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The Capacity of the Catholic Church's Legal Order for International Relations

Abstract. The active participation in the life of the international community of the Holy See is natural. As it comes from its nature, vocation and aim, the Holy See acts on behalf of the world-wide spread Catholic Church. Most of its bilateral diplomatic relations and international treaties are about the relations between a certain state and the local part of the Church. The Holy See is able to exert international activity in the name of the universal Church and for the benefit of it in such way that its acts are complied with the rules of the international law.

It can be read in the manuals of the international law that the Holy See is a *sui generis* subject of the international law. It can hardly be explained for the international law that the Holy See acts in face of “external entities” in the name of the universal Church and on behalf of it. This function is either not mentioned or it is seen as “a tradition” in the manuals of the international law. It can also happen that this function is viewed as a kind of concession from the part of the different states, but one can find other solutions as well.

In this essay I attempt to find a model outside the paradigm of the international law but inside the paradigm of law that explains *in what way the Holy See is able to exert international activity in the name of the universal Church and for the benefit of the universal Church* with the help of the mechanism of the jurisprudence.

Keywords: legal order, constitutional law of the Church, concordatarian law, international relations discipline, international law, sovereignty, nonce, Church, Holy See

I. The description of the problem, the horizon of a plausible solution

1. *The difference of way of thinking of the international law and the international relations discipline*

Generally, the manuals of international law start from the conceptual way of thinking of law, and first they examine the capacity of the aspirant entities for international law *on the basis of the criteria of statehood of the international law*. Although, the Church has the greatest number of diplomatic relations in the world (174 diplomatic relations¹ and several hundred concordatarian treaties²), it is difficult for international public law to handle this legal fact inside its model of explanation.³

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¹ Cf. www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico_index_it.html

² Primary sources: the official gazette of the Catholic Church, *Acta Apostolicae Sedis, Commentarium officiale*, Romae, from 1909. (abbr.: AAS), and the official gazettes of the treating states. Secondary sources: *Raccolta di concordati su materie ecclesiastiche tra la Santa Sede le Autorita civili* (ed.: Mercati, A), Vol. I. 1098–1914, Vol. II. 1915–1954, Typis Polyglottis Vaticanis 1954., *I concordati di Pio XII 1939–1958* (eds: Ciprotti–Talamanca), Milano, 1976; *I concordati di Giovanni XXIII e dei primi anni di Paolo VI 1958–74* (eds: Ciprotti–Zampetti), Milano, 1976.

³ In the Encyclopaedia of Law one can read a train of thought based on the criteria of statehood: “Until 1870, the international subjectivity [of the Holy See] was based on the statehood of the secular power of the Holy See. After the cessation of the Church State the international subjectivity of the

In a logical sense, the approach of the discipline of international relations discipline is prior to the international law. The way in which an international actor thinks about itself plays a great role in the examinations of international relations discipline. 1) The international actor settles its international relations according to its own view-point, 2) if its partners accept the international actor as a partner then the partners accept it as it negotiates and as it acted and there is no reason to think about the question of “how acceptable that actor is”. According to the discipline of international relations, every actor represents itself *on the basis of its self-reflection*.⁴ The discipline of international relations sees international law even as a consequence. *The advantage of the discipline of international relations* in case of a Church related international research is that it is not necessary to state first whether the Church is a subject or not and if it is then how, but the result will come out in the end as an evidence.

2. *Starting point: the crucial role of the canonical legal order in the self-expression of the Church*

Therefore it is not pointless how the Church thinks about itself, and this has to be taken in consideration during the research. The self-understanding of the Church, which is explained by the section of the theology called ecclesiology, characterizes the Church as a *sacred community that has a united teaching and a united organisation all over the world, and functions independently from all human power*.

It seems from the great number of the concordatary treaties that the Holy See is able to act in the name of the universal Church and on behalf of it in face of external entities. On a experimental basis it can be stated that the Church succeeds in asserting its self-image. *The canonical constitutional law plays a key role in shaping up the confidence to contract*. Thus the canonical constitutional law is such a self-regulation that is at the same time an important mean of assertion of the auto-reflection in face of the external entities (states).

In concordatary treaties the legal orders of the Church and the local state are seen as *two ordinary legal orders*, between which an *international public law treaty establishes collisional law*. Certain treaties declare themselves as collisional law expressly while others contain tacitly.

One can suspect that it is the structure of the canon law itself (more closely the canonical constitutional law) which compel states to establish relations with the Holy See if they want to have official contact with the part of the Church living on their territory.

II. **The formation of the canonical constitutional law, its importance and its role**

1. *The elaboration of the canonical constitutional law*

The claim for independency from all human power in the teaching and the ecclesiastical establishment was shaped up in the period of the cesaropapist rule of the Roman Empire (313–476) when the emperor tried to take sides in theological questions as well, but the Church resisted. After the fall of the Empire this claim take such a shape that the Church

Holy See *still remained, although it functioned on the territory of Italy [...]*”. But this is a paradox and not an explanation. Lamm, V.–Peschka, V. (eds): *Jogi lexikon*. Budapest, 1999. 555.

⁴ The basic work of the identity based school is Wendt, A.: *Social Theory of International Politics*. Cambridge, 1999.

communicated with outsiders, it is to say with secular powers, as the independent powers generally communicate with each other. One-one and half millennium later one could call this way of communication that the Church communicated with other powers in manner of foreign relations. At the same time, the Church thought that way of thinking that the Church and the secular powers exerts supervision *in separate manners over the sacred and profane spheres of the human life (gelasian principle, dualism)*. The first and most famous source of this theory is the letter of Gelasius I (49–496) written to the emperor Anastasius. In the letter, which was written in 494, taking advantage of the political vacuum after the dethronement of Romulus Augustus in 476, Gelasius I wrote that the emperor had to oblige to the pope in religious matters and at the same time the clergy have to oblige to the emperor in secular matters.⁵

The legal appearance of this dualist way of thinking is the famous medieval *ius commune* or otherwise the dual legal system of the *utriusque iuris*. While its secular branch disappeared as a result of claims of the territorial sovereigns, its ecclesiastical branch still lives in the catholic canon law of today. Secular sovereigns used willingly the mean of instrumentalisation of religion (*cuius regio eius religio*). Protestant princes built up directly state-church/established church systems (the protestant religious leadership of the country was a part of the secular public administration). But the state–church system it was not even a choice for catholic sovereigns because the foreign activity and claim for independency⁶ of the Catholic Church, shaped up from the middle of the first millennium, set the task for the ecclesiastical leadership to resist the tendency of nationalisation.

One can assess *the development of the theory of sovereignty of the Church* as a defence of the ecclesiastical self-image, as a reinforcement of the claim for independency. With the fact that the Church took part in working out of the theories of sovereignty by the development of its own theory of sovereignty (*societas perfecta seu sufficiens*) in the 16th century, the Church made its already existent rule of being a foreign actor *more approachable, more understandable, more compatible in an institutional sense*. The inner side of the theory of sovereignty, as an outside dispute, was the development of the canonical public law or *ius publicum canonicum* (which is now called the canonical constitutional law) as an independent branch of the canon law, at the same time with the formation of the theory of state sovereignty. In this system the Church formulated itself in it as a consistent legal order, which contributed to have a clearer defined borderline between the ecclesiastical and secular legal orders. This made it possible to think about the relation or the possible conflict between the Church and the local secular power, *according to the*

⁵ Gelasius I, Epist. VIII. *Ad Anastasium Augustum*. “Duo quippe sunt, imperatore auguste, quibus principaliter mundus hic regitur: auctoritas sacra pontificum, et regalis potestas. [...] Si enim, quantum ad ordinem pertinet publicae disciplinae, [...] legibus tuis ipsi quoque parent religionis antistites, ne vel in rebus mundanis [...] quo, oro te, decet affectu eis obbedire, qui praerogandis venerabilibus sunt attributi mysteriis?” “Oh, majestic emperor, this world is based on two main things: the sacred authority of the pope and the royal power. [...] And if it is true that priests obey your laws upon public order and they do not want to have a say in earthly affairs, [...] is not right and proper that you should obey those to whom the right of the function in the divine mystery is given?”

⁶ Before 756, the establishment of the Pontifical State, the Church already had such activity that can be called *foreign activity* today. As it continued after the cessation of the Pontifical State (1870) as well, at the time of the Roman question (1871–1929) when the pope did not have a territory. Thus the foreign activity of the Church is neither bound to the existence of the Pontifical State nor of the Vatican City State.

pattern of the collision of classical legal orders, in contrast with the chaotic every day practice of *ius commune*. On the other hands, although the theological bases had to be taken into the consideration absolutely, the canonical public law was shaped up by the same legal technique as secular theories of sovereignty, and it interpreted the ecclesiastical legal order with that kind of legal technique, that is *legally analog with secular legal orders*.

Nowadays, the ecclesiastical theory of sovereignty is not emphasised on the lectures of history of law, although it takes part in the universal history of law just as the historical formation of other legal systems. Its most important early thinkers were Francesco Suarez (1548–1617), Robert Bellarmin (1512–1621), Giovanni Battista De Luca (pope under the name of Benedict XIV. 1740–1758), Pihring, Engel, Pilcher, Layman, Prospero Farinaccio, Van Espen, Fagnani, and Reiffenstuel.

Thus the statal and ecclesiastical theories of sovereignty live side by side. From the different aspects, this phenomenon describes well the way how the Church considers the relation between the Church and states:

1. The Church is basically not in war with states, only it defends its jurisdiction in sacred issues.

2. It exerts its jurisdiction in sacred issues on a very big territory (on the whole Earth) that completely coincides with the territory of secular sovereigns (considered legitimate by the Church as well).

3. The basic situation between states and the world-wide spread Church is the peaceful coexistence and the fruitful cooperation for the people who live on the given territory, and not struggling with each other.

The simplest way how the Church could express this idea was that the Church interpreted itself *as a legal order existing parallelly besides* the developing secular legal orders.

The clear message of elaboration of the theory of sovereignty and the constitutional law is that “outsiders should have a relation to the Church on the basis of international law”. This message itself calms down the intercourse between the Church and different states, as it contributes to the change of the direction of the struggles from the political ones to the legal polemy. The latter one less endangers the ecclesiastical public administration and institutions.

This interpretation has an other sense, namely after the laws of separation (19th century) with setting up the doctrine of “the states do not know anything about theology” ‘a one-thousand-year-long dream of the Church became true (cf. dual view of sacred and profane sphere, principle of Gelasius I.)’ Church *remained an understandable entity* for states. States and functionaries of the states are not expected to know about religion, and what is more, it is better if they do not know about it *as statal functionaries*, it is enough if they know classical constitutional law, and this is exactly their job. Because of the deliberately formed structural analogy in its constitutional system the Church is able to communicate through its institutions with the different states, and at the same time it does not allow the states near to sacred sphere (dual view).

1.2. The work on constitutional law as “*demonstratio suverenitatis*”

1. The ecclesiastical constitutional law *interpreted* the Church as an organisation that has analog constitutional structure with states and which is built up *by the same principles of legal technique* as the sovereign states. By the interpretation of its constitutional law the

Church does not say that it is a state. Just the opposite: it always emphasized that it is a sacred entity. Lajolo says the societies that are called to be perfect are only legally equal and not from other aspects or according to their nature.⁷

2. As it was explained in earlier texts of constitutional law: it is an original quality of the Church that as a legal order it is the same with all secular legal orders.⁸ The work of the Church with which it elaborated its self-interpretation according to the technique of sovereign legal orders, *is not the cause of the sovereignty* of the Church.⁹ Thus the ecclesiastical constitutional law work is a 'demonstratio suverenitatis' and not a "creatio suverenitatis". Therefore the constitutional law is instrumental, and it is only a technique of structuring of the Church as a sacred entity.

3. By this "demonstratio suverenitatis" the Church makes it clearer for partners that in what way it is in dialogue with other legal orders. At the same time the theological reflection depicts the Church as an organisation *above which none of the powers can stay because of theological reasons*. For the different states, their politicians and jurists the best expression for this phenomenon is in the future too: *sovereignty*. As Peter Erdő says: "[...] the Catholic Church profess itself to be *sovereign*, and *at the same time* it is strictly *dependent* on the will and the directions of its founder Christ".¹⁰

4. In the documents of the second Vatican council (1963–1965) the doctrine of 'societas perfecta' is not used in a strict sense, but after the council the doctrine occurs in legal texts with low frequency (exactly in the MP *Sollicitudo omnium Ecclesiarum* that rules the diplomatic function of the Church¹¹) and also in the specialised literature. I think, this phenomenon has practical reasons (too) and this practical reasons exactly are in connection with the international presence and foreign activity of the Church. The Church interpretation that was built up in the classical period of the *ius publicum ecclesiasticum* is understandable very well for states and therefore that Church interpretation is a very *important capital in foreign relations in the long term* as well. This Church interpretation showed the way to the image about the Church that could be seen by the different states and to the image about the Church which determine the relations between the Church and the different states. That kind of Church-image of the states guaranties that the states have that kind of relation with the Church what is acceptable for the Church. The states accepted this sort of relation, and as the practice demonstrates it, the states apply it also today.

1.3. The nature and character of the canonical legal order as a complete legal order

This legal order is not established for the defence of a territory or for the defence of economic interests, this legal order is not even adapted for this aim and the Church does not need for a defence of this things. This legal order *is expected to defend* the diachronically identical maintenance of the revealed message and *to guarantee* the uniform practice of the sanctifying function for the whole humanity. The Church cannot disregard to guarantee *its*

⁷ Lajolo: *I concordati moderni*. Brescia, 1968. 493–496, and Gismondi–MacCarone–Saraceni–Spinelli: *Rapporti attuali fra Stato e Chiesa in Italia*. *Justitia*, 36, 151.

⁸ The explanation of Jannacone to the concept of "ordinamento giuridico primario": "what finds its motivations and basic arguments in its own ecclesiastical society, and from which and in the interests of which the legal order comes into being". Cites Jannacone: Lajolo: *op. cit.* 146.

⁹ Lajolo: *op. cit.* 33–34.

¹⁰ Erdő, P.: *A magyarországi elváltási modell alapelvei a katolikus egyház szemszögéből*. In: AA. VV.: *Az állam és egyház elváltása*. Budapest, 1995. 118.

¹¹ Paulus VI, *MP Sollicitudo omnium Ecclesiarum*, 1969. VIII. 8., in *AAS* 61 (1969) 473–484.

independence and the independence of its function from all powers. According to Peter Erdő: “If the Catholic Church does not consider even itself fully competent in formation of some of its rules [viz. they are in the Church on the basis of the foundation of the Church by Christ], the Church can even less accept that this would be the right of the states”.¹² Thus the independence of the material of Christ from secular influence, its defence from political or other instrumentalisation is that ecclesiastic function *of which one derivation is the ecclesiastic foreign activity*. As it is discernible, the diplomatic function of the Holy See is the foreign function of the universal Church and not e.g. of the Vatican City State.

In fact this was a goal of the ecclesiastic discipline, too, when it was built up in the first centuries. The *view of constitutional law*, that started to develop in the 16th century, *added one thing to the canon law*. This is that *one can regard* the Church as an organised society in which the order of the sanctification and the teaching and the relation of the Christian faithfuls to each other are not ruled only by some occasional concert of traditions or customs. On the contrary, these things have a consistent order that *one can / should regard as a complete legal order*, and which functions as such legal order and one can communicate with this order as such.

1.4. The importance of the theory of Church’s sovereignty on the field of international relations

Naturally, the above-mentioned image of the Church is not the same with the Church-images built up by the states in their own constitutional laws. Even these Church-images of the different states differ from each other as well. *This above-mentioned Church-image is the same all over the world*. This image of the Church is the same at least in such a degree that on this basis the states have contact with the Church on the basis of classical international relations. This is the key point concerning the international relations of the Church / Holy See, this factor is the effective one and not that one based on the internal statal law. This image of the Church is present in a very clear mode in practice, namely in the thematics of the diplomatic relations of the Holy See and in the thematics of the concordatarian treaties. The other way round: if one comprehends the diplomatic relations and the international treaties between the Church / Holy See and the states he / she has not to treat them as particular or extraordinary, because a very simple mechanism of functioning can be found, and this simple mechanism explains the treaties and the diplomatic relations between the Church and the states in a simply and evident way.

2. The Church as a sovereign legal order

The Catholic standpoint: dualism of the Church and the state

The viewpoint legal unity of the Church leads to the transformation of the Gelasian principle of dual jurisdiction into the principle of two legal orders (Church and state) independent from each other. According to Paczolay the Gelasian principle of separation became a basic element of the social theory of the Christian way of thinking,¹³ and the laws of separation in the 19th century followed this scheme, too.

The canon law as a legal verticum extends from the universal ecclesiastical legislator (the pope) to the Christian faithful (this is the equivalent term in canon law with natural

¹² Erdő: *op. cit.* 120.

¹³ Paczolay cites it repeatedly: e.g. Paczolay, P.: *Államelmélet I. Machiavelli és az államfogalom születése*. Budapest, 1998. 56.

person¹⁴) and it is effective all over the world, viz. on the territories that are covered by the system of the public administration of the Church. Thus it is pointless to make difference between the Holy See and the 'other parts of the Church', because the whole Church is one continuous legal order from the government of the Church to the single governed Christian faithfuls.¹⁵

As it follows, a Christian faithful who was baptised in the Catholic Church, at least belongs to two diplomatically represented legal orders, namely under the jurisdiction of the ecclesiastical legal order and under the statal legal order(s) of his / her citizenship(s). At first glance, this "problem of simultan subjection to two legal orders" can lead to great difficulties. An important part of the diplomacy of the Catholic Church is to represent the sacred benefit (and the financial benefits due to supply it) of the Christian faithfuls and of the dioceses under which jurisdiction they are against the states on which territories these dioceses are situated and of which these Christian faithfuls are citizens in the same time.¹⁶ However, one cannot experience difficulties in practice, because on one hand the Church claim for exclusive jurisdiction only in sacred questions (e.g. in the question of the financial supervision of those ecclesiastical authorities that functions on the territories of the country at issue the Church does not claim any jurisdiction, because this is not a sacred matter), on the other hand, modern states only claim for exclusive jurisdiction in secular matters (the *ius publicum ecclesiasticum* or statal ecclesiastical law rules only non-sacred matters). Therefore the universal ecclesiastic legal order and the local statal orders do not collide in most cases, and as they are different in nature, they "pass side by side". But if there is collision in some questions, or there are not but the ecclesiastic and statal parties decide so, the two parties can establish collisional law in international treaty between the two legal orders.

2.1. The relation of the international law to the theory of sovereignty of the Church

It is not the aim of the Church that its sovereignty should be taught at schools and *it is not the purpose of the theory of the sovereignty of the Church to be taught or formally recognized*. The aim of the theory of sovereignty is that to make more understandable and institutionally more compatible its those mode of existence and action, *which exist in practice and are acknowledged in the practice*, which are also possessed by those other entities that are also independent of all other powers. International law coursebooks describe that the government of the Church (the Holy See) is independent from all other powers, and that "somehow" this government maintains the distant parts of the Church under its supervision, and that it stipulates international treaties with secular sovereigns in defence of those parts of the Church which are in the territory of this secular sovereigns, and that it keeps international contacts with them by ambassadors / nonces. The problem is when a coursebook tries to explain the above-mentioned characteristics of the Church as it came from the half square kilometre wide Vatican City State or as a kind of survivor of the customary law of the Church State ceased to be in 1870 (cf. explain everything from the

¹⁴ CIC 204. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*. Città del Vaticano 1989. (Abbr.: CIC + number of canon).

¹⁵ E.g. the hierarchical and transnational structure of the Catholic Church is able to lead the "national" Churches. Dinh, Q. N.–Daillier, P.–Pellet, A.–Kovács, P.: *Nemzetközi közjog*. Budapest, 2003. 225.

¹⁶ Ciprotti, P.: *Il diritto canonico nella diplomazia ecclesiastica*. In: *Ius populi Dei*. Roma, without year, 172.

criteria of statehood). It is also a problem when a coursebook tries to explain the above-mentioned characteristics as a “cultural tradition”, instead of an approach starting from the view of the *Church as united legal order all over the world*. But in practice this *legal unity* is a key for the states to the Church, they are able to stipulate treaties with the Church on the basis of its legal unity. On this basis the states expect from the government of the Church to be able to make the parts of the Church which function on the territory of the states execute the treaties. And if something works in the practice and it is an active component, then sooner or later it is possible to find a theoretical explanation as well. In spite of the fact that international public law coursebooks and state theory manuals *do not mention* the theory of sovereignty of the Church and *its structural analogy with states*, the states (the staff that works in foreign ministries, the negotiators, etc.) perceive the *legal effectivity* and the capacity for treaties *of the ecclesiastical legal order* precisely *because of the structural analogy*.

3. *The importance of the legal order of the Church in the international relations of the Church*

My view is that states assess the present capacity of the ecclesiastical legal order and they find it able to international relations when states establish foreign relations with the Church. The reason why it was important to review the history of the legal order was to clear up why this legal order is so understandable, and why is this constitutional law so familiar for the states. Firstly, because of the millennium-long common development, secondly, because of the common basic terms of Roman law, thirdly, because the work of the legal theory which characteristically determines its present shape, has been accomplished in the same period of legal history and with the same legal technique as the work of the secular legal orders. The formal law analogy of the ecclesiastical legal order and the secular legal orders is the result of the above-mentioned common roots and common history, and consequently that the ecclesiastical legal order is just as comparable with the secular ones as secular legal orders can be compared with each other. Secular decision makers resp. their specialists can find solution when they consider establishing the first connection with the Church or stipulating an international treaty with the Church.

III. The capacity of a legal order for international relations

Lets consider the criteria of the capacity for international relations of an unspecified legal order. Bruno Bertagna sought for causes of the international personality of a legal order. Among others, he mentions, its capacity that have in its character and its reality:

“a) The personality comes from the *order* itself, on the basis of the rule of effectiveness [he refers to Verdross, Kelsen and Fedozzi].

b) The capacity is simply a character which is present by the legal fact, that it is able to possess in history the requested characteristics of being in the international order.”¹⁷

ad a) The *inner order* and the legal efficiency of the international actor is what makes the greatest impression to its foreign partners in the international practice. (In a state with an existing statehood, where there is a civil war, one do not know with whom one has to

¹⁷ Bertagna, B.: Santa Sede ed organizzazioni internazionali. In: *Monitor Ecclesiasticus*. 1982. 141–142.

negotiate, who is the real possessor of the power, but if it functions good it can be known in the Church.) One can characterize the inner order of an entity by its legal structure. From the aspect of the capacity for international relations this is the relevancy of the inner law.

ad b) The examination of the existence of the capacity for existing in the international order points beyond the horizon of the legal thinking, and somehow it is related to the discipline of international relations. From the fact that a jurist examines this direction one can see that even the jurist demands some help beyond the purely conceptual way of thinking of the law.

Although this approach that is based on the conditions of legal orders seems to be too theoretical at a first glance, I think this is the one that stays nearest to the mechanisms that functions in practice. The examination of the content of the concordatarian treaties shows that these documents contain collisional law or make collisional law between the Church as a legal order and the state as a legal order.¹⁸ The states consider this legal order to be able to contract treaty precisely because it is able to show in a convincing way that if the treaty is stipulated the Church-government (the Holy See) will be able to put the treaty into effect even in the far-away parts of the Church. Not the international public law manuals persuade the decision makers of the states about the future fulfilment of the treaties but the ecclesiastical legal order itself by its analog structure with statal legal orders and *by its efficiency in putting its international treaties into effect*. Other states also experience that the Church puts into effect its treaties well and consequently, they tell this tact to a state that is about to contract with the Church. On this field the emphasis is on the practise instead of theories.

IV. The present structure of the ecclesiastical legal order as a condition and owner of the capacity for international relations

In the previous chapters we have observed in what way and under which conditions the legal conception of the canon law as a sovereign legal order developed and what were the motivations of its development. To be able to maintain the capacity of international relations this legal order continuously has to possess a those characteristics which convince the future partners about its capacity. Now I will examine all this problem on the basis of the canon law codex of 1983 and a few norms which as rules of sectoral law are relevant in the topic of international relations of the Church.

1. The Church as united legal order

1.1. The government of the Church

The experience of the origin of the Catholic Church is that it developed by the expansion of an initially little community in Jerusalem. Consequently, its structure is based on a “downwards” logic. This means that the system is not that the functionaries are elected by a smaller community to represent the members on a higher level. As it derives from this Church-image, the universal Church has a united structure which is divided into dioceses and other units of the public administration. The word “Catholic” comes from the Greek

¹⁸ See Rónay, M.: *Ius matrimoniale concordatarium. A comparative approach. Acta Juridica Hungarica*, 47 (2006) 1, 27.

idiom *κατα όλον* (“*kata holon*” = according the whole), from which one can deduce many things about the self-image of the Church and its probable relations with the outside world.

The government of the Church is led by the legally elected pope,¹⁹ with the assistance of the Roman curial authorities (CIC 360), which have ordinary auxiliary power (*potestas ordinaria vicaria*). The canon law and the international treaties name the whole of the pope and the curial authorities as Holy See (CIC 361). The specialised literature names it as Church-government and as the supreme authority of the Church as well. The central element of the institutional system of the foreign affairs of the Church is the Secretariat of State. The competent authority to stipulate international treaties is the Section for Relations with States inside the Secretariat of State, which is named by journalists frequently as the “Foreign Ministry of the Vatican”.

1.2. The relations of international treaties to the inner laws of the church-law

According to the canon 3 of the current law, the treaties stipulated earlier by the Holy See remain current instead of the contrary rulings of the present codex. With this rule the legislator maintains the usual order in relation of the universal canon law and the international law, which is maintained by all countries in relation to the own laws of the countries and the international law. This means that international treaties constitute higher law compared to the inner law of the legal order. The primary importance of this canon is that the *international partner knows in advance* that if the international partner stipulates a treaty with the Holy See the international treaty will *be considered and fulfilled in the same way in the canon law*, as states consider and fulfil their international treaties, namely the international treaty reconsiders inner law in case of collision.

This canon shows the aim of the diplomacy of the Holy See to the partner as well, namely that 1) in all greater cases the Holy See negotiates concerning the relation of the Church and state and that the Holy See represents directly the dioceses.²⁰ By such a ruling of the canon law, the Church interprets the boundary of internal and external world and the Church defines this border *between the local part of the Church and the local state*, and as a consequence *it is possible to negotiate with the Church on this basis*. 2) This gesture is that the legislator (the pope) continually invest the ecclesiastical legal order with those typical legal characteristics of which the contemporary statal legal orders generally possess. Therefore there are the typical gestures of the reception of legal patterns of external legal structures in the canon law of today as well. According to Graziani, it is a fact that the structure of canon law is capable to have the functions of an ecclesiastical jurisdiction and foreign representation.²¹

¹⁹ “The bishop of the Roman Church, in whom continues *the office given by the Lord* uniquely to Peter, the first of the Apostles, *and to be transmitted to his successors*, is the head of the college of bishops, the Vicar of Christ, *and the pastor of the universal Church on earth*. By virtue of his office he possesses *supreme, full, immediate, and universal ordinary power* in the Church, which he is always able to exercise freely.” CIC 331.

²⁰ Cardinale, I.: *Le Saint-Siège et la diplomatie*. Paris–Tuornai–Rome–New York, 1962. 14.

²¹ Graziani, E.: *Diplomazia pontificia. Enciclopedia del Diritto*, XII, without year, 598.

1.3. The institution of the nonce as a manifestation of the united foreign function of the Church

The ecclesiastical diplomatic function is ruled by the canon law. The codex contains a main figure and the enumeration of the tasks (CIC 362–367), and in its details it is ruled by the already mentioned *motu proprio* (sectoral law) *Sollicitudo omnium Ecclesiarum*. The Church considers and rules its diplomatic function *as one function of the universal Church*.

a) The MP *Sollicitudo omnium Ecclesiarum* states that the task of the papal delegate is to foster the relation *between the Church and state* and this is his task as a main rule.

b) The codex of '83 repeats this rule but it states that this task has to be done in harmony with the local bishops (CIC 354. 7.).

According to the definition of Oliveri: “The function of the nonce originates from the primacy of the bishop of Rome and such a way it fulfils such a task which is attached to the authority of the pope. Therefore, all nonces act directly on behalf of the Holy See, while the Holy See is an organ of the universal Church and [...] it represents the unity in the diversity which is the characteristic of the authority of the successor of Peter.”²²

Those who work in this diplomacy get instruction according this point of view. The following example illustrates well the idea that derives from the nature of this function. Nonces are always ordained priests and bishops, in most cases endowed with a rank of titular archbishop. Nonces cannot be laymen, because they do not carry out their functions by the right of and on behalf of the Vatican City State, but by the right of and on behalf of the Catholic Church as a sacred structure that is extended in all the world.

The persons who works in the apparatus of foreign affairs of the Church (at the Section for Relations with States and the nunciatures) uniformly are instructed in Rome in the 300-year-old the institute of Accademia Pontificia Ecclesiastica.²³ This institution was founded depressingly for this reason. The training starts after the ordination a priest in form of postgraduate instruction. In order to be attached to the Church as such and not to the place of their mission, the ecclesiastical diplomatic agents receive new dispositions in 5–7 years, similarly to their secular colleagues.

1.4. Establishing diplomatic relation with the Church

If one sees the problem from a more practical point of view, e.g. from a point of view of *a politician of a country*, it is not the question whether he / she recognizes the Holy See (with or without the Church) as a real actor of international relations or not. The question is, in *what way* the politician *can negotiate* with the Church-part existing on the territory of that country. The first impression of the politician will be that the local bishops tell him / her that *they are not authorized* to negotiate in greater questions with the state *because they are unauthorized by the canon law*. Therefore, the politician must decide whether he / she follows the way that is required for a valid treaty by the legal order of his future partner or he / she backs from the intention.

However, it always arises in this way in practise, international law jurists do not discuss this side of the establishment of diplomatic relations with the Church. According to the theory of classical international law starting from the criteria of the statehood one can it

²² Oliveri, M.: *Natura e funzioni dei legati pontifici, nel contesto ecclesiologico del Vaticano II*, Torino, 1978.162.

²³ Cf.: www.vatican.va/roman_curia/pontifical_academies/acdecclles/index.htm

exclude that such a subject as the universal Church could exist but *in practice* the states negotiate with the Church as a sovereign. As a consequence, the solution as a *sui generis* subject came up in the international law.

2. *The role of the bishop conferences and the bishops during international talks*

The politicians of certain countries often regard the bishops or the bishop conference functioning on their territory as their evident partner of negotiation. However these are not *negotiating partners of the secular governments*. The lowest forum *with which the states can formally negotiate is the Holy See*.

Negotiations or treaties between single bishops or bishop conferences and local states are not international negotiations in the real sense of the word. According to Bertagna if bishops or their conferences carry out such acts then these ecclesiastical organs perform those negotiations *with the explicit or at least silent consent of the Holy See*. These sort of negotiations are not seen, neither within this conditions, as negotiations or treaties between the Catholic Church and the given state only those ones which are performed by the pope or the Holy See.²⁴

A historical example can illustrate the above-mentioned ideas. After the Second World War the Hungarian government forced the bishops to sign an agreement by deporting thousands of nuns.²⁵ Domenico Tardini, who was the cardinal secretary of state of the Holy See, notified József Grósz, the archbishop of Kalocsa in advance that the Hungarian bishops *do not have any jurisdiction* to sign such an agreement. After signing the document, the Holy See addressed a monitum²⁶ to the Hungarian bishops on 9th October 1950 (“we noticed with indignation”²⁷). In this monitum, the Holy See called the attention of the Hungarian bishops to the fact that settling the relations between Church and state belongs to the jurisdiction of the Holy See.²⁸ It is clear that the Holy See reacts in a sensitive way if the local bishops attempt, the diplomatic representation of the Church even if they act under pressure. My standpoint is that the agreement of 1950 is *invalid by the virtue of the law*, because it was signed by such people who *did not have the jurisdiction* for signing such an agreement.

V. Concordatarian law and concordatarian politics

1. *The nature of the concordatarian law*

After the examination of the nature of the ecclesiastical legal order, one can interpret the nature of the concordatarian law much easier: the concordat is an *international treaty contracted between the Catholic Church and a state*. In case of a state the treaties are

²⁴ Cf.: Bertagna, B.: Santa Sede ed organizzazioni internazionali. *Monitor Ecclesiasticus*, 1982. 119.

²⁵ Gergely, J.: *Az 1950-es egyezmény és a szerzetesrendek feloszlataása Magyarországon*. Budapest, 1990.

²⁶ Monitum: punitive warning. Prohibition from further infringement of law. The Holy See gives such a measure to bishops very rarely.

²⁷ Zombori, I.: *Le relazioni diplomatiche tra l'Ungheria e la Santa Sede*. Szeged, 2001. 98.

²⁸ Adriányi, G.: *A Vatikán keleti politikája és Magyarország 1939–1978. A Mindszenty-ügy*. Budapest, 2004. 21–22.

contracted by the government (the competent authority is the Ministry of Foreign Affairs) as the representative of the state on the international level. This method is the same in the case of the Church. The treaties are contracted by the Holy See (the competent authority, is the Section for Relations with States inside the Secretariat of State.

The characteristics of all concordatarian treaties²⁹ that 1. they establish *collisional law* between the *sacred, global and anational legal order* of the Church and a *secular legal order* of a state, 2. and they settle the relations between a part of the Church that functions on the territory of the country and the state of the country.

This definition of the concordatarian law which interprets the international treaties of the Holy See as *collisional law between sovereign legal orders* is in full accordance with the international empirical facts 1. how the parties contract concordatarian treaties, 2. what their attitude is to the contracted treaties.

If one examines the concordatarian treaties from the *normative view* of the international law, then one has to start from the point that the Holy See signed the Convention of Vienna of 1969 upon the law of international treaties. The participation in this convention shows that *the Holy See contracts in an analog way with states*. This means that when the Church contracts concordatarian treaties, it signs treaties *as* states do. With doing this the Church does not become a state because this is only an analogy, but the international law acts of the Church *have the same nature and efficiency as* the Church would be a state.

Bertrams expresses this in a very similar way. He says that the Church is a person of international law in an analog sense: the Church is an international law person while it has not the same nature with state.³⁰ This means that from the aspect formal law it is the same but in its nature is different. Bertagna expresses this such a way that in the sense of the international law the activity of the Church is real (namely it is not a legal fiction), the difference is that the Church acts in another way and it works for other aims than states.³¹

Bertagna summarises why *the whole Church contracts* a concordat in such a way: The concordat as such includes in it that it is stipulated by the supreme authority of the Church, or at least the supreme authority of the Church participates in it, namely because of 1. *theological*, 2. *canonical* 3. and *international law* reasons.³² He says that

“1. according to the second Vatican council the totality of the concept of the Church subsists in all dioceses *inasmuch* as the diocesis stays *in communion* (communio) with the other dioceses, first of all with the diocesis of Rome (the bishop of Rome is the pope). Therefore, the condition of the theological totality of the diocesis is *its being in communion with the whole Church*.

2. the concordat concerns the whole Church, otherwise, when the Church contracts concordats then it exercises the right and freedom which derives from the nature of the whole Church.

²⁹ The reason for using this complicated expression is that most treaties do not name themselves as concordat, but partial agreement, *modus vivendi*, exchange of notes and protocol, etc. All these forms belong to the category of concordatarian treaties because their legal mechanism of effectivity is the same.

³⁰ Cf.: Bertrams, W.: De origine personae moralis in Ecclesia. *Periodica*, 36 (1947) 169–184; and Hervada–Lombardia: *El Derecho del Pueblo de Dios*. Navarra, 1970. 259–265.

³¹ Bertagna: *op. cit.* 113.

³² Bertagna: *op. cit.* 118. and Oliveri, M.: *Natura e funzione dei legati pontifici nel contesto ecclesiologico del Vaticano II*, Torino, 1978. 242–244.

3. the concordat, as it comes from its nature, is *brought into being by independent and autonom subjects*, and bishop conferences, archbishops and bishops are not such.”

When the nonces negotiate with states they work under the jurisdiction of the authority of the Section for Relations with States.³³ Therefore the international treaties of the Church are manifestations of the *contractual foreign policy* of a single office. No wonder that after the comparative examination of the treaties, a really consistent contractual foreign policy takes shape.

2. *The erga omnes effectivity of the international subjectivity and the unity*

It can be said that *the expressis verbis recognition of the international subjectivity and the unity of the canonical legal order* exists only with those states with which the Church contracted an international treaty. But exist some legal statements which confirm the erga omnes perceptibility and effectivity of the international subjectivity and unity.

It is known, e.g. the resolution of the French Court of Nullity (Cour de cassation) in 1913: France did not have a diplomatic relation with the Holy See at that time. But *referring to the consensus of the international practice* the Court and the Ministry of Foreign Affairs decided that France regards the Holy See as a subject of international law. This example shows that not only those countries which have diplomatic relations with the Holy See regard the Holy See as an international law subject, but the others as well.³⁴

There is a resolution of the Italian Constitutional Court of 1978 as well. In Italy they wanted to hold a definitive referendum on the Lateran concordat of 1929. (This document is different from the Lateran treaty which established the Vatican City State albeit they are stipulated in the same day.) However the Italian Constitutional Court passed that resolution in 1978 that “the Lateran concordat of 1929 is an international law treaty, with other words, a treaty stipulated by independent and sovereign subjects”, and as such it is not allowed to be taken as an object of definitive referendum.

From the international fame of these resolutions one can know that these unilateral statal declarations have strong precedential value. Even the justifications of these resolutions refer to the wide acceptance of these facts. In the same way, the international treaties also have precedential value. It is also known that the view of precedents is not far from to the international law and the diplomatic practice.

Conclusion: a foreign nature relation between sovereign legal orders

With the examination of the *canonical constitutional law* one can show that *in the legal technique interpretation of its self-reflection* the Church consciously endeavoured to use the common legal formulas and legal techniques which was based on the Roman law—used by exteriors (states) as well—during one and half year thousand. In this way and with the help of shaping its legal institutions, the Catholic Church is able express its self-reflection of theological nature that *it is a united organisation all over the world*. It has such a *global*

³³ Its current ruling: Ioannes Paulus II, Const. Ap. *Pastor Bonus*, De romana curia, 1988. VI. 28, in AAS 80 (1988) 872.

³⁴ Gidel, M.: Quelques idées sur la condition internationale de la Papauté. In: *Revue des droit international public*, XVIII (1911) 589.

and anational construction and such a constitutional structure that keeping relations with the Church is only possible with regard to this feature. This is the very reason why the states negotiate with the Church-government (Holy See) in spite of local bishops or their conferences, since this way of negotiation is not made compulsory by the laws of the single states for the decision-makers of the states. It follows that if one wants to *deal with the international relations of the Church* he / she cannot avoid the study of the *constitutional structure of the Church*.

The foreign function of the Church is centralised, the system of nunciatures and contractions of international treaties are led by an authority of the Holy See (Section for Relations with States inside the Secretariat of State) on the basis of the law *MP Sollicitudo omnium Ecclesiarum*. This authority makes a consequent foreign policy in the international treaties and in the diplomatic relations of the Church.

The examination of the conditions of canon law of the *international function capacity of the canonical legal order* became clear it that the legal capacity of bishops and their conferences are ruled by the canon law in way that they are not able to represent the local parts of the Church officially in face of the local state. This system assures that the Holy See is the lowest representative of the smallest part of the Church as well. During their diplomatic activity the states communicate with the global, anational legal order of the Church, and *in case of a concordatarian treaty the contracting partner of the secular legal order of the state is the universal ecclesiastical legal order*.