Introduction

The key question that is addressed in this book is how the notion ‘constitutionalism’ can provide the constitutional state with functional standards according to which the challenges of religious pluralism may be dealt with justly.

Why this is a relevant question is determined by various factors. In 1991 M.H.A. Reisman wrote perceptively:1

Since the Iranian Revolution, a new vocabulary and a new set of demands appear to have found an enduring place in discussions about international politics and law. They have generated curiosity about and a renewed scholarly interest in religion and its potentially explosive political effect on our science-based civilization, which takes pride in cultivating the capacity for sophisticated, rational and logical thoughts and which has, in many ways replaced supernatural beliefs with scientific theories.

Since then ‘our science-based civilization’ has on the one hand continued on the road of an exponential progression in scientific and technological advances, while on the other hand the world has seen a concomitant escalation of religiosity, probably enhanced by religion-related conflict and by the growth of religious pluralism in the global demography.

These developments have not only attracted renewed interest in issues related to religion in the social sciences and humanities, but are also quite pronounced among natural scientists. To name but two examples: the Human Genome Project was brought to fruition under the rival leadership of both a Christian theist, Francis Collins and an atheist, Craig Venter (no relation of the author); and a well-publicized and fiery disputation in books and public media has been raging for some years between the Christian Oxford mathematician, John Lennox and the atheistic Oxford biologist, Richard Dawkins over the question whether religion should be an influence in science.

Decisions over how to teach children about evolution and religion, if religious instruction should be undertaken in public schools and if

religious symbols and dress in the classroom or on uniforms should be allowed or prohibited, have led to hard-fought litigation in many countries.

Religious pluralism is progressively becoming a characteristic of the populations of most states; rather the norm than the exception. This is a fact with which constitutions, legislatures, governments, courts and societies have to deal in the 21st Century. Being inherently controversial and complex, the resurgence of religion as an overt motivation for social behaviour is a reality with which many in authority would prefer not to have to deal. Not surprisingly, therefore, legislative, judicial and administrative evasion of the need to take a clear stance on religious controversy is in evidence around the world. Some seek answers in state neutrality, others in subtle or express religious preferentialism.

Clearly neither avoidance nor preferentialism offers a reliable route to the achievement of justice. In a world whose human (and therefore religious) demography is in constantly accelerating flux, securing and preserving optimal fairness and justice for all must be a prime goal for the enlightened state. The question with which the world of constitutional government is therefore increasingly being confronted is whether a just approach can be developed for dealing with the challenges of religious pluralism.

Despite the endeavours of some to extricate religion from the sphere of law, the linkage is historic, evident and indisputable. Through the ages states have responded differently to the phenomenon that the governed populace is not only religious but also diverse in its religious beliefs and structures. Simultaneously some global standards for good governance and democratic constitutional structuring of the contemporary state are receiving broadening acceptance, if not always in practice, at least rhetorically. Regional, supra-national and international legal norms intended to promote religious accommodation are also growing in volume. Finding the desired balance between denial that the state has a key role to play in dealing with religious pluralism and active utilization of the law to promote a particular religion is therefore a topical challenge.

The effects of religious migration in a globalizing world, a comparative critique of the merits and shortcomings of approaches to the religious pluralism of contemporary constitutional states, some influences of supra-national and international law on the subject and suggestions regarding the obligations of the 21st Century constitutional state in these matters are addressed here. A progression from factual description to principled evaluation via normative and theoretical analysis is presented.

Constitutionalism and religion
Religion is pervasive. Consequently not many aspects of individual or social life can be isolated from its effects. Drawing up and discussing a comprehensive catalogue of instances of situations and contexts within which the state may be challenged to deal with issues of potential religious conflict is not possible, but a review of jurisprudence goes some way towards exposing the extent of the range of issues that regularly arise in this regard. Although respect for or infringement of the right to religious freedom is a matter that inevitably comes up in such a discourse, there is much more to it: various other individual and social interests and functions of the state are involved.

The difficulties arising from religious issues are not limited either to the global North or to the South, to the first world or the third world, or to established or new democracies. Even a cursory glance at the history and current practices in many countries shows that clear-cut answers to the constitutional state’s responsibilities regarding religion are not readily available, and that courts, legislatures, governments and even scholars often avoid the apparently intractable problems attending the matter.

In the Christian era of Europe, which was also the era of the emergence of the nation state, it was not only possible, but also demanded by society, that the dominant religious sentiments expressed by Christianity in its various configurations be respected, protected and supported by emperors, kings and governments. The occurrence of long-lasting and widespread wars among European Christians, frequently founded upon real or supposed religious differences, makes it clear that it was and still is difficult enough to deal with pluralism within one and the same belief system. This is currently also being demonstrated by the fierce factionalism among various Islamic sects.

In the course of history, conflict across fundamentally different systems, especially between Christianity and Islam, was exacerbated by raw struggles for territorial and political power. In short, the subjective religious partisanship of the rulers was understood to be justified. With the exception of some of the remaining Islamic theocracies, republics and kingdoms, that is no longer the case. The religious pluralism of the populations of most states in the 21st Century is such that religiously partial governance brings about injustice towards significant components of society adhering to religions that are not favoured by the state. Whereas this was not seen to be a problem in Europe in the pre-Enlightenment Christian era, contemporary demands on the constitutional state do not countenance systemic injustice and discrimination in any form. The Christian era was followed by a period of secularism, and the world has now entered into a post-secular phase – leaving the law and the state with many questions.
Questions that are addressed in this book include the following:

- What does ‘religion’ mean?
- What is the relationship between law and religion?
- What are the effects of globalization on constitutional law and constitutional comparison, in particular regarding religious pluralism?
- How are state sovereignty and citizenship changing and how do these changes affect religion?
- What are the elements of universalized constitutionalism?
- What are the typical forms in which constitutions deal with religion?
- How does religion impact on international law and vice versa?
- How do judges approach cases involving religion around the world?
- How do contemporary constitutional states respond to religious pluralism, and are established constitutional concepts such as the social contract, constituent power and the counter-majoritarian dilemma still relevant?
- What does constitutionalism demand of the constitutional state regarding religion?
- Where might the beginnings of a better solution than secular neutrality be sought?

It is hoped that the raising of these questions and the suggested responses to them will promote further debate and discussion of the urgent issues surrounding the link that is drawn here between constitutionalism and religion.

The book is divided into three parts, each consisting of three chapters. Part I deals with religion, the state and constitutionalism. Chapter 1 is intended to expose the ties between religion and the state. Chapter 2 touches on the effects of globalization on constitutional law, and constitutional comparison and its relevance to religious pluralism as an issue in constitutional law. As part of the effort to identify a conceptual space within which just responses by the state to the problems generated by religious pluralism may be sought, Chapter 3 is an endeavour to clarify the meaning of the rather elusive notion of ‘constitutionalism’ in order to render it useful.

Part II investigates contemporary modes in which law deals with religion. Chapter 4 focuses on constitutional approaches to religion, and Chapter 5 describes the position that religion takes in international law. Chapter 6 traverses the extensive territory covered by the jurisprudence of a range of courts in religious cases around the world. This overview of
judgments, selected for their demonstrative value as indicators of the nature of law and religion issues, particularly highlights the difficulties that arise in all regions of this globalized world when law is called upon to deal with religion.

In Part III the possibility of moving towards solutions more satisfactory than the usual is explored. Chapter 7 looks critically at the inadequate responses that constitutional states make when they deal with unavoidable religious questions against the background of the growing reappearance of religion to the public square and the shortcomings of traditional constitutional thinking. Chapter 8 brings the findings on the nature of constitutionalism in Chapter 3 to bear on the reality of the demands on the state when dealing with religion, and Chapter 9 concludes with a suggestion of the direction in which solutions may be sought to the difficulties in which the contemporary constitutional state finds itself as its task to deal with religious pluralism intensifies.