The Invocation to God in the Preamble of the Swiss Federal Constitution

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Table of contents: 1. Introduction. – 2. On the normative value of the preamble. – 3. On the function of the invocatio Dei in the preamble. – 4. Invocatio Dei and freedom of religion in the secular state. Law, religion and social ties.

1. Introduction

The question relating to the permanence of an invocation to God in the preamble of the Swiss Federal Constitution was – as is well known – one of the most debated during the procedure for the total revision of the Fundamental Charter of 1874. The invocatio Dei, which had been *approved at* the unanimity by the Constituent Assembly of the second half of the nineteenth century – even within a text strongly inspired by the principles of liberalism and the democratic movement, which had, among other things, extended free-

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dom of worship to all confessions and attributed to all individuals full freedom of belief and conscience, residence and the ability to contract civil marriage – was revived in a very cautious way by the Total Revision Project of 26 June 1995.

No trace, in the text of the preamble proposed by the Federal Council, of the elegant and moving introduction to the constitutional pact proposed by Adolf Muschg in 1977 (Lehmann 2003, 135)[1]: the new Constitutional Charter should have been limited to an invocation to almighty God, followed by a *narratio* aimed at listing, in a sober way, the constituent subjects.

Only the popular discussion – following the publication of the draft revision and in which not only the parties were active, but also numerous intermediate groups and many individual citizens – prompted the constituent legislator to broaden the content of the preamble and to further emphasize the principles/ values contained in the *narratio* in order to transform the opening lines of the Constitutional Charter into a statement of the foundations on which the very existence of the Swiss Confederation rests. Thus some of the fundamental characteristics constituting the backbone of the pact which unites the confederates in a *juridische gemeinschaft*: freedom, independence, peace, spirit of solidarity, openness to the world, responsibility towards future generations.

The rewriting of the preamble confirmed the presence of the *invocatio Dei* within the constitutional provisions: after

[1] «Im names Gottes des Allmächtigen! Im Willen, den Bund der Eidgenossen zu erneuern; gewiss, dass frei no bleibt, wer seine Freiheit gebraucht und dass die Stärke des Volkes sich misst am Wohl der Schwachen; eingedenk der Grenzen aller staatlichen Macht und der Pflicht, mitzuwirken am Frieden der Welt, haben Volk und Kantone der Schweiz dazzling Verfassung beschlossen».

all, the popular debate had shown a broad consensus towards that reference to almighty God which had characterized the fundamental Charters of 1848 and of 1874: and despite the fact that the Federal Council – in the message concerning the revision of the Federal Constitution released on 20 November 1996, i.e. at the end of the popular discussion and the rewriting of the preamble – had hastened to underline the essentially historical-traditional character of the *invocatio Dei* , the parliamentary debate on the issue was heated, as the Socialist Party requested with some insistence the cancellation of this invocation or – at least – the elimination of the "omnipotent" attribute referring to the divinity.

The Socialist National Councilor Jean Ziegler underlined how the reference to God in the preamble could not fail to have repercussions on the entire spirit of the Constitution, preventing – in fact – it from being able to qualify the Swiss Confederation as a "secular state". This consideration had already been raised by the Federal Court in its landmark decision on the crucifix in the municipality of Cadro, in which the judges of Lausanne had based on the invocatio Dei proposed by the preamble a significant relativization of the principle of secularism of the Confederation[2].

At the end of the discussion, the insertion of the invocation «In the name of almighty God!» within the preamble was approved by the majority of the parliament. However, the question of the legal value that should have been conferred on the reference to the divinity remained unresolved.

[2] Judgment of 26 September 1990 of the First Court of public law in the Municipality of Cadro case c. Guido Bernasconi and the Administrative Court of the Canton Ticino (public law appeal).

Indeed, in the parliamentary debates, the usual arguments aimed at excluding that the invocatio Dei can explain its effects on the Swiss legal system (the first concerns, in general, the fact that the preamble is devoid of any legal effect, the second affirms instead the exclusively historical-traditional nature of the invocation to God, understood as a simple homage to the historical continuity between the various confederate pacts) collided with assertions that instead underlined the reference to the Christian and Western European cultural tradition made through the reference to almighty God or the role of axiological orientation that the preamble plays within the constitutional text. Emblematic in this regard were the interventions of Councilors Otto Zwygart and Oscar Fritschi during the parliamentary debate, but the aforementioned message of the Federal Council of 20 November 1996, in which the Government does not exclude that the invocatio Dei may have some effect on the Swiss legal system.

In this contribution we will try to demonstrate three assumptions:

1. The invocation to God in the preamble of the Swiss Federal Constitution is inserted in a text (the preamble) endowed with normative value, which is inserted in the species of teleological norms (norms that do not prescribe a behavior, but recommend an end that the public authorities are free to reach through a plurality of detailed rules).
2. Within the legislative text in which it is included, the invocatio Dei performs three functions: a function of historical recognition of the fundamental values on

which the confederal agreement is based, a symbolic function of reaffirmation of these values within the law in force, and a teleological function of orientation of the action of the legislator, the interpreter, and the judge aimed at the full realization of these values.

3. The invocation to Almighty God is fully compatible with religious freedom and contributes to build a concept of secular state open to the valorisation of religious traditions as an element of spiritual progress of society.

2. On the normative value of the preamble

The thesis that the preamble lacks normative value is often presented dogmatically, without adequate justifications. The preamble would constitute a simple summary, carried out in an emphatic form and in non-normative language, of the constitutional principles: from it it would not be possible to extrapolate anything original with respect to the actual text. Furthermore, during the revision process the majority of parliamentarians would have expressed themselves against a normative value, and this would help reinforce the idea that it represents a text endowed with simple political value, devoid of any ability to explain its effects on the legal system (Bertschi, Gächter 2000). Another doctrine (Ehrenzeller 2002) maintains that the preamble – being an integral part of the Constitution and being able to be modified only through a formal constitutional revision – is a text endowed with normative value. According to this doctrine, the preamble indicates the ethical-political aims and guiding principles of the Confederation, and must be read in conjunction with

art. 2 of the Federal Constitution, with which it integrates into a sort of continuous and uninterrupted textual flow aimed at enunciating the founding values on which the fundamental pact rests.

In our opinion, the latter doctrine hits the mark, also in the light of a further argument linked to compliance with the fundamental principle of conservation of legal acts.

As is known, the Italian doctrine has long discussed the principle of conservation of legal acts especially in the 1930s. Originally limited to the sole sphere of private autonomy and rigidly connected to art. 1132 of the Civil Code of 1865, the principle of conservation was progressively identified, first by Pugliatti and then by Grassetti, as an axiological canon endowed with generalized application, which must find application both in the interpretation of the law and in that of the legal shop.

In particular, it constitutes a concrete application of the brocardo «*magis valet quam pereat*» enunciated by Giuliano and – albeit with different scopes of extension – by Ulpiano, Paolo and Marcello: brocardo which constitutes one of the foundations of the western legal tradition of civil law, and which – if referred to the texts promulgated by the legislator – involves two precise consequences:

a. What is found in a normative document must have the function of innovating the legal system by producing certain consequences on it, unless the legislator has explicitly excluded the validity of a certain proposition, confining it to the mere ambit of rhetorical exercise;
b. Any normative act of ambiguous meaning must, in doubt, be understood in its maximum useful meaning (Grassetti 1961).

Two arguments push the interpreter to extend these consequences to the Swiss legal system as well: one of a logical nature, and one of an exegetical-textual nature linked to art. 1 of the Civil Code of 1907.

From a logical point of view, the need to extend the *magis valet quam pereat* principle also to the constitutional regulatory provision – and therefore also to the preamble, it is due to the particular relationship that exists between issuer and recipient that exists in the documents promulgated by the legislature. This relationship is characterized by an interaction process in which:

- The issuer is called, in compliance with the principles of popular sovereignty and legal certainty, to form a cohesive and coherent text, endowed with complete meaning, aimed at obtaining the result of producing effects capable – mediately or immediately – of regulating the conduct of the associates in order to carry out a specific social project;
- The recipient has the right to demand, always in compliance with the principles of popular sovereignty and legal certainty, a cohesive and coherent text, endowed with a complete meaning, which is useful or relevant for regulating the conduct of the associates and thus contributing to the realization of a particular social project.

In a state of law, therefore, the sovereign people has the power to organize juridical communication through linguistic acts endowed with meaning and capable of effective impact on the law (*magis valeat*) rather than through rhetorical formulas devoid of meaning or effective legal value (*quam pereat*), unless it explicitly declares that – for reasons compatible

with the principle of reasonableness – in a specific regulatory communication it intends to create a sort of pleonastic or even meaningless "linguistic joke".

Obviously, this does not mean that every statement contained in a normative document must assume the character of a prescriptive rule containing a command or a permit: there are statements that fall within the category of principles – without losing any juridical effectiveness – and have a teleological and /or parametric, and are therefore not addressed to all legal *subjects* but exclusively to the legislator and the interpreter with the aim of directing the activity of normative production or the hermeneutical action aimed at attributing a clear meaning to norms with ambiguous language.

The preamble to the Swiss Federal Constitution, which gives voice to the spirit of the Fundamental Charter, and calls the legislator, the administrator and the judge to respect – each for his part – can certainly be included in the latter category of statements. this originating *Volksgeist*. It enunciates, through a complete work of synthesis, the cultural matrix on which the fundamental pact between the associates is based, and expresses objectives and fundamental values specified and made concrete by the remaining constitutional provisions (Häberle 1982).

From an exegetical-textual point of view, there can be no doubts about the fact that the preamble to the Federal Constitution, and therefore also the invocation to God with which it opens, can be modified only through a formal constitutional revision: this implies that its strength of passive resistance must be considered the same as all constitutional norms, and that therefore it places itself – in the system of the hierarchy of sources of the Swiss legal system – at the top point.

Moreover, the preamble, which signifies the ethical-political goals and guiding principles of the Swiss Confederation, serves as a crucial complement to the provisions of Article 2 of the Federal Constitution; on the contrary, the latter provision, deprived of what is expressed in the preamble, would lose a large part of its legal effectiveness, being reduced to a provision of an exclusively emphatic nature and devoid of a precise programmatic value.

Since article 1 of the Swiss Civil Code of 1907 – which lays down the general provisions on normative interpretation, which must also be considered applicable to constitutional principles and rules – requires the jurists to direct their hermeneutical action by respecting the letter of the law, it is quite clear that he must also respect the letter of the preamble, in the light of the fact that it – placing itself at the top of the system of sources and contributing in a decisive way to the specification of art. 2 CF – is undoubtedly "law" in the technical-juridical sense.

It goes without saying that «respecting the letter of the preamble» means giving it a complete meaning and defining its essence in all its semantic complexity: so that the *narratio* it could not be read without the *invocatio*, since both represent inseparable parts of a normative complex wanted in a unitary way by the constituent legislator.

Of course, the preamble, and in particular the invocation to God contained in it, is a prescriptive normative proposition not expressed in an imperative form (Bobbio 1958), but rather a regulative meta-norm which concerns activities concerning norms (Guastini 2010). In other words, it offers the legislator and the interpreter a compass to orient themselves in the typical activity that distinguishes its function: so that both the procedures of normative production and the

activities aimed at providing a complete sense of a legislative provision will have to keep in mind consideration of what the preamble states in its *narratio* that in his *invocatio.*

Now, we must consider how an exclamation like the one that opens the federal Constitution can influence the interpretation and lawmaking process.

In other words, even admitting that the invocation to the divinity, as part of the preamble, can be qualified as a regulative meta-norm directed at the legislator and the interpreter and capable of directing their activity, as concrete options – both law that of juridical hermeneutics – can (and must) cause the Constitution to open with the exclamation «in the name of Almighty God!»? Is it possible that the activity of normative production should be so much conditioned by the *invocatio Dei* as to move towards a form of substantial confessionalism capable of rejecting any project of legal policy incompatible with Christian morality? Is it possible to expect from the interpreter that the work of attributing meaning to a normative proposition is always marked by submission and respect for the fundamental principles of Christianity?

3. On the function of the invocatio Dei in the preamble

The answers to the previous questions can only be negative.

In a democratic state of law that intends to respect the fundamental rights recognized by the *jus internationale cogens,* the normative grammar of a text such as the constitutional one can only be inclusive, or capable of serving as a valid axiological reference for the vast majority of citizens. Indeed,

if the Fundamental Charter, as Ernst-Wolfgang Böckenförde states, is not only a *Herrschaftsvertrag* («binding regulation of the organization, orientation and delimitation of the political power of the domain»), but also a *Gesellschaftsvertrag,* or the document with which an agreement is implemented, an agreement (*Vereinbarung*) aimed at setting out rules and fundamental principles of social coexistence (Böckenförde 2006), it is evident that it must arise from an *overlapping consensus* between the different *Weltanschauungen* present in the social body capable of enucleating a shared ethical common denominator (Rawls 1987).

In a national community, in which different visions of the world coexist, the constitutional act cannot be oriented exclusively towards the values of Christian morality or for drawing from Christianity the fundamental hermeneutic canons for interpreting constitutional norms. Secularism, a cardinal principle of all systems that have signed the ECHR, imposes respect for (confessional and cultural) pluralism, and binds the public authorities to the role of "impartial organizers" of the beliefs that develop within the social body. Naturally this does not exclude the possibility that each legal system can decline the principle of secularism according to some specific coordinates of a historical, cultural and sociological nature, so that these coordinates can have specific juridical consequences, provided that the State is able to guarantee the equal enjoyment of the rights of freedom to all confessions and the exercise of the right of religious freedom – within the limits established by art. 9 par. 2 of the Convention – to all individuals.

It must be emphasized that, according to the Swiss Federal Court, religious neutrality is not absolute. It is considered fully compatible with the structure of relations between

the State and the Churches – existing in numerous cantons – based on the attribution of legal personality under public law (and on the specific legal status connected to it) only to some confessional groups historically rooted in the territory. Therefore, as far as the Confederation is concerned, the validity of a principle of secularism emerges which – if on the one hand it appears weak as regards the regulation of relations between the cantons and the confederation (as it is marked by a proportionally greater position of freedom for the Churches with public law personalities) and some specific issues relating to the religious freedom of some minorities (prohibition of building minarets, issue of ritual slaughter, cemeteries) – on the other hand it generally guarantees freedom of belief and conscience, freedom of expression and general moral freedom also for a series of behaviors contrary to Christian ethics.

On the other hand, the impossibility of interpreting the *invocatio Dei* as an instrument aimed at creating a confessional state does not arise only in the relationship between the Federal Constitution and the Rome Convention – a juridically complex relationship since, in the system of sources of Swiss law, the eminent position of conventional international law can act as a limit to the action of the constituent legislator only within the boundaries set by art. 194, second paragraph of the Fundamental Charter – but also (and in my opinion above all) in compliance with art. 15 of the *Bundesverfassung*. Indeed, it seems clear to me that a normative hermeneutic aimed at paying homage to or even favoring principles and dogmas of Catholicism in the operation of attributing juridical significance to provisions of the law valid for all associates would constitute an evident limitation of the freedom of conscience of the non-Christians.

Therefore, it ought to be emphasized that Spaemann's reading of the relationship between God and the Constitution should be rejected: according to Spaemann the reference to God in the preamble of the fundamental Charter would legitimize the legislator to privilege the belief in a supreme being as the "normal" behavior of citizens and residents (Spaemann 2000), but this interpretation is clearly in opposition with the secularism of the State. But – while certainly significant of the concerns of a particular historical moment and profoundly linked to the commitment of Christians against all forms of totalitarianism and contempt for human dignity – it must also be pointed out the necessity to reject Barth's reading of the *invocatio Dei* as a "Christian sign", from bring together with three others (the cross on the flag, the writing on the 5-franc coin, the fact of being a nation founded on an *Eid ,* on an oath before God) in order to justify a "vocational" dimension of the Confederation capable of justifying its commitment (also military) against all forms of totalitarianism (Barth 1941).

Au contraire, it must be emphasized the compatibility between the interpretation of Peter Saladin and thr the principle of secularism which characterizes the Swiss constitution: according to Saladin «die Anrufung Gottes wird [...] zur Anrufung einer irgendwie vorgestellten, geglaubten Transzendenz» (Saladin 1996); the invocation to God would become – not unlike what was proposed by the German jurist Willibalt Apelt – the constituent legislator's awareness that the Fundamental Charter crystallizes a precise system of values, pre-existing the decisions of the majority and centered on the Western and Christian conception of man and his dignity (Apelt 1949).

This hermeneutic opens up an answer – realistic and respectful of history – to the question of what kind of "God" is invoked within the constitutional pact. It is in fact evident that the attribute "omnipotent" which refers to the divinity in the legislative text, together with the deliberative process that convinced the legislator to re-propose the invocatio *Dei,* leads the interpreter to favor a correspondence between the God of the Constitution and the God of the Judeo-Christian tradition (Marti 1955).

On the other hand, however, this hermeneutic leads to the exclusion that the *invocatio Dei* wants (and can) build a Christian State: the fact that the Constitution was deliberated, approved and promulgated in the name of God of Abraham, of Isaac, of Jacob, of Jesus Christ means that it recognizes as pre-juridical and pre-political values that underlie it the values of Western civilization, shaped on the meeting of the Greek-Hellenistic tradition with the Christian message (Schmid 1991), as highlighted by Benedict XVI's Regensburg speech.

This implies, as previously mentioned, that the invocation to God must be considered endowed with three distinct functions (Ehrenzeller 2002):

a. A function of historical recognition of the fundamental values on which the confederal pact is based. Here we are faced with a complex investigation of a juridical, historical, philosophical and political nature, which however is prodromal to the correct interpretation of the current constitutional law. Indeed, if it is true, as previously mentioned, that the Constituent Assembly recognized, as pre-juridical and pre-political values underlying the *Bun-*

desverfassung, those of Western civilization shaped on the encounter between the Greek-Hellenistic tradition and the Christian message, it is equally true that the preamble does not specify – if not in part – what these values are and what concrete form they have assumed within the legal system. So here is the role of humanistic culture, and of the places where it is taught, in the study of law. The link of the juridical rule with history, with the earth, with culture, prevents – at least in my opinion – the degradation of the legal system to a simple collection of technical rules that must bend uncritically to the needs of the markets or to the populist demands of the moment. The law must be nourished by the contribution of different disciplines, philosophical, theological, literary, historical to be capable of not losing the reasons for which it is placed and the idea of society that it intends to contribute to shaping: and from this derives, at least in my opinion notice, the impossibility of correctly approaching the production and interpretation of the law without an adequate cultural (including theological) background that brings the law back – to quote Schmitt – to its link with the land in favor of which it is produced. The cultural roots of an entity endowed with sovereignty (and it doesn't matter if this body is called a Confederation or a canton) cannot be disregarded, under penalty of falling into juridical nihilism, and the work of revealing these roots is due to the contribution of different languages all with equal dignity.

b. a symbolic function of reaffirmation of these values within the law in force;
c. a teleological function of orientation of the action of the legislator, the interpreter and the judge aimed at their full

realization. The lack of detailed specification of the pre-juridical reference values on which the federal constitutional pact is based means that the language in which the *invocatio* Dei is articulated within the constitutional preamble is characterized by a high rate of symbolism. As is known, the symbol is a semantic structure that refers to another entity endowed with a certain charge of ideality, so that whoever decodes the signifier of this structure is naturally inclined to construct the meaning in relation to the entity callback. And so the invocation to God does not only constitute the commemoration of a tradition – that is, the one that arises from the encounter between Christianity and Hellenism – but confirms the validity of the latter as a reference for the action of all those who are called to produce and apply the law. The high rate of symbolism expressed in the *nominatio* Dei of the preamble therefore does not prevent the values on which the *christlich – abendländischen Tradition* – once identified through a combined action of the various disciplines mentioned above – can truly constitute one of the keys through which the judge can fill a rule with meaning or can constitute an impulse and limit to the legislator's action (Wertenbruch 1958). But this comes with a double caveat:

- The values of the *christlich – abendländischen tradition* must always be read, as previously mentioned, in an inclusive and not an exclusive way. This implies that there must be a very broad consensus around them, and that therefore their position of pre-eminence within the legal system must be recognized regardless of their ideological or faith affiliations. In

other words, the role of orientation and inspiration can only belong to that *Kerngehalt* of the set of values of the Christian and Western tradition to which even the majority of non-Christian and non-religious citizens pay homage (Fleiner 1976).

- The constitutional text, in its articulation, often offers an identification and a description of the *Kerngehalt* of the set of values of the Christian and Western tradition relevant for those who have to produce and interpret the law (see for example articles 7 and 8 CF). It is quite clear that the text of the Fundamental Charter must prevail over any ideological interpretation of the opposite sign, as well as the implementing provisions of the constitutional principles – be they of a federal or cantonal nature – if they respect the *jus international cogens* and the Fundamental Charter in force – cannot be accused of infidelity with respect to the values of the Christian – Western tradition. The Swiss legal system, as secular, offers the sovereign people the power to concretely implement the reference values through a first, immediate reference to the parametric role of the Constitution, for which the centrality of the text on the context is an indispensable fact.

4. Invocatio Dei and freedom of religion in the secular state. Law, religion and social ties

To sum up, the secular nature of the Confederation prevents the interpretation of the *invocatio Dei* as a constitutional clause aimed at qualifying the Swiss legal system as a confessional

system in the Christian sense; moreover, the reference to God can only be inclusive, appearing as an element of unification of citizens regardless of their religion or vision of the world: in the light of the aforementioned considerations, the *invocatio* opens up to an emphasis on a series of values – characteristic of the Christian West – generally recognized as pre-juridical and pre-political references of the constitutional pact.

Hence the idea of a "secularization" of religious references within the Swiss legal system which could be read as the construction of a "civil religion" of all Swiss people.

We know that – in a general sense – civil religion is a complex structuring of values, rites, myths and symbols considered expressive of the bond between people and nation: civil religion is not built from dogma or supernatural revelation, but is structured from exaltation of the *Heimat* and by the ideal, cultural and historical processes which have formed or strengthened the relationship between the individual and the state community. Civil religion, in other words, is the set of those values which can be considered of such importance by the political community as to be considered sacred and intangible: their observance is not imposed on the associates by a divinity, but by practical reason, thus how it has evolved across the spectrum of history and cultural tradition.

We can therefore state that the preamble to the Federal Constitution represents a figurative and summary listing of Switzerland's reference values: values considered to be so closely connected with the identity of the people and with the ethical foundations of society – from which springs the love for the State and harmonious coexistence among the associates – to be considered endowed with a sacred character. It is precisely this sacredness that justifies the call to

God: regardless of the different faiths, ideologies, visions of the world, the *Kerngehalt* of the socially shared values listed in the preamble, it has a mystical, moral and civic dimension that binds all Swiss people to respect it. Hence the need to call the highest guarantor of ethics, or "Almighty God", as witness of this link, an expression with which the atheist or the agnostic can understand the imperative of his own moral conscience without the need to embrace necessarily no theistic view (Ehrenzeller 1998).

In many respects, this interpretation reconnects the "almighty God" guardian and guarantor of the fundamental reference values of the social pact to the τὸ κατέχον / ὁ κατέχων of the Epistle to the Thessalonians, at least in the interpretation of the latter given by Carl Schmitt. Almighty God, as the supreme guarantor of ethics, gives sacred force to the founding values on which the unity of the Swiss people rests, and thus prevents their dissolution.

From this point of view, the *invocatio Dei* would constitute a logical instrument of "detention" against ideologies wishing to make *a clean sweep* of the political theology on which not only Switzerland is founded, but – more generally – Western Europe. The preamble, and in particular the reference to God contained in it, prevents the public authorities from veering towards technocracy, from causing the death of any form of binding morality at a pre-juridical level and – finally – from destroying that axiological complex on which the social bond and therefore the identity (and the very essence) of the State.

It is quite evident that the "restraint" operated by the preamble cannot in any way be the only instrument capable of contributing to the continuation of the social bond: but

its functions (recognitive, symbolic and teleological) are endowed with great power, and renouncing them – especially in the face of the risks of social dissolution that come from a certain civic nihilism – can open the way to unforeseen and certainly not positive consequences for the peace and prosperity of the *Willensnation.*

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