

## SYMPOSIUM INTRODUCTION

# WHY DOES RELIGIOUS ESTABLISHMENT NEED TO JUSTIFY ITSELF?

ANDREA PIN

Associate Professor of Constitutional Law, University of Padova

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As M. Christian Green observes in her editorial to this issue, despite the secularization processes that have characterized the previous decades, religious establishment seems to be rather in good shape around the world.<sup>1</sup> And it is quite telling that it sounds like an anomaly in an era of liberalism, of which many thinkers believe a-religiosity and neutrality to be intrinsic components.<sup>2</sup> The odd resilience of establishment seems to need explanations. The title of this symposium—“The Legitimate Scope of Religious Establishment”—reflects the view that it is the establishment that must justify itself. The comparative constitutional law scenario and its lingua franca of rights and values would naturally lean towards disestablishment;<sup>3</sup> constitutional establishments would instead carry the burden of proof in order to survive contemporary constitutionalism.

Of course, religious establishment may mean many things. Twenty-first-century establishment takes its own shapes, as the three articles in the symposium show: it can be accommodative or discriminatory, either welcomed or unwelcomed by dominant religions. Brett Scharffs emphasizes that stereotypes of a disestablished America and an established Europe do not help understanding the complex accommodations that have flourished in Europe and in the United States in recent decades, bringing the two shores of the “pond” closer than written texts would have probably imagined. Matteo Visioli sees the contemporary Catholic doctrine on religious freedom as a reconsideration of the relationship between spiritual and earthly powers, not as a surrender to secularism. Juan Martin Vives focuses on the Argentine model to highlight that its establishment of religion has been formally mitigated but discriminatory rules and practices still affect religious minorities.

When one looks further around the world, more establishment revivals are apparent. In 2011, Hungary enacted a new Constitution that magnifies its Christian lineage. The post-Arab Spring constitutions have given more room to *Shari'a* than before 2011, when uprisings started spreading in the region. On July 19, 2018, the Knesset enacted a new Basic Law that defines Israel as the country of the Jewish people. Conflicts in the Middle East and in sub-Saharan Africa still develop along religious rifts that may eventually reshape borders and demographics.

Overall, the three contributions pose challenges to the average understanding of establishment and of its dismissal. Visioli demonstrates how Catholicism was able to leave establishment behind without giving up its claim to be the true religion. Through highlighting the pervasive role of Catholicism in Argentine law, Vives shows that Catholic establishment in his country has outlived Catholic doctrine itself, therefore raising the issue of why secular states can preserve establishment even after religious doctrines have left them behind. Scharffs points out convergences that have

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1 REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 152 (2005).

2 RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 76 (2010).

3 *Id.* at 1. On the development of a “generic constitutional law” that is traded from one legal order to the other, see David Law, *Generic Constitutional Law*, 89 MINNESOTA LAW REVIEW 652, 742 (2005).

given more room to establishment through accommodation much more than what one would have expected. There are, actually, reasons why the constitutional establishment of religion has not dried out on a global scale, even in the Western world, where religious disestablishment found many of its intellectual underpinnings.

First, nations are transgenerational entities. Those who inhabit them do not develop bonds only with their contemporaneous citizens. They have vital connections also with their genitors and progenitors, and they hope that their physical and intellectual creations will outlive them. A people's wisdom, values, and identities spill from one generation to the next. Analogously, constitutions bear the sign of previous generations, as do legislation and case law. Even detailed disciplines in highly technical fields such as taxation reflect the basic assumptions, values, and cultural frameworks upon which a society has built itself. Constitutional provisions establishing a religion are just a parcel of a broader legal scenario, which largely draws from the past.

Established churches, constitutional protection for long-standing religious traditions, and other constitutional devices thus can hardly be dissociated from the broader legal setting within which they dwell. They belong to a constitutional canon, and their removal is likely to be perceived as a profound alteration of it. If a legal order has developed in connection with a specific religion—as is often the case—any attempt to disestablish it may be perceived as threatening, and potentially dismembering, the basic infrastructure of the country.<sup>4</sup> The constitutional plane thus can become a battlefield on which supporters of establishment try to preserve the legacy of a given society, which is exactly what those willing to disestablish challenge.

The *Lautsi*<sup>5</sup> case that recently came before the European Court of Human Rights is very telling in this respect. When the Court was confronted with the issue of the crucifix in Italian public classrooms, the most problematic aspect resided in the long-standing tradition of displaying crosses in Italian schools. The question was not simply whether a crucifix could be hung above the teachers who impart their lessons; it was whether it was justified to *remove* it. In other words, the challenge was to the legacy and the importance of the symbol for Italians, not merely to its religious and legal significance.

The topic of establishment thus connects with the idea of political and constitutional identity<sup>6</sup>—of what constitutes a polity. Supporters of identity, however, are not simply or always concerned with keeping up with the past. When people spell out their spiritual heritage they help their self-understanding for the present and even how they envision their destiny. The global movements of people that are altering the social strata of many states are pushing them to reflect on how they foresee their ethos, their future, and what actually binds them as a people. Religious, moral, and spiritual diversity are a hallmark of our age. It is no surprise that the religious layer surfaces in moral, historical, even mythological narratives, as it helps people find their place on a global scale.

Resorting to religious establishment claims can also be responsive to the purported failures of liberalism. A significant amount of scholarship has exposed the flaws and the disillusion of the global project of liberalism.<sup>7</sup> Endowing everybody with the certain amount of liberties, carving

4 On the concept of “constitutional dismemberment,” see Richard Albert, *Constitutional Amendment and Dismemberment*, 43 *YALE JOURNAL OF INTERNATIONAL LAW* 1, 84 (2018).

5 *Lautsi v. Italy*, 54 *European Court of Human Rights Reporter* 3 (2012).

6 Roland Robertson, *Globalization, Politics, and Religion*, in *THE CHANGING FACE OF RELIGION* 19 (James A. Beckford & Thomas Luckmann eds., 1989); Pietro Faraguna, *Constitutional Identity in the EU—A Shield or a Sword?*, 18 *GERMAN LAW JOURNAL* 1617, 1618 (2018).

7 The literature in this field is legion. Among the most recent volumes, see Patrick Deneen, *WHY LIBERALISM FAILED* (2018).

out room for a public square, and granting access to markets are increasingly targeted with suspicion.<sup>8</sup> The type of liberalism that has cradled such values does not provide sufficient foundation for the development of a polity and a worthy life for individuals.

The resilience, even the revival, of religious establishment must be understood at least in the light of the few drivers sketched above: statehood as a transgenerational undertaking, the politics of identity, and the disillusion of liberalism. This scenario does not give free rein to religious establishment, of course—but it certainly avoids misunderstanding it as a historical and constitutional anomaly. It is an inherent part of contemporary constitutional landscapes and of the tensions that characterize them.

In the current comparative constitutional context, religious establishment surely stands out for some defining characteristics. First, within states it singles out individuals and groups according to their faith, thereby challenging the liberal paradigm of religious neutrality. Second, on a global scale, it hardly fits the projects of global constitutionalism and of the theories underpinning the idea of a “generic constitutional law,”<sup>9</sup> or of a renewed idea of “*ius gentium*.”<sup>10</sup> Such projects theorize the global migration of a sort of package of concepts and legal devices that circulate across the globe, thanks to the piecemeal contributions of domestic and supranational legal orders influencing and fertilizing each other. Religious establishment is locally situated and hardly exportable. What can be exported are the reasons backing the establishment, and this is feasible only as long as states share comparable status for the religions they protect. After all, establishment is hardly a formula that has bright corners and can be easily detected, exported, or imported.

Third, religious establishment works also as an identity-marker, and its connotations change from one place to another, depending on a multitude of legal and social variables. For instance, the Irish attachment to Catholicism has a clear patriotic salience, as faith helped define the nation also in opposition to the British rulers. On the contrary, the Catholic Church opposed the creation of a unified kingdom in Italy.

Constitutionalism and religious establishment may be perceived as an odd couple. But it is a couple that has lasted a very long time, and it does not seem to be breaking up anytime soon, as Scharffs’s analysis exemplifies. Establishment may even survive the religious doctrine under which it was conceived—think of Vives’s depiction of the Argentine favor for Catholicism, notwithstanding the developments of the Catholic doctrines of religious freedom described by Visioli.

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8 EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* 13 (2017).

9 Law, *supra* note 3, at 660.

10 JEREMY WALDRON, *PARTLY LAWS COMMON TO ALL MANKIND* 28 (2012).