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Churches and Federal State in Europe: the paradigm of Germany and Switzerland *

SUMMARY: 1. What do we mean about "Federalism"? – 2. Federalism and religions in Germany – 3. Federalism and religions in Switzerland.

1 – What do we mean about "Federalism"?

Although Germany and Switzerland are not the only federal countries in Europe, they nevertheless represent a paradigm of that form of autonomic State¹ characterized by the repartition of the legislative, administrative and judicial powers between political and legal distinct bodies, in which the central authority has the dimensions of a State-apparatus and is equipped with significant power to enact norms and commands directly binding for the widely speaking of the citizens/residents².

The paradigm of Germany and Switzerland is not only due essentially to the historical vicissitudes which have characterized the concrete implementation of the federalism inside their constitutional structures, but also to the progressive erosion of local authorities competence operated by the central authority: erosion that could cause one to question the future of the federalism in the germanic geopolitical area, also as a result of the progressive transfer of sovereignty that Germany and Austria (but partially also the Helvetic Confederation –

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¹ See **A. REPOSO**, *Profili dello Stato autonomico. Federalismo e regionalismo*, Giappichelli, Torino, 2005.

² See **G. BOGNETTI**, voce "*Federalismo*", in *Dig. disc. pubbl.*, VI, UTET, Torino, 1991, pp. 273 ff.; **T. GROPPI**, *Federalismo e costituzione*, Giuffrè, Milano, 2001, pp. 63 f.



bon grè mal grè - in force of the bilateral Agreements) have had to operate in favor of the European Union³. In particular, Germany and Switzerland represent in an obvious way two prototypes of the changeover from the “dual federalism” of liberal origins to the “cooperative federalism” born as a result of the new welfare models that rose in the years after the Second World War: federalism that forces the peripheral agencies to collaborate (both on the legislative plan and on the administrative one) between them and with the central authority with the aim of carrying out the re-balancing of the social inequalities present on the territory and to find common solutions to problems within the local authorities⁴. The cooperative principle - which in Germany has existed since the the federal Constitution of the post-war period, while in Switzerland it has been progressively acquiring importance as a result of the constitutional reform of 1999 - has undoubtedly weakened the autonomy of *Länder* and Cantons⁵. And if in Switzerland the federal State has seen itself to attribute actually an always greater number of competences, thus today some fields are global responsibility, or exclusive, of the Confederation (even if - in the majority of the cases, the division of the competences is less clean, and takes the form of the federalism of execution or the complementary federalism), in Germany the Charter of 1949 had granted to the *Bund* notable exclusive competences, to which the so-called “principle of the concurrent competences” had to add, according to which- if the *Bund* had regulated the subject, the *Länder* did not have anymore the possibility to change the normative frame (art. 31 GG). The 2006 constitutional reform has moreover reshaped the relationships between *Bund* and *Länder* , since it allows to define a more specific distribution of the respective legislative competences, annulling, among other things, the “legislation frame” (of reference): the subjects that fell back in this last discipline has been transferred partially to the *Länder* 's exclusive legislation, partially to the exclusive legislation of the Federation and partially to the concurrent legislation⁶.

At last, the paradigms of Germany and Switzerland are due to the characteristics which differentiate such orders from the not federal

³ R. HRBEK, *The effects of EU integration on German federalism* , in C. Jeffery (ed.) *Recasting German Federalism. The Legacies of Unification*, Pinter, London, 1998 pp. 217 ff.

⁴ F. PALERMO, J. WOELK, *Germania*, Il Mulino, Bologna, 2005, pp. 31 f.

⁵ See C. JEFFERY, *From Cooperative Federalism to a “Sinatra-Doctrine” of the Länder?*, in Ch. Jeffery (ed.) *Recasting German Federalism. The Legacies of Unification*, cit., pp. 329-42.

⁶ C. PANARA, *Il federalismo tedesco della legge fondamentale dalla cooperazione alla competizione*, Aracne, Roma, 2008, pp. 55 ff.



autonomic States characterized by a regionalist organization in a more or less broad sense. Germany and Switzerland give evidence that today the only important difference - at least under the technical profile - suitable to distinguish the federal States from those regional ones⁷ is represented by the guarantee that the peripheral authorities participate necessarily to the constitutional review⁸. Thus the federal character of the State is not given by the weight or the amount of the competences (Catalonia has more competences, even if given by the center, than Bavaria), but by

a) the constitutional power owned by the member States⁹;

b) the *Kompetenz-Kompetenz*, that is the power to attribute them to itself or to yield them to the legislative competence (and then administrative) of the central State when they become too much onerous - let's think about health or instruction - or simply "uncomfortable" because onerous from a financial point of view¹⁰. This entails exactly that regional orders, like Spain, provide for a autonomic decentralization degree so much greater than others which, even if bluntly federal in their essential characters, have known a progressive loss of powers from the peripheral agencies to the center, except the possibility to get again possession of them when it will be convenient¹¹.

2 – Federalism and religions in Germany

This general introduction can help us to understand in a more completed way the peculiar models of relationships between autonomic State and religious communities that characterize Germany and

⁷ About this distinction see: **G. LOMBARDI**, *Lo Stato federale. Profili di diritto comparato*, Giappichelli, Torino, 1986; **G. LUCATELLO**, *Federazione e Confederazione di Stati*, in *Novissimo Digesto Italiano*, VII, UTET, Torino, 1961, pp. 207 ff.; **G. LUCATELLO**, *Stato federale*, in *Scritti giuridici*, CEDAM, Padova, 1983, p. 183 ff.; **L. PALADIN**, *Problemi e strumenti attuativi di un possibile federalismo italiano*, in *Le Regioni*, 1996, pp. 609 ff.; **G. DE VERGOTTINI**, *Stato federale*, in *Enciclopedia del diritto*, XLIII, Giuffrè, Milano, 1990, p. 859 ff.; **G. BOGNETTI**, *Lo Stato federale figlio della modernità: Stati Uniti d'America e Svizzera*, in **VV.AA.**, *Il federalismo nella storia*, Istituto Lombardo di Lettere ed Arti, Milano, 1998, p. 81 f..

⁸ **A. LA PERGOLA**, *Tecniche costituzionali e problemi delle autonomie "garantite"*, CEDAM, Padova, 1987, p. 140

⁹ **A. D'ATENA**, *L'Italia verso il "federalismo". Taccuini di viaggio*, Giuffrè, Milano, 2001, pp. 14 ff.; **M. OLIVETTI**, *Nuovi statuti e forma di governo delle regioni. Verso le costituzioni regionali?*, il Mulino, Bologna, 2002, pp. 18 ff.

¹⁰ **A. D'ATENA**, *L'Italia verso il "federalismo"*, cit., p. 13 f.

¹¹ **F. PALERMO**, *Federalismo asimmetrico e riforma della Costituzione italiana*, in *Le Regioni*, 1997, pp. 291 ff.



Switzerland nowadays: models only partially influenced by numerically hard and socially controversial confessional multiplicity or by religious wars that had been going on for three centuries. As we will see, both these models in fact are deeply connected to the general theory of the cooperative federal State, and this has to make the Italian jurist reflect on the perspectives of new modulation of the relationships with confessions that the federal reform opens to our Country.

We will start trying to understand why the German model of relationships between State and confessions ties to the cooperative federalism, above all if we consider as basic norm for the interpretation of the system the article n° 137, first paragraph of the Constitution of the Weimar Republic (WRV) – still in force according to art. 140 GG – that - asserting that: “No Church of State does exist” - seems to construct a system founded on a rigid separatism¹², in which so few spaces of autonomy would be granted to the *Länder*¹³. This impression seems to be confirmed by other constitutional norms (like for example the expressed right of the religious communities to self-determination, in defining their own inner organization) and by clear decisions of the *Bundesverfassungsgericht* (prohibition of organizational-institutional connection of State and Churches) clearly inspired by a solid progressive and separatist doctrine (according to Starck: every threat to this principle is “like an attack to the democratic State”)¹⁴

Nevertheless the jurist immediately realizes that the outlined separation expressed by art. 137 § 1 of the WRV is simply a *hinkende-Trennung*¹⁵ in which every *Land* has wide margins to model the relationship with the religious communities present on the territory on the base of own social and cultural peculiarities (*Staatskirchenhoheit der Länder*). The norms - constitutional and ordinary – by virtue of which it is possible to talk about “halting separation”, which leaves to the *Länder* a wide decisional autonomy, are various: they can be subdivided in different groups.

¹² M. MORLOK, *Art. 137 WRV/Art.140*, in Horst Dreier (Hrsg.), *Grundgesetz. Kommentar*, Bd. III, Mohr, Tübingen, 2000, nn. 14 ff.

¹³ K. SCHLAICH, *Neutralität als verfassungsrechtliche Prinzip*, Mohr, Tübingen, 1972, pp. 154 ff.

¹⁴ C. STARCK, *Der demokratische Verfassungsstaat*, Mohr, Tübingen, 1995, pp. 364 ff.

¹⁵ U. STUTZ, *Die päpstliche Diplomatie unter Leo XIII. nach den Denkwürdigkeiten des Kardinals Domenico Ferrata*, Verlag der Akademie der Wissenschaften, Berlin, 1926, p. 54; A.F. VON CAMPENHAUSEN, *Staatskirchenrecht*, 3. Aufl., Beck, München, 1996, pp. 94 ff.; M. BOROWSKI, *Die Glaubens und Gewissensfreiheit des Grundgesetzes*, Mohr, Tübingen, 2006, p. 50.



A) Norms which regulate the relationships between State and confessions in the institutional level and the freedom of the confessional organisms: these offer to the Churches historically rooted in the territory a substantially homogenous privileged legal status but objectively differentiated for every single *Land*. Among these we must remember:

I) Arts. 73, 74 and 109 of the *Grundgesetz*, in the measure in which they do not reserve to the *Bund* specific competences in the relationships between State and Churches, authorizing every single *Land* to regulate in the form that it prefers its own relationships with the confessional communities present in the territory (in the respect - of course - of arts. 3.3, 4, 7, 33.3, 56.2 and 140 of the same fundamental Law). The competence of the *Länder* in the ecclesiastical subject is to be interpreted as *Residualkompetenz* attributed to these last ones by means of *Subtraktionsmethode*¹⁶ and so identifying in an interpretative way what can't be considered part of the competences attributed to the *Bund* as *ausschließliche Gesetzgebung* (art. 71), *konkurrierende Gesetzgebung* (art. 72) or *Grundsatzgesetzgebung* (art. 109)¹⁷. It must be underlined that the exclusive competence of the *Länder* is about a series of numerically not elevated subjects, and that the attribution to every single State of the legislative power in the ecclesiastical subject is one of the few cases in which the *Länder* are exclusive titulars of the right to enforce with specific normative rules a disposition of principle in the theme of fundamental rights sanctioned by the *Grundgesetz*. The *Staatskirchenhoheit* der *Länder* is one of the most delicate and complex consequences of the German federalism, traditionally incline to leave to the single states an exclusive legislative power, all adding rather meager, both from the quantitative point of view and the qualitative one.

II) Art. 137.V WRV (still in force according to art. 140 GG): on the basis of such norm the religious communities which - for the law prior to the coming into effect of the Weimar Constitution - were recognized like legal entities of public law conserve the same status. The norm, besides guaranteeing the legal personality to the so called "Great Churches" traditionally rooted in the German territory, consents to extend the *Körperschaften des öffentlichen Rechts* status to all the minor religious communities if they, in relation to their order and to the

¹⁶ C. PANARA, *Il federalismo tedesco della legge fondamentale dalla cooperazione alla competizione*, cit., pp. 81 ff.

¹⁷ See M. GROßE HÜTTMANN, *The Practice of Federalism in Germany*, in J. Rose, J.C. Traut (eds), *Federalism and Decentralization. Perspectives for the Transformation Process in Eastern and Central Europe*, LIT, Münster, 2001, pp. 101 ff.



number of their own members, offer a duration guarantee. The disposition increases in evident way the *Staatskirchenhoheit der Länder*, because each one of the States that compose the *Bund* estimates in independent way – even if in the respect of objective requirements indicated by the constitutional Court – the *dauerhaften Stabilität* of the groups that ask for the acknowledgment of public law. Naturally the religious communities recognized as *Körperschaften des öffentlichen Rechts* enjoy a legal privileged status: this status - which takes the name of *Privilegienbündel*¹⁸ - entails - besides the faculty to levy the religion tax, as it will be said later on - the exemption from some authorizations for the sale of lands as said on the *Grundstückverkehrsgesetz* (§ 4), a specific discipline about foundations (on § 22 and after of the *Stiftungsgesetzes für Baden-Württemberg*), a specific penal protection (§ 132 StGB), some dispositions of favor in the building field and in norms directed to protect nature and landscape¹⁹.

III) Art. 137.VI WRV (still in force according to art. 140 GG), disposition that authorizes the Churches with legal personality to levy a tax from own members as compensation for the offered religious services. A part from every other analysis on nature and functions of the *Kirchensteuer* - analysis which we send back to a specific paper on the topic - it has here to be observed that art. 137.VI WRV represents the only enforced constitutional norm which attributes exclusive fiscal competence to the *Länder*: art. 105 of the GG establishes in fact - in the field of customs and fiscal monopolies - the exclusive competence of the *Bund*, while the other taxes are disciplined through the exercise of concurrent legislative power. Certainly, also in the field of local taxes of consumption and luxury the competence to legislate is mostly up to the *Länder*, but only until and in the measure in which the aforesaid taxes cannot be assimilated to other homogenous taxes which are disciplined by federal law. The fiscal decentralization in the field of religious tax, apart to being an obvious corollary of the *Staatskirchenhoheit der Länder*, attributes to the local - ecclesiastics and seculars - authorities a prominent role on the determination of the entity of the destined financing to the confessional groups. The share of the *Kirchensteuer* in fact is determined by the provincial confessional

¹⁸ M. MORLOK, *Art. 137 WRV/Art.140*, in H. Dreier (Hrsg.), *Grundgesetz. Kommentar*, Bd. III, cit., nn. 95 f.

¹⁹ See A.F. VON CAMPENHAUSEN, J.E. CHRISTOPH, *Amtliche Beglaubigung der öffentlich-rechtlich korporierten Kirchen im weltlichen Recht*, in *Deutsches Verwaltungsblatt*, 1987, pp. 984 ff.



power on explicit disposition of the various *Gesetze* which – in a decentered level - discipline the subject²⁰.

IV) Art. 32.3 of the *Grundgesetz*, in the part in which it doesn't consider as "treaties stipulated with foreign States" the agreements with the Holy See or the settlements with other religious confessions. The silence of the norm - which disciplines the foreign power of the *Länder* and constitutes the legal foundation thanks to which the single states that compose the *Bund* can be considered endowed of a limited subjectivity of international law - about the ecclesiastical subject is fundamental, because it has led the doctrine to a theory that makes every *Land* absolutely free to contract with the Churches present on the territory, without any interference of the *Bund*. The agreed legislation is in fact the exercise of the exclusive competence of the *Länder* in the ecclesiastical subject, because it is not considered in any norm that such competence must be exercised in a unilateral way: moreover, the removal of species "agreements with confessions" to the genus "international treaties", allows to every single *Land* to stipulate agreements or other *Kirchenverträge* without any approval by the federal Government. Once again the *Staatskirchenhoheit der Länder* allows the creation of differentiated legal regimes for the different Churches present on the territory²¹.

V) All the *Konkordate* and the *Kirchenverträge* in force in the territory of the federal Republic of Germany. According to the combined provision of the principle of *Staatskirchenhoheit der Länder* and of the provision of the art. 32.3 GG, the order of the institutional relationships between the Churches traditionally present on the territory and the public powers is regulated by local agreements stipulated with every single *Land* (even if - for the relationships between the State and the catholic Church - an agreement is still formally in force on a federal base, the *Reichskonkordat* of the 20th July 1933). Thus there are sixteen various agreements stipulated between the *Länder* and the Holy See and nineteen various agreements between the *Länder* and the *evangelische Landeskirchen* present on the territory, to which it must be add a great number of unilateral implementation laws. Certainly, the contents of these agreements are substantially homogenous, but this fact cannot hide meaningful differentiations

²⁰ A. HOLLERBACH, § 97 *Exkurs: Kirchensteuer, Kirchenbeitrag*, in J. Listl (Hrsg.), *Grundriß des nachkonziliaren Kirchenrechts*, Pustet, Regensburg, 1980, pp. 720 ff.

²¹ About european and foreign policy of the *Länder* see A.B. GUNLICKS, *The Länder and German Federalism*, Manchester University Press, Manchester/NewYork, 2003, pp. 360 ff.



which contribute to create a “plural” and “decentralized” ecclesiastical law, sharply debtor of every single *Land* geopolitical peculiarities.

B) Norms directed to regulate the free expression of people religious feeling: these, even if not affecting in a direct way on the organizational vicissitudes to which the religious factor gives origin, guarantee the freedom of faith of citizens and residents respecting the limits placed by the constitutional dictation but - at the same time - realizing this last one with modalities differentiated from *Land* to *Land*. Between these we can mention:

I) The various *Schulgesetzen* enacted by every single *Land* in the implementation of the *Residualkompetenz* in the cultural and scholastic subject. The *Kulturhoheit der Länder* allows to these lasts not only to regulate the modalities of the religious instruction development, but also to make choices about the role of the school, which unavoidably connect themselves with the relationship between the divine and the human. One of these choices concerns the mention of the “Christian principles” as the guiding lines which must orient the educational activity of the public schools of every single *Land*. If the *SchulG* of the Nordrhein - Westfalen establishes that one of the aim of the public school must be that one to educate young people to the reverence to God (*Ehrfurcht vor Gott*, § 2), engaging the scholars also to give “appropriate representation” of the principles of the Christian and western culture (*die entsprechende Darstellung christlicher und abendländischer Bildungs- und Kulturwerte oder Traditionen widerspricht*, § 57,4) that one of the Rheinland-Pfalz is about formation to the responsibility of own behaviors forehead God and forehead the man (*in Verantwortung vor Gott und den Mitmenschen*, §1). If in Bavaria the ecclesiastical authorities must be listened before instituting or closing public *Volkschulen* (§ 26) and the crucifix can be exposed in the classrooms, in Saxony the public schools are invited to cooperate with the Churches for the realization of common projects (§ 35b). The meaningful and articulated presence of the religious in the public schools of the various *Länder* comes true therefore in various forms, both regarding the modalities, and for what concerns its insertion in the educational plan.

II) The various *Baugesetzen* enacted by the *Länder* in the implementation of own absolute authority in the subject of building. The connections with the freedom of belief, above all for what concerns the edification of minority confessions’ places of cult of are evident. However it has to be observed that the paragraph 1 cpv. 6 n. 6 of the German building Code (*BauGB*) affirms that the worship and treatment requirements of the souls manifested by the Churches with legal



personality represent one of the leading values to which the administrator must accord a detail attention when it comes to carry out activities of building planning. Such attention has been extended by the case law also to questions of edification of worship places claimed by organized religious communities according to the private law, and this seems to avoid - at least today - provisions modeled on those adopted by the Helvetic Confederation and by some Austrian *Länder* in order to beg the possibility that minarets (or mosques) come built up on own territory.

III) The various norms in the subject of state theological faculties and *religionspädagogische Lehrstühle*, above all for that matter the requirements demanded for the nomination of the university professors and the possibility that a religious authority can decide - with binding effectiveness for the law of the State - to fire teaching or technical-administrative staff for the violation of confessional dispositions. There is - in *subiecta materia* - an obvious discretion of every single *Land*, together with the federal dispositions and the case law of the *BundesVerfassungsGericht* in the topic of tendency organizations. Certainly, all the Constitutions of the *Länder* seem to converge around two firm points (freedom for the Churches and the other *Religionsgemeinschaften* to found theological faculties; necessity of agreements between State and Churches to define rights and duties of the staff of the state theological faculties): but this does not offer any assurance on the existence of valid standards on all the national territory neither regarding the constitution of faculties of theology in the public Athenaeums neither for that matter the freedom of instruction of the scholars neither for that matter to the freedom

C) Norms apparently not susceptible of legal consequences in technical sense, but in reality able of a certain impact - at least theoretical - on the processes of production and interpretation of the law. We refer essentially to the preambles to the Constitutions of the *Bund* and of some *Länder*, which see a reference to the much differentiated deity and can therefore produce patchy effects on dynamics of the protection of the fundamental rights in the German order²². As for the phrase "With awareness of the responsibility in front of God and to the men...", contained in the preamble of the *Grundgesetz*, it probably was inserted as a result of the necessity, much tightening in the immediate post-war period, to arrive to a stable compromise between the forces call to reconstruct a system destroyed

²² See W. VÖGELE, *Zivilreligion in der Bundesrepublik Deutschland*, Chr. Kaiser/Gütersloher Verlagshaus, Gütersloh, 1994, pp. 278 ff.



by the national-socialist catastrophe, thus constituting a kind of assent of the entire political democratic body to the demands of the CDU. It is moreover obvious, in this "*nominatio Dei*" the necessity and the will to go most possible away from the experience of the nazi regime, seen as a "*gottlosen Totalitarismus*". Moreover it has been noticed that the reference to God contained in the preamble is shaped like a *nominatio* and a not an *invocatio*, and this seems to reduce the importance to a simple reference directed to relativize the state powers, preventing that these can claim an absolute character²³.

The God mentioned in the preamble, moreover, would not be identifiable with the Christian God, but instead with a not confessional supernatural entity able to enclose in itself the fundamental characters of the ethics of reference of the German people²⁴. However some authors have the presence of God in the preamble as "vehicle" in order to develop an interpretation confessionally oriented of all the Fundamental Chart, facilitated - at least till the '70 - by the political situation that had been created in the first two decades of the post-war period. The doctrine²⁵ notices that - in the so-called Adenauer era - the State had in its guide lines that one of a strong political clericalism, that carried to leave wide space and to guarantee a privileged acknowledgment to the *Große Kirchen*, in a cultural and social context greatly Christianized. Thus, beyond the Martin Heckel's opinion, who does not pinpoint in the Constitution specific references to the Christianity²⁶, those of Hermann Lübke can be noted, who sees as a substrate of the Constitution a civil religion greatly impregnated of Christian values²⁷, and of Robert Spaemann, who sees the origin of the obligation -weighing on the public powers - to privilege the veneration of God as a "normal behavior" from the Constitution²⁸. This part of

²³ G. CZERMAK, *Das System der Religionsverfassung des Grundgesetzes*, in *Kritische Justiz*, 2000, pp. 229-247.

²⁴ P. HÄBERLE, *Präambeln im Text und Kontext von Verfassungen*, in Joseph Listl, Herbert Schambeck (Hrsg.), *Demokratie in Anfechtung und Bewährung, Festschrift für Johannes Broermann*, Duncker & Humblot, Berlin, 1982, pp. 211 ff.

²⁵ See T. ELLWEIN, *Klerikalismus in der deutschen Politik*, Isar, München, 1955; T. GAULY, *Katholiken. Machtanspruch und Machtverlust*, Bouvier, Bonn, 1991, pp. 127-178

²⁶ M. HECKEL, *Gleichheit oder Privilegien? Der Allgemeine und der Besondere Gleichheitssatz im Staatskirchenrecht*, Mohr, Tübingen, 1993, pp. 39 ff.

²⁷ H. LÜBBE, *Zivilreligion und der ‚Kruzifix‘- Beschluß des Bundesverfassungsgerichts* in W. Brugger, S. Huster (eds.), *Der Streit um das Kreuz in der Schule. Zur religiös-weltanschaulichen Neutralität des Staates*, Nomos, Baden-Baden, 1998, pp. 237 ff.

²⁸ "Aus der unbedingten sittlichen Pflicht der Gottesverehrung folgt die Pflicht des Staates, die Gottesverehrung - bei gleichzeitiger Toleranz gegenüber dem Atheismus - als Normalität zu privilegieren". So R. SPAEMANN, *Sittliche Normen und*



doctrine, more in general terms, makes own the idea that the religion, and in particular the Christian one, is still today a fundamental factor of social integration and that it is necessary that the State recognizes and defends this role²⁹. An institutional support to these ideas comes from some local courts: in particular, the Bavarian Court expressed itself in favor of a concept of neutrality able to confront itself with *christlich-abendländischen* Tradition, which constitutes - according to the judges - a *Gemeingut* of the German *Kulturkreise*. Also the constitutions of the *Länder* contain principle dispositions which - in some cases - emphasize the role of the religion (and in particular of the Christianity) inside the

Rechtsordnung, in H. Marré, D. Schümmelfeder, B. Kämper (Hrsg.), *Das christliche Freiheitsverständnis in seiner Bedeutung für die staatliche Rechtsordnung, Essener Gespräche zum Thema Staat und Kirche*, Bd. 30, Aschendorff, Münster, 1996, p. 17.

²⁹ During the last years, in many European legal systems the Christian faith is becoming – for different reasons – a landmark as a “civil religion” . This transformation is possible, firstly, because the Christian Churches are no longer proposing a socio-political model essentially alternative to democracy, with the significant exception of specific issues – like abortion or bioethics – whose legitimation is independent from the majority vote . In other words, the State and the Churches currently agree – with a high probability – on the central role of individual conscience for private and public choices . This process, on the institutional level, explains the passage from the ancient confessionalism – expressing the demand of a special, and public, recognition of the Christian faith – to the recognition of the Christian faith: a) as an element essential for the promotion of the “common good” (as shown by the latest forms of concordat) ; b) as the original root of the national and European historical identity . Demonstrations of this process, that’s still ongoing in many European Countries, could be: the debate on the eventual mention of a “Christian heritage” in the Preamble to the European Constitution; the progressive and officially-inspired legitimation of some Christian symbols (like the crucifix) as European symbols; the way many political philosophers refer to the Christian faith, in terms hard to imagine in the recent past . See H. LÜBBE, *Religion nach der Aufklärung*, Styria, Graz/Wien/Köln 1986, p. 320 f. „Zivilreligion ist das Ensemble derjenigen Bestände religiöser Kultur, die in das politische System faktisch oder sogar förmlich-institutionell..., integriert sind, die unbeschadet gewährleisteteter Freiheit der Religion die Bürger unabhängig von ihren konfessionellen Zugehörigkeitsverhältnissen auch in ihrer religiösen Existenz an dasn Gemeinwesen binden und dieses Gemeinwesen selbst in seinen Institutionen und Repräsentanten als in letzter Instanz religiös legitimieren, das heißt auch im religiösen Lebensvollzug anerkennungsfähig darstellen.“ On this topic see also: S. FERRARI, *The Secular and Sacred in Europe’s Constitution*, in K. Biedenkopf, B. Geremek, K. Michalski (eds.), *The Spiritual and Cultural Dimension of Europe*, European Commission, Vienna/Brussels, 2004, 19 ff.; D. HERVIEU-LÉGER, *The Role of Religion in Establishing Social Cohesion*, in K. Michalski (ed.), *Religion in the New Europe*, Central European University Press, Budapest/New York, 2006, 45 ff.; P. SCHLESINGER, F. FORET, *Political Roof and Sacred Canopy? Religion and the EU Constitution*, in *European Journal of Social Theory*, 9, 2006, pp. 59 ff.; B. NELSEN, C. FRASER, J. GUTH, *Does religion matter? Christianity and public support for the European Union*, in *European Union Politics*, 2001, 2, pp 191 ff.



order. Making a rapid list of the more extraordinary cases: the Constitution of Baden-Württemberg, using a Christian specifically terminology, asserts that the task of the humanity is that one to take advantage of own talents according to the Christian moral rules and that the State must help it in this; in the same way typically Christian concepts like those of the veneration for God, the fraternity are indicated like objectives of the education of the children, and, avoiding misunderstandings, it is clear that they have to be interpreted in a religious sense. In the Bavarian Constitution, after having expressed in the preamble (indirectly through a reference to the experience of the nazi State) the necessity to refer to God so that a community can be right, once again the devotion to God as a value and the Christian orientation that the education must maintain are affirmed. A reference to the Christianity in the topic of education appears in the Constitutions of the Nordrhein-Westfalen, the Rheinland-Pfalz and the Saarland; the Nordrhein-Westfalen and the Saxony recognize the role of the religion in creating and consolidating the individual and social moral; the Nordrhein-Westfalen, at last, in the preamble of its Constitution, directly appeals to God, indicated as founder of the law and creator of the human community. As it is easy deducible, it is about a series of dispositions and affirmations that contrast completely with the image of the German order as a "separatist order", but they leave also to imagine the possibility - anything but remote - that such *Länder* approve laws characterized by progressive and differentiated situations of privilege for the confessions pertaining to the Judaic-Christian stock, that is end with compressing the religious freedom of members to confessional groups of new settlement on the base of the incompatibility of certain behaviors with undetermined religious pivotals of the "social moral"³⁰.

³⁰ Facing this renewed role of religion in the public square, we can say that Germany is facing off a "positive secularism" which implies, for the State legal system and for its institutions, the respect of religious facts, having its embodiment in the neutral and pluralistic acceptance of cultural differences and aiming at shaping their coexistence and the construction of their meaning. Positive secularism implies that the factual presence of religious confessions in the civil society is an essential condition to the positive start of a process of "secularisation of secularism", implying first of all the overcoming of political hegemony on every dimension of human experience - thing to which any thought open to the hypothesis of transcendence can effectively contribute. According to this concept, the secularism of a democratic State must free itself more and more from any ideological assumption, in order to open to cultural and religious pluralism and to let this pluralism become an instrument of promotion of the development of a person. For this reason, the State ruled by positive secularism cannot be completely indifferent to the religious phenomenon - even if it guarantees the free practice of religion by individuals - and only qualify confessions as simple expressions of the associative autonomy of private citizens. On the contrary, the



In fact, the recent provisions in the field of *Kopftuch* inside of the schools adopted in Baden-Württemberg, in Niedersachsen, Bavaria, Hessen, Saarland, Nordrhein-Westfalen and in Bremen and Berlin seem to be in some way included in such category. These provisions can be distinguished in two groups: in Baden-Württemberg, in Saarland and in Nordrhein-Westfalen the legislator preferred to prohibit in a generic way the spread - by the scholars - of ideas which can bother the religious political or ideological peace of the school; in Niedersachsen, Bavaria, Hessen, in Bremen and Berlin the parliaments has arranged instead - in a more explicit way - the prohibition for the teachers to adopt a dress that can generate doubts on their eligibility to relate with the pupils or on the ability of the school to form in a convincing way (*überzeugend*) the young generations. In this second group it is evident that the reference idea that the *Kopftuch* represents a garment contrary to the "common social conscience" of the population that has come forming according to the principles of the Christian morals. Of-fact, the recent legislative intervention operated by various *Länder* in the delicate subject of the freedom of clothing inside of the public schools makes that today - in the German order - there is no uniformity with respect to

principle of positive secularism implies that the State is able to give specific relevance to the religious phenomenon in the social relationships of citizens with "promotional" actions, co-operating with religious groups in order to find the best legal accommodation to let them live together under the same freedom. From this viewpoint, the positive secularism does not seem to be a limit, but rather a true guarantee of the freedom to show one's own belief: positive secularism implies co-operation between States and religious groups, and this co-operation is a great chance to give freedom of a religion a real guarantee in Europe. In our opinion the concept of "positive secularism" is opposite to the point of view of Wilfred McClay. As we know, McClay differentiates negative and positive types of secularism as follows: "The former view, on the one hand, is a minimal, even "negative" understanding of secularism, as a freedom "from" establishmentarian imposition. For it, the secular idiom is merely a provisional lingua franca that serves to facilitate commerce among different kinds of belief, rather than establish some new "absolute" language, an Esperanto of postreligious truth. The latter view, on the other hand, is more robust, more assertive, more "positive" understanding of secularism ... - the one that affirms secularism as an ultimate faith. **W.M. MCCLAY**, *Two Concepts of Secularism*, in *Wilson Quarterly*, Summer 2000, pp. 63-64. We'd like to remember that - according to Silvio Ferrari, too - different notions of secularism emerge in the context of contemporary Europe. The first refers to a set of principles and values (tolerance, democracy, freedom, equality etc.) around which citizenship should be constructed: in this sense, secularism sets itself up as the civil religion of the Europeans (as opposed to Christianity, which others believe should be fulfilling the same function). The second sets itself up as a rule of social and religious pluralism; it does not take the form of secularism as a programme, but of secularism as a method. See **S. FERRARI**, *Religione civile in Europa. Laicità asimmetrica*, in *Regno-att.* 2006, 6, pp. 200 ff.



the issue of the so called “religious symbols of the conscience” used by the teachers: to wear the *hijab* is lawful in some *Länder* and prohibited in others, and this while the article 4 GG recognizes - on all the national territory - the right of religious freedom both under the *forum internum* profile (as freedom of faith and its profession in the first paragraph) and under the *forum externum* profile (as a right to the undisturbed exercise of the cult in the second paragraph).

3 – Federalism and religions in Switzerland

The scholars of public law emphasize that the Swiss federalism was born and developed first of all to govern the wealth, the complexity and the potential conflict due to the cultural, linguistic and religious variety of the nation. It is considered the main instrument to obtain the peace between the various communities and to realize a harmonic co-existence of the differences³¹.

In fact it has not been forgotten that Switzerland, just as “nation - will”, was born by a stipulated confederative pact between a certain number of partially heterogeneous communities, extremely independent and strongly tied to the direct democracy. Thanks to the federalism, every of these communities have been able to develop its own institutional nature, its own (political and religious) culture, its own democratic tradition maintaining itself free and independent from the great powers which have characterized Europe’s history in the last eight hundred years. This independence has demanded that the confederate Pact previewed a strong autonomy of the cantons and the collaboration between the various cultures of which Switzerland is made up³².

Here is because the Swiss federalism is also - and perhaps above all - a *Kulturföderalismus*³³: it implies the acknowledgment and the attribution of equal dignity to the various cultures and religions which

³¹ T. FLEINER, A. MISIC, *Föderalismus als Ordnungsprinzip der Verfassung*, in D. Thürer, J.-F. Aubert, J.P. Müller (Hrsg.), *Verfassungsrecht der Schweiz*, Schulthess, Zürich, 2001, p. 431.

³² See T. FLEINER, A. MISIC, N. TÖPPERWIEN, *Swiss constitutional law*, Kluwe, The Hague, 2005, pp. 101 ff.

³³ See P. HÄBERLE, *Federalismo, regionalismo e piccoli Stati in Europa*, in G. Zagrebelsky (a cura di), *Il federalismo e la democrazia europea*, NIS, Roma, 1994, p. 74.



compose the Country and it is found therefore on the solidarity between cantons and their cultural communities³⁴.

Between the instruments of the realization of the cultural federalism, in the field of the tasks remitted in an exclusive way to the cantons there is the regulation of the relationships between State and Churches.

In this subject the key-norm of the system is represented by art. 72 fed. Const., norm that

a) gives to the cantons the right to regulate liberally their relationships with the religious confessions, in application of the general principle of the division of the competences between Confederation and cantons;

b) establishes that the Confederation and the cantons can, within of their respective competences, to take the necessary provisions in order to preserve the peace between the supporters to the various religious communities. In principle, the adoption of similar provisions is up to the cantons: also in subiecta materia the federal competence is subsidiary and becomes only effective if the cantonal provisions are revealed insufficient³⁵.

³⁴ The federal Constitution of 1999 affirms the cantons as “sovereign”; they have in fact a substantial autonomy in the definition and in the accomplishment of their tasks, in the collection and use of their entrances, in the determination of their organization and political and decisional procedures. In reality the cantonal sovereignty is a partial one: the cantons are sovereign, in the measure in which their sovereignty is not limited by the federal Constitution, and can exercise all the rights which are not transferred to the federal authority. They have therefore classic state powers (legislative, judicial and executive), but only within the borders traced by the federal Constitution. In other words, in order to fully realize the cantonal sovereignty, the federal Constitution foresees, in general, the principle of residual competence in favor of the cantons, as “the Confederation performs the tasks which are assigned to itself by the Constitution” (art. 42), while the cantons “determine which tasks they have within their competences” (art. 43). In such way every modification of the competences cannot be impose unilaterally by the Confederation through the ordinary normative, but it demands a modification of the constitutional dispositions for which the double majority is necessary. Guarantee of the linguistic rights, representation of the minority groups in the government bodies, popular initiative and the right to promote referendum, valorization of the dominant culture respecting minority traditions in the public school represent just some of the instruments through which every single canton tries to answer to the peculiar requirements of the social reality which composes it.

³⁵ See **U.J. CAVELTI, A. KLEY**, *Staat und Kirche. Art. 72*, in B. Ehrenzeller, P. Mastronardi, R.J. Schweizer, K.A. Vallender (Hrsg.), *Die schweizerische Bundesverfassung, [St. Galler] Kommentar*, Dike/Schulthess Juristische Medien AG, Zürich,-Basel-Genf-Lachen, 2. Aufl., 2008, pp. 1286 ff.



In virtue of article 72, 1st and 2nd paragraph, of the Constitution, every canton is therefore fundamentally free to manage as it prefers its relations with the various religious communities, even in the respect of determined principles fixed by the federal law. Such principles are represented: a) by the art. 15 Const., norm that guarantees to all the residents the right of religious freedom (right that must be specific and integrated by art. 9 of the ECHR and by the interpretation made by the European Court of Human of it; b) from art. 8 Const., that binds the public powers to the respect of the legal equality without any religion distinction; c) by the laicité of the State, principle gained in an hermeneutic way by the federal Court, in force of which the public powers cannot not only have any official religion, but they also have the obligation to abstain themselves from estimating, acknowledging, favoring or propagandizing the values of a determined confessional or philosophical doctrine³⁶.

The over mentioned principles do not prevent to the cantonal legislator to grant a particular statute to certain religious communities through the acknowledgment of public law, but only on condition that the privileged treatment is based on real differences – both of historical, sociological or traditional character – which are suitable to justify disparity.

They are moreover subject to a faint and uncertain jurisprudential interpretation, which on one hand has read in reductive way the implications of the secularism on the concrete work of the public powers, from the other hand it has faced in a not always satisfactory manner the requests of the members of religions not traditionally present on the Confederation territory (especially about building of temples, burying grounds and ritual slaughtering). But then, the recent public voting which has sanctioned – in the constitutional level - the prohibition to build minarets on the Swiss territory must be read in correlation with an growing fear of Islam in the Country, and the consequent fear of a loss of identity which sees a founding element in the Christianity.

The extreme fragmentation of the history and of the systems of relationships between State and Churches in the various Helvetian cantons, together with the rooting of the tradition - that has a determining role in orienting the cantonal legislator principles who is

³⁶ See **U.J. CAVELTI**, **A. KLEY**, *Glaubens- und Gewissensfreiheit, Art. 15*, in B. Ehrenzeller, P. Mastronardi, R. J. Schweizer, K.A. Vallender (Hrsg.), *Die schweizerische Bundesverfassung, [St. Galler] Kommentar*, cit., pp. 349 ff.; **F. HAFNER**, *Glaubens- und Gewissensfreiheit*, in D. Thürer; J.F. Aubert; J.P. Müller (Hrsg.), *Verfassungsrecht der Schweiz*, cit., pp. 716 ff.



about to update the normative system of the ecclesiastical law – determinates in fact a situation characterized by an extreme complexity in defining the common elements of the Swiss legislations in the field of relations between States and confessions.

Traditionally the ecclesiastical legislation of the cantons with an evangelical majority is inspired to a radical system of *Kirchenhoheit*, marked by the attribution of the legal personality of public law to the Churches traditionally rooted in the territory. The Churches/corporations of public law become thus legal entities with powers, rights, duties of legal character and are subordinates to the specific protection and surveillance of the State itself; their authorities and their civil employees are assimilated to public employees although they carry out exclusively ecclesiastic functions and the documents written up by them have also an official nature. To Churches/corporations of public law is attributed a lot of prerogatives that confer to them - in the cantonal legal system - a position of privilege in relation to their spiritual importance and historical tradition. Such prerogatives change from canton to canton: generally they consist in:

- the possibility to create theological faculties subsidized by the State,
- the creation of a spiritual assistance system in the jails or in the hospitals for the members of the Churches/corporations of public law;
- the creation of a religion teaching form about the Churches/corporations of public law inside of public schools,
- the taxes exemption (for example the mutation taxes, the right of real estate pledge, the successions or the tax donation) for Churches/corporations of public law
- in the concession of fiscal sovereignty to the aforesaid Churches³⁷.

In exchange for these privileges, the activity of the Churches/corporations of public law is controlled rather hardly from the canton that imposes unilateral organization norms to the aforesaid confessions limiting - in a more or less incisive way - their autonomy.

The system of relationship between State and Churches is not dissimilar neither in equal cantons neither in those of catholic majority: however, especially in these ones the *Kirchenhoheit* system is

³⁷ R. PAHUD DE MORTANGES, *De la reconnaissance et de l'égalité de traitement des communautés religieuses*, in *Schweizerisches Jahrbuch für Kirchenrecht/Annuaire suisse de droit ecclesial*, 4, 2003, pp. 155 ff.



remarkably attenuated, till to leave to the religious groups which have obtained the acknowledgment an almost total ecclesiastical freedom.

The Helvetian system of relations between State and Churches permits therefore to the cantonal legislator to grant a particular statute to some specific religious communities through the acknowledgment of public law, but only if the privileged treatment is based on real differences - historical, sociological or traditional they are - relevant on the legal plan. Today, nearly all cantons take advantage of such option, and decide therefore - in complete autonomy - the confessions (considered as agencies of fundamental importance for the collectivity, as institutions able to contribute positively to the creation of the important values of the cantonal community) to which attribute not only a privileged position regarding the other confessions present in the canton, but also regarding the intermediate groups with non confessional purposes³⁸.

On the other hand, in the Kirchenhoheit system, the not traditional religious confessions – or not historically rooted in the territory - assume the status of agencies of private law: such a qualification does not involve the attribution of specific legal positions, in fact such agencies are titular of an inferior number of rights than those attributed to corporations/churches of public law. This situation reflects one of the common denominators of the whole European systems of relationship between States and Churches: the so called “selective collaboration”: the Helvetian cantons, as nearly all the European States, pay attention to the religious groups requirements, considered like intermediate societies able to spiritually elevate the individual and to effectively contribute to the social development, and are therefore disposed to collaborate with them³⁹. But this availability is not indiscriminate: it is wider where there is a tuning between the values that hold the religious society and those placed as foundation of the civil society, less wide where this tuning does not exist or is limited⁴⁰.

³⁸ U. FRIEDERICH, *Droit d'autodétermination des Eglises et autres communautés religieuses*, in *Schweizerisches Jahrbuch für Kirchenrecht/Annuaire suisse de droit ecclésial*, 4, 2003, pp. 188 ff.

³⁹ See K. KOCH, *Kirche und Staat in kritisch-loyaler Partnerschaft*, in A. Loretan (Hrg.), *Kirche Staat im Umbruch, Neuere Entwicklungen im Verhältnis von Kirchen und anderen Religionsgemeinschaften zum Staat*, NZN, Zürich, 1995, pp. 108-129.

⁴⁰ G. A. RUTZ, *Die öffentlich-rechtliche Anerkennung in der Schweiz*, in R. Pahud de Mortanges, G.A. Rutz, C. Winzeler (Hrsg.), *Die Zukunft der öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften*, Universitätsverlag, Freiburg, 2000, pp. 35 ff.



The more obvious test of this is offered by the simple analysis of which religious confessions enjoy - in the today normative situation - of the status of "corporations of public law".

Today the majority of the cantons grant the legal personality of public law only to the two confessional groups that - beginning from the XVI century - represent the traditional religious reference of the majority of the Swiss citizens: the catholic Church and the reformed evangelical Church. Such acknowledgment is generally established by dispositions of the cantonal Constitutional charter, a normative document placed on the top of the hierarchy of the sources of the local order, whose changing is subject to aggravated procedures and to an extremely wide social consent; in the majority of the cases, there is the possibility of ad hoc ordinary laws which offer to other confessional groups the status of Churches *selbständige Körperschaften des öffentlichen Rechts*, but actually this possibility is not exercised by the legislative power⁴¹.

Certainly, in some cantons there are confessions different from the catholic and the reformed evangelical ones that have by the Constitution the personality of public law: but also in this case it deals with religious groups historically rooted on the territory and totally compatible with the Helvetian democracy. We refer in fact to the catholic-Christian (or old-catholic) Church and to the Israelite Community, confessional groups well known by the legislator and traditionally present in the social ground of the cantonal community.

We have pointed out the fact that the activity of the Churches/corporations of public law is controlled by the cantons, which can impose unilateral norms of organization to the aforesaid confessions limiting - in a more or less incisive way - their autonomy.

It is clear that - in order to completely face this thematic - it will be necessary to analyze the different cantonal legislations in the ecclesiastical subject: but we can assert right now that the cantons' power of interference in the inner organization of the Churches *selbständige Körperschaften des öffentlichen Rechts* is generally present in two legal obligations weighing on these last ones: the obligation to create assembly institutions regulated by the cantonal law, democratically organized with decisional power on the community and

⁴¹ G. NAY, *Développements structurels dans la jurisprudence et la législation étatiques en Suisse*, in L. Gerosa, R. Pahud de Mortanges (Eds.), *Eglise catholique et Etat en Suisse*, Schulthess, Zürich, 2010, pp. 25 ff.; A. LORETAN, *Le droit ecclésiastique cantonal, ou, Les relations juridiques entre l'Eglise et l'Etat dans les 26 cantons suisses*, *ibid.*, pp. 40 ff.



the obligation to guarantee the public right of the members to elect the guide of the religious community following democratic procedures⁴².

When it comes to the first of these two obligations, it is necessary to remember that the existence of confessional assembly structures is regulated by the cantonal law and able to guarantee the democratic participation of all the *coetus fidelium* to the life of the belonging religious community. It is certainly a meaningful peculiarity of the Swiss ecclesiastical law regarding the general European legal situation. In fact in western Europe - as it is known - the state orders let the churches substantially free to organize themselves according to their own law, even if such general principle - as we will see later on - seems to suffer of a certain erosion due to the fact that the activity of guarantee the civil rights, beginning from that one of religious freedom, seems to stop always less in front of the specificities of the confessional orders.

The forecast of democratic character ecclesiastical assembly institutions aside from what has been established by the single orders of the religious groups constituted in corporations of public law finds its historical background in the late Middle Ages, when - with the constitution and the consolidation of the communal institutions - corporations with a wide popular participation and decisional power on the life of their religious community began to be born on the Helvetian territory. Such corporations were known successively as *Kirchgemeinden* (parish municipalities): after the Reform, they started to assume the function of intermediate entities between the religious community and the political power, allowing to this one to control the nominations of the ecclesiastical staff and the administration of the assets of confessional property.

It was with the *Kulturkampf* that the *Kirchgemeinden* began to be considered as instruments suitable to guarantee the participation of all the believers to decisions about the belonging religious community: and if the reformed Church - which already knew government instruments on democratic base - did not have difficulty to receive and to value the cantonal legal norms that imposed the constitution of the parish municipalities as fundamental constitutional units of all the Churches *selbständige Körperschaften des öffentlichen Rechts* present on the territory, the catholic Church manifested (and continues to manifest) remarkable perplexities on the possibility to conciliate the presence of ecclesiastical institutions created by the cantonal law with the

⁴² B. EHRENZELLER, *L'avenir est-il à une séparation de l'Eglise et de l'Etat ou à de nouvelles formes de coopération?*, in L. Gerosa, R. Pahud de Mortanges(Eds.), *Eglise catholique et Etat en Suisse*, cit., p. 65 f.



traditional government organs previewed by the Codex Iuris Canonici⁴³.

Today the parish municipalities represent - in the nearly totality of the Helvetian cantons – the only ecclesiastical institutions of the Churches *selbständige Körperschaften des öffentlichen Rechts* recognized by the public powers. It is up to the parish municipalities to collect and to rule the ecclesiastical tax and to manage the assets of confessional property: it is up to the parish municipalities to look after the modalities of the spiritual assistance in jails and hospitals, to manage the catechism and the religious instruction in schools, to assume and to coordinate the staff of the Church to which they belong.

The organs of parish municipalities government and the systems of coetus fidelium participation to the decisions of such organs vary from canton to canton: in any case the Kirchgemeinde institution must be structured in order to assure to all its members the right to take part in the public life of the belonging Church.

Generally, the cantonal law assures such participation through own institutes of representative democracy: in such case the believers' participation to the creation of the measures directed to rule the life of the community is given to a synod assembly, to an "ecclesiastical parliament" democratically elected by the believers with decisional power on the activities of the parish municipality. However, in some cantons where the institutes of the direct democracy are traditionally strong (just see what happens to Glarona or Appenzello Interno) the participation of the believers in the decisional processes of their religious community is carried out without any intermediation in public assemblies opened to those with entitlement to vote. This situation – regarding the catholic Church – creates a "double organizational structure" (a canonical one and one created by the civil ecclesiastical law) that - beyond to a remarkable confusion - involves a remarkable attenuation of the Bishop's *munus regendi* on the people he governs and relational dynamics between the Parish priest and parish assemblies not always free from conflicting phenomena. If the jurisdictional power of the Bishop must in fact concur with the powers attributed to the "parliaments" or "governments" of the structures created by the civil ecclesiastical law, the Parish priest pastoral action can be prejudiced by the power - usually very wide - granted to the

⁴³ E. CORECCO, *Katolische «Landeskirche» im Kanton Luzern. Das problem der Autonomie und der synodalen Struktur der katolischen Kirche*, in *Arkiv fuer Katolischen Kirchenrecht*, 139, 1970, pp. 3 – 42.



parish municipalities in financial management subject of the proceeds coming from the ecclesiastical tax.

As for the second aspect, it must be noticed that - in the majority of the Helvetian cantons - the public powers take part in a rather incisive way to the aim of disciplining (completely or partially) the nomination procedures of the parish priests and the pastors. This happens because the necessity to assure the respect of democratic procedures also for what it concerns the nomination of the spiritual guide of the ecclesiastical community is so urgent to justify an erosion (also rather meaningful) of the principle of distinction of orders.

The different procedures provided by the cantons laws that are worried to regulate the democratic election modalities of the subjects destined to act as spiritual guide of the *selbständige Körperschaften des öffentlichen Rechts* Churches are generally characterized by detailed common dispositions, to which specific dispositions direct to safeguard the peculiarities of every single confession can join. However there are also cantons in which the election procedures are only regulated in principle by the cantonal legislator: in this case, the cantonal legislation establishes just some principle norms leaving the Churches endowed of personality of public law free to give performance to them according to the norm, the traditions and their specificities⁴⁴.

⁴⁴ V. PACILLO, *Federalism and Religions in the Swiss Confederation's Institutional Dynamics*, in *Journal of Church and State*, 2009, 4, pp. 617 ff.