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The Conclusion of an International Agreement by the Holy See

Abstract

The concordat is an international, bilateral agreement concluded between the supreme authorities of a State and the Catholic Church (represented by the Apostolic See) on the basis of a partnership between the parties. In practice, apart from the term 'concordat', other terms, such as 'convention' or 'treaty', are used to designate the international agreement to which the situation of the Catholic Church on the territory of a particular state is the object. In the procedure for concordat conclusion, the Holy See applies not only the relevant regulations stipulated in international law (especially the Vienna Convention on the Law of Treaties), but the Catholic Church's own law (the 1983 Code of Canon Law). Therefore, the procedure for concluding a concordat can be divided into the following stages: 1) the granting of full authority to negotiate and adopt the text of an international agreement and to conduct negotiations; 2) the authentication of the text and the initialling of the international agreement; 3) the signing, ratification and exchange of ratification documents; 4) the promulgation and entry into force of an international agreement.

KEYWORDS: international law, international agreements, concordat, Vienna Convention on the Law of Treaties, Holy See

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1 Introduction

The scope of the Holy See's public law capacity includes not only the establishment of relations with other subjects of international law (*ius legationis*) or participation in international organisations – both as a member and as

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an observer[1], but also the conclusion of international agreements (*ius contrahendi*).[2]

At the beginning it should be mentioned that the Apostolic See is an entity of international law other than the Vatican City State (created in 1929). The Apostolic See is the supreme governmental organ of the Catholic Church, representing it in the international arena while the Vatican City State (Città del Vaticano) is subject to international law that integrates some organizations of technical character of that State (not of the Catholic Church).[3] The Holy See and the Vatican City State are therefore two separate entities of an international law, which are united by the person of the Bishop of Rome. Consequently, both the Holy See and the Vatican City State can conclude the international agreements, but they are agreements of a different nature. The Vatican City State concludes agreements concerning the functioning of the Vatican as a state, while the Holy See concludes agreements on behalf of the Catholic Church, which it represents on the international stage. Most often, the agreements concluded by the Holy See with a specific state regulate the legal situation of the Catholic Church in that state – they are then called concordats. The concordat refers to a situation when two sovereign subjects under international law, e.g. the Holy See and a state, are parties to an international agreement and its content

1 Grzegorz Świst, "Stolica Apostolska jako podmiot prawa międzynarodowego" *Gdańskie Studia Prawnicze*, vol. XXXVIII (2017): 706-708; Mirosław Sitarz, „Rodzaje i kompetencje legatów papieskich", [in:] *Fides – Veritas – Iustitia. Księga Pamiątkowa dedykowana Księdzu Biskupowi Antoniemu Stankiewiczowi*, ed. Piotr Stanisz, Leszek Adamowicz, Marta Greszata-Telusiewicz (Lublin: "Libropolis", 2013), 45-59.

2 Sławomir Majszyk, "Prawo do zawierania umów międzynarodowych przez Stolicę Apostolską" *Studia Iuridica*, vol. LXXXVI (2020): 157-158; see also Paweł Bogacki, *Stolica Apostolska jako podmiot prawa międzynarodowego* (Warszawa: Instytut Wydawniczy PAX, 2009); Herihert F. Köck, *Die völkerrechtliche Stellung des Heiligen Stuhls. Dargestellt an seinen Beziehungen zu Staaten und internationalen Organisationen* (Berlin: Duncker & Humblot, 1975); Piotr Łaski, Karolina Słotwińska, "Stolica Apostolska a Państwo-Miasta Watykan. Kilka uwag o wspólnej podmiotowości prawnomiędzynarodowej" *Kościół i Prawo*, No. 1 (2021): 57-68.

3 More see Josef L. Kunz, "The Status of the Holy See in International Law" *The American Journal of International* Law, No. 2 (1952): 308-314; Ioana Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014); Kurt Martens, "The position of the Holy See and the Vatican City state in international relations" *University of Detroit Mercy Law Review*, No. 5 (2006): 729-760; Yves-Marie Leroy De La Brière, *La Condition juridique de la Cité du Vatican*, ([S.l.]: [éditeur inconnu], 1930); Hyginus E. Cardinale, *The Holy See and the International Order* (Toronto: Macmillan, 1976); Jan Staszków, "Podmiotowość Watykanu i Stolicy Apostolskiej w prawie międzynarodowym publicznym" *Krakowskie Studia Międzynarodowe*, No. 3 (2006): 201-210.

concerns the legal situation of the Catholic Church (represented by the Holy See) on the territory of that state.[4] What is more, the Holy See (as a subject of international law) may also conclude agreements (bilateral and multilateral) that are not of a religious nature but concerning the material basis of its functioning, e.g. in monetary matters.[5]

However, the subject of this article will be just the procedure for concluding a bilateral international agreement, known as a concordat, by the Holy See. Therefore, this article aims to answer the following questions: 1) What are essential elements of an international agreement – e.g. a concordat – concluded by the Holy See? 2) Why is the Holy See, at the various stages of the procedure for concluding a concordat, bound both by the law of the Catholic Church and by international law? Whether the Concordat is an agreement sui generis or an agreement in the proper sense? In this context, the article begins by clarifying the concept of a concordat, followed by an analysis of the various stages of its conclusion.

2 The definition of the concordat

The concordat is an international, bilateral agreement[6] concluded between the supreme authorities of a State and the Catholic Church on the basis of a partnership between the parties. The Catholic Church – as religious community with a universal scope – is represented by the Holy See.

The doctrine distinguishes between the concept of "concordat" in a narrower (*sensu stricto*) and a broader sense (*sensu largo*). In the strict sense, the concordat is a solemn international agreement (*conventio sollemnis*) between the Holy See and the highest authorities of a state, on matters of

4 By virtue of its unquestionable public law capacity on the international level, the Holy See may also conclude other bilateral agreements with states containing so-called "extra-ecclesiastical" content, as well as multilateral international agreements. See more: *Agreements of the Holy See*. https://www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm. [accessed: 23.11.2023].

5 See Conventio monetalis pactio inter Statum Civitatis Vaticanae et eius opera inter Sanctam Sedem et Communitatem Europaeam. Convenzione monetaria tra l'Unione Europea e lo Stato Della Città del Vaticano (17.12.2009), AAS 102 (2010), p. 60-65.

6 More on the international agreements see: Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa: Prawo i Praktyka, 2006).

interest to both parties regardless of their scope, concluded on the principle of partnership and with effects for both parties (among others, the *pacta sunt servanda* principle). In a broader sense, the concordat is understood as any agreement between the Holy See and a given state regulating matters concerning the situation of the Catholic Church on the territory of that state.[7]

In legislative and diplomatic practice, apart from the term "concordat", other terms, such as "convention," "treaty," "settlement," "memorandum," are used to designate an international agreement to which the Holy See is one of the parties and the situation of the Catholic Church on the territory of a particular state is the object.[8]

The doctrine of international law and ecclesiastical public law distinguishes the concordat types according to three criteria:

1. the scope of the matters regulated and the degree of their specificity – comprehensive concordats (defininig the basic principles of mutual relations between the Catholic Church and a given state, regulating a wide range of matters) and subject-specific concordats (defining selected matters of relations between the Catholic Church and a given state, e.g. military ministry or property-related matters);
2. the form of concordat agreements – concordats concluded in a solemn form (with observance of all the requirements of international procedure; it is an ordinary form of concordat conclusion, such concordats constitute a new source of law binding for the parties) and concordats concluded in a simplified form (they have a purely declarative character, ratified without the consent of the parliament; in principle they do not introduce new regulations to those already in force);
3. the form of drafting of legal regulations – concordats contain so-called referring clauses to:

7 See more: John R. Morss, "The International Legal Status of the Vatican/Holy See Complex" *European Journal of International Law*, No. 4 (2016): 927-931. https://doi.org/10.1093/ejil/chv062; Cedric Ryngaert, „The Legal Status of the Holy See" *Goettingen Journal of International Law*, No. 3 (2011): 839-843; Irena Głuszyńska, „Konkordat jako instrument prawny regulujący stosunki między państwem a Kościołem" Politeja, No. 1 (2017): 85-102.

8 See also Justyna Krzywkowska, "Konkordat jako element polskiego systemu prawa wyznaniowego" *Studia Prawnoustrojowe*, vol. 46 (2019): 177-187.

a. the norms contained in the concordat previously in force;
b. the norms contained in the laws in force at the time of ratification of the concordat;
c. a new regulation that can be enacted unilaterally by the state authorities;
d. a future bilateral agreement between the Holy See and the state;
e. a future bilateral agreement between the government and the conference of bishops in that state.[9]

3 The will to conclude an international agreement

According to the teaching of the Second Vatican Council (1962-1965) contained in the constitution *Gaudium et spes*,[10]

> It is very important, especially where a pluralistic society prevails, that there be a correct notion of the relationship between the political community and 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 men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all [...]. The Church herself makes use of temporal things insofar as her own mission requires it. [...] (No. 76).

The principle of freedom of contract is expressed in the autonomy of the will of the parties (i.e. the Holy See and a given state), who, on the basis and within the limits of the law, can define their legal situation. On the part of the Catholic Church, it is the papal legate who acts on behalf of and with the authority of the Holy See, who has the task of developing

9 Józef Krukowski, *Concordats between the Holy See and Poland. History and the Present* (Lublin: Towarzystwo Naukowe KUL, 2020), 23-28.

10 *Pastoral Constitution on the Church in the Modern World 'Gaudium et spes'* (07.12.1965). https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html. [accessed: 23.11.2023].

and maintaining the relations between the Holy See and the government of the country in which he conducts his mission.[11]

4 The granting of full powers to negotiate and adopt the text of an international agreement and conduct negotiations

"Full powers" in international law are defined as

> [...]a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty.[12]

A person is considered to represent a State if he or she produces the appropriate full powers or if it is clear from practice that the person represents the State – in which case he or she is exempted from producing full powers.[13]

According to the Catholic Church's own law,

> It is also the special function of a pontifical legate who at the same time acts as a legate to states according to the norms of international law: 1° to promote and foster relations between the Apostolic See and the authorities of the state; 2° to deal with questions which pertain to relations between Catholic Church and state and in a special way to deal with the drafting and

11 See: Pope Paul VI, „Litterae apostolicae motu proprio datae 'Sollicitudo omnium Ecclesiarum' de muneribus Legatorum Romani Pontificis (24.06.1969)" *Acta Apostolicae Sedis* vol. LXI (1969): 473-484, No. X; „Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus (25.01.1983)" *Acta Apostolicae Sedis* vol. LXXV (1983): part II: 1-317 [hereinafter: CIC/83], Canon 365 § 1, 1°.

12 Vienna Convention on the Law of Treaties (23.05.1969), Article 2(1)(c).https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en. [accessed: 23.11.2023].

13 Vienna Convention on the Law of Treaties, Article 7(1).

implementation of concordats and other agreements of this type (Canon 365 § 1 CIC/83).

Therefore – on the part of the Holy See – negotiations concerning drafting the text of the concordat agreement are conducted by the papal legate, who should consult the bishops of the state concerned and inform them about the progress of the negotiations (Canon 365 § 2 CIC/83). At the same time, the Papal Legate acts as a legate for the States according to the norms of international law, for example, in practice, the Vienna Convention on the Law of Treaties. However it should be noted that the issue of direct application of the provisions of the Vienna Convention on the Law of Treaties to the concordat concluded be the Apostolic See is not clearly decided in the doctrine of international law. Due to the fact that the Holy See is a party to the international agreement, which is the concordat, the question that must be asked is whether the concordat is a *sui generis* agreement or an agreement in the proper sense? In order to answer this question, it should first be noted that, in accordance with Article 2(1)(a) of the Vienna Convention on the Law of Treaties, "«treaty» means an international agreement concluded between States [...]". If interpreted literally, international agreements (treaties) to which the Vienna Convention applies can only be concluded by the states. On the other hand, it should be noted that currently not just states, but also international organisations of universal and regional scope (mainly developed after World War II), which have legal personality, are parties to international agreements. What is more, in international law it is a consequence of international custom as evidence of the existence of a common practice accepted as law.[14] The Holy See is therefore a subject of international law, even though, like international organisations, it has no territory of its own. The Concordat is therefore an international agreement in the true sense of the word.

The aim of the ongoing negotiations (which can last up to several years) is to agree on and draft the content of the international agreement, which should also contain certain formal elements, i.e.: 1) title – to designate an agreement between the Holy See and a particular state, regulating the legal situation of the Catholic Church on its territory, concluded in accordance with the procedure laid down in international law; various names are used in diplomatic practice (e.g. convention, memorandum, settlement); 2) intitulation – designation of the parties, i.e. the sovereign subjects

14 See also Canon 27 CIC/83: „Custom is the best interpreter of laws."

of international relations concluding the agreement (the Holy See and the particular state); 3) *arenga* – indication of the reasons why the parties have decided to conclude an international agreement (e.g. in the preamble); 4) *narratio* – includes the parties' appointment of their representatives, followed by the representatives' examination and acknowledgement of their powers and the representatives' consent to the provisions included in the agreement; 5) disposition – the substantive part of the concordat agreement, which depends on whether the concordat is comprehensive or subject-specific; 6) transitional and final provisions – refer to the manner of ratification and entry into force of the agreement, however, if the agreement is concluded for a definite period of time, the transitional and final provisions contain information on the term of the agreement; 7) date and place of conclusion – to determine the legal effects; 8) signatures of the representatives and seals of the parties – the signing of the international agreement (by the representatives: the papal legate and the foreign minister) should be distinguished from affixing of signatures ratifying the agreement – the Bishop of Rome and the Head of State.[15]

The negotiations conclude with the adoption of the text of the agreement, i.e. the agreement of the parties to the negotiations.[16]

5 The authentication of the text and initialling the international agreement

The text of an international agreement may be established as authentic and definitive in two ways: a) by such procedure as may be provided for in the text or agreed upon by the parties; b) in the absence of such a procedure – by the signing or initialling of the text by the representatives of the parties.[17]

Concordat agreements are drawn up in two copies, each in two languages – currently in Italian (Latin until the 18th century) and the national

15 More see Józef Krukowski, *Kościelne prawo publiczne. Prawo konkordatowe* (Lublin: Towarzystwo Naukowe KUL, 2013), 252-253.

16 Vienna Convention on the Law of Treaties, Article 9.

17 Vienna Convention on the Law of Treaties, Article 10.

language of the given state. The texts drawn up in the two languages are deemed equally authentic.

According to custom, before a concordat is solemnly signed and ratified, it is subject to initialling. Intitialing involves affixing the initials of the parties' representatives (i.e. the first letters of their first and last names) under the negotiated international agreement. This confirms the establishment of the authenticity of the text of the agreement, i.e. the completion of the drafting of its content. Initialling signifies the intention to give the international agreement a solemn character. It should be noted that initialling is different from giving consent to be bound by an agreement.[18]

6 The signature, ratification and exchange of ratification notes

Signing an international agreement implies consent to be bound by it. Consent resulting in the signing of an agreement can be expressed in three ways: (1) the agreement stipulates that the signature will have such effect; (2) it is otherwise established that the negotiating parties have agreed that the signature is to have such effect; (3) the intention of one of the parties to give the signature such effect is apparent from the full powers of its representative or was expressed during the negotiations.[19] The signing of the agreement obliges the parties to submit the agreement for ratification. The concordat, according to custom, is first signed by the representative (plenipotentiary) of the Holy See, i.e. the papal legate.[20]

Ratification is the final expression of consent to be bound by an international agreement. Consent, the consequence of which is ratification, can be expressed in four ways: (1) the agreement stipulates that such consent shall be expressed by ratification (e.g. Article 29 of the 1993 Concordat:

18 Vienna Convention on the Law of Treaties, Article 12(2)(a) – the initialling of a text constitutes a signature of the treaty when it is established that the negotiating states so agreed.

19 Vienna Convention on the Law of Treaties, Article 12(1).

20 Józef Krukowski, "Konkordat", [in:] *Leksykon Prawa Kanonicznego*, ed. Mirosław Sitarz (Lublin: Stowarzyszenie Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego, 2019), 1367.

"This Concordat shall be subject to ratification"); (2) it is otherwise established that the negotiating parties have agreed that ratification is required; (3) the party's representative has signed the agreement subject to ratification; or (4) the party's intention to sign the agreement subject to ratification appears from the full powers of its representative or was expressed during the negotiation.[21] On behalf of the Holy See, the signature ratifying the agreement is affixed by the Bishop of Rome.

The consequence of ratification is the approval of the agreement by the competent authority and the incorporation of the agreement into domestic legislation. It should be noted that, unlike secular legislation, the concordat in canon law is a source of particular law. Furthermore, if the agreement does not bring new elements into the legislation of the parties or has the character of provisional obligations, it is not subject to ratification.

The exchange of ratification notes marks the end of the ratification stage, as it brings to an end the relevant proceedings for the conclusion of an international agreement. According to the Vienna Convention on the Law of Treaties, unless an international agreement provides otherwise, instruments of ratification establish the consent of the parties to be bound by a treaty upon their exchange between the contracting parties.[22] The exchange of ratification notes is carried out by the entities entitled to do so. On the part of the Holy See, this is the Cardinal Secretary of State at the head of the Secretariat of State.

Until the exchange of ratification notes an international agreement is not legally binding; however, this does not mean that it has no legal effect. Above all, the parties are obliged not to frustrate the object and purpose of the agreement before it enters into force. Indeed, according to the Vienna Convention on the Law of Treaties (Article 18), a party to an agreement is obliged to refrain from acts which would defeat the object and purpose of that treaty, *inter alia*, when it has signed an agreement or exchanged documents constituting an agreement subject to ratification, acceptance or approval, until it has disclosed that it does not intend to become a party to that agreement. In addition, the parties have the right to formulate reservations to the agreement, unless: 1) the reservation is prohibited by the agreement; 2) the agreement provides that only specific reservations

21 Vienna Convention on the Law of Treaties, Article 14(1).

22 E.g. Concordat between the Holy See and the Republic of Poland (28.07.1993), Journal of Laws of 1998, No. 51, item 318: the Concordat „shall enter into force one month after the date of the exchange of instruments of ratification" (Article 29).

may be made and the particular reservation is not one of them; 3) the reservation is incompatible with the object and purpose of the agreement.[23]

7 The promulgation and entry into force of an international agreement

The concordat is promulgated (in two authentic language versions) via official promulgation platforms of the parties. The official publication instrument of the Holy See is "Acta Apostolicae Sedis" – Acts of the Holy See (cf. Canon 8 CIC/83).

An international agreement enters into force in the manner and on the date stipulated in the agreement or agreed upon by the negotiating parties.[24] In the 1993 Concordat, the date of entry into force was set by the parties in the final clause (Article 29): "It shall enter into force one month after the date of the exchange of instruments of ratification."

8 Conclusion

The following conclusions can be drawn from an analysis of the Holy See's procedure for concluding concordats and the bilateral international agreements:

1. The Holy See – endowed with the attribute of sovereignty and public law capacity in international law – can conclude international agreements, both bilateral and multilateral. The concordat is a special type of bilateral agreement, as it regulates the legal situation of the Catholic Church and its adherents on the territory of the specific state with which the Holy See concludes an agreement. Therefore the essential elements of concordats are both the parties (Holy See

23 Vienna Convention on the Law of Treaties, Articles 19-23.
24 Vienna Convention on the Law of Treaties, Article 24(1).

which represents the Catholic Church and the proper state) and the subject (the legal situation of the Catholic Church on the territory of that state) of the agreements.

2. The concordat is concluded according to a specific procedure, which involves the following stages: the granting of full powers to negotiate and adopt the text of the international agreement; the negotiation conducted by the parties; the authentication of the text and the initialling of the international agreement; the signing of the international agreement; the ratification of the international agreement and the exchange of ratification notes; the promulgation and entry into force of the international agreement.
3. In the procedure for concordat conclusion, the Holy See applies not only the relevant regulations stipulated in international law (especially the Vienna Convention on the Law of Treaties), but the Catholic Church's own law. In the Code of Canon Law, the legislator states twice (Canon 362 and Canon 365 CIC/83) that the papal legate who, on the part of the Holy See, negotiates the conclusion of the concordat is furthermore bound by the regulations of international law. This is additionally confirmed by the fact that in Canon 3 the legislator stated: "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."
4. The Holy See which represents the Catholic Church in the procedure for concluding a concordat is bound both by the Catholic Church's own law (Code of Canon Law and particular law in force in the proper state) and by international law (Vienna Convention on the Law of Treaties). Moreover, the Church legislator provides for the possibility of applying state regulations, "[...] insofar as they are not contrary to divine law and unless canon law provides otherwise" (Canon 22 CIC/83).
5. In the opinion of the author of this article, the concordat – as an international agreement concluded between the Holy See and the proper state – is an agreement in the proper sense. This can be proven by the fact that nowadays an international agreement is an agreement concluded by entities endowed with public-law subjectivity in international relations. In this sense the Holy See has a function analogous to that of international organizations.

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