

Concordats Today: From the Second Vatican Council to John Paul II*

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In U.S. journals, the attention for concordats, that is, the agreements between Church and state that regulate matters of common interest, is not commensurate to the importance that this instrument continues to have in promoting religious freedom and productive church-state relations worldwide. In examining the data from diplomatic practice, in light also of the Second Vatican Council and the new canonical codification, the present article will show how the growing prestige of the Holy See in the international community has been accompanied by a new golden age of concordats, which remain pragmatic and flexible instruments adaptable in form and content to the realities of contemporary life. In this respect, too, there is that element of *innovation in continuity* regarding contingent matters, to which Pope Benedict XVI has referred as the fruit of the Church's action in the world, in conformity with the true spirit of the Second Vatican Council.

Introduction

In American legal journals, it is rare to encounter articles on concordats between the Church and the state.¹ Does this merely signal lack of interest, among American lawyers, in an instrument that does not belong to the tradition of the relationships between the United States and the Holy See? Is there something deeper to this, namely that, after the Second World War and especially after the Second Vatican Council, the concordat may have become an obsolete instrument in regulating the relationships between Church and state?

In trying to answer this question, this article will first consider the concordat in light of the Second Vatican Council and the new canonical codification and

then summarize the data emerging from practice, with special regard to the concordats concluded during the pontificate of John Paul II.

At the outset, some clarification is needed with respect to both the terminology and scope of this article. In the recently published *Compendium of the Social Doctrine of the Church*, one reads that Church and state, to prevent or attenuate possible conflicts between them, have defined “*stable forms of contact and suitable instruments for guaranteeing harmonious relations*.”² One such instrument of great historical and current significance is the concordat.³ The term *concordat* identifies a wide variety of agreements between the Holy See and the state that regulates matters of common interest.⁴ From the time of Callixtus II (the pope of the Concordat of Worms in 1122) to the present,⁵ concordats have been concluded in various forms (the Concordat of Worms, for example, consisted of two separate declarations, one by the pope and one by the emperor), under various names (the term *concordat* being often reserved for the more solemn and comprehensive agreements, while for the others the terms *accord*, *convention*, *exchange of notes*, *protocol*, *modus vivendi*, *treaty*, and others, are used), and on various matters (traditionally categorized as spiritual, mixed, and temporal). In this article, references to the concordat as a legal instrument will be based on this loose usage of the term in actual practice, with no assessment of the classic definitions found in the literature,⁶ and no attempt to propose any new definition.

The concordat will be considered here from a purely canonical perspective, within the limited scope of the issues addressed in this article. Hence, the myriad of questions examined in the literature regarding the form, content, and vicissitudes of a concordat, in the internal legal orders of Church and state and in international law (on the assumption, which is prevalent but not unanimous in the literature,⁷ that international law is the governing law of concordats) will be ignored here because of the obvious limitations inherent in the selective approach followed in this article.⁸

Has the Concordat Become an Obsolete Instrument in Church-State Relations? (Concordats and the Second Vatican Council)

In studying the impact of the Second Vatican Council on the utilization of concordats to regulate Church-state relations, one encounters an apparent paradox: On the one hand (as will be seen in this article), no teaching is as congenial as that of the Council to concordats; on the other hand, some observers have contended that the Council rang the death bell of the concordat era. To solve this

riddle, it is perhaps appropriate to (1) summarize, in broad outline, the theories of Church-state relations before the Council; then (2) consider what the Council taught on Church-state relations; and finally (3) examine whether, in this teaching, there is any negative judgment on the concordat as an instrument to regulate such relations.

Theories on Church-State Relations Before the Second Vatican Council

Theorizing about Church-state relations has been a hallmark of canonical (and especially curial) doctrine since time immemorial.⁹ At the height of papal political authority, in medieval times (from Gregory VII through Innocent III to Boniface VIII),¹⁰ the prevailing theory was that of *potestas directa Ecclesiae in temporalibus*. According to this theory, all authority comes from God, who transmits both the spiritual and temporal powers to Christ's vicar on earth—the pope. While directly exercising his spiritual power, the pope delegates the exercise of the temporal power to earthly rulers. These, therefore, owe the legitimacy of their power to the pope who can always directly (*potestas directa*) intervene in a legally enforceable manner into temporal affairs by creating legal norms or abrogating those created by earthly sovereigns if conflicting with either divine or ecclesiastical law.

In the age of counter-reformation, the theory of *potestas directa* lost ground (presumably as a result also of the changed political conditions) in favor of the theory of *potestas indirecta Ecclesiae in temporalibus*. The distinguishing feature between the two is that, according to the theory of *potestas indirecta*, spiritual and temporal powers are transferred to the respective authorities separately, with the consequence that earthly rulers receive their temporal power directly from God, with no intermediation by the pope. The ecclesiastical authority, though, retains the residual power of intervention in temporal affairs regarding the so-called *res mixtae* or *res mixti fori*, such as marriage, which between two baptized individuals is a sacrament (hence falling within the spiritual domain of the pope) but is also a civil contract of great relevance to society (hence falling within the temporal domain of the sovereign). According to the theory of *potestas indirecta*, the Church has the legal authority to regulate *res mixtae* by virtue of the prevalence of the spiritual over the temporal.

To reaffirm the Church's *potestas indirecta* and its freedom (*libertas Ecclesiae*) to pursue its spiritual aim against state interference, a new legal discipline arose under the name of *ius publicum ecclesiasticum externum*.¹¹ This discipline was new in its orientation and central tenets but certainly not new in the basic issue

it addressed because the question of its relationship with the political authority had been with the Church since the very beginning. Interestingly, the first names associated with this new discipline (Barthel, von Ickstadt, Neller, Rauttenstrauch, Endres, Schmidt, Ditterich, Zallinger) are those of German scholars of the eighteenth century. Many of them belonged to, or at least were connected with, the University of Würzburg, which was a leading center for the study of public law and where the distinction between private law and public law first developed.¹² Therefore, this was a case in which concepts, legal categories, and methods, originally elaborated within the public law of the Roman-Germanic Empire (the heir to the medieval Holy Roman Empire), were being transferred to another universal legal system, namely the law of the Church.¹³

In its flourishing period, from the end of the eighteenth century to the middle of the twentieth century, the study of the *ius publicum ecclesiasticum externum* moved southward, and the authors of the leading treatises on the subject were Italian cardinals of the Roman curia,¹⁴ in the footsteps of Cardinal Soglia¹⁵ and prominent teachers at the ecclesiastical universities in Rome,¹⁶ with papal encouragement.¹⁷

The key concept developed by the writers on the *ius publicum ecclesiasticum externum* was that the Church is a *societas iuridice perfecta*, a concept that was a helpful instrument against all attempts by the political authorities to restrict the Church's freedom.¹⁸ The starting point was a philosophical concept of society that led to the identification of the "juridically perfect society," namely a society that does not depend, for its very existence, on any other society. A careful examination of the Church's characteristics as a human society (without obviously prejudicing the reality of the Church of being also a supernatural entity) led to the conclusion, fully endorsed by the magisterium,¹⁹ that the Church is indeed a *societas iuridice perfecta*, endowed by divine law with all the powers to achieve its supernatural ends.²⁰

Against this background, it is easy to understand that the concordat had a role in regulating potential areas of conflict between the two perfect societies of the Church and the state. At the same time, however, the accent on the *potestas indirecta* of the Church, reflecting its being not only *iuridice perfecta* but also *suprema* (by virtue of its spiritual ends, which are superior to the temporal ones), was bound to lessen a full appreciation of the contractual nature of the concordat as an instrument concluded by, and binding on, two subjects (Church and state) which, at least from the limited perspective of the legal instrument governing their mutual relations,²¹ are on a foot of equality.

The Second Vatican Council's Teaching on Church-State Relations

The concept of *societas perfecta* was retained at the Second Vatican Council, and it could not really be otherwise.²² While a key component of the *ius publicum ecclesiasticum externum* and of the theory of *potestas indirecta in temporalibus*, the concept of *societas perfecta* was not intrinsically linked to the fate of either one of them.²³ Whatever else it is, the Church is also a society of men, and as such is a *societas perfecta*, in the sense that its legal order is independent from that of any other entity and that it has the means to attain its aims without receiving such means from any other *societas*.²⁴

At the same time it is true that from the Second Vatican Council it emerged in even clearer terms than ever before that the Church is ontologically different from the secular state, and that the very juridical and institutional dimension of the Church cannot be understood outside of its supernatural foundation and end. In the conciliar teaching, the Church is at one time a charismatic and an institutional community, and these two dimensions are strictly connected to one another. As “a people brought into unity from the unity of the Father, the Son and the Holy Spirit”²⁵ (in the words of the Church’s Fathers quoted by the Council), the Church is founded on the mystery of God and finds in the unity of one God, in the Trinity of Persons, its “highest exemplar and source.”²⁶

The Church has a sacramental structure in that it is the continuation, in time, of Christ, its divine founder. As in Christ humanity and divinity are perfectly united, so in the Church (which participates in the sacramental nature of Christ) the human and visible elements are one with its divine and invisible reality: “As the assumed nature, inseparably united to [Christ], serves the divine Word as a living organ of salvation, so, in a somewhat similar way, does the social structure of the Church serve the Spirit of Christ who vivifies it, in the building up of the body²⁷ (cf. Eph. 4:15).

Provided by Christ with the “means adapted to [its] visible and social union,”²⁸ namely profession of faith, sacraments, and hierarchy, the Church,

at once “a visible organization and a spiritual community” [*LG*, chap. 1n8], travels the same journey as all mankind and shares the same earthly lot with the world: it is to be the leaven and, as it were, the soul of human society in its renewal by Christ [*Ibid.*, chap. 4n38] and transformation into the family of God.²⁹

In this earthly journey toward its eschatological end, the Church travels side by side with the world: The point of convergence between the action of the Church

and that of the world is man, both in his human fulfillment and in his transcendent salvation. It is therefore possible to conclude that these are the ecclesiological premises for the study of the relationship between Church and political community: “(1) the Church is a charismatic and at one time institutional community; (2) the Church is present in the world but separate from secular societies; and (3) the Church is at the service of man.”³⁰

On these ecclesiological premises, the Council affirmed religious freedom, freedom of the Church, and cooperation between Church and state as the guiding principles of Church-state relations. Regarding the first principle, the Council declared that

the human person has a right to religious freedom. Freedom of this kind means that all men should be immune from coercion on the part of individuals, social groups and every human power so that, within due limits, nobody is forced to act against his convictions nor is anyone to be restrained from acting in accordance with his convictions in religious matters in private or in public, alone or in associations with others.³¹

This is obviously not the place to examine the principle of religious freedom or the extent to which the Second Vatican Council developed the tradition of the Church in this important respect.³² It will suffice to recall that in the footsteps of Augustine, Aquinas, and the constant teaching of the Church, canon 1351 of the 1917 Code, canon 748 §2 of the current Code for the Latin Church, and canon 586 of the Code for the Eastern Churches all expressly prohibit the use of coercion in matters of faith.³³

Religious freedom is a right inherent in the dignity of the human person and belongs not only to individuals but also to social formations such as the family or a religious community. Connected to, but distinguished from, religious freedom is the freedom of the Church (*libertas Ecclesiae*).³⁴ Unlike religious freedom, which belongs to the Church as to any other social formation, this freedom belongs to the Church (and only to the Church) by virtue of its very nature: it is its right to accomplish the mission received from Christ and, to this end, the Church must

enjoy that freedom of action which her responsibility for the salvation of men requires. This is a sacred liberty with which the only-begotten Son of God endowed the Church which he purchased with his blood. Indeed it belongs so intimately to the Church that to attack it is to oppose the will of God. The freedom of the Church is the fundamental principle governing the relations between the Church and public authorities and the whole civil order. As the

spiritual authority appointed by Christ the Lord with the duty, imposed by divine command, of going into the whole world and preaching the Gospel to every creature, the Church claims freedom for herself in human society and before every public authority.³⁵

Ultimately, this claim of freedom is based on the independence of the Church and should lead, when respected, to sound cooperation between Church and state for the benefit of each individual and the common good of society. The state (or, more generally, the political community) has the obligation to respect Church autonomy in its own order and to protect its freedom; conversely, the Church must acknowledge the legitimate autonomy of the temporal order without seeking privileges but always preserving the right to exercise its moral authority (*auctoritas magisterii*) whenever the protection of human dignity and the promotion of the salvation of souls so requires. These are words the conciliar fathers used to express this notion:

The political community and the Church are autonomous and independent of each other in their own fields. Nevertheless, both are devoted to the personal vocation of man, though under different titles ... the Church utilizes temporal realities as often as its mission requires it. But it never places its hopes in any privileges accorded to it by civil authority; indeed, it will give up the exercise of certain legitimate rights whenever it becomes clear that their use will compromise the sincerity of its witness, or whenever new circumstances call for a revised approach. But at all times and in all places the Church should have true freedom to preach the faith, to proclaim its teaching about society, to carry out its task among men without hindrance, and to pass moral judgments even in matters relating to politics, whenever the fundamental rights of man or the salvation of souls requires it. The means, the only means, it may use are those which are in accord with the Gospel and the welfare of all men according to the diversity of times and circumstances.³⁶

This last reference to the different modalities that may be used to accomplish the Church's mission is a clear indication that no particular means is preferred to any other in the abstract. Lay faithful are called to animate "from within" the temporal order with their Christian witness. However, this does not exclude forms of cooperation at the institutional level between the Church and the political community. In other words, the Church is theologically and legally entitled to use all those means of action that, in its judgment, may be efficacious in pursuing its mission.

Did the Second Vatican Council End the Era of Concordats?

One of the means used for centuries to ensure this cooperation between Church and state at the institutional level is the concordat. Do the passages from the Second Vatican Council reported above imply a negative judgment on this instrument? More generally, can any such negative judgment be inferred from the discussions on Church-state relations held at the Council?

Drawing the conclusions from an article that probably remains the most thorough study on the pronouncements on concordats by the conciliar fathers in the course of the debates at Second Vatican Council, José de Salazar Abrisquieta (then dean of the law faculty at the University of Zaragoza, Spain) wrote that the Council's support for a new direction of concordats does not mean that the concordat is a thing of the past: the doctrine that better corresponds to Council teaching is that the concordat is still the "normal and ordinary" means to protect the freedom of the Church and therefore to regulate the relations between the Church and the political community.³⁷

Yet, several arguments have been proposed in the literature to draw the opposite conclusion to the one arrived at by Salazar Abrisquieta. For reasons of convenience, these various arguments may be grouped under five categories that it is here proposed to call (1) the silence argument, (2) the historical argument, (3) the social argument, (4) the prophetic argument, and (5) the legal argument.³⁸

According to the *silence argument*, the silence on the concordat in the conciliar documents would signal its rejection as a useful instrument in Church-state relations today.

This line of argument, though, attempts to prove more than it really can. It is certainly true that no document of the Second Vatican Council refers explicitly to concordats.³⁹ However, it is conversely true that no document can be invoked in support of the allegation that the conciliar fathers rejected this instrument. During the conciliar debates, there were favorable and unfavorable interventions, some of which revealed the complexity of any discussion on concordats, as part of the broader question of the role of the Church in society.⁴⁰ The Council, in its documents, did not accept or reject the arguments made for and against concordats. As was mentioned above, it merely endorsed a principle of sound cooperation between Church and state, according to modalities that should be appropriate to the given circumstances of time and place.

What has been called here the *historical argument* against concordats, instead, is that the concordat would be the mere product of the "Constantine system" of Church-state relations, whereby the regulation of religion, like that of other

social phenomena, was the exclusive prerogative of the supreme authorities of Church and state. After the Second Vatican Council, the very reason for resorting to concordats would be lacking precisely because the counterpart in the regulation of the religious phenomenon would no longer be the hierarchical institution of the Church but the faithful in their dual role of citizens and members of the Church.⁴¹

This argument is not convincing because setting up the Church as people of God against the Church as institutional hierarchy is a sociological construction inconsistent with Catholic tradition. Obviously, the Church as people of God is called to animate the secular environment in which it lives and operates. However, this does not exclude that the Church as institutional hierarchy may and should contribute to create favorable circumstances for the exercise of the apostolic mission throughout the world.

The *social argument* is the one advanced by the opponents of concordats in the name of the poverty of the Church. The proposition that the Church must be poor would entail that the Church's only strength must be the proclamation of the Gospel and the witness of the faithful without seeking any special protection or privilege through concordats. The Church, in the economic order, cannot compromise its spiritual mission with money; likewise, in the political order, the Church cannot compromise its witness to the truth by resorting to the strength of the secular power.⁴²

This argument is based on a questionable and superficial notion of poverty. It is true that all Christians are called to be poor and not to seek material goods for their own sake beyond what is appropriate to their status and mission in life. However, it is also true that, in a deeper spiritual sense, poverty is the internal detachment from the things of this world in the humble acknowledgment that the human creature can only find his or her fulfillment in God, creator and savior. Hence, the Church is not called to pursue material misery but to consecrate itself fully to the glory of God, using wisely all those instruments that can serve its eschatological end. Against this background, it is easy to see that the problem is not the concordat in itself (which can be put to good or bad use) but the way in which the Church utilizes it in its mission.

Likewise, of dubious value is the *prophetic argument* against concordats whereby the concordat would in itself be incompatible with the prophetic mission of the Church. According to this argument, there are two ways in which the Church may operate in the world. The first one is to be a power among powers; the second one is to be a prophetic voice that refuses all compromise with power. A Church that signs concordats would be a Church seeking compromises with power, thus betraying the gospel.⁴³

The main flaw with this argument is the ecclesiology underlying it, which rejects the institutional nature of the Church. The prophetic mission of the Church is not that of a private individual but that of a community having an intrinsic institutional dimension since the very selection by Christ of the twelve apostles. Hence, the Church does not betray its prophetic function by using those instruments (including concordats) aimed at ensuring its freedom of apostolate but would rather betray the gospel if it were to weaken its witness to the world by rejecting those very means that, if properly used, are effective instruments in the accomplishment of its prophetic call.

Finally, the *legal argument* against concordats is that being a party to an international agreement (such as the concordat) requires preconditions that would not apply to the Church, namely being an organized human society (instead of a spiritual community) and having an international legal personality comparable to that of a state.⁴⁴

Both preconditions are imprecise, and this argument is flawed. As was recalled above, the Second Vatican Council, while insisting on the spiritual dimension of the Church, did not at all exclude (but on the contrary reaffirmed) the nature of the Church also as a human society endowed with a normative system and institutional hierarchy.⁴⁵ As to international legal personality, the international community is mainly but not exclusively composed of states and, what is more, the Holy See has been an international legal subject since time immemorial.⁴⁶ From this, it follows that it is inaccurate to suggest that the Church's ability to operate internationally (and conclude concordats) is obfuscated by its heterogeneity from the state; rather, the very presence and activity of the Church on the international plan implies that homogeneity with the state is not a prerequisite for international subjectivity.

Conclusions

To sum up, there is in the conciliar documents (1) no preclusion whatsoever, either explicit or implicit, against the Church's resorting to concordats to regulate Church-state relations, and (2) no contradiction between the principle of religious freedom, as proclaimed in the Second Vatican Council, and the conclusion of concordats. Quite the contrary: The principle of cooperation between Church and state as mutually independent entities on a foot of equality (at least in law), already formulated by Pius XII and then sanctioned by the Council,⁴⁷ equipped the Church with a favorable premise, which had never existed before in these explicit terms, for concluding an agreement with the state on matters of mutual interest whenever the two parties would consider this appropriate. The question

of consistency between a specific concordat and the ecclesiology that emerged from the Second Vatican Council cannot, therefore, be answered in the abstract but by the actual determination of the content of the concordat in question.

Concordats and the Codes of Canon Law

The element of continuity between the eras before and after the Council is clearly reflected in its implementing documents, such as the apostolic constitution *Regimini Ecclesiae Universae*, on the Roman Curia (where, in the chapter on the *Signatura*, there is an express reference to the rights created by concordats)⁴⁸ and even more so in the apostolic letter (in form of *motu proprio*) *Sollicitudo omnium Ecclesiarum* on the legates of the Roman Pontiff. In this last document, one reads that the office (*munus*) of the legate is to promote the relations between the Holy See and the government of the country to which he is accredited, to handle Church-state relations and, in particular, to be involved “in the stipulation of ‘modus vivendi,’ accords and concordats, as well as conventions relating to questions of public law.”⁴⁹ Hence, unlike the passage in *Regimini Ecclesiae Universae*, where the reference was to concordats stipulated in the past, this passage from *Sollicitudo omnium Ecclesiarum* confirms the expectation that concordats will continue being concluded in the future. Indeed, under canon 365 §1, 2°, papal legates have the special function “to deal with questions which pertain to relations between Church and state and in a special way to deal with the drafting and implementation of concordats and other agreements of this type.”⁵⁰

Among the documents implementing the decisions adopted at the Second Vatican Council, the Code of canon law figures prominently because, as Pope John Paul II recalled in *Sacrae disciplinae leges* (the apostolic constitution that promulgated the new Code for the Latin Church), “the reform of the Code of Canon Law appeared to be definitely desired and requested by the same council which devoted such great attention to the Church.”⁵¹ It is therefore appropriate to investigate, however briefly, whether and how the new codification, both for the Latin and Eastern Churches, has departed from the discipline on concordats found in the Code of 1917.

The Latin Code of 1917

On the eve of the First World War, the concordat seemed to be an instrument belonging to the past history of the Church, with no current use or future prospect. The isolation of the Holy See in international diplomacy at the end of a violently secularistic century, which had led to the disappearance of the Papal

States, induced Pope Leo XIII to a guarded attitude toward concordats without, though, ruling them out completely.⁵² The situation changed significantly at the end of the First World War: In his speech to the secret consistory on November 21, 1921, Pope Benedict XV indicated that the Holy See was ready to sign agreements with the new states that had emerged or had acquired new territories after the First World War, provided that these agreements would not prejudice the Church's dignity or freedom.⁵³ This new attitude was certainly due to a number of different factors, including the new political conditions in Europe and the restored international prestige of the Holy See. However, such a turn of events would not have been possible were it not for the 1917 Code, which opened the way to the concordats era of the twentieth century.⁵⁴ The towering figure of Cardinal Gasparri,⁵⁵ who was at one time the faithful and ingenious executor of Pius X's vision for a code,⁵⁶ and the patient negotiator of various concordats (including the 1929 Lateran Pacts) as Pius XI's Secretary of State after covering the same role throughout the pontificate of Benedict XV,⁵⁷ embodies in his person this close connection between the codification of Church law and the new life of concordats.⁵⁸

In the 1917 Code, there are several canons referring to agreements with states where different terms, all having the same meaning of agreements between independent subjects giving rise to reciprocal rights and obligations,⁵⁹ are used: from *pacta conventa* in canon 255⁶⁰ to *concordata* in canon 1471.⁶¹

The crucial canon, though, is canon 3, which reads as follows:

The canons of the Code in no way abrogate or alter the agreements entered into by the Apostolic See with various nations; they therefore continue to be in force as at present, notwithstanding any prescriptions of this Code to the contrary.⁶²

This canon refers to agreements (*conventiones*) concluded by the Apostolic See with nations (*nationes*), thus delimiting the scope of its application and excluding from its reach agreements stipulated by Church authorities lower than the Apostolic See, such as agreements concluded by bishops. Presumably, the term *nationes* is broad enough to encompass not only agreements with states (that, being concluded between international legal subjects, are international treaties) but also agreements with territorial subdivisions of states (which lack this international legal character).

What the canon provides is that the Code neither abrogates (*abrogare*) nor alters (*obrogare*) these agreements. The background to these terms is a passage attributed to the Roman jurist Ulpian, wherein he wrote that a law may abolish a previous law in its entirety (*abrogare*), abolish it only in part (*derogare*), add

to it (*subrogare*), or alter it (*obrogare*).⁶³ Interestingly, in this canon, the verb *obrogare*, unusually followed by the accusative case (*aliquid obrogare*), means “to alter,” whereas elsewhere in the 1917 Code, notably in canon 22,⁶⁴ the verb *obrogare*, followed by the dative case (*alicui obrogare*), means to abrogate implicitly or explicitly an earlier law by means of (1) an express provision that the earlier law is abrogated, (2) the creation of an incompatible law, or (3) the complete reordering of the matter previously regulated at least in part by the earlier law.⁶⁵ In any event, the use of the terms in canon 3 clearly indicates that the Code was not meant to affect the agreements in question.

In this way, canon 3 implicitly reaffirmed the fundamental principle *pacta (iusta) sunt servanda*,⁶⁶ having its origins in natural law and expressing the parties’ obligation to be faithful to the agreements they have undertaken. This principle, which serves the purpose of avoiding any “temptation to appeal to the *law of force* rather than to the *force of law*,”⁶⁷ had been invoked by Pope Pius X in his encyclical *Vehementer Nos*, when denouncing the French law of separation and consequent breach of the obligations descending from the concordat with the Holy See.⁶⁸ By embodying it in a general norm of the Code, the ecclesiastical legislator proclaimed, in the canonical order, a fundamental principle of international law and of Church diplomatic practice.⁶⁹

The Italian jurist Pio Fedele has also seen in this reaffirmation of the principle *pacta sunt servanda* in canon 3 the explicit acknowledgment of the dualistic theory, whereby the law of concordats and canon law are separate and autonomous legal orders from one another. Canon 3 would therefore operate in such a way that (1) as soon as a concordat enters into force, canon law would automatically adapt to it so as to avoid any conflict; and (2) adaptation would be complete and continuous, in the sense that any change to a concordat would automatically be mirrored by a corresponding change in canon law.⁷⁰ In other words, as another writer remarked, canon 3 is similar to those provisions on the adaptation of internal law to international law, which are found in the constitutions of various countries.⁷¹

The Latin Code of 1983

In the numbering of the opening canons of the new Code for the Latin Church, the canon on concordats remained canon 3, which in the 1983 Code reads as follows:

The canons of the Code neither abrogate nor derogate from the agreements entered into by the Apostolic See with nations or other political societies. These agreements therefore continue in force exactly as at present, notwithstanding contrary prescripts of this Code.⁷²

The comparison between this text and the wording of canon 3 in the 1917 Code reveals the following differences: (1) the counterparts to the agreements with the Apostolic See are identified as those belonging to the broader category of “nations or other political societies” (“*nationibus aliisve societatibus politicis*”) instead of the narrower one of “various nations” (“*variis nationibus*”); (2) the verb *derogate* (*derogare*) has replaced the verb *alter* (*obrogare*); and (3) the words *neither... nor* (*non ... neque*) have replaced *in no way* (*nullatenus*). That the changes to the previous text of canon 3 should be limited to these was unanimously accepted in the course of the work of codification.⁷³

The reasons for these modifications are fairly obvious. It was readily agreed that the changes in international society since 1917 suggested a wider category of international legal subjects than the community of states.⁷⁴ As to the replacement of the verb *obrogare*, its inconsistent use has already been noted above regarding the 1917 Code and was expressly mentioned during the codification.⁷⁵ (There are, though, two canons in the 1983 Code where it is still used.)⁷⁶ Finally, the last modification was prompted by the need to avoid the cacophonous term *nequaquam*.

Other suggested changes were considered but rejected. There was a proposal to refer in the canon, not only to agreements entered into by the Apostolic See but also to those approved by the Apostolic See and concluded by the Conference of Bishops. This suggestion conflicted, though, with the decision to include in the Code only universal (not particular) law and of restricting the operation of canon 3 to agreements between international legal subjects (which the Conference of Bishops, obviously, are not).⁷⁷

Another proposal had been the suppression of the second part of the canon, whereby agreements would remain in force despite any contrary prescripts contained in the Code. This proposal, too, was rejected,⁷⁸ presumably on account of the explanation given by some commentators of the corresponding canon in the 1917 Code, namely that the second part was not superfluous as it specified that the preservation of the effects of the concordat applied only to those concordats that were still in force and for those privileges that had not already ceased.⁷⁹

Had these proposals been rejected, it is possible to conclude that the canon on concordats in the current Code has essentially remained the same as the corresponding one in the 1917 Code. From this conclusion, it would be erroneous to infer, however, that the new Code is not a source of significant changes for future concordats, especially regarding their content. In this respect, the example of the free appointment of bishops is instructive.

In quite a number of agreements, the Holy See has acknowledged the right of civil authorities to consultation or presentation before proceeding with an

ecclesiastical appointment.⁸⁰ By virtue of canon 3, these rights remain in force despite any contrary provision in the Code. Yet, regarding the future, canon 377 §5 expressly provides that “no rights and privileges of election, nomination, presentation, or designation of bishops are granted to civil authorities.”⁸¹ This echoes the clear letter of the Council’s decree on the pastoral office of bishops in the Church (*Christus Dominus*) in which the conciliar fathers asserted

that the competent ecclesiastical authority has the proper, special, and, as of right, exclusive power to appoint and install bishops. Therefore in order to safeguard the liberty of the Church and the better and more effectively to promote the good of the faithful, it is the desire of the sacred Council that for the future no rights or privileges be conceded to the civil authorities in regard of the election, nomination or presentation to bishoprics. The civil authorities in question, whose good will towards the Church the sacred Synod gratefully acknowledges and highly appreciates, are respectfully asked to initiate discussions with the Holy See with the object of freely waiving the aforesaid rights and privileges which they at present enjoy by agreement or custom.⁸²

Therefore, with respect to existing concordats through which civil authorities have acquired rights and privileges regarding ecclesiastical appointments, the Church acknowledges their continuing legal force by virtue of canon 3, while asking the civil authorities in question to consider waiving them.⁸³ As to future concordats, as expressly stated in canon 377 §5, no such rights and privileges will be granted. This shows the relevance of the new codification to existing and future concordats.

The Eastern Code of 1990

A provision on concordats similar to the one found in the 1983 Code for the Latin Church is also contained in the Code for the Eastern Churches, canon 4 of which reads as follows:

The canons of the Code neither abrogate nor derogate from the agreements entered into or approved by the Holy See with nations or other political societies. These agreements therefore continue in force exactly as at present notwithstanding contrary prescripts of this Code.⁸⁴

There are two differences from canon 3 in the Latin Code. The first one is the use of the expression “Holy See” instead of “Apostolic See.” Pursuant to canon 361 of the Latin Code,⁸⁵ and canon 48 of the Eastern Code,⁸⁶ these two expressions are used interchangeably to identify the Roman Pontiff and the dicasteries of the Roman Curia, unless otherwise provided. Hence, there is no substantial

difference between the two canons in that one refers to the Apostolic See and the other to the Holy See. It has been remarked, though, that, while in the West, Rome is *the* Apostolic See, in the East the expression still applies to the many churches of apostolic origin.⁸⁷ This is why, in the title on ecumenism contained in the Eastern Code, one finds the expression “Roman Apostolic See,”⁸⁸ which may sound somewhat redundant to Western ears.

The second difference from the Latin Code is the reference, in canon 4, to agreements into which the Holy See does not enter but that it approves.⁸⁹ As was mentioned above, the question of the agreements concluded by others (such as the Conference of Bishops) and merely approved by the Holy See had been discussed also in the preparatory work of the new Latin Code, but the final decision was not to include them within the scope of the new canon 3. The opposite solution reached in the Eastern Code is justified by the fact that, in accordance with canon 98, a patriarch of an Oriental church may, with the consent of the synod of bishops of that patriarchal church and the prior assent of the Roman Pontiff, stipulate agreements with a civil authority that are not in conflict with the law established by the Holy See. These agreements then enter into effect upon receiving the approval of the Roman Pontiff.⁹⁰

Except for this couple of differences, canon 4 of the Eastern Code reproduces *verbatim* the text of its corresponding canon 3 of the Latin Code; thus, providing further evidence that the passage of time (from the new Latin codification to the Eastern codification) did not lessen the significance of concordats and that the regulation of Church-state relations by agreement is not a uniquely Western phenomenon.

Conclusions

The conclusions of the previous chapter were that the Council, without either condemning or exalting the concordat, affirmed its compatibility with the principle of religious freedom and its continued usefulness in promoting cooperation between Church and state, whenever such an instrument is deemed appropriate, and subject to modifications as required by the new circumstances of place and time.

Likewise, the conclusions of the present chapter are that there is a strong element of continuity between the provision on concordats in the 1917 Code and the new provisions in the 1983 Code for the Latin Church and the 1990 Code for the Eastern Churches. Within this context of continuity, there are also elements of *aggiornamento*, both in the very text of the new provisions (most notably the reference to the broader category of political societies, rather than the narrower one of states, as the Holy See’s counterparts in concordats) and in

the way in which new concordats are expected to reflect such principles as the Church's freedom of appointment to ecclesiastical offices, which principles, while belonging to the historical heritage of the Church, have been embraced with new vigor since the Council.

The Data from Diplomatic Practice: Adapting Concordats to the New Realities

The intense diplomatic activity conducted by the Holy See in the forty years after the Second Vatican Council, which led to the conclusion of an unprecedented number of concordats, is the clearest answer to the doubts raised by some on the compatibility between the concordat and the principles proclaimed by the Council.⁹¹

The numbers are self-explanatory. Since the end of the Second Vatican Council, the Holy See has concluded more than one hundred and twenty agreements with about forty different countries. During his reign from 1963 to 1978, which lasted slightly more than half the number of years of the combined reigns of Pius XII (1939–1958) and John XIII (1958–1963), Paul VI concluded thirty agreements, a number that was higher than the number of agreements concluded by his two predecessors together.⁹²

In his turn, John Paul II (1978–2005) concluded a number of agreements higher than that of his four predecessors taken together (including John Paul I, who reigned for thirty-three days in 1978 and signed no concordat).⁹³

Why so many agreements? There are obviously different factors accounting for this faster pace in their conclusion, among which two deserve closer attention, namely the expansion of the geographical sphere of concordats and the new structure of concordats.

Expansion of the Geographical Sphere of Concordats

There is no need to summarize the overview of the geographical expansion of concordats, which is provided in some recent writings in the literature.⁹⁴ Some general considerations will suffice. It is certainly true that part of the explanation of the proliferation of concordats is due to the fall of the Berlin wall in 1989 and the break-up of the former Soviet Union and Yugoslavia with the consequent conclusion of various agreements with the newly independent countries and new democracies that emerged from those events. In other words, it is fair to say that this proliferation was partly due to political events that, being exceptional and unlikely to be repeated in the near future, might lead to an inflated assessment of the real proportions of the proliferation of concordats.

However, it is also true that, in addition to the traditional areas of Europe and Latin America, the concordat has expanded to new areas during and after the Second Vatican Council. After the signing in 1964 of a *modus vivendi* with Tunisia, the Holy See has concluded agreements with many other North-African and Sub-Saharan countries (Morocco, Ivory Coast, Cameroon, Gabon) and even with a regional organization—the African Union.⁹⁵ Likewise, it would have been unthinkable, twenty years ago, that the Holy See would enter into agreements with Israel and the Palestine Liberation Organization, or with Kazakhstan (a Central Asian country having an almost entire Muslim population).

Hence, in some ways, the expanded geographical sphere in the conclusion of concordats mirrors the expansion of the Holy See's diplomatic relations, whereby, under the pontificates of Paul VI and John Paul II (i.e., between 1963 and 2005), the number of states entertaining diplomatic relations with the Holy See almost quadrupled, from forty-six to one hundred and seventy-two.⁹⁶

The proliferation of concordats has occurred at the time of what some have called the “third wave of democratization.”⁹⁷ This confirms how simplistic (and, ultimately, unrealistic) was the prediction, formulated by some at the time of the Council, that the relations with totalitarian regimes would continue to be regulated by agreements, while religious freedom and the freedom of the Church in democratic states would be assured by the participation of committed Christians within society and their contribution to just laws.⁹⁸ The reality is quite the opposite. It is the very tendency of many contemporary democratic states to intervene in the economic and social sphere (for instance, in the sectors of health and education) that carries with it the risk of conflicts with the Church and therefore the need for agreements to avoid or resolve such conflicts.⁹⁹ What is more, the political decisions of the government of a democratic state are changeable, based as they are on the sovereignty of the people expressed in elections: a concordat is therefore all the more needed as a way of avoiding continuous changes affecting the relations between Church and state, which call for a measure of stability to the benefit of both Church and state and, ultimately, of all citizens.¹⁰⁰

New Structure of Concordats

One of the aims pursued by the pontifical diplomacy between the two World Wars had been to negotiate and conclude concordats that would regulate the whole spectrum of the relations with a given state. This comprehensive model is still occasionally used; for example, in the agreements with the German *Ländern*. However, besides this traditional approach, two other models have developed. Romeo Astorri, while cautioning against the risk of strict classifications, calls

them the “model of parallel agreements” and the “model of the framework agreement.”¹⁰¹

The model of parallel agreements is the one used in Spain in the late 1970s: The first agreement of 1976 on the appointment of bishops and penal matters was followed, in 1979, by four agreements on religious assistance to the armed forces and on legal, cultural, and economic matters, with subsequent agreements on tax issues (1980) and matters of common interest in the Holy Land (1994).

Unlike this model, in which subsequent agreements on specific matters are concluded between the Holy See and the state, the so-called model of the framework agreement is one in which an umbrella agreement between the Holy See and the state is followed by subsequent agreements in various forms (exchange of notes and others) between subjects that are not necessarily the same highest authorities who entered into the umbrella agreement. This model has been followed, for example, in Italy since the 1984 amendment to the earlier concordat.

The concordat has, therefore, become more than ever before a flexible instrument adaptable to the specific circumstances of every country both in its form and (what cannot obviously be explored here) in its content.¹⁰²

Conclusions

Summing up the data from diplomatic practice one may therefore conclude, with Celestino Migliore (the Apostolic Nuncio and Permanent Observer of the Holy See to the United Nations since 2001) that the number of concordats is considerably increasing while expanding to new geographical areas and being accompanied by the evolution of Church doctrine on concordats.¹⁰³ All this is made easier by the flexible structure of contemporary concordats, which reveals that the prevailing value today is not so much uniformity but adaptability to the different realities.

General Conclusions

The concordat has historically been a privileged target of the prophets of doom. With the end of the temporal power of the Church, in the nineteenth century the Italian statesman Cavour and other enemies of the Church foretold that the concordat would have no future in Church-state relations. Their predictions did not materialize, though. Instead, a golden age of concordats developed in the first part of the twentieth century as a reflection of the newly restored prestige of the Holy See in the international community.

History repeated itself in the 1960s when certain antijudicial trends reflecting dubious ecclesiological orientations were accompanied by broad statements to the effect that the concordat would be incompatible with the spiritual dimension of a Church that does not seek privileges but is called to witness Christ without undue burdens on its prophetic mission. Contrary to these allegations, the concordat has proved to be a useful instrument at the service of the Church's freedom (*libertas Ecclesiae*) in its proclamation throughout the world of the good news of salvation. The forty years since the closing of the Second Vatican Council have seen the signing of more than one hundred concordats (with traditionally concordat countries as well as with newly independent states and non-Christian countries); thus, making the present time a new golden age of concordats.

The leading principle in contemporary concordats is the one found in paragraph 76 of the pastoral constitution *Gaudium et Spes* (the most often cited conciliar document in the Compendium of the Social Doctrine of the Church): The Church and the political community, in their own fields, are autonomous and independent from each other; yet both, under different titles, are devoted to the personal and social vocation of the same persons. This leading principle is then specified in the detailed discipline on religious freedom, civil effects of marriage, education, religious assistance in hospitals and armed forces, juridical status of the Church within the civil legal order, protection of the Church cultural and artistic heritage, and such other areas of collaboration that Church and state decide to regulate by agreement.

It is this very leading principle proclaimed by the Council that allows the appreciation of the concordat not as the lesser evil it used to be (*historia concordatorum, historia dolorum Ecclesiae*, as the old adage went) but as a pragmatic and flexible instrument adaptable in form and content to the different realities of contemporary life. Hence, Plöchl's evaluation of 1947 is still valid: While not an exclusive solution, the concordat remains a unique and helpful means of cooperation between Church and state, with all the necessary adaptations that the new times have required.

In this, there is that element of "innovation in continuity" regarding contingent matters, to which Benedict XVI has referred as the fruit of the Church's action in the world and in conformity with a "hermeneutic of reform," not of "discontinuity and rupture," which alone can do justice to the spirit of the Second Vatican Council.¹⁰⁴

Notes

- * This article is a shorter version of the author's JCL thesis submitted to the School of Canon Law of the Catholic University of America. The author wishes to express his gratitude to Msgr. Brian Ferme, former dean of the School of Canon Law at Catholic University, for acting as his thesis director, and to Msgr. Ronny Jenkins, associate general secretary at USCCB, for acting as his thesis reader. This article is dedicated to the memory of Msgr. Giuseppe Di Meglio. Born at Piedimonte of Ischia, Italy, in 1907, after his ordination he moved to Rome, where he studied at the faculty *utroque jure* of the Lateran University and chose, as his confessor and spiritual director, the saintly figure of one of the great canonists of the twentieth century, the Jesuit Felice Cappello. Msgr. Di Meglio was first at the nunciature in Vienna during the *Anschluss*, and then in Germany at the time of the Nazi persecutions. He accompanied the Apostolic Nuncio to the Berchtesgaden meeting with Hitler and Von Ribbentrop with a proposal for an international peace conference aimed at avoiding the invasion of Poland and the impending Second World War. During the war, he met Maximilian Kolbe and spared no effort in trying to save the life of Edith Stein, for which he was imprisoned and subsequently released by the Gestapo. A diplomat in Madrid after the war (when he played a crucial role in the preparation of the new Spanish concordat), Msgr. Di Meglio was then a member, for seventeen years, of what is now the Congregation for the Doctrine of the Faith, and in this capacity attended the Second Vatican Council. His diplomatic skills and scholarship in international law, evidenced by his writings on the international legal personality of the Church and on the relationship between international law and natural law, earned him honors from several states. Msgr. Di Meglio died in Rome in 1994, having lived his blindness for twenty-seven years as a spiritual trial in the hope that, pleasing God as a devotee to Our Lady Gate of Heaven of his native Ischia, he may one day rejoice in His eternal light.
1. For example, in its more than sixty years of existence, the American journal of canon law *The Jurist* has hosted only one article on concordats, and that article was published more than half a century ago: Willibald M. Plöchl, "Reflections on the Nature and Status of Concordats," *The Jurist* 7 (1947): 10–44.
 2. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Rome: Libreria Editrice Vaticana, 2004), 239, par. 427. (Italics in the original.)
 3. The classic collection of concordats, up to 1954, is Angelo Mercati, ed., *Raccolta di concordati su materie ecclesiastiche tra la Santa Sede e le autorità civili* (Rome: Tipografia Poliglotta Vaticana, vol. 1, 1919, and vol. 22, 1954). (The editor of this work was Msgr. Angelo Mercati, Prefect of the Vatican Archive and brother of Cardinal Giovanni Mercati.) For later concordats, see José T. Martín de Agar, ed.,

Raccolta di concordati 1950–1999 (Rome: Libreria Editrice Vaticana, 2000) and Id., *I concordati del 2000* (Rome: Libreria Editrice Vaticana, 2001). A collection containing a selection of concordats concluded during the two last centuries is Erminio Lora, ed., *Enchiridion dei concordati. Due secoli di storia dei rapporti Chiesa-Stato* (Bologna: Edizioni Dehoniane, 2003). The text (and Spanish translation) of the concordats currently in force is given in Carlos Corral Salvador, ed., *Concordatos Vigentes*, 4 vols. (Madrid: Comillas, 1981–2004).

4. According to Cardinal Erdö, the term *concordat*, in the sense of an agreement between Church and state, was probably first utilized in the concordats of Constance of 1418. (Peter Erdö, “Accords bilatéraux entre le Saint-Siège et la Hongrie,” *Le Supplément. Revue d’éthique et de théologie morale* 199 [1996]: 121.)
5. On the history of concordats, see Jean Julg, *L’Église et les états: Histoire des concordats* (Paris: Nouvelle Cité, 1990). On the history of concordats during the last couple of centuries, see Fernando Della Rocca, *Appunti di storia concordataria* (Milan: Giuffrè, 1977); Roland Minnerath, *L’Église et les États concordataires (1846–1981). La souveraineté spirituelle* (Paris: Les éditions du Cerf, 1983). On the period between the First World War and the Second World War, see Yves de la Brière, “Concordats postérieurs a la grande guerre,” in *Dictionnaire de droit canonique* 3, ed. Raoul Naz (1942): 1431–1472.
6. See, for example, the definition given by Cardinal Ottaviani in his classic treatise on *ius publicum ecclesiasticum*: “*Conventiones inter S. Sedem et civitatum moderatores supremos initae, quibus reipublicae officia et privilegia Ecclesiaeque iura circa determinatas res, in bonum utriusque societatis definiuntur et pactorum sollemnitatibus firmitur*” (Alaphridus Ottaviani, *Institutiones iuris publici ecclesiastici*, 4th ed. [Rome: Typis Polyglottis Vaticanis, 1958], 2:253, par. 364)]. (Italics in the original.) In the contemporary literature, Martín de Agar has distinguished between concordats in the wide sense, namely conventions between the Holy See and nations or other political societies, and concordats in the strict sense, namely general and solemn agreements regulating matters of common interest, whereas the more limited or less formal accords are called with names other than concordats. (José T. Martín de Agar, “Passato e presente dei concordati,” *Ius Ecclesiae* 12 [2000]: 616–17.)
7. On the denial of the international legal character of concordats, see the bibliographical references contained in Pierfrancesco Grossi, “Interrogativi in ordine ad una proposta per un diverso assetto dei rapporti fra Stato e Chiesa cattolica,” in *Individuo, gruppi, confessioni religiose nello stato democratico. Atti del Convegno nazionale di Diritto ecclesiastico. Siena, 30 novembre – 2 dicembre 1972* (Milan: Giuffrè, 1973), 984n1.
8. The bibliography on concordats is so vast that no justice can evidently be done to it in a footnote. Among the monographs, see Gaetano Catalano, *Problematica giuridica dei concordati* (Milan: Giuffrè, 1963); Giovanni Lajolo, *I concordati mod-*

erni. *La natura giuridica internazionale dei concordati alla luce di recente prassi diplomatica* (Brescia: Morcelliana, 1968). (Archbishop Giovanni Lajolo, an Italian national, was formerly Secretary for Relations with States in the Secretariat of State and is, at the time of the writing of this article, President of the Governorate of the Vatican City State.) Among the entries in dictionaries or encyclopedias, see L. A. Kelly and B. Ojetti, "Concordat," in *Catholic Encyclopedia* (1908), online: www.newadvent.org/cathen/04196a.htm; Raoul Naz, "Concordat," in Id., ed., *Dictionnaire* 3 (1942): 1353–83; Pietro Agostino d'Avack, "Concordato," *Enciclopedia del diritto* 8 (1961): 441–71; Carlos Corral Salvador, "Concordato (*Concordatum, Conventio cum Nationibus*)," in *Diccionario de derecho canonico*, ed. Id. and José M.^a Urteaga Embil (Madrid: Tecnos, 1989), 122–29. From an international legal perspective, the classic monograph remains Henri Wagnon, *Concordats et droit international. Fondement, élaboration, valeur et cessation du droit concordataire* (Gembloux: J. Duculot, Éditeur, 1935). See also Yves de la Brière, "Le droit concordataire dans la nouvelle Europe," *Recueil des cours de l'Académie de droit international de l'Haye* 63 (1938/I): 371–467; Sidney Z. Ehler, "The Recent Concordats," *ibid.* 104 (1961/III): 1–67; Heribert Franz Köck, "Concordats," in *Encyclopedia of Public International Law*, 1 (1992): 729–32, ed. Rudolf Bernhardt. A section on concordats is invariably contained in the manuals of ecclesiastical law in those juridical traditions where such a discipline exists. See, for example, the section in the classic manual by the pre-eminent exponent of the Italian school of canon law: Vincenzo Del Giudice, *Manuale di diritto ecclesiastico*, 10th ed. (Milan: Giuffrè, 1970), 28–30.

9. An excellent summary of the theories of Church-state relations through the ages, which was extensively used in drafting this paragraph, can be found in Giuseppe Dalla Torre, *La città sul monte. Contributo ad una teoria canonistica sulle relazioni fra Chiesa e Comunità politica*, 2nd ed. (Rome: Editrice A.V.E., 2002), 173–80. A prolific writer on this theme is Lorenzo Spinelli, *Il diritto pubblico ecclesiastico dopo il Concilio Vaticano II. Lezioni di diritto canonico*, 2nd ed. (Milan: Giuffrè, 1985), 4–44; *La Chiesa e gli stati alla luce del Concilio Vaticano II. Riflessioni sui principi conciliari sotto il profilo giuridico* (Modena: S.T.E.M. Mucchi, 1969); *Prospettive canonistiche nella Chiesa di oggi*, 2nd ed. (Modena: S.T.E.M. Mucchi, 1975), especially 165–94; *Libertas ecclesiae. Lezioni di diritto canonico* (Milan: Giuffrè, 1979), especially 189–215. On the wider background of the interaction between Church (and, more generally, religious confessions) and state in the West, see Brigitte Basdevant-Gaudemet, "Églises/État," in Denis Alland and Stéphane Rials, eds., *Dictionnaire de la culture juridique* (Paris: Quadrige/Lamy-PUF, 2003), 595–604. Among the monographs, see Giuseppe Leziroli, *Relazioni fra Chiesa cattolica e potere politico. La religione come limite del potere (cenni storici)*, 4th ed. (Turin: Giappichelli, 1998). For a handy collection of documents, see Sidney Z. Ehler and John B. Morrall, eds., *Church and State Through the Centuries. A Collection of historic documents with commentaries* (New York: Biblo and Tannen, 1954).

10. Gregory VII reigned from 1073 to 1085, Innocent III from 1198 to 1216, and Boniface VIII from 1294 to 1303. (While Gregory VII and Innocent III are universally admired for their greatness, Boniface VIII's fame has regrettably suffered, at least in popular imagination, from the negative judgment expressed in the *Divine Comedy* by Dante, who was exiled as a consequence of the victory of the Florentine faction supported by Boniface VIII. See Ernesto Sestan, "Bonifacio VIII, (Bonifazio)," *Enciclopedia dantesca* 6 (2005): 323–29. English translations, with commentaries, of Gregory VII's *Dictatus Papae*, Innocent III's views on the plenitude of papal authority, and Boniface VIII's bull *Unam Sanctam*, can be found in Ehler and Morrall, eds., *Church and State*, 43–44, 64–73, and 89–92.
11. On the various definitions of the expression, see Alberto de la Hera and Charles Munier, "Le droit public ecclésiastique a travers ses definitions," *Revue de droit canonique* 14 (1964): 32–63. A historical overview of *ius publicum ecclesiasticum externum* can be found in Carlos Soler, *Iglesia y estado en el Vaticano II* (Pamplona: Ediciones Universidad de Navarra, S.A., 2001), 15–30 and, more extensively, Id., *Iglesia y estado. La incidencia del Concilio Vaticano II sobre el derecho público externo* (Pamplona: Ediciones Universidad de Navarra, S.A., 1993), 21–49. Among the writings on the subject, see Laurentius R. Sotillo, *Compendium iuris publici ecclesiastici*, 2d ed. (Santander: Administración de Sal Terræ, 1951), especially 167–354, and Roland Minnerath, "Le droit public ecclésiastique. Une doctrine des relations de l'église et de l'état," *Lumière & Vie* 37 (1988/1990): 63–75. See also the series of articles published by Emilio Fogliasso between the forties and early seventies of last century: "Il Codice di diritto canonico e il 'ius publicum ecclesiasticum,'" *Salesianum* 6 (1944): 7–31; "Il compito apologetico del Ius Publicum Ecclesiasticum," *ibid.* 7 (1945): 49–80; "La tesi fondamentale del ius publicum ecclesiasticum," *ibid.* 8 (1946): 73–80; "Compito e caratteristiche del diritto pubblico ecclesiastico esterno," *ibid.* 16 (1954): 218–57; "Per la sistematicità e funzionalità del 'Ius publicum ecclesiasticum,'" *ibid.* 25 (1963): 412–82; "Il ius publicum ecclesiasticum e il Concilio Vaticano II," *ibid.* 30 (1968): 243–301; "Non sarebbe più dialogico presentare il 'ius publicum ecclesiasticum' come una introduzione in 'iura ecclesiae'?" in *Ius populi Dei. Miscellanea in honorem Raymundi Bidagor* (Rome: Pontificia Università Gregoriana, 1972), 1:143–66.
12. On the private-public dichotomy, as applied to the canonical legal order, see Angelo Criscito, *Diritto pubblico e diritto privato nell'ordinamento canonico* (Turin: Giappichelli, 1948).
13. See Lorenzo Spinelli, *Il diritto pubblico ecclesiastico*, 26–27.
14. In addition to the one by Cardinal Ottaviani, cited above, the classic treatises are those by Cardinals Tarquini and Cavagnis: Camillus Tarquini, *Iuris ecclesiastici publici institutiones*, 14th ed. (Rome: Typographia polyglotta, S. c. de propaganda fide, 1892) and Id., *Les principes du droit public de l'Église réduits a leur plus simple*

expression (Paris: Ancienne maison Retaux-Bray, Victor Retaux et fils, successeurs, 1891); Felix Cavagnis, *Institutiones iuris publici ecclesiastici*, 3d ed., 3 vols. (Rome: Desclée, Lefebvre et c.ie, 1890).

15. See his *Institutionum iuris publici ecclesiastici libri tres*, editio altera (Laureti: ex Typographeo Rossiorum, 1844). On Cardinal Soglia (a canon law professor at the University of Rome and a close aide to Pius IX), and on his *Institutiones*, see Marie Zimmermann, *Structure sociale et Église. Doctrines et praxis des rapports Église-état du XVIIIe siècle à Jean-Paul II* (Strasbourg: Cerdic Publications, 1981), 20–24.
16. See, among others, Matthaeus Conte a Coronata, *Ius publicum ecclesiasticum* (Turin: Marietti, 1924); Felix M. Cappello, *Summa iuris publici ecclesiastici*, 6th ed. (Rome: Apud aedes Universitatis Gregoriana, 1954); Ludovicus Bender, *Ius publicum ecclesiasticum* (Bussum: Paulus Brand, 1948).
17. Leo XII had created a chair of public ecclesiastical law at the University of Rome in 1824. After this university became a state university with the end of the Church's temporal power, Leo XIII introduced the discipline into the Roman seminary, entrusting its chair to Cardinal Cavagnis.
18. It has been observed that the doctrine “fue un intento de desmontar las tesis identificadoras del derecho con el Estado, siendo así, si no *la* respuesta al positivismo, al menos *una* respuesta que cumplió una misión importante en su momento.” (Iván C. Ibán, *Derecho canonico y ciencia juridical* [Madrid: Universidad Complutense, 1984], 149. Italics in the original.)
19. See the papal pronouncements listed in Lorenzo Spinelli, *Il diritto pubblico ecclesiastico*, 33n55. As indicated by Durand (Jean-Paul Durand, “Le renouvellement postconciliaire du droit concordataire. Hypothèses de compréhension,” *Le Supplément. Revue d'éthique et de théologie morale* 199 (1996): 136), an early magisterial endorsement of the theory of the Church as *societas perfecta* is in the letter *Cum catholica Ecclesia*, issued by Pius IX on March 26, 1860. (The text of the letter, in Italian, is electronically available at: www.totustuus.biz/users/magistero/p9cumcat.htm.) See also Leo XIII's encyclical *Immortale Dei*, November 1, 1885: “For the only-begotten Son of God established on earth a society which is called the Church... This society is made up of men, just as civil society is, and yet is supernatural and spiritual, on account of the end for which it was founded, and of the means by which it aims at attaining that end. Hence, it is distinguished and differs from civil society, and, what is of highest moment, it is a society chartered as of right divine, perfect in its nature and in its title, to possess in itself and by itself, through the will and loving kindness of its Founder, all needful provision for its maintenance and action.” (Paragraphs 8 and 10 of the English version electronically available at: www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html.)

20. For example, in par. 25 (at p. 46) of his *Institutiones*, Cardinal Ottaviani thus defined the juridically perfect society: “*Societas iuridice perfecta ea est quae bonum in suo ordine completum tamquam finem habens, ac media omnia ad illud consequendum iure possidens, est in suo ordine sibi sufficiens et independens, id est plene autonoma.*” (Italics in the original.) On this basis, in par. 95 (at pp. 150–51), he could easily conclude that the Church, being the *societas iuridice suprema* by reason of its own supernatural end, is also, obviously, a *societas iuridice perfecta*.
21. Cotta has rightly insisted on this crucial point: The Church is certainly superior to the state, precisely because religion (which embraces the everlasting destiny of man) is superior to politics (which has a merely temporal dimension). Hence, Church and state can be on a foot of equality only in law, not in theology: “Come è che allora due enti così ineguali possono trovarsi d’accordo, senza stabilire un ‘foedus iniquum’? Proprio esclusivamente con lo strumento giuridico. Tale strumento è quello che pone anche enti disuguali su un piano di parità... La formula delle due società che si dicono perfette è esclusivamente una formula giuridica e non teologica” (Sergio Cotta, “Discussione,” *Iustitia* (1975): 405).
22. It has correctly been remarked that the aspect of the Church as a *societas iuridice perfecta* cannot be neglected, as it is intrinsic in the very constitution of the Church on earth: “sia pure, secondo alcuni, ridimensionato dal Vaticano II, e collocato nella sua più esatta posizione e finalità, non può tuttavia venire sottovalutato né tanto meno dimenticato, perché è pur esso essenziale alla natura della Chiesa nella sua costituzione e fase pellegrinante.” (Mario Oliveri, “La diplomazia pontificia alla luce del Concilio Vaticano II,” *Ius Ecclesiae* 14 [2002]: 252.) Others have expressed a more critical view: “Por mi parte considero que, aunque esa expresión es, como tal, compatible con la mutua independencia y libertad entre Iglesia y Estado, su abandono va implícito en la eclesiología conciliar.” (José T. Martín de Agar, “La teoría concordataria desde el punto de vista del derecho canónico actual,” in *Los concordatos: pasado y futuro. Actas del simposio internacional de derecho concordatario. Almería, 12-14 de noviembre de 2003*, ed. José María Vázquez García-Peñuela (Granada: Comares Editorial, 2004), 137.
23. On the impact of the Second Vatican Council on the *ius publicum ecclesiasticum externum*, see Pedro Lombardía, “Le droit ecclésiastique selon Vatican II,” *Apollinaris* 40 (1967): 59–112; Guido Saraceni, “‘Ius publicum ecclesiasticum externum’ e prospettive conciliari,” in *La Chiesa dopo il Concilio (Atti del convegno internazionale di diritto canonico. Roma, 14-19 gennaio 1970)* (Milan: Giuffrè, 1972), 1:321–47; Vincenzo Mascione, “Ordinamento giuridico (Diritto canonico),” *Enciclopedia del diritto* 30 (1980): 757–63.
24. See Lorenzo Spinelli, *Il diritto pubblico ecclesiastico*, 78–79, and Giuseppe Dalla Torre, *La città sul monte*, 66–69. On the expression “perfect society,” Minnerath has remarked: “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.” (Roland Minnerath, “The position of the Catholic Church regarding concordats from a doctrinal and pragmatic perspective,” *Catholic University Law Review* 47 [1997–1998]: 469.)

25. Vatican II, dogmatic constitution *Lumen gentium*, chap. 1, n. 4, in *Vatican Council II: The Conciliar and Post Conciliar Documents*, ed. Austin Flannery, 2d ed. (Northport, N.Y.: Costello Publishing, 1996), 352. The Latin original reads as follows: “de unitate Patris et Filii et Spiritus Sancti plebs adunata” (Vatican II, dogmatic constitution *Lumen gentium*, November 21, 1964, *AAS* 57 [1965]: 5–67).
26. Vatican II, decree *Unitatis redintegratio*, chap. 1, n. 2; Flannery 455. The Latin original reads as follows: “supremum exemplar et principium” (Vatican II, decree *Unitatis redintegratio*, November 21, 1964, *AAS* 57 [1965]: 90–107).
27. *LG*, chap. 1, n. 8; Flannery 357. (Footnote omitted.) The Latin original reads as follows: “Sicut enim natura assumpta Verbum divinum ut vivum organum salutis, Ei indissolubiliter unitum, inservit, non dissimili modo socialis compago Ecclesiae Spiritui Christi, eam vivificanti, ad augmentum corporis inservit (cf. Eph. 4, 15).”
28. *Ibid.*, chap. 2, n. 9; Flannery 360. This passage is quoted in Vatican II, pastoral constitution *Gaudium et spes*, chap. 4, n. 40; Flannery 939. The Latin original reads as follows: “aptis mediis unionis visibilis et socialis” (Vatican II, pastoral constitution *Gaudium et spes*, December 7, 1965, *AAS* 58 [1966]: 1025–1115).
29. *GS*, chap. 4, n. 40; Flannery 939–40. The Latin original reads as follows: “insimul ‘coetus adspectabilis et communitas spiritualis’, una cum tota humanitate incedit eandemque cum mundo sortem terrenam experitur, ac tamquam fermentum et veluti anima societatis humanae in Christo renovandae et in familiam Dei transformandae existit.” (Footnotes omitted.)
30. “Sono queste – ci sembrano – le premesse teologiche da tenere presente allorquando si voglia discutere dal nostro angolo visuale della questione concordataria nell’ambito del problema generale dei rapporti fra la Chiesa e la Comunità politica: (1) la Chiesa intesa come comunità carismatica e insieme istituzionale; (2) la Chiesa compenetrata nel mondo ma distinta dalle società mondane; (3) la Chiesa a servizio dell’uomo.” (Agostino Vallini, “C’è un futuro per i concordati fra Chiesa e Stato? Appunti per un approccio teologico-giuridico,” *Iustitia* [1975]: 369. Agostino Vallini, Prefect of the Supreme Tribunal of the Apostolic Signatura since May 2004, and also President of the Court of Appeal of the Vatican City State, was created and proclaimed cardinal by Pope Benedict XVI in the consistory of March 24, 2006.)
31. Vatican II, declaration *Dignitatis humanae*, chap. 1, n. 2; Flannery 800. The Latin original reads as follows: “personam humanam ius habere ad libertatem religiosam.

Huiusmodi libertas in eo consistit, quod omnes homines debent immunes esse a coërcitione ex parte sive singulorum sive coetuum socialium et cuiusvis potestatis humanae, et ita quidem ut in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam neque impediatur, quominus iuxta suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, intra debitos limites.” (Vatican II, declaration *Dignitatis humanae*, December 7, 1965, *AAS* 58 [1966]: 929–41.)

32. The bibliography on the theme is so vast that any attempt to select here the main suggested readings would be futile. On the specific aspect of religious freedom and freedom of the Church in their impact on Church-state relations, see Giovanni Lajolo, “‘Libertas Ecclesiae’: principio fondamentale nelle relazioni tra Chiesa e stato,” *La Scuola Cattolica* 98 (1970): 3–31 and 113–34.
33. Canon 1351 stated (in the style of a *regula iuris*): “Ad amplexandam fidem catholicam nemo invitus cogatur.” Canon 748 §2 provides: “Homines ad amplectendam fidem catholicam contra ipsorum conscientiam per coactionem adducere nemini umquam fas est.” Canon 586 more amply reads: “Severe prohibetur, ne quis ad Ecclesiam amplectendam cogatur vel artibus importunis inducatur aut alliciatur; omnes vero christifideles curent, ut vindicetur ius ad libertatem religiosam, ne quis iniquis vexationibus ab Ecclesia deterreatur.”
34. On the relationship between religious freedom and freedom of the Church, see Giuseppe Dalla Torre, “Orientamenti e problemi sui rapporti tra Chiesa e Stato dopo il Vaticano II,” in Ernesto Cappellini, ed., *Problemi e prospettive di diritto canonico* (Brescia: Queriniana, 1977), 347–360.
35. *DH*, chap. 2, n. 13; Flannery 810. (Footnotes omitted.) The Latin original reads as follows: “ut ecclesia tanta perfruatur agenda libertate, quantam salus hominum curanda requirat. Haec enim libertas sacra est, qua unigenitus Dei Filius ditavit ecclesiam acquisitam sanguine suo. Ecclesiae sane adeo propria est, ut qui eam impugnant, iidem contra Dei voluntatem agant. Libertas ecclesiae est principium fundamentale in relationibus inter ecclesiam et potestates publicas totumque ordinem civilem. In societate humana et coram quavis potestate publica ecclesia sibi vindicat libertatem, utpote auctoritas spiritualis, a Christo domino constituta, cui ex divino mandato incumbit officium eundi in mundum universum et evangelium praedicandi omni creaturae.”
36. *GS*, chap. 4, n. 76; Flannery 984–85. The Latin original reads as follows: “Communitas politica et Ecclesia in proprio campo ab invicem sunt independentes et autonomae. Ambae autem, licet diverso titulo, eorundem hominum vocationi personali et sociali inserviunt . . . et ipsa Ecclesia rebus temporalibus utitur quantum propria eius missio id postulat. Spem vero suam in privilegiis ab auctoritate civili oblatis non reponit; immo quorundam iurium legitime acquisite exercitio renuntiabit, ubi constiterit eorum usu sinceritatem sui testimonii vocari in dubium aut novas vitae condiciones

aliam exigere ordinationem. Semper autem et ubique ei fas sit cum vera libertate fidem praedicare, socialem suam doctrinam docere, munus suum inter homines expedite exercere necnon iudicium morale ferre, etiam de rebus quae ordinem politicum respiciunt, quando personae iura fundamentalia aut animarum salus id exigant, omnia et sola subsidia adhibendo, quae Evangelio et omnium bono secundum temporum et condicionum diversitatem congruant.”

37. “Ciertamente, las enseñanzas del Concilio imponen una nueva orientación a los Concordatos... Pero esto no quiere decir que el Concordato, como medio de regular las relaciones Iglesia-comunidad política ha de ser arrumbado, ha de pasar al desván o a una tienda de anticuario, que se ha convertido en una antigualla... La doctrina concordataria que, basada en las tesis de la coordinación y el poder directivo, sostiene que el concordato, con las modificaciones y características arriba expuestas, es el instrumento y medio normal y ordinario para asegurar la libertad de la Iglesia y, por tanto, para regular las relaciones entre la Iglesia y la comunidad política, es la que encuentra mayor refrendo en las enseñanzas del Concilio.” José de Salazar Abrisquieta, “El Concilio Vaticano II y los Concordatos,” in *La Institucion concordataria en la actualidad. Trabajos de la XIII Semana de Derecho Canónico* (Salamanca: C.S.I.C. Instituto San Raimundo de Peñafort, 1971), 95 and 101–2.
38. In this cursory examination of the arguments, extensive (but not exclusive) use is being made of Cardinal Vallini’s article headed “C’è un futuro per i concordati,” cited above. This article also contains ample bibliographical references to some of the significant writings exemplifying the first four arguments (which, though, Cardinal Vallini classified under neither the names adopted here nor any other names).
39. See Xaverius Ochoa, *Index verborum cum documentis Concilii Vaticani Secundi* (Rome, Commentarium pro religiosis, 1967). In the *Index*, there is no trace of the Latin term *concordatum*. As to the expression “conventio internationalis,” the reference one finds on page 115 is to a passage from paragraph 79 in the constitution *Gaudium et spes* regarding multilateral treaties on the law of war: “Exstant de rebus bellicis variae conventiones internationales quibus sat multae nationes subscripserunt, ut minus inhumanae efficiantur actiones militares earumque sequelae: huiusmodi sunt conventiones quae pertinent ad militum vulneratorum aut captivorum sortem, variaequae huius generis stipulationes.”
40. Just to make one example among many, Bishop Beitia of Santander, Spain, asked “utrum *concordata* adhuc retineant aliquem *valorem*, non solum ut ius conditum, neque ut principium privilegiorum pro Ecclesia, neque ut mera consecratio Caesarismi pro Statu, sed ut formula iuris applicabilis pro Statibus modernis, et praecipue ut basis certa fecundae collaborationis.” (José de Salazar Abrisquieta, “El Concilio Vaticano II,” 79.)

41. See, for example, Pasquale Colella, “Il superamento del regime concordatario quale espressione peculiare di una Chiesa che sceglie la libertà,” in *Individuo, gruppi*, 886: “La riaffermazione del carattere esclusivamente religioso dei fini della Chiesa importa che la penetrazione religiosa si compia non attraverso gli strumenti tradizionali di pressione politica né a mezzo del massiccio lavoro delle organizzazioni e delle istituzioni; ma soprattutto mediante l’annuncio della parola e la testimonianza cristiana nella società operata dai *cives-fideles*, con la conseguenza di preferire al sistema di regolamentazione concordataria quello derivante da posizioni del tutto diverse ma in armonia con queste ribadite caratteristiche peculiari ed essenziali della Chiesa.” (Footnote omitted.)
42. “La pobreza y la debilidad de la iglesia exigen, ante todo, la renuncia a la utilización de cualquier protección que el estado quisiera ofrecerle, que implicara una lesión de los derechos ajenos, es decir, una injusticia cometida a su favor, a costa de quienes habrían de padecerla. El planteamiento es paralelo al que puede hacerse en el orden económico. La iglesia no puede servirse del dinero injusto para santificarlo con una motivación o finalidad ‘piadosa’ o religiosa. Esto es claro, pero es comprometedor.” (J. M. Setién, “Eclesiología subyacente a la teoría concordataria,” in *Concordato y sociedad pluralista* [Salamanca, Ediciones Sígueme, 1972], 46.)
43. “Cioè, vi sono due modi di concepire l’incarnazione della Chiesa nella storia. Ci può essere un modo, che è quello di incarnarsi come potere in mezzo ai poteri, come partito in mezzo ai partiti, ed è un modo, direi, che sicuramente è stato presente nella storia ecclesiastica. Ma c’è anche un altro modo, ed è un modo che forse è altrettanto presente nella storia ecclesiastica, che certo è più vicino alle sue vere ispirazioni cristiane, come osserva il prof. Alberigo, ed è quello della sua incarnazione in funzione di testimonianza profetica. Un rapporto cioè con la politica ed in connessione con la politica, ma non in transazione con la politica, non come *aliquid datum aliquid retentum*... Se noi vogliamo tradire la Chiesa continuiamo per la strada dei Concordati, se vogliamo tradire la Scrittura continuiamo per questa stessa strada.” Francesco Zanchini, “Discussione – Interventi,” in *Individuo, gruppi*, 814–15.
44. This argument is summarized and criticized in José Giménez y Martínez de Carvajal, “Los concordatos en la actualidad,” in *Catedráticos de derecho canónico de universidades españolas*, *Derecho canónico* (Pamplona: EUNSA, 1975), 748–50.
45. See the passage from chapter 1, n. 8, from the *Lumen gentium*, reproduced in the previous paragraph.
46. There are innumerable writings on the international activity and personality of the Holy See. Among the works in English, see, for example, Hyginus Eugene Cardinale, *The Holy See and the International Order* (Gerrard Cross: Colin Smythe, 1976); Gaetano Arangio-Ruiz, “On the Nature of the International Personality of the Holy See,” *Revue belge de droit international* 29 (1996): 354–69; Robert John Araujo,

“The International Personality and Sovereignty of the Holy See,” *Catholic University Law Review* 50 (2001): 291–360.

47. See Pius XII’s speech, on December 6, 1953, to the fifth national congress of Italian Catholic jurists. (*AAS* (1953): 801–802.) See also the brief reflections on it in Michele Maccarrone, “*Prima Relazione – I concordati nella storia della Chiesa,*” *Iustitia* (1975): 344–45.
48. “iuribus gaudet quae eidem tribuuntur in Concordatis inter Sanctam Sedem et varias Nationes.” (Par. 105.) The original text of this apostolic constitution, dated August 15, 1967, is in *AAS* 59 (1967): 885–928. Its electronic version is available at: www.vatican.va/holy_father/paul_vi/apost_constitutions/documents/hf_p-vi_apc_19670815_regimini-ecclesiae-universae_lt.html.
49. “peculiari modo tractet de stipulationibus quae ‘modus vivendi’ appellantur, de pactis et concordatis, nec non de conventionibus, quae de negotiis agunt ad ius publicum pertinentibus.” (Par. X[1].) The original text of this apostolic letter, dated June 24, 1969, is in *AAS* 61 (1969): 473–84. Its electronic version is available at: www.vatican.va/holy_father/paul_vi/motu_proprio/documents/hf_p-vi_motu-proprio_19690624_sollicitudo-omnium-ecclesiarum_lt.html.
50. “questiones pertractare quae ad relationes inter Ecclesiam et Civitatem pertinent; et peculiari modo agere de concordatis aliisque huiusmodi conventionibus conficiendis et ad effectum deducendis.” (This being the only canon in the 1983 Code using the term *concordat*.)
51. “reformatio Codicis Iuris Canonici prorsus posci atque expeti videbatur ab ipso Concilio, quod in Ecclesiam maximopere considerationem suam converterat.” The original text of this apostolic constitution, dated January 25, 1983, is in *AAS* 75/II (1983): VII–XIV. Its electronic version is available at: www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_25011983_sacrae-disciplinae-leges_lt.html.
52. In his encyclical letter *Immortale Dei*, dated November 1, 1885, Leo XIII wrote: “There are, nevertheless, occasions when another method of concord is available for the sake of peace and liberty: We mean when rulers of the State and the Roman Pontiff come to an understanding touching some special matter. At such times the Church gives signal proof of her motherly love by showing the greatest possible kindness and indulgence.” (The English translation is electronically available at: www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html.) The original text of the encyclical is in *Acta Sanctae Sedis* 18 (1885/86): 162–75.
53. “Verum si qui Rebuspublicis vel Civitatibus quas diximus praepositi sunt, velint cum Ecclesia pacisci concordiam aliis condicionibus quae mutatis temporibus melius

congruant, sciant Apostolicam Sedem – nisi quid aliam ob causam sit impedimento – non recusaturam quominus ea de re cum ipsis agat, ut cum aliquot iam agere instituit. Hoc autem vobis, Venerabiles Fratres, denuo confirmamus, in pactiones huiusmodi Nos minime passuros ut quidquam irrepat quod sit ab Ecclesiae alienum dignitate aut libertate; quam quidem salvam esse et incolumem vehementer interest, hoc maxime tempore, ad ipsam civilis convictus prosperitatem.” (“Allocutio SS. D. N. Benedicti PP. XV, die 21 novembris 1921,” *AAS* 13 [1921]: 522.)

54. “Non a caso proprio il codice del 1917 apre la grande stagione concordataria del secolo XX, con l’effetto – tra gli altri – di tornare a rendere vigente negli ordinamenti statali quel diritto canonico che, per diverse ragioni, era stato espunto dai diritti secolari nel secolo precedente.” (Giuseppe Dalla Torre, “Il codice pio-benedettino e lo ‘Jus publicum ecclesiasticum externum’,” in Arturo Cattaneo, ed., *L’eredità giuridica di san Pio X* (Venice: Marcianum Press, 2006), 238.) On the turning point represented by the 1917 codification, in the modern history of concordats, see also Giorgio Feliciani, “Droit canonique des relations de l’Église catholique avec les états depuis 1917,” *Revue d’éthique et de théologie morale. Le Supplément* 198 (1996): 95–100.
55. For a biographical note, see Romeo Astorri, “Gasparri, Pietro,” in *Dizionario biografico degli italiani* 52 (1999): 500–507. See also Francesco Roberti, “Il Cardinal Pietro Gasparri. L’uomo. Il Sacerdote. Il Diplomatico. Il Giurista,” *Apollinaris* 33 (1960): 5–43 (*Miscellanea in memoriam Petri Card. Gasparri*).
56. That the initial idea for a code is attributable to Pius X (with the consequence that Gasparri was its coordinator and principal draftsman, but not its architect) has cogently been shown in a recent article: Carlo Fantappiè, “Pio X e il ‘Codex iuris canonici,’” in Arturo Cattaneo, ed., *L’eredità giuridica*, 155–71.
57. Cardinal Gasparri was Secretary of State from October 13, 1914 (as the successor of the saintly Cardinal Rafael Merry del Val), to February 11, 1930 (when he was succeeded by the saintly Cardinal Eugenio Pacelli, the future Pope Pius XII).
58. “Selon les vues de Pie X, il a su accomplir une magistrale codification du Droit canonique. Sous Benoît XV, il préside à la promulgation du nouveau Code et à sa mise en vigueur. Sous Pie XI, il négocie les pactes concordataires qui en font pénétrer les ordonnances dans la législation civile de plusieurs États de l’Europe contemporaine. Au service de la conception chrétienne et catholique du droit public, peu de carrières auront été aussi cohérentes.” (Yves de la Brière, “La carrière du Cardinal Gasparri. Codification canonique et pactes concordataires,” *Études* 202 [1930]: 606.)
59. That these different terms have the same meaning (“piena corrispondenza”) is underlined in D. Lazzarato, “Commento al Codice di Diritto Canonico. Can. 3 (part one),” *Il Monitore Ecclesiastico* 3, 6th series (1941): 238–39.

60. “Ad Congregationem pro negotiis ecclesiasticis extraordinariis spectat dioeceses constituere vel dividere et ad vacantes dioeceses idoneos viros promovere, quoties hisce de rebus cum civilibus Guberniis agendum est; insuper Congregatio in ea negotia incumbit, quae eius examini subiiciuntur a Summo Pontifice per Cardinalem Secretarium Status, praesertim ex illis quae cum legibus civilibus coniunctum aliquid habent et ad pacta conventa cum variis Nationibus referuntur.” (The Latin text of this and the other canons from the 1917 Code reproduced here is taken from *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus* [Rome: Typis Polyglottis Vaticanis, 1917].)
61. “Si cui Sedes Apostolica sive in concordatis sive extra concordata indultum concesserit praesentandi ad ecclesiam vacantem vel ad beneficium vacans, non inde ius patronatus oritur, et privilegium praesentationis strictam interpretationem pati oportet ex tenore indulti.”
62. “Codicis canones initas ab Apostolica Sede cum variis Nationibus conventiones nullatenus abrogant aut iis aliquid obrogant; eae idcirco perinde ac in praesens vigere pergent, contrariis huius Codicis praescriptis minime obstantibus.”
63. “Lex autem *rogatur*, id est fertur; aut *abrogatur*, id est prior lex tollitur; aut *derogatur*, id est pars primae legis tollitur; aut *subrogatur*, id est adiicitur aliquid primae legi; aut *obrogatur*, id est mutatur aliquid ex prima lege.” *Liber singularis regularum* I, 3.
64. “Lex posterior, a competenti auctoritate lata, obrogat priori, si id expresse edicat, aut sit illi directe contraria, aut totam de integro ordinet legis prioris materiam; sed firmo praescripto can. 6, n. 1, lex generalis nullatenus derogat locorum specialium et personarum singularium statutis, nisi aliud in ipsa expresse caveatur.”
65. This terminological discrepancy between the use of *obrogare* in canon 3 and its use elsewhere in the Code was noted in the main commentaries. See, for example, Mario Falco, *Introduzione allo studio del “Codex iuris canonici”* (Bologna: Società editrice Il Mulino, 1992, reprint edited by Giorgio Feliciani of the original 1925 edition), 132–33; Alphonsus Van Hove, *De legibus ecclesiasticis (Commentarium Lovaniense)* (Mechliniae-Romae: H. Dessin, 1930), vol. 1/2, 14–15; Gommarus Michiels, *Normae generales iuris canonici*, 2d ed. (Tournai: Desclée & Co., 1949), 1:63–64; Amleto Giovanni Cicognani, *Canon Law*, 2d ed. (Philadelphia: Dolphin Press, 1935), 469; Dino Staffa, “Imperfezioni e lacune del primo libro del Codice di diritto canonico,” *Apollinaris* 33 (1960): 46 (where the author concludes: “Se si accettano le osservazioni sopra esposte, basterebbe, invece di *obrogant*, dire nel can. 3 *derogant*”, which is in fact what was done in the new Code).
66. Spinelli has written: “Certo è che questa norma rappresenta una applicazione canonistica o, se si vuole, una ‘canonizzazione’, del principio *pacta sunt servanda*, che

costituisce norma fondamentale nell'ordinamento internazionale, e racchiude in sé l'essenza stessa del diritto dei trattati." (*Il diritto pubblico ecclesiastico*, 70.)

67. Paragraph 437 of the Compendium of the Social Doctrine of the Church, quoting from a message of John Paul II. For an extensive analysis of the principle, from ethical and legal perspectives, see Emilio Silvestrini, *Il fondamento etico-giuridico del principio internazionale "Pacta sunt servanda"* (Vatican City: Libreria Editrice Vaticana and Libreria Editrice Lateranense, 1987).
68. "nihil tam interest humani convictus et societas ad secure explicandas rationes populorum mutuas, quam ut pacta publica sancte inviolateque servantur." *Vehementer Nos*, February 11, 1906, par. 5, in Petrus Gasparri, ed., *Codicis iuris canonici fontes* (Rome: Typis Polyglottis Vaticanis, 1925), 3:663.
69. Carlos Corral lists *pacta sunt servanda* as one of the principles underlying all concordats. See, among his many articles, "La politica concordataria della Santa Sede," *La Civiltà cattolica* (2005/I, quaderno 3713): 465.
70. "Dal procedimento automatico contemplato nel can. 3 – nel quale, pertanto, non che una conferma della superiorità del diritto concordatario sul diritto interno della Chiesa, deve vedersi un riconoscimento legislativo esplicito della tesi dualistica, che considera diritto concordatario e diritto interno come distinti tra loro ed autonomi – consegue, da un canto, che l'adattamento delle norme del *Codex* alle norme concordatarie ha luogo nel momento stesso in cui sono poste in essere le norme concordatarie che quell'adattamento postulano; d'altro canto, che questo adattamento è completo e continuo, nel senso che ad ogni variazione delle norme concordatarie segue istantaneamente una corrispondente variazione delle norme interne della Chiesa, salvo che sia stata manifestata una volontà contraria da parte del supremo legislatore ecclesiastico." (Pio Fedele, "Valore delle norme concordatarie nell'ordinamento canonico," in *Chiesa e Stato. Studi storici e giuridici per il decennale della conciliazione tra la Santa Sede e l'Italia* (Milan: Società editrice "Vita e Pensiero," 1939), 2:402.)
71. "Can. 3 videtur quamdam normam statuere, similem communibus in Statuum modernis Chartis, quae constitutionales dicuntur, ordinem iuridicum internum internationali juri exaequantibus." (Vincenzo Bellini, "Jus canonicum, jus internationale, jus concordatarium. Brevis commentatio de natura et officio can. 3 C.J.C.," *Ephemerides juris canonici* 3 [1947]: 698.)
72. "Codicis canones initas ab Apostolica Sede cum nationibus aliisve societatibus politicis conventiones non abrogant neque iis derogant; eadem idcirco perinde ac in praesens vigere pergunt, contrariis huius Codicis praescriptis minime obstantibus." (The Latin text of this and the other canon from the 1983 Code reproduced here is taken from *Codex Iuris Canonici. Auctoritate Ioannis Pauli PP. II promulgatus* [Rome: Libreria Editrice Vaticana, 1989].)

73. “Tandem aliquando post longam disceptationem, omnes conveniunt ut canon remaneat prouti est, salvis sequentibus modificationibus: post ‘Nationibus’ adiungatur ‘aliisve societatibus politicis’ et loco ‘aut iis aliquid obrogant’ dicatur ‘aut iis derogant’; et, demum, loco ‘nullatenus’ dicatur simpliciter ‘non’, quia verbum ‘nequaquam’ a Rev. mo Secretario Ad. propositum aliis non placet.” (“Canon 3 CIC,” *Communicationes* 23 [1991]: 115.)
74. “Rev. mus tertius Consultor aliam movet quaestionem, utrum, videlicet, in canone praevideri debeant conventiones initae ab Apostolica Sede cum variis Nationibus tantum vel etiam cum aliis entibus quae, iure internationali, personalitate iuridica internationali gaudent.” (Ibid., 114–15.)
75. “Rev. mus Secretarius Ad. proponit ut dicatur ‘nullatenus abrogant aut iis aliquid (vel) derogant’ loco ‘obrogant’, cum usus verborum ‘abrogare’ et ‘obrogare’ in Codice constans non sit.” (Ibid., 114.)
76. The two canons in question are canon 53 on singular decrees (*posterius tempore obrogat priori*) and canon 1739 on recourses against administrative decrees (*emendare, subrogare, ei obrogare*). These are the only two canons where *obrogare* is used, as listed in Xaverius Ochoa, *Index verborum ac locutionum Codicis iuris canonici*, 2nd ed. (Vatican City: Libreria Editrice Lateranense, 1984), 312b (where there is the typographical error of “1939” instead of “1739”).
77. “Rev. mus quartus Consultor proponit ut post ‘initas’ adiungatur ‘vel probatas’, cum possibile sit conicere conventiones inter Statum et Episcoporum Conferentiam. Respondent Rev. mi primus Consultor et Secretarius Ad. ea tantum quae ius spectant univemale Codice consideranda esse. Conventio habetur tantum pro iure internationali et solummodo inter personas quae personalitate internationali gaudent... Rev. mus quartus Consultor instat ut in textu praevideatur casus etiam conventionum inter Gubernia civilia et Episcoporum Conferentias, quia etsi non formaliter tamen materialiter conventiones sunt.” (“Canon 3 CIC,” *Communicationes* 23 (1991): 113–14.)
78. “Consideratis animadverionibus, Ill. mus quintus Consultor proponit suppressionem secundae canonis partis, inde a verbis ‘eaedem perinde...’. Rev. mi primus Consultor et Secretarius Ad., e contra, retinent melius esse ut secunda canonis pars servetur quaeque ibi dicuntur superflua non esse. Rev. mus quartus Consultor praefert suppressionem secundae canonis partis, etsi non de necessitate. Rev. mus secundus Consultor praefert ut tantummodo secunda canonis pars retineatur. In fine disceptationis, omnes conveniunt ut textus remaneat prouti iacet.” (Ibid., 144.)
79. See, for example, Michiels: “per ultima canonis verba: ‘*ae idcirco perinde ac in praesens vigere pergant*’ indicatur principium exceptionale can. 3 valere de iis solis conventionibus quae momento promulgationis Codicis adhuc vigeant. Quare, ad elidendas Codicis praescriptiones, immerito invocatur concessionem contrariae,

quondam ab Apostolica Sede elargitae per conventiones, quae propter legitimam causam jamdiu omni vi sunt destitutae; cessante enim horum specialium iurium causa et fonte, i.e. Conventione, cessant ipso facto et jura, natioque illa, antea regimini speciali subjecta, juri Codicis communi subjicitur.” (*Normae generales*, 65.)

80. Two monographs on the appointment of bishops, with extracts from the relevant provisions in various concordats, are Jean-Louis Harouel, *Les Désignations épiscopales dans le droit contemporain* (Paris: Presses Universitaires de France, 1977) and Joël-Benoît D’Onorio, *La Nomination des évêques. Procédures canoniques et conventions diplomatiques* (Paris: Éditions Tardy, 1986). On episcopal appointments in the concordats concluded after the Second Vatican Council, see Anna Talamanca, “Le nomine episcopali nei concordati post-conciliari,” *Quaderni di diritto e politica ecclesiastica* (1999/1): 97–110. On state intervention in ecclesiastical appointments, see also Pio Ciprotti, “La notifica preventiva delle nomine ecclesiastiche,” *Apollinaris* 33 (1960): 257–72; Carlos M. Corral Salvador, “Libertad de la iglesia e intervencion de los estados en los nombramientos episcopales,” *Revista española de derecho canonico* 21 (1966): 63–92; René Metz, “L’intervention du pouvoir civil dans la nomination des Évêques, des Vicaires apostoliques et des Vicaires aux armées d’après les conventions signées au cours des années 1955 à 1965,” *Revue de droit canonique* 16 (1966): 219–50; Anna Talamanca, “I procedimenti concordatari di nomina,” in *Ministero episcopale e dinamica istituzionale. I vescovi nella Chiesa del Vaticano II* (Bologna: Società editrice Il Mulino, 1981), 63–125.
81. “Nulla in posterum iura et privilegia electionis, nominationis, praesentationis vel designationis Episcoporum civilibus auctoritatibus conceduntur.” There is no need to address here the hypothetical question of the effect, in the internal order of the Church and in international law, of the granting of a right or privilege to the state in breach of the provision contained in canon 377 §5.
82. Vatican II, decree *Christus Dominus*, chap. 2, n. 20; Flannery 575. The Latin original reads as follows: “sacrosancta oecumenica synodus declarat ius nominandi et instituendi episcopos esse competenti auctoritati ecclesiasticae proprium, peculiare et per se exclusivum. Quapropter ad ecclesiae libertatem rite tuendam et ad christifidelium bonum aptius et expeditius promovendum in votis est sacrosancti concilii ut in posterum nulla amplius civilibus auctoritatibus concedantur iura aut privilegia electionis, nominationis, praesentationis vel designationis ad episcopatus officium; civiles vero auctoritates, quarum obsequentem erga ecclesiam voluntatem sacrosancta synodus grato animo agnoscit plurimique facit, humanissime rogantur ut praedictis iuribus vel privilegiis, quibus in praesens pacto aut consuetudine fruuntur, consiliis cum apostolica sede initis, sua sponte renuntiare velint.” (Vatican II, decree *Christus Dominus*, October 28, 1965, *AAS* 58 [1966]: 673–96.) On this passage, see Legrand’s commentary in *La Charge pastorale des Évêques. Décret “Christus Dominus”. Texte latin et traduction française* (Paris: Les Éditions du Cerf, 1969), 148–67.

83. As was recalled above, the Church is itself ready to give up the exercise of certain legitimate rights whenever it becomes clear that their use will compromise the sincerity of its witness. (*GS*, chap. 4, n. 76; Flannery 984–85.)
84. “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 pergunt contrariis Codicis praescriptis minime obstantibus.” (The Latin text of this and the other canons from the 1917 Code reproduced here is taken from *Codex Canonum Ecclesiarum Orientalium. Auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus* [Rome: Libreria Editrice Vaticana, 1995].)
85. “Nomine Sedis Apostolicae vel Sanctae Sedis in hoc Codice veniunt non solum Romanus Pontifex, sed etiam, nisi ex rei natura vel sermonis contextu aliud appareat, Secretaria Status, Consilium pro publicis Ecclesiae negotiis, aliaque Romanae Curiae Instituta.”
86. “Nomine Sedis Apostolicae vel Sanctae Sedis in hoc Codice veniunt non solum Romanus Pontifex, sed etiam, nisi aliter iure cavetur vel ex natura rei constat, Dicasteria aliaque Curiae Romanae instituta.”
87. On this point, see Salvatore Manna, “The Supreme Church Authority (cc. 42–54),” in *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches*, ed. George Nedungatt (Rome: Pontificio Istituto Orientale, 2002), 141–42, citing Jobe Abbas, *Apostolic See in the New Eastern Code of Canon Law* (Lewiston: Mellen University Press, 1994).
88. Canon 904 §1 reads as follows: “Incepta motus oecumenici in unaquaque Ecclesia sui iuris sedulo provehantur normis specialibus iuris particularis moderante eundem motum Sede Apostolica Romana pro universa Ecclesia.”
89. For commentary, see Dimitrios Salachas and Luigi Sabbarese, *Codificazione latina e orientale e canoni preliminari* (Rome: Urbaniana University Press, 2003), 215–17.
90. Canon 98 reads as follows: “Patriarcha de consensu Synodi Episcoporum Ecclesiae patriarchalis et praevio assensu Romani Pontificis conventiones iuri a Sede Apostolica statuto non contrarias cum auctoritate civili inire potest; easdem autem conventiones Patriarcha ad effectum ducere non potest nisi obtenta Romani Pontificis approbatione.”
91. A similar remark is made by Prieto: “La prassi ecclesiastica degli ultimi trent’anni dimostra che l’attività concordataria non è diminuita, anzi è aumentata notevolmente negli anni posteriori al Concilio Vaticano II confermando, in pratica, la vigenza dell’istituzione concordataria e la sua compatibilità con i principi conciliari.” (Vicente

Prieto, *Diritto dei rapporti tra Chiesa e società civile* [Rome: Edizioni Università della Santa Croce, 2003], 184.)

92. See Francesco Margiotta Broglio, “I concordati di Paolo VI,” in *Paul VI et la modernité dans l’Église: actes du colloque organisé par l’École française de Rome (Rome 2-4 juin 1983)* (Rome: École française de Rome, 1984), 480.
93. Writing in 1999, that is, six years before the death of John Paul II, a commentator had noted that the number of concordats concluded by this pope was already equal to the combined number of concordats of his four predecessors. See Silvio Ferrari, “I concordati di Giovanni Paolo II: spunti (problematici) per una sintesi,” *Quaderni di diritto e politica ecclesiastica* (1999/1): 173.
94. See, for example, José T. Martín de Agar, “Passato e presente”: 650–55; Carlos Corral and Damiano Elmisi Ilari, “Universalità ed espansione dell’attuale politica concordataria della Santa Sede,” *Periodica de re canonica* 93 (2004): 103–22; Joël-Benoît, D’Onorio, “La Diplomatie concordataire de Jean Paul II,” in *La Diplomatie de Jean Paul II*, Id., (Paris: Les Éditions du Cerf, 2000), 253–62.
95. As these agreements and the other ones being mentioned in this paragraph will not be discussed here, there is no need to provide the precise references to their texts, which are reproduced in the recent collections of concordats referred to in footnote 3, above.
96. An updated list of the countries having diplomatic relations with the Holy See is electronically available at: www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html. For a recent reflection on papal diplomacy, see the lecture given by the former Secretary for Relations with States on February 16, 2006: Giovanni Lajolo, “Uno strumento docile e fedele al Papa,” *30giorni* (2006/3), electronically available at: www.30giorni.it/it/articolo.asp?id=10264.
97. See the intervention of Margiotta Broglio in “L’evoluzione dei rapporti tra Chiesa e Stati durante il pontificato di Giovanni Paolo II. Tavola Rotonda,” *Quaderni di diritto e politica ecclesiastica* (1999/1): 12–14.
98. For criticism of this theory of different relations applicable to totalitarian states from those applicable to democratic states, see Nicola Colaiani, “L’interesse statale alla disciplina ‘concordata’ della libertà religiosa,” in *Individuo, gruppi*, 204–5.
99. On this point, see Giuseppe Dalla Torre, “Orientamenti,” 367.
100. See the clear and penetrating (as always) words of Orio Giacchi in his report to a 1972 congress of ecclesiastical law: “Posizione della Chiesa cattolica e sistema concordatario,” in *Individuo, gruppi*, 780–82.

101. “Pur con la cautela che deriva dalla lezione dello Jemolo, secondo la quale l’interprete deve essere particolarmente attento a non cadere nel rischio di classificazioni aprioristicamente determinate, mi pare sufficientemente fondata l’ipotesi che individua tre modelli negli accordi firmati durante questo pontificato, quello della pluralità degli accordi paralleli tra di loro (il modello spagnolo), quello dell’accordo quadro da cui ne dipendono altri che non sono vere e proprie fonti concordatarie (il modello italiano) e quello dei concordati con i *Länder* tedeschi, che mantiene il modello formale degli accordi della prima metà del secolo.” (Romeo Astorri, “Gli accordi concordatari durante il pontificato di Giovanni Paolo II. Verso un nuovo modello?,” *Quaderni di diritto e politica ecclesiastica* [1999/1]: 27 [footnote omitted].)
102. On the variety of matters regulated by the new concordats, see José T. Martín de Agar, “Passato e presente”: 638–41; Carlos Corral and Damiano Elmisi Ilari, “I principi, le coordinate, il fine, le applicazioni e la panoramica dell’attuale politica concordataria della Santa Sede,” *Periodica de re canonica* 93 (2004): 456–62.
103. “A prima vista emergono, dunque, due considerazioni di rilievo: primo, l’attività pattizia della Santa Sede è in forte aumento; e, secondo, essa ha mutato di area geografica. Se, poi, leggiamo attentamente in particolare i Preamboli degli Accordi stipulati di recente, rileveremo un terzo aspetto molto importante: la stessa dottrina concordataria sta evolvendo nei suoi presupposti sociali e giuridici.” (Celestino Migliore, “Presentazione di una raccolta di concordati,” *Ius Ecclesiae* 12 [2000]: 662.)
104. See Benedict XVI’s address to the Roman Curia on December 22, 2005, electronically available at: www.vatican.va/holy_father/benedict_xvi/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia_en.html.