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Constitutionalism and Religion. By Francois Venter. Cheltenham: Edward Elgar, 2015. Pp. 272. $125.00 (cloth). ISBN: 978-1785361616.

Francois Venter is a leading scholar in South Africa on constitutional law. His legal education was at the Potchefstroom University for Christian Higher Education (now the University of the North-West), where legal education was not purely positivistic and confined to rules of empirical law, but more normative in nature; its emphasis was on not only the basic theoretical foundations but also the moral propriety or impropriety of the applicable rules of law. This basic training is reflected in his excellent analysis of constitutionalism and religion. Venter testifies in the opening sentence of the preface that *Constitutionalism and Religion* was inspired by the author's "engagement … with constitutional comparison." His analysis is intended to provide "an appropriate response … to the difficulties arising from religious pluralism" and to provide "an outline of the meaning in which key concepts such as 'religion,' 'globalization,' 'constitutional comparison,' and especially 'constitutionalism' are used" (vii). Francois Venter is supremely qualified to clarify these concepts, the exact meaning of which, according to his testimony, is in current literature often quite vague.

The interrelationship of law and religion has come a long way since the days when law in constitutional states was guided, expressly or by implication, by a predominant religious predilection (46). Venter cites Morly Frishman and Sam Muller in support of the proposition that constitutionalism has come to embrace in general terms a legal or political school of thought which holds that any form of governance should constantly uphold "a system of checks and balances derived from a primary legal document or body of principles" (47). He endorses the proposition of Louis Henkin that constitutionalism has come to "secure constitutional legitimacy and constitutional review, authentic democracy and accountable government that will respect and ensure individual human rights and secure basic human needs" (47). It must be emphasized, though, that religious pluralism has not been accommodated, constitutionally, by universally accepted norms and regulations.

The legal and constitutional dimensions of religion have many, quite distinct, ramifications, including the following:

(a) Freedom of religion or belief, which is an individual right and includes (i) the right to believe, and (ii) the right to manifest one's religion or belief in teaching, practice, worship, and observance;
(b) Freedom from discrimination based on religion or belief, which is an individual right and includes an obligation of the state (i) to display in its laws and practices objectivity toward all religions, and (ii) to outlaw unfair discrimination and to take action against persons who discriminate in the public sphere against persons on grounds of religion;
(c) The relationship between the state and religious organizations, including church institutions, which is an institutional group right (that is, it vests in a religious institution as such) and that requires of the state not to interfere in the internal affairs of religious institutions; and
(d) the right to self-determination of religious communities, which is a collective group right (that is, it vests in individuals as members of a religious community) and includes (i) the right to practice one's religion in association with other members of the religious community, and (ii) the right to form, join and maintain religious associations.

Venter deals quite elaborately with these distinct manifestation of law and religion, though, in this writer's respectful opinion, he deals perhaps somewhat superficially with the right to self-determination of religious communities. It should be noted that the right to self-determination of peoples has, over time, become an important component of international law. It is mentioned, alongside the equality of nations, large and small, in the Charter of the United Nations (arts. 15 and 73), and has been afforded a special place of prominence in the International Covenant on Economic, Social and Cultural Rights (art. 1) and in the International Covenant on Civil and Political Rights (art. 1). It features prominently in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (art. 2), and the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations of 1970 (art. 1, fifth principle). On the regional level, it has been endorsed by none other than the Helsinki Final Act of 1975 (para. VIII).

The constitutional principles of different states dealing with these distinct manifestation of religion varies quite considerably. Venter distinguishes between a rich variety of constitutional arrangements relating to religion: "the atheist state, assertive secularism, separation as state neutrality towards religion, weak religious establishment, formal separation with the de facto pre-eminence of one denomination, separation alongside multicultural accommodation, religious jurisdictional enclaves and strong establishment" (87). Non-establishment constitutions include those of Turkey, France, Belgium and the United States of America (89–92). Dubious constitutional protection is exemplified by China, Pakistan and Greece (92–96). Historical church-state alliances—a "close relationship between the state and one or more religious denominations" (96)—include countries such as England, Ireland, Germany, and Switzerland (96–102). The globalization of religions of the world, and the consequential plurality of religions within distinct political communities, has been the cause of a magnitude of problems and legal arrangements, exemplified at opposite extremes by the Saudi Arabian Basic Law of Government of 1992, which proclaimed the kingdom to be "a sovereign Arab Islamic state with Islam as its religion" (105), and the United States of America, which postulates in the First Amendment to its constitution that "Congress shall make no law respecting the establishment of religion" (105), and which allegedly created a wall of separation between church and state that, in the celebrated words of Mr. Justice Black, "must be kept high and impregnable" (*Everson v. Board of Education*, 330 U.S. 1, at 18 (1947)).

It is important to note that the United States is not, strictly speaking, a secular state because its constitution is not hostile toward religion. Venter makes special mention in this regard of the distinction made by international scholars of law and religion Javier Martínez-Torrón and Cole Durham between secularism and secularity (109–10). The concept of secularity "is useful," according to Venter, "for the characterization of a state as one that allows for a degree of religious freedom on a continuum from theocracy via neutrality or abolitionism" (109).

Constitutionalism and Religion contains a rich variety of religion-related controversies that provoked legal disputes in many countries of the world, for example the propriety of religion in public education (132–47), the influence of religion on migration and citizenship (147–50), protection of animals and hygiene requirements implicated by religiously-based customs (150–52), public disturbances deriving from religiously inspired conflict situations (152–53), religion in state institutions such as the public service, prisons, the police force, and the military (153–55), conscientious objections against conscription (155–57), insisting on religious grounds on corporal punishment in schools (157–59), state funding of religiously related ceremonies and tax exemption of religious institutions (159–61), the impact of religion on labor relations (161–63), upholding days of rest (163–66), religious practices such as the consumption of cannabis, burial rights, circumcision,

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and solemnization of same-sex marriages (166–69), the display of religious symbols and the wearing of religious dress in public places (169–72), and the jurisdiction of state tribunals in intra- and inter-religious disputes (172–74).

It is perhaps also important to make special mention of a section in the book on religion and international law (111–27) that might at a first glance seem out of place in a book focusing on constitutionalism. However, international law sets standards that ought to be upheld in national jurisdictions. The "new South Africa," for example, has committed itself in the Constitution of the Republic of South Africa (1996) to abide by international standards of human rights protection. Customary international law (sec. 232), as well as self-executing international agreements (sec. 231(4)), are thus part of the law of the land unless it is inconsistent with the Constitution or an act of Parliament. The 1996 Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law (sec. 233). When interpreting the constitutional Bill of Rights, courts of law *are permitted* to consider comparable foreign law (sec. 39(1)(c)) but *are compelled* to take international law into account (sec. 38(1)(b)). They are evidently precluded from following international-law directives that are at odds with constitutionally protected rights.

It is perhaps also important to note that the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief was never converted into a binding convention, mainly because the international community of states could not, and will not in the foreseeable future, reach consensus regarding the fundamental principle of selecting a religion of one's own choice. The wording in international instruments depicting this fundamental right was changed over time in an attempt to find a generally acceptable norm. The 1948 Universal Declaration of Human Rights referred to a person's "freedom to change his religion or belief" (art. 18), regarded in some religions as highly unacceptable and in some religions even as apostasy punishable by death. The 1966 Covenant on Civil and Political Rights consequently changed the wording to "freedom to adopt a religion or belief" of one's own choice (art. 18), which was again changed in the 1981 Declaration to an individual's "freedom to have a religion or belief of his choice" (art. 1). Needless to say, freedom *to change* one's religion or belief essentially means the same as freedom *to adopt* and freedom *to have* a religion or belief of one's own choice, and therefore the change of wording has left the controversies concerning this aspect of religious freedom unresolved.

A major contribution of *Constitutionalism and Religion* is centered on Venter's contribution to conceptual refinement of different perspectives and constitutional arrangements of the interchange between law and religion. The analysis of constitutionalism is not merely descriptive but is to a large degree founded on the principles of what the law ought to be—that is, directives of the legal idea that are founded on the morally based modalities of justice and equity. Constitutionalism, in Venter's analysis, thus acquires a commendable normative substance that provides a feasible alternative to, for example, neutrality as a means of providing "a constant balance between the state's responsibility of maintaining social order, religious preferences and legal certainty" (212–13). Constitutionalism could serve as "a credible standard of 'good' statehood" (226), and accordingly "provide contemporary states with the means to do justice to diverse and sometimes conflictual demands within pluralized society" (229).

Although Venter testifies that "the comparative perspective is not one specifically focused on the author's native environment (South Africa)" (viii), it is evident that the current South African constitution is in full command of the idealized perception of constitutionalism as reflected in the book. The current South African Constitution deals elaborately with religious freedom, the relationship between law and religion, and religious diversity within the South African community, and can in general be described as one of profound toleration and accommodation. It is, indeed, not

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based on the separation of church and state or the proscription of state action in matters of religion. In general, it allocates to church institutions the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the church as a juristic person (sec. 8(4)); it guarantees the free exercise of religion (sec. 15(1)); it sanctions freedom of assembly (sec. 17) and freedom of association (sec. 18) of "[e]veryone"; it protects the right to self-determination of religious communities (secs. 33 and 235), and makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (secs. 181(1)(c) and 185–86; and see the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002); it envisions the establishment, by means of national legislation, of a Pan South African Language Board charged, inter alia, with promoting and ensuring respect for "Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa" (sec. 6(5)(b)(ii)).

The Constitutional Court has on several occasions emphasized the vital importance of religion as a component of South Africa's constitutional democracy. In *Christian Education South Africa v. Minister of Education*, Justice Albie Sachs identified religion as "the key ingredient of any person's dignity" and as "a framework for individual stability and growth," which as such "affects the believer's view of society and founds the distinction between right and wrong."[1] But there is more to it than just that. Religion is also of great importance to the state. In *Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs*, Justice Albie Sachs, delivering the unanimous decision of the Court, noted the many difficulties attending "the relationship foreshadowed by the Constitution between the sacred and the secular," but he went on to say (para. 93):

> Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life. Religious organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.[2]

For these reasons, constitutionalism should place an obligation on the state to accommodate, and indeed to promote, religion, but it must do so on basis of objectivity, which, according to Venter, rejects the predominance within the structures of the law and good governance of a particular religion but requires instead that the state affords to all religions a place in the sun on the basis of equality and nondiscrimination.

In *Constitutionalism and Religion* Venter records the difficulties confronting states in virtue of religious diversity and does so within the framework of wide-ranging comparative information, systematically classified and analyzed, and with commendable guidance of what constitutionalism ought to entail. The scholarly exposition and principle directives encapsulated by Venter are significant and clearly reflect his fundamental academic training and maturity. It is to be hoped that the

1 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) par. 36.

2 2006 (1) SA 524; 2006 (3) BCLR 355, par. 93.

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South African dimension of constitutionalism and religion, which clearly informed Venter's emphasis on state or legal objectivity towards religion, will over time have an influence on the systems of governance in African and other countries where denominational religious rivalries still prevail. *Constitutionalism and Religion* can serve as a useful academic guide in religious teaching and research for highlighting the problems associated with religious pluralism and for dealing with those problems on a commendable basis.

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