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SPEECH

THE POSITION OF THE CATHOLIC CHURCH REGARDING CONCORDATS FROM A DOCTRINAL AND PRAGMATIC PERSPECTIVE⁺

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I.

In the last thirty years, concordats, conventions, or agreements between states and the Holy See, against all predictions, have increased in number and variety of types. The ongoing practice of signing concordats witnesses the legal nature of the Catholic Church in its relationship with states, and the common principles it shares with secular powers. Currently the word concordat is used for encompassing covenants possibly dealing with all aspects of Church life. But those are rare today. The Holy See prefers more concise instruments dealing with specific questions, which are easier to elaborate and eventually to modify. They may be called conventions, agreements, *modus vivendi*, or protocols. But whatever the designation—from now on I shall use the word concordat as a generic term for any kind of international agreement with the Holy

⁺ This speech was delivered during the April 8, 1997 symposium at The Catholic University of America, Columbus School of Law.

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See—these instruments have all the same legal force. They are treaties between two subjects of international law, each one sovereign in its own sphere: spiritual and political. They are negotiated, signed, and ratified according to current international practice. Under the regime of the League of Nations, some concordats were even registered in the Record Book of International Treaties in Geneva.

The first element of doctrine inherent in concordats is precisely that the Catholic Church, through the Holy See, understood as the organ of its government, is qualified as a subject enjoying sovereignty equal to the state. The history of concordats is parallel to the history of the reappropriation of the sovereignty of the Church in its internal affairs. It is not without reason that the first concordat—that of Worms in 1122—was negotiated at the end of the long lasting struggle for free investitures in the medieval Church, thanks to the Gregorian Reform. Only where two subjects of equal legal capacity decide to settle their common interests is a concordat possible.

Agreements entered into between a state and the National Conference of Bishops, for example, or other national church authorities are not concordats. They are internal settlements according to state law. With concordats there are two subjects of independent primary or original legal systems that decide to conclude a specific covenant. This feature of the Catholic Church is unique among religious communities in world history. It is the result of a specific development of the Catholic Church in the west where papacy was recognized as the supreme authority of the Church over political, national, and cultural borders. It also results from the self-understanding of the Catholic Church, different from the Byzantine or Protestant model, which was steadily defended throughout the second millenium, the principle of its inner autonomy with respect to the control of secular law and political power. From that time on, the relationship between church and state was conceived as one of distinction between two orders and at the same time of co-operation between both.

Concordats implicitly mean that religion as such on the one hand, and the community of faithful on the other, cannot be treated as purely private issues. If church and state must be distinguished in their organization, legal structures, and aims, they cannot ignore each other. Religion is not a matter of pure individual conscience. By its very nature it implies community, organized structure, and social visibility. As such, the political community or state has no choice but to be interested in it. State and church must be separated, but not church and society. In society, all communities, religious, philosophical, or whatever, co-exist in mu-

tual respect. As such, the state has the responsibility to ensure that they behave according to law and that public order is preserved.

Obviously, the relationship of both powers, spiritual and temporal, shifted continuously according to circumstances. The supreme spiritual authority, however, never claimed to absorb the political domain, even in the two-swords theory of Bonifacius VIII. The political authority also did not dare to exercise the spiritual direction of the whole Church, as in Byzantine cesaropapistic theory and practice. "The emperor is in the Church," said Saint Ambrosius in the fourth century, "not over the Church," and this statement remained the leading principle of Catholic understanding.

After the rise of national states and the period of absolute monarchies, even until 1914, it was not unusual that concordats signed with Catholic sovereigns intended to limit the inner autonomy of the Church. Most monarchs wanted to appoint their bishops themselves and prohibited them from having any free contact with the Roman Curia. This was the case of the French Concordat of 1516 which was in force until the Revolution. Still worse for the independence of the Church were concordats with Spain (1753) and Portugal (1857), by which the Pope had to give up all his ecclesiastical jurisdiction to the monarchs in Latin America and India. Even after the independence of Latin American states, the concordats signed with most of them between 1851 and 1887 maintained the so-called right of *padronado*, now exercised by the new republics.

Induced by the control of the states on inner-church affairs, a new doctrine emerged in the eighteenth century among the lawyers and jurists of Würzburg, Germany. They developed the concept that the church, like the state, is a "perfect society." This expression, often misunderstood, has no moral or theological connotation. It only meant that church and state, each one in its own sphere, spiritual and temporal, enjoys all the means needed to achieve their respective aims, including a legal system which is not derived one from the other. Thus, the visibility and the social aspect of the Church were highlighted. With the help of this doctrine, the Church endeavored to win back those original rights that the absolutist regimes had confiscated during the former centuries.

In many ways, the French Concordat signed in 1801 with Napoleon Bonaparte extended the ideology of the former Royal Concordat of 1516, as the state maintained its control over the Church by continuing to appoint bishops and prohibiting free communication with Rome. The only important innovation was a new understanding of the state in relation to the Church. Catholic faith was no longer the official religion of the state, but that of the majority of its citizens. State law also intro-

duced new concepts as it granted the Lutheran, Reformed, and Jewish minority religious communities equal legal recognition and rights.

II.

Between 1850 and 1960, the doctrine of the two perfect societies became official in concordatarian negotiations with most so-called Catholic states. The Church considered that it had to win back its freedom by directly confronting its rights with those of the modern state. There was no question of religious freedom of the individual, but only corporate freedom of the Church. Thus, the doctrine elaborated a whole set of principles based on natural law which helped to clearly establish the respective competencies of spiritual and temporal power. Competencies were drawn according to the final aim of both societies: the temporal aim of peace and justice among citizens was subordinated to the spiritual aim of leading believers to eternal life.

The Church claimed not only to be recognized in its structures and institutions, for example dioceses, parishes, seminaries and schools, but it also concluded that it had a primary right to legislate, for instance, on marriage and religious education of Catholics. As the same men and women were both citizens and believers, the state with a Catholic majority was supposed to follow the social and moral teachings of the Church, and eventually tolerate minority religions but not grant them the same rights. These theories were not unusual in other confessional backgrounds in the last century, when states with established churches prohibited the very existence of minorities on their soil.

From World War I to the Second Vatican Council (1962-1965), the doctrine of the two perfect societies began to bring some fruits. The concordats of Pius XI and Pius XII are among the most perfectly elaborated treaties of the kind. Most of them have survived the war like the concordats of Germany (1933) and Austria (1933) that are still in force without any change. The Italian Concordat of 1929 and the Spanish one of 1953 belong to that period.

Most of these concordats had been eagerly desired by both parties. With Italy, the settlement of the "Roman question" was desired by the popes ever since 1870. The compromise reached in 1929 was satisfactory for both sides, as the concordat was signed together with the Lateran Treaty creating the Vatican State and giving to the Holy See the territorial independence it needed to guarantee its specific sovereignty in Church matters.

It has often been said that the Catholic Church, under the pressure of the Nazi regime, signed the Reich Concordat of 1933. Under the given

circumstances, there was no other reasonable means to try to safeguard the corporate rights of Catholics in the era of youth education and associations, as well as religious teaching. One must not forget that concordats had already been signed with most of the *Länder* of the Weimar Republic: Bavaria (1924), Prussia (1929), and Baden (1932).

III.

The Second Vatican Council developed the Catholic doctrine on social issues. At the same time, the culture of human rights, that was spreading world-wide since the end of World War II, was given full consideration in papal documents such as the encyclical *Pacem in Terris* (1963). Two documents of that Council would have a deep impact on principles regulating church-state relations. These are the constitution *Gaudium et Spes* on the Church and the world, and the declaration *Dignitatis Humanae* on religious freedom. The latter appeared as a revolution of Copernican dimension in respect of the previous theory of the two perfect societies. In fact, the Council shifted from the traditional approach of the corporate right of the Catholic Church to the basic right of each human person to have or not to have a religion, to exercise it privately and publicly under legal guaranties.

The state was now meant to be neutral in questions of religion, and effectively the right to religious freedom, carrying out its own specific duties toward the whole of society, namely that of protecting the rights of others, and safeguarding public order, health, and morality. The state would not identify itself with a given religion. Nevertheless, it was admitted that with a historically linked religion, a people could receive special legal protection under the condition that the fundamental rights of all other communities would be recognized.

It is important to note that the Church from that time on implicitly wished to deal with states governed according to the rule of law. This implies that a state does not place itself above citizens, but rather acts at the service of their fundamental rights and tries to promote the common good, identified through the democratic process. Promoting the freedom of the Church was no longer understood as winning recognition from the political power, but rather such freedom was enshrined in the very concept of the dignity of each human being. Therefore, the new approach of the Church converged in a way with the international instruments elaborated since 1948, where freedom of religion is based on an individual right, while the corporate rights of communities are considered as derived from the rights of individuals to enter into community with others for worship, teaching, and living their faith. It is precisely in the field of

the corporate right of the Church as a community that concordats fill a gap.

Concordats in the post-Vatican II era can no longer be misused to justify state jurisdiction over religious makers. Now concordats are concluded with constitutional states. They do not imply privileges for Catholics. Since the Spanish Agreement of 1976, the habit has been introduced to dedicate the preambles to the statements of both parties. Often in these preambles doctrinal principles are enunciated. The Spanish Agreement clearly referred to Vatican II as it stressed that “fundamental principles [for the] relations between the political community and the Church are the mutual independence of both parties in their own field and a healthy collaboration between both.” It also recalled the double approach of Vatican II towards religious freedom which is at the same time individual, as set forth in articles 2 and 13 of *Dignitatis Humanae*, and corporate, remembering that “the freedom of the Church is the fundamental principle of the relations between church and public authorities and the whole civil order,” as stated in *Gaudium et Spes* in article 76, section 3.

The Italian Concordat of 1984 recalls, on the side of the Church, the changes introduced with the doctrine of religious freedom, and, on part of the state, the principles of the Constitution of 1947. The Italian Concordat gives a concise doctrinal definition in article 1: “church and state are each in its own realm independent and sovereign.” This wording, which fits perfectly with Catholic doctrine, is drawn from article 7 of the Constitution. It can be found in many concordats after 1984. The mutual independence of both partners is now the key concept of concordatarian law. Thus, the Italian State does no longer automatically recognize the effects of canonical marriage and judgments of ecclesiastical courts, as it did in 1929, but preserves its right to judge their conformity with civil law. Religious teaching is offered at school, but pupils or their parents may freely choose if they wish to avail themselves of it. An additional agreement on financial questions sealed the mode in which the state collaborates in the financing of the Catholic Church.

In the Polish and the Israeli preambles, specific considerations appear. The first stresses the historical moment of the fall of communism and the significance of the pontificate of Pope John Paul II for the nation. The Israeli preamble underlines the singular character of the holy land for both partners and the “unique nature of the relationship between the Catholic Church and the Jewish people.”

IV.

The following suggests a classification of the post-Vatican II concordats.

Significant steps have been undertaken by the Holy See with countries which named Catholicism as the state religion in both their Constitutions and concordats such as Spain, Italy, Colombia, Argentina, Monaco, Peru, and Malta. The mention of state religion disappeared from all new concordats signed after 1964. It was the wish of the Holy See to avoid these statements which looked like privileges and were incompatible with the doctrine of the neutrality of the state.

At the same time, the Holy See energetically expressed its desire to review those concordats which still allowed secular powers specific ecclesiastical rights such as the appointment of bishops. This objective was achieved with Argentina abolishing the secular right of patronage in 1966, followed by Spain in 1976, Monaco in 1981, and Haiti and Italy in 1984. Also San Marino renounced its policy of intervening in ecclesiastical appointments in 1992. While Franco had formally refused in 1967 to renounce his right of intervention in the appointment of bishops, the Haitian president decided to do so in 1984. Only the right to object for general political reasons, or even less, to the appointment of bishops was conceded to governments. As for Spain, political changes also introduced changes in the legal treatment of minority religions.

With Germany, Austria, and Portugal, the concordats of the thirties and forties were maintained thanks to accommodations and readjustments. In Germany, several partial agreements had been signed since 1960 with the different *Länder*. It was a requirement of the German Concordat of 1933 and the Prussian Concordat of 1929 that any revision of the diocesan circumscriptions needed the agreement of the respective governments. Therefore, the important modifications introduced in 1994 with the creation of two new provinces and three new dioceses were carried out with appropriate convention and with the *Länder* involved. With Portugal, the article of the 1940 concordat that prohibited Catholics who had married under canonical contract from resorting to the civil law of divorce was abolished in 1975.

Only the new Colombian Concordat of 1973 did not follow the general evolution. The Colombian Concordat maintained a broader state control over the appointment of bishops and some judicial privileges for the clergy. The constitutional court of Columbia declared unconstitutional some articles of the concordat. A draft revision was elaborated in 1992, recognizing with more consequence the autonomy of each partner in his own sphere.

In the past, it was rare for non-Catholic countries to sign concordats with the Holy See. Diplomatic relations with non-Catholic governments were first established in 1806 with Prussia, in 1848 with the United States, in 1894 with Russia, and even with China after 1880. In the nineteenth century, the first concordats ever signed with a non-Catholic state, namely orthodox Russia in 1847, 1882, and 1907 was aimed at protecting the Polish Catholic population of the Empire. There was also, in 1886, a concordat with Montenegro and in 1914 with Serbia, both orthodox countries, that had the goal of protecting the rights of the Catholic minorities, as requested by the Congress of Berlin in 1878. Under Pius XI, Lutheran Prussia in 1929 and the Kingdom of Yugoslavia in 1935 drew-up concordats. While the former is still in force seventy years after the dissolution of Prussia, the latter never reached the step of ratification because of the opposition of the Orthodox hierarchy. It never was applied although bilateral local agreements between the state and the Orthodox, Protestant, Muslim, and Jewish communities were in force.

During the communist era, only two Eastern European States with strong Catholic populations concluded concordats with the Holy See: Hungary concluded a secret partial agreement in 1964, and Yugoslavia concluded a Protocol in 1966. These emergency agreements as a result of the so-called "Ostpolitik" of the "little steps" undertaken during the cold war, allowed at least Catholics to have some religious life and to survive in a hostile environment. In Poland, an agreement was signed in 1957 due to political pressure between the government and the Primate, not the Holy See.

A total innovation was the *modus vivendi* negotiated with Tunisia in 1964. Tunisia is, according to its constitution, a country with Islamic state religion; although one of the most moderate ones. This agreement created the conditions for a Catholic minority, most of them foreigners, to live in Tunisia in harmony with other citizens. The norm referred to in Article 1 is exclusively the Tunisian constitution's guarantying of freedom of conscience and religion.

With Morocco, an unusual kind of agreement was reached in 1983-1984. Formally, it consists of an exchange of letters between the Pope and the King. The human right to religious freedom is not invoked, but the King grants freedom of religion to Catholics by virtue of "the spirit of extreme tolerance which characterizes Islam." Here, there is a different political philosophy, unparalleled in other concordats, and an exception to international standards and Catholic principles as well. In this agreement, pragmatism precedes doctrine, as the aim obtained seems more desirable than its doctrinal justification.

The Agreement with Israel carefully insists on common international standards as the reference for religious freedom and cooperation between church and state. The agreement with Israel is a unique case in which the Holy See stresses its commitment to comply with international instruments to which it is a party. Implicitly meant are the Convention on the Elimination of All Forms of Radical Discrimination to which it acceded in 1969, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981. Also unique is Article 2 in which both partners commit themselves to combat anti-Semitism. Upon opening negotiations in 1992 with the Holy See, Israel's priority was the establishment of diplomatic relations, while the Holy See preferred to solve bilateral problems. Even before the opening of the Madrid talks between Israel and the PLO in 1991, the bilateral commission started its talks. Israel had at that time no experience in dealing with the Holy See, its legal nature, and its claim to enjoy a proper legal independence in its own sphere. The fundamental principle that "both are free in the exercise of their respective rights and powers" was finally admitted after long negotiating. As required by the Fundamental Agreement, a further agreement on the legal personality of church institutions was completed in March 1996. Another agreement on economic and taxation matters is being elaborated.

Another category of concordats can be identified, namely those concluded after Vatican II with states having no concordatary tradition or resuming a tradition after the fall of communist rule. This is the case with respect to Malta, Poland, San Marino, and Croatia and will be the case in the proximate future with Hungary and some other states. An interesting parallel could be drawn between central Europe after World War I and after 1990 when nearly all new states created out of the central empires established diplomatic relations with the Holy See and signed concordats, for example Czechoslovakia in 1927, Yugoslavia in 1935, Poland in 1925, Lettland in 1922, and Lithuania in 1927.

Presently, all these new concordatary states have a Catholic majority population. This point is even recalled in the concordats with Poland and Croatia because coming from former communist regimes, they wish to repair some injustices of the past. The main problems at issue are the legal recognition of the Catholic Church and its institutions, and the restitution of confiscated properties. It is interesting to note, as it was recently confirmed by a symposium held in Budapest in March 1997, that all Central and Eastern European states contemplate cooperation with the churches in financing arrangements. This is a remarkable achievement due, in part, to the Italian model set forth by the Revision of 1984.

Again, political changes and the legal settlement of religious rights are related. The concordats with Poland and Croatia strongly underline the "historic and present role" of the Church in educating the people and promoting their culture.

Difficulties have been raised with the ratification of the Polish Concordat and the Third Maltese Agreement. The respective oppositions in the Parliaments thought the autonomy of the state was not fully respected in this item and in some others. In Malta, two agreements, one on religious education in schools and the other on church properties, were signed in 1991 and ratified in 1993. A third one on marriage was blocked for two years by the opposition before finally being ratified in Parliament. The objection was against the automatic equivalence of canonical marriage and civil effects. In Poland, similar objections are being raised, arguing that the rights recognized by the Church in canonical marriages and school education conflict with state competencies. The objection suggests that the fundamental criteria of mutual independence of both legal orders should be carefully respected.

In conclusion, it should be remembered that concordats exist within the most diverse categories of church-state patterns: systems of total separation like France have agreements running from 1801 through 1921 to 1974. Systems of separation with institutional cooperation, like Germany and Austria, have the strongest concordat tradition. In the Eastern European countries, the model of legal distinction with cooperation of church and state is being adopted. While in Russia, Bulgaria, and Romania, the Orthodox Church will continue to enjoy, as in Greece, special state protection.

By establishing concordats with all types of states, common principles have arisen and are being enforced as conforming to the self-understanding of the Church and the demands of states under the rule of law. There is no question anymore of privileges, but strictly of human rights. Thus, the international character of the Holy See indirectly confers to the parallel agreements concluded between states and other religious communities, the support of an international treaty, as it is the first duty of the state to treat all its citizens equally.