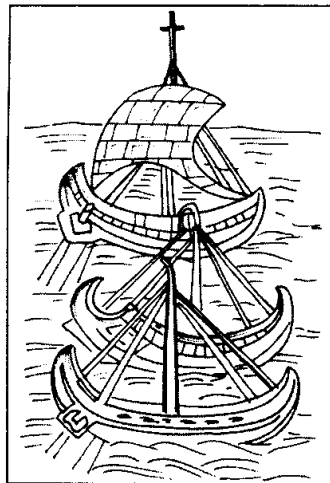


CONGREGAZIONE PER LE CHIESE ORIENTALI

IUS ECCLESIARUM VEHICULUM CARITATIS

*Atti del simposio internazionale
per il decennale dell'entrata in vigore del
Codex Canonum Ecclesiarum Orientalium*

Città del Vaticano, 19-23 novembre 2001



LIBRERIA EDITRICE VATICANA

2004

The Role of Concordats Promoting Religious Freedom with Special Reference to Agreements in the Middle East

RAFAEL PALOMINO

Canon 4 CCEO – «*Canones Codicis initas aut approbatas a Sancta Sede conventiones cum nationibus aliisque societatibus politicis non abrogant neque eis derogant; eadem idcirco perinde ac in praesens vigere pergent contrariis Codicis praescriptis minime obstantibus*».

The Catholic Church has preserved an enduring tradition according to which She resolves conflicts and confrontations with the Secular power — and settles what is known as “*res mixta*” — through what it is commonly called *Concordats*.

Concordat could be described as a legal rule of a written text, divided into clauses or articles, signed by two international sovereign subjects¹ (one of which is the Holy See on behalf of the Catholic Church), as a bilateral compact.² This is a broad notion of Concordat, embracing not only large agreements dealing with all the aspects of Church life, but also concise instruments concerning specific affairs, whatever “*nomen iuris*” (convention, agreement, “*modus vivendi*”, protocol) may be.

The earliest Concordats meant a peaceful settlement between the Pontifical power and the Secular one. They mixed secular and religious matters, since the Pope enjoyed political-secular power too. These initial Concordats reflected (and this characteristic is still in force)³ the lasting Church effort in keeping her freedom (*libertas ecclesiae*) away from secular intervention. Besides, in some cases Concordats reveal the difficult balancing between the Pope and the Emperor governing the same individuals or the same society.

However, the role and meaning of Concordats has changed in some measure. Somehow modern Concordats serve the purpose of promoting those conditions in which Christian communities could flourish peacefully. And as a ba-

¹ Concerning the international legal ability of the Holy See, G.R. WATSON, “Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement”, *Catholic University Law Review* 47 (1998), 499-506.

² J. T. MARTÍN DE AGAR, *Raccolta di Concordati 1950-1999*, Città del Vaticano 2000, 26.

³ R. MINNERATH, “The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective”, in: *Catholic University Law Review* 47 (1998) 468.

sic *side effect*, Concordats improve in the signatory countries a wider understanding of religious freedom, which benefits other religious groups or even the civil society in general.

This paper addresses two related topics: the role of Concordats in promoting a *religious freedom culture*, and the religious freedom content of two Concordats, which have been settled in the Middle East.

1. Relationship between Concordats and Freedom for the Church: a Different Outlook of the “*libertas Ecclesiae*” Principle

One may argue that Concordats promote a privileged position before the State, unavailable to other religious communities. Possibly this could be true concerning Concordats signed before the Twentieth Century. Yet this aim has changed completely. The change is due in part to the new direction that the Second Vatican Council gave to Church-State relationships. According to the Declaration «*Dignitatis humanae*», the new *keyword* for understanding the proper role of the State in dealing with religion is religious freedom,⁴ which belongs not only to individuals, but also to families⁵ and religious communities.⁶ Religious freedom offers the basic criterion under which it is possible to assess the suitability of a given Government or State in its relationship with Religion. Consequently the Church only claims «freedom for herself in her character as a spiritual authority, established by Christ the Lord, upon which there rests, by divine mandate, the duty of going out into the whole world and of preaching the Gospel to every creature. The Church also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith»,⁷ being aware that «where the princi-

⁴ For a thoughtful introduction to the religious freedom conception inside the Declaration «*Dignitatis humanae*», A. FUENMAYOR, *La libertad religiosa*, Pamplona 1974, 15-47.

⁵ «The family, since it is a society in its own original right, has the right freely to live its own domestic religious life under the guidance of parents. Parents, moreover, have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive. Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly». Declaration on Religious Freedom «*Dignitatis humanae*» on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, Promulgated by His Holiness Pope Paul VI on December 7, 1965, n. 5. Original text in *AAS* 58 (1966), 929-946.

⁶ «The freedom or immunity from coercion in matters religious which is the endowment of persons as individuals is also to be recognized as their right when they act in community. Religious communities are a requirement of the social nature both of man and of religion itself». *Ibid.*, n. 4.

⁷ *Ibid.*, n. 13.

ple of religious freedom is not only proclaimed in words or simply incorporated in law but also given sincere and practical application, there the Church succeeds in achieving a stable situation of right as well as of fact and the independence which is necessary for the fulfillment of her divine mission ».⁸

According to authoritative opinions,⁹ the latter assertion would lead to a new situation in which bilateral agreements between the Catholic Church and the democratic States (in which religious freedom is recognized) were no longer necessary. Instead of those agreements, unilateral legislation would be enough to protect religious communities legal needs.

In spite of this, the Catholic Church continues new legal ties with different democratic States. And it is important to note that a significant part of these new compacts were signed with non-Christian countries.¹⁰

Let us summarize the two previous ideas. The Catholic Church requests from the States for herself only this: *freedom* for accomplishing her mission in the World. To this aim, unilateral legislation from the States is enough, since the State law could guarantee “*per se*” freedom of religion. But, at the same time, in recent years we have witnessed an increasing number of Concordats (more than sixty conventions of various titles with twenty-seven different countries!). Is there any legal explanation for this paradox? From my view, there is no paradox at all. The reason for maintaining the concordatarian practice is twofold: sometimes democratic States do not implement completely religious freedom (specially those States which started the democratic experience recently), or cannot determine Catholic Church religious needs satisfactorily, and the other reason is that Concordats work in the same way as unilateral legislation on religious freedom, going even *beyond* that legislation. In other words, Concordats themselves promote religious freedom.

The role of Concordats promoting religious freedom has two different stages.

In their inner or *internal stage*, Concordats report patterns of actions connected with religious freedom of individuals and communities. For instance, Article 7 of the Concordat with the Republic of Kazakhstan¹¹ establishes as follows:

«The Republic of Kazakhstan in conformity with its national legislation shall give the Catholic Church the possibility of acquiring through ownership or lease, corresponding to the needs of the Church, buildings

⁸ *Ibid.* n. 13.

⁹ P.A. D’AVACK, “La Chiesa e lo Stato nella nuova impostazione conciliare”, in: *Atti del Congresso Internazionale di Diritto Canonico “La Chiesa Dopo il Concilio”*, Milano 1972, 351-380.

¹⁰ Let us understand under this term (non-Christian countries) those States and Governments without a Christian historical tradition.

¹¹ J.T. MARTÍN DE AGAR, *Raccolta di Concordati 1950-1999*, Città del Vaticano 2000, 613.

and plots of land for the construction of the buildings necessary for the pastoral service of the Church, such as Churches, parish houses, houses of residences for the performance of religious, socio-cultural, catechetical, educational and charitable activities».

With this wording, the Concordat offers a different enunciation to the right proclaimed in the “Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief”, Proclaimed by General Assembly resolution 36/55 of November 25, 1981 (hereinafter *DEAFID*), Article 6:¹²

«In accordance with article I of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

(a) To worship or assemble in connection with a religion or belief, *and to establish and maintain places for these purposes* [...]»(emphasis added).

Article 12 of the Concordat with the Polish Republic of 1993 provides:¹³

«1. Riconoscendo il diritto dei genitori all’educazione religiosa dei figli e il principio della tolleranza, lo Stato garantisce che le scuole pubbliche elementari e medie, nonché i centri prescolastici, gestiti dagli organismi dell’amministrazione civile o autogestiti, organizzino, in conformità alla volontà degli interessati, l’insegnamento della religione nel quadro del relativo programma di scuola o prescolastico».

With this language, the text repeats part of Article 5 of the *DEAFID*, accommodating its intent to the specific situation the Parties are deciding on:

«1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up».

The inner or internal stage of Concordats bears a promotion of specific aspects of religious freedom, according to the particular circumstances of each

¹² R. NAVARRO-VALLS, R. PALOMINO, *Estado y Religión.- Textos para una reflexión crítica*, Madrid 2000, 192-196.

¹³ J.T. MARTÍN DE AGAR, *Raccolta di Concordati 1950-1999*, Città del Vaticano 2000, 689 (official Italian version).

agreement. Each Concordat in which religious freedom is specifically regulated transposes into legal terms a religious and secular understanding of religious freedom, making possible to government agencies and to non-religious officials, judges, etc., to *recognize* in the legal text a *legal and secular translation* of religious conduct.

At the same time, Concordats contribute to some extent to the system of relationship between religious groups and the State. This is what I call the *external stage*, in which Concordats contribute to religious freedom of other religious groups and communities. The Catholic Church has played a significant role in crystallizing some sort of Church-State legal system, known as “co-operationist regime”.¹⁴ This system consists basically in launching through legal measures channels of communication and understanding between the Government and the religious groups (normally, but not necessarily, the most important ones). Co-operation is not a *religious* model of monitoring relationships between religious groups and the secular state. However, it is properly consistent with the Christian tradition.¹⁵ Under this system, the State recognizes itself as an entity *different* from religious groups, but not completely isolated from them, since both religious groups and the State share matters of common concern, and the religious groups satisfy or fill some needs (religious, charitable, and so forth) of the population. As a result, the State assists the religious groups in several topics (education, tax matters, direct funding) and removes obstacles, which hinder the action of religious groups in other topics (chaplainry in hospitals or prisons). Frequently Governments use *legal agreements* (as in Spain, Italy and Portugal) to put into effect co-operation. It often happens that these legal agreements follow the structure and content of the Concordats (the Spanish case is apparent). Recently, scholars have pointed out that agreements with religious groups could be particularly useful in three situations. First, implementation of religious freedom in countries with no written constitution or where the constitution does not adequately protect religious freedom, if these agreements include a *minimum* religious rights description.¹⁶ Second, solution of problems related to the position of the respective religious communities in the absence of a general treaty on religious rights. Third, effective fulfillment of the 1992 U.N.

¹⁴ W. C. DURHAM, “Perspectives on Religious Liberty: A Comparative Framework”, in: *Religious Human Rights in Global Perspective. – Legal Perspectives*, The Hague 1996, 20-21. For a comparative analysis of co-operationist regimes in Spain and Italy, see J. MARTÍNEZ-TORRÓN, *Separatismo y Cooperación en los Acuerdos del Estado con las minorías religiosas*, Granada 1994.

¹⁵ J. RATZINGER, “El significado de los valores morales y religiosos en la sociedad pluralista”, in: *Verdad, Valores, Poder.- Piedras de toque de la sociedad pluralista*, Madrid 2000, 106-107.

¹⁶ S. FERRARI, “The Fundamental Agreement Between the Holy See and Israel and the Conventions Between States and the Church since the Vatican II Council”, in: *Catholic University Law Review* 47 (1998) 406.

“Declaration on Minorities” (specially concerning obligation of the States).¹⁷ In addition, a co-operationist approach may be necessary for a transitional period, from religious freedom repression to religious freedom pluralist recognition (this is the case of post-communist countries in Europe).¹⁸

2. The Concordats in the Middle East

According to the latter considerations, let us analyze the salient aspects of two important Concordats which have been settled in recent years: the “Fundamental Agreement” between the Holy See and the State of Israel of 1994 (and its following developments) and the “Basic Agreement” between the Holy See and the Palestine Liberation Authority (hereinafter, *PLO*) of 2000.

Being each different from the other, however there are some relevant common aspects to underline.

Both belong to the same pattern,¹⁹ that of “frame” agreements, i.e. texts crafted in broad terms that require further development to achieve real efficiency and meaning. Usually, these “frame” agreements establish among other things special bilateral commissions for the future negotiation on specific matters.

The two agreements show a particular esteem for the “Holy Land”, for its meaning for the three monotheistic religions, for the sacred places inside its borders and for the Christian population inside it.

The two agreements are signed with entities concerned with the peace in the Middle East. Attaining peace in this region is something that deals with the observance of human rights too.

Both the Israeli and the *PLO* Agreements are signed in a region in which Christians are a minority.

Finally, the two agreements recall the observance and supporting of religious freedom as the cornerstone of the commitment between the signatory parties. In the case of the Israeli Agreement, both Israel and the Holy See compel to observance upon different legal texts.²⁰ The *PLO* Agreement does not con-

¹⁷ For the content and implications of this Declaration, N. LERNER, “The 1992 UN Declaration on Minorities”, in: *Israel Yearbook on Human Rights* 23 (1994) 111-128.

¹⁸ W. C. DURHAM, “Perspectives on Religious Liberty: A Comparative Framework”, in: *Religious Human Rights in Global Perspective. – Legal Perspectives*, The Hague 1996, 21.

¹⁹ R. ASTORRI, “I concordati durante il pontificato di Giovanni Paolo II. Verso un nuovo modello?”, 1/1999 *Quaderni di Diritto e Politica Ecclesiastica* (1999) 27-35.

²⁰ Fundamental Agreement Between the Holy See and the State of Israel, AAS (1994) 716-729. Article 1 § 1. The State of Israel, recalling its Declaration of Independence, affirms its continuing commitment to uphold and observe the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international in-

tain so many explicit references to international instruments, but includes the mutual commitment to uphold and observe religious freedom as well.²¹

As an Israeli scholar has pointed out, the “Fundamental Agreement” «contains a concrete and clear human rights element. It lists a series of rights of churches and their members, generally acknowledged today but not specifically listed in obligatory positive international law. In the absence of detailed convention on religious human rights — and such a convention does not seem to be in the making, soon at least — it is important that States, particularly perhaps a state without a written Constitution and of a very special character, such as the Jewish State of Israel, on the one hand, and, on the other, entities like the Catholic Church, playing such a major role in the Christian world, conclude agreements defining and clarifying their reciprocal interests and rights, inclusive the wide spectrum of rights belonging to the category of religious human rights, or rights related to religion if the interests of secular non-religious persons are also taken into consideration».²² Although the obligations undertaken by the parties regarding the freedom of religion are asymmetrical,²³ the reference to the Universal Declaration on Human Rights allows us to broaden the intersection from the structure of the right to religious freedom to its contents, identifying a catalogue of rights that both the Church and Israel undertake to support.²⁴ At the same time, the common commitment to uphold the human right to religious freedom seems to put its undertaking beyond the agreement itself. For the common engagement refers not only to the treaty, or to the common relationship, but also to the action of both parties in other foreign or domestic political and

struments to which it is a party. § 2. The Holy See, recalling the Declaration on Religious Freedom of the Second Vatican Ecumenical Council, *Dignitatis humanae*, affirms the Catholic Church’s commitment to uphold the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party. The Holy See wishes to affirm as well the Catholic Church’s respect for other religions and their followers as solemnly stated by the Second Vatican Ecumenical Council in its Declaration on the Relation of the Church to Non-Christian Religions, *Nostra aetate*.

²¹ Basic Agreement Between the Holy See and the Palestine Liberation Organization, 15.02.2000, Article 1 § 1. The PLO affirms its permanent commitment to uphold and observe the human right to freedom of religion and conscience, as stated in the Universal Declaration of Human Rights and in other international instruments relative to its application. § 2. The Holy See affirms the commitment of the Catholic Church to support this right and states once more the respect that the Catholic Church has for the followers of other religions.

²² N. LERNER, “Protecting Human Rights by Bilateral Agreements”, in: *Anuario de Derecho Eclesiástico del Estado* 13 (1997), 145.

²³ M. HIRSCH, “The Freedom of Proselytism under the Fundamental Agreement and International Law”, in: *Catholic University of America Law Review* 47 (1998) 423.

²⁴ S. FERRARI, “The Fundamental Agreement Between the Holy See and Israel and the Conventions Between States and the Church since the Vatican II Council”, in: *Catholic University Law Review* 47 (1998) 405.

legal fields. Many of the “Fundamental Agreement” provisions could be identified as developments of the religious human rights contained in international legal instruments.²⁵ Thus, the “Fundamental Agreement” itself is to some extent a new explanation of the content and scope of religious freedom.

Six years before signing the “Fundamental Agreement”, the Holy See agreed a new important one. The “Basic Agreement” of February 2000 is not a conventional Concordat with a State, but a treaty with an Organization with international personality, which acts for the Palestinian People. Thus the strength of the agreement seems to be unclear. But it is also important to note that it could be interpreted as a charter which reports the intentions that will rule the mutual relationships in the future, specially after the Palestinian State establishment. Both parties agreed in the “Agreement Preamble” that the solution of the Jerusalem question requires a special statute internationally guaranteed which should safeguard freedom of religion and conscience for all. In the Preamble and in Article 3 as well, the *PLO* recognizes that Palestinians, irrespective of their religious affiliation, «are equal members of Palestinian society». This recalls again international instruments on religious freedom,²⁶ and it is especially appropriate for the future regulation of basic freedoms in a society of Muslim majority. Article 1 underlines the joint commitment to respect religious freedom for all. Article 2 reports the obligation to promote inter-faith dialogue «for the promotion of better understanding between people of different religions». This could seem a naive declaration, alien to the real needs and aims of the agreement. But it is important to note that International Organizations recommend inter-faith dialogue as a proper means for preventing intolerance.²⁷

²⁵ Compare Fundamental Agreement, Article 4 § 3 and § 4, with Article 6 a. & b. of the *DEAFID*; Fundamental Agreement Article 8 with Article 18.3 and Article 19 of the International Covenant on Civil and Political Rights of December 19, 1966; Fundamental Agreement Article 9 with Article 6 b) of the *DEAFID*, etc.

²⁶ Article 2 of the *DEAFID*: «§ 1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief. § 2. For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis».

²⁷ See Recommendation 1396 (1999) “Religion and Democracy”, Assembly debate on 27 January 1999 (5th Sitting) (see Doc. 8270, report of the Committee on Culture and Education, rapporteur: Mr. de Puig). Text adopted by the Assembly on 27 January 1999 (5th Sitting): «13. The Assembly consequently recommends that the Committee of Ministers invite the governments of the member states: [...] iii. to promote better relations with and between religions, and in particular: [...] b. encourage dialogue between religions by providing opportunities for expression, discussion and meetings between representatives of different religions». Text in R. NAVARRO-VALLS, R. PALOMINO, *Estado y Religión. Textos para una reflexión crítica*, Madrid 2000, 192-196.

The Preamble and Articles 1 to 3 set up the “human rights” section of the agreement, with two possible structural meanings. One, the commitment of the parties to observe, promote and encourage human rights (mainly freedom of religion) in their common relationships. Two, the commitment of *each* party to observe, promote and encourage human rights in their relationships with *third* States, individuals or groups, being the other party in the agreement a qualified witness of the commitment assumed.