

CONCORDATS AS INSTRUMENTS FOR IMPLEMENTING FREEDOM OF RELIGION

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1. 'Historia concordatorum, historia dolorum'?

Is this curial adage – with which in the past Concordats were criticized as mutual concessions of privileges between Church and State – still relevant today? Drawing on a question of a prominent member of the Italian Constituent Assembly, Giuseppe Dossetti (who was also a canon lawyer): are Concordats a 'bad deal for the Church'?

In order to answer, I would preliminarily clarify that Concordats are international treaties between two entities, the State and the Catholic Church, both sovereign in their own domain respectively, the temporal and the spiritual one. They are just tools, in themselves they are neither good nor bad. They become good or bad depending on their contents.

It would be interesting to retrace the historical development of Concordats in order to detect whether and how they have guaranteed freedom of religion in its three aspects, institutional, collective and individual. We could start with an initial arrangement (basically a concordat) still under emperor Commodus in Roman times, which allows a temporary cessation of persecution against Christians, to find that it guarantees religious freedom as a minimum existential level: the freedom to live as Christians. Or, for a formal agreement to ensure the *libertas Ecclesiae*, we refer to the Concordat of Worms (1122), which in the Middle Ages ended the Investiture Controversy, freeing the Church from the power of the Princes. It would also be interesting to dwell on the concordats of the Age of Absolutism: they were an equivocal alliance between Throne and Altar but allowed for a space (now small, now large) of freedom that in a society based on privilege would not be otherwise granted. Nevertheless it was a space surrounded by such caution and distrust that represented a jurisdictionalist restriction both on the *libertas Ecclesiae* and on the religious freedom of the subjects having a religion different from the Sovereign's one. Finally we consider the first non-confessional Concordat, Napoleon's Concordat (1801). For the first time religious freedom was no longer linked to the choice of the sovereign but to the choice of the people.

Being not possible to deepen these issues here, I would focus my thoughts to the Twentieth Century and the beginning of our Century to

highlight a particular trend: the purification of the concordat from ‘exchange of privileges’ to ‘pact of liberty’.

Several factors lead to the passage from privilege to liberty.

Ex parte Status the spread of democratic regimes in once authoritarian States creates the need to harmonize the previous Concordats with the new principles of freedom. Let us consider, for example, the three most important and controversial Concordats of the Twentieth Century with Western European countries: the Concordats with Fascist Italy, with Nazi Reich and with Franco’s Spain. Concordats were a protection against the spread of authoritarian – if not totalitarian – regimes: they were not a full protection – of course – but still they were a protection. After the fall of illiberal regimes, the ‘pact of liberty’ becomes the model of Concordat which – made it so compatible with the confessional pluralism – is inserted in the evolutionary process of pluralist democracy.

Ex parte Ecclesiae the ‘pact of liberty’ is reached after an extraordinary event in the rethinking of the relationship between Church and political community: the Second Vatican Council. It is prepared by the Encyclical *Pacem in Terris*, the watershed between ancient times and modern times. Aspects of the Church’s concordatary policy post-Vatican II show a great capacity of the Catholic Church to become a standard-bearer for freedom. Let’s look at them.

2. Vatican II: the tomb of the Concordats?

A question was heavily debated immediately after the Council: did the Council Fathers intend to bury the Concordats? The answer is no. But we need to qualify this statement.

First, the Council does not express itself in technical legal terms. The Council does not use the term Concordat but the reference to *sana cooperatio* on one hand and, secondly, the claim that ‘the Church and the political community in their own fields are autonomous and independent from each other’ (*Gaudium et Spes*, n. 76) are arguments in favour of the concordatary system. The dialogue between Church and State will be more fruitful to the extent that it will respect the equal dignity, even in legal terms, of the parties. The Concordat – as legal act between two entities that mutually recognize each other’s sovereignty in their respective domain and that are both designed to serve the human person – allows to reach an agreement which is the fruit of cooperation rather than the result of an act of supremacy. Let’s consider the Italian example. During the Fascist Age, in 1929, the Concordat provides important – albeit limited – areas of freedom for the Church and for the individual which would otherwise not exist, and

the two entities, Church and State, seem jealous of their own sovereignty. During the democratic age, in 1984, the Concordat is a tool of 'mutual co-operation in the interest of the person and for the good of the country'. It goes from a static position of *actio finium regundorum* to the dynamic perspective to be serving the common good. The 1993 Concordat with Poland expresses itself in similar terms.¹

The second point concerns a discontinuity of the Council with the past. *Gaudium et Spes*, n. 76, states that the Church 'does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods'. So the privileges are to be abandoned, not the Concordats.

A third novelty of the post conciliar Concordats regards freedom of the person and of his/her choices. The Conciliar Declaration *Dignitatis Humanae* continues a turning point in a direction already indicated by *Pacem in Terris*. John XXIII (in discontinuity with the *Syllabus* of Pius IX) had already invited to distinguish between error and the person who errs. Accordingly *Dignitatis Humanae* provides for religious freedom as a fundamental right benefiting also 'those who do not live up to their obligation of seeking the truth and adhering to it', in the belief that 'the truth cannot impose itself except by virtue of its own truth'.

Hence further developments in various post-conciliar Concordats such as the need to ensure the freedom of religious choice. An example from the 1984 Agreement with Italy: it is guaranteed the right to attend to Catholic religious teaching in public schools as well as it is guaranteed the right to not attend to such teaching. Hence the tendency to avoid preferential legal regime for Catholics, since a differential treatment could have detrimental consequences for non-Catholics.

Finally, the facts also prove that the post-conciliar Church does not consider the Concordats' season closed. After Vatican II not only there was a review of existing Concordats to adapt them to the Council's teaching, but several others were also signed, even with officially or sociologically non-Catholic Countries. Let's consider the Agreement with Israel or the one

¹ 'The Republic of Poland and the Holy See reaffirm that the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this principle in all their mutual relations and in co-operating for the promotion of the benefit of humanity and the good of the community'.

with Kazakhstan. This shows that the Concordat will continue to be a tool for a *sana cooperatio*.²

3. Today's systems of relations between Church and State

In order to better assess the characteristics of the Concordats let me broaden now the horizon to the various systems of relations between Church and political community (which usually is the nation-State but which can be another articulation in federal systems, such as the Land in Germany).

They mirror and reflect the historical, cultural and legal traditions of each country. They are essentially referable to three models: a) the separatist model, b) the Church of State's model; c) the concordatarian model.

Before evaluating each of them not so much in the abstractness of the theory but in the concreteness of the present reality, I would point out that freedom of religion can be protected in each of the three models. The imposition of a single model – as someone would wish in the case of the European Union – would violate the principle of subsidiarity, which gives to each political community a margin of appreciation in choosing how to regulate their relations with religious denominations and how to guarantee its citizens religious freedom.

a) *The separatist model*

The separatist model has as its most famous archetypes France and USA: separatism 'hostile to religion' the first one, 'friend of religion' the second. This distinction was valid at the beginning of the Twentieth Century when the echoes of the Enlightenment in France and of the French Revolution was not yet extinguished, while in America the reference to the Founding Fathers was still strong. Recently there has been a mitigation of French separatism has increased (at least in the words of President Sarkozy), and U.S. separatism (some judgments of the Supreme Court have emphasized the role of the so-called wall of separation) in the sense opposite to that outlined by Alexis de Tocqueville in his famous essay 'Democracy in America'.

² Another criticism of the Concordats is based on the assertion that the relationship between Church and State after the Council can no longer be classified as a relationship between two legal systems, but between two communities of men. The teaching of Paul VI already denied this claim in 1969, so soon after the ending of Vatican II. His *Motu Proprio Sollicitudo Omnium Ecclesiarum* states that State and Church 'both are perfect societies, endowed therefore with their own means, and are autonomous in their respective spheres of activity'. Moreover, reasserting the aims of the dialogue between Church and States, it considers them more easily accessible if there is an official legal relationship, such as the concordatarian practice.

Separatism is characterized by the fact that the State shall refrain from adopting measures in support of religious denominations (e.g. public funding), offering as a *pendant* a commitment not to interfere in the activity of such denominations. It is a model in itself not contrary to religious freedom but which raises three concerns.

First, the lack of state support to religious phenomena can lead to unequal treatment: the choice not to fund religious denominations is not expressing neutrality in front of the religious phenomenon but a favourable attitude toward non-religion. Second, separatism often appears as ‘free Church in a free State’. A well known expression to the Italians, having been coined by Cavour. A seductive but misleading expression. Because ‘in’ actually means that the Church is not recognized by the State as primary and original legal order (it is not said ‘free Church and a free State’), but as a secondary legal order, therefore subject to State’s sovereignty.

The promise, therefore, not to interfere in the activity of the Church can remain a dead letter. Finally – and it is perhaps the most important aspect – separatism imposes incommunicativeness between State law and religious legal order. Except that we all know that if there are purely spiritual matters (the sacraments) and purely temporal matters (the sword, the scale and the currency), there are also different *res mixtae*. Let us consider, for example, cultural heritage of religious interest belonging to ecclesiastical structures: incommunicativeness between the two legal systems makes it difficult for a regulation satisfactory for the one or for the other, being the result of a unilateral decision.

b) The Church of State’s model

The Church of State’s model (confessionalism) is even more varied than the separatist one. It is present in very different contexts: in several Orthodox and Protestant Countries, just to mention Christian contexts. But even Israel and many Islamic States adopt it.

It is possible to identify a common denominator: the non-existence (or at least the weakening) of the distinction between temporal and spiritual power. This in two ways: either the head of state is also the head of the National Church (think of the Queen of England), or religious leaders have a role of government. In this second sense the case of Iran is emblematic. Also the Dalai Lama asserted political, as well as spiritual, leadership of Tibet, which he waived very recently.

The general objection to such a model is that it denies the principle of the duality of mankind’s government, embodied in the Gospel precept ‘repay to Caesar what belongs to Caesar and to God what belongs to God’.

On a more practical plan the Church of State's model can produce violations of religious freedom not only of the members of other denominations, but also of the freedom of Church of State. The Church of Norway, for example, is subject in all respects to the legislation of the National Parliament (Storting) that in June 2008 legalized same-sex unions. As a result, the National Church was expected to endorse these unions and was called upon to reform the liturgy in order to comply with new legislation. Violation of institutional religious freedom is obvious: a relevant decision – even from the doctrinal point of view – is not taken by the religious authorities (the Synod), but by the political power.³

c) *The concordatarian model*

The concordatarian model entails a bilateral negotiation between Church and political community which is respectful of their reciprocal autonomy. In democratic Countries the dialogue with the Church meets a participatory conception which nourishes freedoms. We have already mentioned it above referring to the Italian situation. It should be added here that the strong concordatarian tradition in Italy was driving for the freedom of other denominations. Our founding fathers have in fact introduced a new legal institution, the *Intesa* (agreement) with non-Catholic denominations, which allowed them to protect their own identity through negotiation with the Government. The difference in treatment derives from the fact that the Catholic Church has legal personality under international public law and may therefore conclude an international treaty (the Concordat), while other denominations – without international legal personality – enter into an agreement under domestic public law. This principle of bilateralism was reflected in 1997 by the democratic Constitution of Poland which looked at the Italian example as a model.

If the concordatarian model is not in itself immune from criticism (especially when used as an instrument of privilege to the detriment of members of other religious denominations), nevertheless it has at least two aspects that make it preferable to other models: 1) it implies the recognition by the State of the Church's sovereignty (whose implications we will examine shortly) and

³ On the other hand in Greece a legislation was in force until the Nineties (later abrogated following up the European Court of Human Rights' judgment *Manoussakis v. Greece*) according which the building of places of worship of religious denominations different from the Greek-Orthodox one was subject to the authorization of the local Orthodox Metropolitan. The intent to keep the historical and religious tradition of the Country is appreciable but we cannot help reporting the consequent violation of the religious freedom.

thus the distinction between temporal and the spiritual sphere; 2) the regulation of *res mixtae* is the result of bilateral negotiations and is not one-sided.

Where possible, the Catholic Church has entered into Concordats (or, beyond the *nomen iuris*, similar international treaties) to adjust its relations with the States. To date, the Holy See has diplomatic relations with 178 States and 43 of them have signed a concordatarian agreement.

4. The issue of sovereignty

The fact that the concordatarian system presupposes and confirms the sovereignty of the Catholic Church is not a merely decorative or ceremonial issue. It relates to fundamental aspects, first of all the Holy See's claim of legal personality and capacity under international law. If the legal doctrine differs in providing the theoretical justification for such principle (there are those who argue that it would be a dogma of faith), an empirical overview of this issue (an approach that characterizes international public law) leads to recognize her legal personality and capacity. In fact the Holy See historically participates in international relations, meeting the criterion requested under international law for external sovereignty: the existence *de facto* as a centre of will and independent action. Among the most significant contributions, I would recall that the Holy See has participated in the work of drafting of the Vienna Conventions on diplomatic relations and on international treaties and then became a party of them. Similarly in 1972, when the Conference on Security and Cooperation in Europe was convened, she was considered a participating State, without any dispute on her sovereignty.

Two issues need to be mentioned. The first concerns the fact that the Holy See's international sovereignty is independent from the temporal power on the Vatican City State. After *debellatio* of Papal States, from 1870 to 1929 the Holy See continued to exercise active and passive rights of legation and to conclude Concordats. It is a demonstration of the spiritual – not temporal – nature of her international sovereignty, recognized by the *ius gentium*. The second question is closely linked to this special nature: the Holy See – self-limiting her sovereignty (Article 24 of the Lateran Treaty) – declares herself 'not involved in international disputes between the States and in international conferences organized for that purpose'. Therefore she no longer intends to deal with purely political or military disputes.

Even so limited, the international sovereignty of the Holy See is victim of a propaganda campaign aimed at excluding her from International Organizations and at denying the Concordats' nature as international treaties. These lobbies are extremely dangerous not so much, or just because, they are intended to deprive the Church of a right essential for the exercise in

the World of her priestly, prophetic and royal office, but also because, limiting her sovereignty, surreptitiously seek to impose on the Church rules conflicting with her religious beliefs.

Unlike in the past, when it was the freedom of episcopal appointments which was at stake, today the neo-jurisdictional attack is more subtle but no less dangerous. Denying the sovereignty of the Church means, in this context, opening the way for the application of State law even within the Catholic Church itself. The European Parliament has already adopted a resolution contrary to religious denominations that do not allow women access to positions of government. It is expected that soon another resolution will object to the Church ban against same-sex marriage under Canon law.

From this point of view Concordats have crucial importance. In addition to reaffirming the sovereignty of the Holy See they are an important bulwark to ensure that State's legislation does not affect the very nature of the Catholic Church. It is such an important legal bulwark that there are several attempts to attack it indirectly. Supranational bodies (I refer in particular to the European Court of Human Rights and to the EU Institutions) – being unable to directly challenge the contents of the Concordats – contest them indirectly. These bodies claim that the State Party, while giving execution to Concordats, introduces into domestic law a legislation which is not in line with international standards. It follows an invitation to the States, more or less explicit, to denounce the Concordat.

The ultimate goal of these manoeuvres is to exclude religion from public life. Eliminating in fact any autonomy and individuality of religious communities and subjecting them to the laws of the State becomes instrumental to the assimilation of religious choice to the choice to join charitable or sporting associations. In essence, it means removing the public role of religion and relegating it to a purely private fact.

5. The Concordats and the national episcopate

In conclusion, I mention an issue which, although specific, has consequences of a general nature: the role of the national bishops' conferences. After the Council, there were those who put into question the role of the Holy See in its relations with States, and tried to exclude any jurisdiction of the apostolic nuncio in favour of the conferences of bishop.

Although more nuanced than previously, the current Canon Law⁴ continues to give to the Holy See (*Sectio altera* of the Secretariat of State) and

⁴ *Motu Proprio Sollicitudo Omnium Ecclesiarum*, can. 365 Code of Canon Law and article 46 of the Constitution *Pastor Bonus*.

to the apostolic nuncio the authority to entertain relations with the States and gives to the first the power to enter into Concordats. In some Concordats there is a mediation: they defer to subconcordatary agreements between the State and the episcopal conference the establishment of the practical implementation of general principles set out in the Concordat.

I do not want to address the issue of the relationship between the Holy See and the conferences of bishops from a theological and pastoral point of view. From a legal point of view I note that a further expansion of this practice runs the risk of leading to the emergence of national churches. History shows how the national conferences of bishops have sometimes come to terms with unjust governments. Our French colleagues, but not only them, will certainly remember the 1682 Declaration of the Gallican Clergy with its infamous four articles: a black page of subservience of the episcopacy to the absolute King.

To avoid similar temptations, the universal authority of the Holy See seems the best guarantee of freedom.