights to be carefully provided for in a constitution was explained by United States President William Taft, when he said[2]

> No honest clear-headed man, however great a lover of popular Government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical or cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority …

Such rights are therefore not provided for lightly and are by necessity and prudence incorporated into a modern constitution after much deliberation. On the necessity for fundamental and specifically articulated rights in a constitution, S.K. Sharma observed that:[3]

> The insertion of Fundamental Rights in the forefront of the Constitution coupled with an express prohibition against legislative interference with these rights and the provision of constitutional sanction for the enforcement of such prohibition by means of judicial review is a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws.

---

* LLB Macquarie University, LLM University of New England, PhD University of Southern Queensland; Sessional Academic, School of Law and Justice, University of Canberra.

1 Pratap Bhanu Mehta, 'Hinduism and Self Rule', in Larry Diamond, Marc F. Plattner and Philip J. Costopoulos (eds), *World Religions and Democracy* (JHU Press, 2005), 64.

2 Message to the United States Congress on August 15, 1910.

3 S.K. Sharma, *Privacy Law: A Comparative Study* (Atlantic Publishers & Dist, 1994), 60.

Similarly the United States Supreme Court, Jackson J in *West Virginia State Board of Education v Barnett* argued that:[4]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. … One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote: they depend on the outcome of no elections.

The need for specifically addressed fundamental rights is necessary in many jurisdictions. Such provisions in constitutions limit the power of powerful private groups that may represent any proportion of the population, and attempt to reduce the possibility of representatives of such groups to pursue their own interests rather than those of the general population. Such provisions, whilst often working against majoritarian interests, are democratic in that they ensure that broad public interests are preserved.[5]

However to have any value specific rights must be capable of being enforced when invoked. As a self-styled sceptic put it, '[l]ike everything else in human society, constitutional rights do not enforce themselves. … someone has to be given the power to overrule even the government. In those Western democracies that have written constitutions, this job falls upon the judges of the law courts.'[6]

Ultimate courts such as Supreme Courts in India and the USA or High Courts such as in Australia are often the final arbiter of what rights may claimed and enforced. As was noted by Michael J Perry, [7] '[i]n the period since the end of World War II, a growing number of democracies have empowered their judiciaries to enforce constitutional norms, many of the most important of which are human rights norms that, as articulated, serve principally to limit the power of government'. This could almost be the classic clash between the irresistible force and the immovable object, on which Puja Kapai and Anne S Y Cheung observed:[8]

> When the liberty to freely express oneself is at odds with another's right to freedom of religion, we are confronted with the classic dilemma of choosing between two equally fundamental, constitutionally and internationally protected rights. The contours of the said two rights however, are far from clear. Whilst freedom of expression is not an absolute right, its limits are controversial. Equally, while it is undisputed that freedom of religion is an internationally protected human right

4 319 US 624 (1943), 638.

5 Cass R. Sunstein, 'Constitutions and Democracies: an epilogue', in Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 1988), 327-328.

6 A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys ,1988) 200.

7 Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 28 *Wake Forest Law Review* 635, 636.

8 Puja Kapai and Anne S Y Cheung, 'Hanging in a Balance: Freedom of Expression and Religion' (2009) 15 *Buffalo Human Rights Law Review* 41, 41.

> enshrined in various international instruments, there is no comprehensive international treaty which addresses as its subject the content and extent of the right of freedom of religion …

So, where does the state determine the limits where a religious freedom right is claimed and accepted? The state may apply limits that are intended to be of general benefit to the community. The Supreme Court of Canada illustrated this in 1985 in *R. v Big M Drug Mart*

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.[9]

The ultimate courts have the role in a secular democracy as protectors of religious freedoms, and to keep at bay the extreme views by presenting balanced interpretations of constitutional issues.

Despite some anomalies, constitutionalism aims to consider the personal rights of those identified as a distinct minority or diverse population from the majority of their society, as well as considering the rights of that majority. Without diversity it is unnecessary to consider constraints within the constitution to protect that diversity. The difference to be considered is that of the individual citizen and the 'collectivity or ruling majority'.[10]

Often constitutional law will examine matters arising from clashes between the nature of national identity and values as articulated in a national constitution (often set long ago and rarely amended), and often in contrast with the ideals and values of a modern diversified society. Many modern constitutional law cases derive from communities which feel their constitutions do not adequately represent their values. As Michel Rosenfeld notes,[11]

> [t]he clash between constitutional identity and other relevant identities, such as, national, ethnic, religious, or cultural identity, is made inevitable by the confrontation between contemporary constitutionalism's inherent pluralism, and tradition. … in a country with a strong constitutional commitment to religious pluralism, constitutional identity must not only be distinct from any religious identity, but also stand as a barrier against national identity becoming subservient to the fundamental tenets of any religion.

---

9 *R. v Big M Drug Mart* [1985] 1 SCR 295, 336-337 (Chief Justice Brian Dickson for the court).

10 Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity', in Michel Rosenfeld (Ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994) 3, 3-5.

11 Michel Rosenfeld, 'Law and the Postmodern Mind: The Identity of the Constitutional Subject' (1995) 16 *Cardozo Law Review* 1049.

Rosenfeld points out that a working constitutional order must have at its base a predominant identity, where constitutional protection is usually accorded to the predominant identity, noting that 'constitutional identity emerges as complex, fragmented, partial and incomplete. In the context of a living constitution, moreover, constitutional identity is the product of a dynamic process'.

The highest courts of many countries with modern secular constitutions are often being asked in recent years to review their underlying ideals regarding religious freedom in their constitutions, and whether contemporary views remain consistent with previous thinking, as well as whether they accord with modern concepts of constitutionalism, and in the context of religious freedom, secularism. They are considering issues that have not been raised in the past, such as religious clothing in the public sphere in France, and the role of an increasingly assertive religious presence in politics in India and the United States. The nature of changing demographics in many societies due to migration or other changes means that this is increasingly more difficult. Ultimate courts must consider anew matters of religious freedom in newer contexts, considering the application of constitutional principles to novel circumstances. The courts often find it difficult to consider the demands of a modern plurality of religious views in the public sphere where 'church' and 'state' collide.

Partha Chatterjee asked the question 'What are the characteristics of the secular state?' and offered in response that 'three principles are usually mentioned in the liberal-democratic doctrine on this subject.'[12] These he says are liberty (where the state permits the practice of any religion), equality (where the state will not favour one religion over another), and neutrality (which requires the state not to prefer the religious to the non-religious). These elements appear in different degrees in the various models that are often considered.

[12] Partha Chatterjee, 'Secularism and Tolerance', in Rajeev Bhargava (ed.), *Secularism and its Critics* (Oxford University Press, 1998), 358.