Catholic University Law Review

Volume 47
Issue 2 *Winter 1998*

Article 7

1998

The Fundamental Agreement Between the Holy See and the State of Israel: A New Legal Régime of Church-State Relations

David-Maria A. Jaeger

THE FUNDAMENTAL AGREEMENT BETWEEN THE HOLY SEE AND THE STATE OF ISRAEL: A NEW LEGAL RÉGIME OF CHURCH-STATE RELATIONS[+]

*Father David-Maria A. Jaeger, O.F.M., J.C.D.**

FOREWORD

As a participant in the negotiations that produced the Fundamental Agreement between the Holy See and the State of Israel, and in the follow-up negotiations, which produced the "Legal Personality Agreement" now awaiting signature, it is my purpose to bear witness on this occasion to certain aspects of the larger significance and legal impact of that Agreement. Notwithstanding actual statements of fact, my testimony reflects strictly my own understanding of the guiding principles and larger purpose of the Agreement and is not given on behalf of any other person or institution.

Accordingly, this is no more than a superficial treatment of a number of serious questions. Historical, constitutional, political, and even religious questions are touched upon in some manner or other by the Agreement. Inevitably, recourse has to be made to overbroad generalizations and excessive simplifications of deep and complex issues. This is, in fact, only an outline for a much larger study already in progress, which will amount to a history of, and a commentary on, the Fundamental Agreement.

[+] This is the full text of the paper prepared for delivery at the April 8, 1997 symposium at The Catholic University of America, Columbus School of Law. This text has been edited by the *Catholic University Law Review.*

* The Rev. Dr. David-Maria A. Jaeger is a Catholic Priest, a Member of the Custody of the Holy Land of the Franciscan Order of Friars Minor, and a Doctor of Canon Law. He has served as the Holy Land Correspondent for the London-based weekly, THE TABLET; Liaison Secretary of the United Christian Council in Israel; Director of the "Study, Research and Publication" program on Christianity in the Holy Land at the Ecumenical Institute for Advanced Theological Studies, Tantur, Jerusalem; Professor of Canon Law at the Jerusalem and Rome campuses of the Pontifical Athenaeum "Antonianum"; Professor of Canon Law at the Faculty of Easter Canon Law in Rome; and member of the Delegation of the Holy See and the State of Israel. Currently Father Jaeger is the Vicar Judicial in the Diocese of Austin, Texas. He recently has been appointed as the Consultor of the Pontifical Council for the Interpretation of Legislative Texts.

I. INTRODUCTION

On December 11, 1993, Pope John Paul II delivered an address, which traced in bold, imaginative lines a new vision for the future of the Christian presence in a renewed Middle East.[1] Speaking to a convention of experts in Roman and Canon Law that was being held at the Pontifical Lateran University in Rome, the Supreme Pontiff reviewed the Church's centuries-long search for a legally secure existence in a region which saw the birth, successively, of the three great monotheistic religions. The Holy Father spoke of the ways pursued in the past to assure the Christian religious minorities a necessary autonomous space, which have borne fruit in legal and social institutions that deserve recognition and esteem. However, the Pontiff emphasized that "the profound social changes" of our times render "insufficient the sole safeguards traditionally accorded to personal situations or to individually construed aspects of worship."[2] Recently, he has stated:

> [T]he freedom of religion cannot, in fact, be reduced to the sole freedom of worship, but includes also the right to non-discrimination in the exercise of the other rights and of the freedom that are proper to every human person, considered both in its individual and in its communitarian dimension.[3]

This contemporary insight into the exigencies intrinsic to the dignity of the human person poses a challenge and a task to every state. Quoting a decision issued by the United Nations Human Rights Committee, the Holy Father said that each state is called to examine its own legal order and to modify and perfect it accordingly.[4] "A mature conception of the State and of its legal order," the Pontiff proceeds, "inspired by that which the common conscience of humanity has expressed in the rules of the international community, demands the effort to ensure equality of treatment to every person, irrespective of his ethnic, linguistic, cultural and religious origin."[5] He concludes that it is in societies that are built or refashioned in accordance with these principles that "it will be possible to guarantee, increasingly better, also to the Christians of the Eastern Mediterranean, a future that will preserve their special identity and will be re-

---

1. *See* Giovanni Paolo II, *Discorso ai partecipanti al IX Colloquio Internazionale Romanistico-Canonistico organizzato dalla Pontificia Università Lateranense*, *in* L'OSSERVATORE ROMANO, Dec. 12, 1993, at 5.

2. *Id.*

3. *Id.*

4. *See id.*

5. *Id.*

spectful of the human person and his fundamental rights."[6]

The Supreme Pontiff is calling here, in effect, for a paradigm shift in the church-state relationship that became the norm in the Middle East in the seventh century, and that the State of Israel also inherited upon its creation in 1948. Fewer than three weeks after the Pontiff's address, on December 30, 1993, the Holy See and the State of Israel signed their Fundamental Agreement, which represents the first concrete application of the new paradigm and creates a new and different kind of legal relationship between the Church and the state in that region.

II. THE *ANCIEN RÉGIME*

The modern problems of church-state relations in the Holy Land originated with the Muslim conquest in 638.[7] To be sure, there had been earlier problems in this region. For instance, problems in church-state relations existed in the period beginning at Pentecost and ending in the fourth century with a series of legal dispositions that first assured the Church its freedom and then Christianized the Roman Empire itself. With the freedom of the Church, and even more with the Christian confessionalization of the Empire, which included the Holy Land, the previous problems ended except for some episodic recrudescence, such as those occurring under Julian the Apostate (362-365). This momentous transformation did not necessarily and at all times ensure the full liberty of the Catholic Church in relation to the State. Subsequent conflicts took place within Christendom and were thus internal to the Christian *Res publica*. Even the Persian occupation of 614, while certainly destructive, did not alter the situation definitively. However, the conquest of 638 did alter the situation. A different, very definite legal order was thereby established, which would only be interrupted with no lasting effect by the Crusades.

Having been governed between 639 and 1099 by the Muslim Arabs, the Holy Land, after the withdrawal of the Crusaders, came under Muslim Mameluk rule. In 1516-1517, the Holy Land passed into the hands of the Muslim Ottoman Turks, thus remaining subject to the Muslim legal system, which determined, among other things, the legal condition of the

6. *Id.*

7. *See* A. O. ISSA, LES MINORITÉS CHRÉTIENNES DE PALESTINE À TRAVERS LES SIÈCLES 22-65 (1977) (describing the events and developments concerning the juridical condition of the Church in the period between Pentecost and the Constantinian Peace of the Church).

Church and Christians.[8] While the political rulers, dynasties, and empires changed, the meta-constitutional fundamentals of the Islamic *Res publica*, rooted in their shared religion, remained constant.

The Islamic Commonwealth is based on an absolute monism, which consists of maintaining the unity of the spiritual and the temporal juridical spheres. It is, therefore, a pure theocracy, *sensu pleno*.[9] The intentional sphere of the Islamic legal order, or juridical universe, knows no limit at all, either territorial or personal, given that it is destined to be extended to the whole world.[10] In terms of the actual situation, however, the legal order draws a distinction between territory in which the Islamic *imperium* already has been established effectively, namely the *dar-al-islam* or "homestead of Islam," and territory that is still outside its rule, and which is yet to make its submission—that is what the word *Islam* means. This latter territory, called *dar-al-harb* or "home of war," is the object of the believers' all-out efforts, designated *jihad* or "holy war," to ensure its submission.[11]

Comprised geographically within *dar-al-islam*, there may be unbelievers, who, while not yet ready to surrender to Islam in matters of religious belief and practice, are prepared to submit to the Islamic *imperium* politically. These unbelievers, provided they belong to the "People of the Book" or *ahl-al-kitab*, a designation applicable principally to Jews and Christians, may be spared the sword and may obtain the condition of *religio tolerata* for their beliefs and practices. To achieve this condition, unbelievers must accept the status of *ahl al-dhimma*, which means sub-

8. Anything that is said here of Islamic legislation or political organization is not meant to apply to any Muslim-majority political society existing today. Additionally, this discussion is not intended to give any sort of illustration of Islamic religion and law. References to these realities are made only with respect to their incidental effect on the previously observable legal condition of the Church and its members in the region that currently corresponds to the territory of the State of Israel. For the general reader, a reasonably brief, judiciously balanced view of the laws of Islam is offered by Y. Linant de Bellefonds, *Law*, *in* 2 RELIGION IN THE MIDDLE EAST: THREE RELIGIONS IN CONCORD AND CONFLICT 413-58 (A.J. Arberry ed., 1969).

9. *See* SAMI AWAD ALDEEB ABU-SAHLIEH, L'IMPACT DE LA RELIGION SUR L'ORDRE JURIDIQUE CAS DE L'EGYPTE NON-MUSULMANS EN PAYS D'ISLAM 45 (1979). Abu-Sahlieh observes that Muhammad "établit à Médine le noyau du premier Etat islamique, un Etat-religion, basé sur une loi révélée et sur un critère de distinction religieux." *Id.* This is entirely different from the phenomenon of a state religion in Christendom. The Christian confessional State is predicated on the ultimately irreducible duality of the state and religion, no less than on their deliberate joining together.

10. *Cf.* N. ARMANAZI, L'ISLAM ET LE DROIT INTERNATIONAL 98, 100 (1929).

11. *Cf.* ABU-SAHLIEH, *supra* note 9, at 48-49; N. ARMANAZI, *supra* note 10, at 69.

stantially, "people under protection."[12] Such a status is formalized through the payment of a special poll tax and is construed as a status of perpetual humiliation, which is due to their obstinate persistence in unbelieving, and lasting for as long as this resistance to Islam perdures.

Given the monistic nature of the Islamic *Res publica*, the status of *dhimma* leads to the effective exclusion from it of those consigned to this status. Moreover, it brings with it multiple public law disqualifications, as well as many civil law and penal law restrictions and inequalities, while the very *toleratio* of the religion itself is clearly circumscribed.[13] Even the "autonomous" personal jurisdiction granted to the respective hierarchies or religious authorities of *dhimma* communities is a concession that by its nature does not empower its beneficiaries to claim or vindicate any rights over the Islamic empire, within which they are meant to operate. The absolute theocracity of the Islamic *Res publica* and the intrinsic anomalousness of the *dhimma* status in relation to this seamless religious-political continuum, or whole, do not allow for adequate ground on which to take a stand in defense of the rights of those consigned to *dhimma* status vis-à-vis the Islamic empire itself.[14]

The circumscribed "autonomy" granted the *dhimma* communities in matters that go well beyond the intrinsic exigencies of proper religious governance is itself a potent double-edged sword. Superficially, this "autonomy" could be presented, and has been presented by its apologists, as the expression of an enlightened tolerance, but in reality, it is even more an expression, a cause, and an instrument of the effective isolation of those considered to belong to those communities.

Given the seamless religious-political whole of the surrounding society, Christians, under these conditions, were not even second class citizens. Rather, *qua* Christians, they were effectively excluded from a society and

12. For the historical origins and early development of this status, in law as well as in fact, see generally A. S. TRITTON, THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS: A CRITICAL STUDY OF THE COVENANT OF 'UMAR (1970). For a detailed historical-juridical study of Islam from the very beginning to the fall of the Ottoman Empire, see ANTOINE FATTAL, LE STATUT LÉGAL DES NON-MUSULMANS EN PAYS D'ISLAM (1958). For an unusual and somewhat idiosyncratic treatment, see BAT-YE'OR, THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM (David Maisel et al. trans., 1985). See also the collection of contributions to the study of the *Dhimmi* specifically in the Ottoman Empire in CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY (Benjamin Braude & Bernard Lewis eds., vols. I, II, 1982).

13. *Cf.* ABU-SAHLIEH, *supra* note 9, at 52-58.

14. On the *dhimma* system, and the autonomous role of the communities subject to it, see Richard B. Rose, *Islam and the Development of Personal Status Laws Among Christian Dhimmis: Motives, Sources, Consequences*, 72 MUSLIM WORLD 159 (1982).

a state that professed to be integrally Islamic. When considered in the context of their Christian identity, they were forced to exist only within the confines of socio-juridical enclaves, or "ghettoes." Christian churches thereupon became "ghettoes" legally, and would perforce become sociologically and psychologically as well. Indeed, the allied combination of the prohibition and corresponding renunciation of evangelization, and the socio-juridical confinement of Christians within their own partly and forcibly "autonomous" enclaves, operated a profound distortion in the image of the Christian community. The community was forced into the alien mold of an ethnic or tribal society, which only properly survives through natural procreation, with membership determined by natural descent, and with a role in the life of its members and a share of their over-all social, political, and legal identity far in excess of that proper to the Church.[15]

The application of this fundamental "meta-constitutional" conception of the Islamic *Res publica*—with its consequences for the Christians under its rule—was not, of course, always consistent. Far-reaching constitutional developments within the Ottoman Empire in its last century, as well as the welcome emergence of a secular Arab national consciousness in which Christians and Muslims could share in perfect equality, served as powerful agents of change, even as the Ottoman Empire was collapsing. Later, there were a variety of developments in the several Arab States with their different, evolving political and legal régimes. However, at the time Ottoman rule in Palestine ended (1917-1918), the legal régime in force was still fundamentally premised on the monistic nature of the political-religious Islamic *Res publica* and the consequent constitutional-legal confinement of the tolerated minority religions within their partly and really forcibly "autonomous" ghettoes. Under the Ottomans, the "autonomous" ghettoes were known as "*millets*." It was a system in which the Muslim religious community was numerically identical with the political community, and so not properly existent as such, while those not belonging to it were contained in the socio-juridical "ghettoes" of the *millets*.[16]

---

15. *See* D.-M. A. Jaeger, *Christianity in the Holy Land: The Main Issues*, *in* PAPERS READ AT THE 1979 TANTUR CONFERENCE ON CHRISTIANITY IN THE HOLY LAND 74-78 (D.-M. A. Jaeger ed., 1981).

16. *See generally* ANTON ODEH ISSA, LES MINORITES CHRETIENNES DE PALESTINE: A TRAVERS LES SIECLES 101-226 (1976) (providing vicissitudes occurring during the approximately thirteen centuries from the first Muslim conquest to the end of the Ottoman rule in the Holy Land); CHARLES A. FRAZEE, CATHOLICS AND SULTANS: THE CHURCH AND THE OTTOMAN EMPIRE 1453-1923, at 59-64, 145-50, 214-20, 304-11

Following its liberation-occupation of Palestine in 1917-1918, Great Britain, both as belligerent occupant, and later as the mandatory power on behalf of the League of Nations, essentially was committed to upholding the legal régime of church-state relations already in place in Palestine. Pending final disposition of Palestine, though, Great Britain perfected, adapted, and consolidated these relations.

The State of Israel inherited this state of affairs with its founding in May 1948. It was in direct contradiction with Israel's *Declaration of Independence*, which envisaged a completely different kind of political society, namely, a modern democracy, predicated on the equality of all its citizens before the law. Israel's vision is evident from its unconditional promise that the state:

> will be based on freedom, justice and peace by the prophets of Israel; it will ensure complete *equality of social and political rights* to all its inhabitants *irrespective of religion*, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.[17]

The original vision of the modern Jewish national movement, or "Zionism," like the *Declaration of Independence*, envisaged a lay modern democracy, in which citizens would be equal before the law, regardless of their various choices of religious beliefs. The Zionists anticipated a state in which the Church would not have to play a role in the lives of its members beyond that proper, and where the Church would be able to reemerge as a spiritual and religious society based on a shared faith. The Zionists desired to remove the Church from the focus of not necessarily voluntary quasi-ethnic identification in a context where everyone else was so identified. Ideally, the Zionists envisioned a State that would be more like the United States, contemporary England, or post-1984 Italy, rather than Lebanon, the Balkans, or even Northern Ireland.

Although it would have been entirely natural for the new State to draw the consequences from its proclaimed self-understanding and formally abolish the *millet* régime as incompatible with its democratic aspirations, this did not happen. In fact, the abolition of the Jewish religious community (Knesset Israel) in the next decade only strengthened that régime by putting the Jewish community in the same position previously occupied by the Muslims. The Muslim community, indeed, has suffered the

---

(1983) (providing an overview of the relationship between the Catholic Church and the Ottoman Empire and its resulting impact on the Holy Land).

17. Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, 4, (1948) (emphasis added).

most paradoxical fate under this dispensation. Having lost its identification with the ruling political community, the Muslim community has not been able to acquire any communal or institutional structure of its own and to that extent, still does not have a communal or institutional existence of its own apart from the state that services it. For the Christian churches, on the other hand, this turn of events meant that they were to remain exactly where they had been all along, within sociological, legal, and civic enclaves that were outside the mainstream of national life. To this extent, Christian churches were *millets*, called "Recognized Religious Communities" under the Israeli system.[18]

Briefly, this system assigns each citizen a religion, which then becomes part of his civil identity. The State establishes criteria for religious classification, which in most circumstances, broadly correspond to those religions concerned. However, discrepancies and contradictions still remain. If the particular religion to which a citizen is assigned corresponds to one of the several "Recognized Religious Communities," the State leaves the citizen to the operation of the laws and courts of that "community" with respect to specific matters, notably certain areas of marriage and family law. Normally, a citizen may not opt out of the religion assigned to him or her except by formal conversion to another religion. In any case, there are no provisions for religionless persons or any others who so choose to contract marriage, for example, or to be buried. The system of religious classification as part of the citizen's civil identity vis-à-vis the State and society both express and powerfully reinforce present ethnic distinctions in society. It acts as a guarantor of enforced "group identity," which is a powerful barrier against assimilation. Above all, however, it distorts the process and meaning of assuming a religious identity—of making choices of faith. By inextricably and perversely tying faith to belonging (or not belonging) to a given ethnic group, nationality, or tribe, the system of religious classification distorts religious faith itself.[19] Nowhere is this more unnatural than in the case of Christianity and the church.

---

18. *See* Silvio Ferrari, *Libertà Religiosa e Pluralismo Confessinale: Il Caso di Israele*, *in* RACCOLTÀ DI SCRITTI IN ONORE DI PIO FEDELE 890-902 (1984) (providing an understanding view of how Israel has handled its difficult legacy in this area).

19. Among other things, the system traps in the "Recognized Religious Community," all the children and grandchildren of members of that Church, and effectively compels them to maintain an institutional affiliation with that same Church or another such Church. Members must abide by this system in order to be able to exercise such fundamental civil rights as contracting marriage or burial. This renders largely meaningless the basic statistics of Church membership.

Indeed, it cannot be said that under this system the churches themselves are accorded recognition of their proper identity. Rather, the "Recognized Religious Communities" are a creation of the State, and as such a construct of the civil law. This is brought out clearly by the 1926 Religious Communities Ordinance which still appears to be in effect. The Ordinance recognizes the non-Jewish religious community as only a *substratum* of sorts, having no more than a certain *potentia oboedientialis*, or a mere radical capacity for legal personality and legally recognized organization. For the religious community to acquire legal capacity and a legally recognized organization, it must petition the Minister of Religious Affairs—a figure that is a relic from an earlier, very different kind of constitutional régime. If the Minister accepts the petition, he may enact regulations for that religious community, bestowing legal recognition upon it, pursuant to his own authority and the authority of the State under the Ordinance, its statutes, or bylaws. Obviously, Catholic churches, recognized for the purpose of the operation of personal status laws and the tribunals that administer them, never petitioned the Minister to organize them in this manner and were therefore repeatedly subjected to court challenges as to their legal personality in the State of Israel.[20]

While the courts of the Catholic Church, *sui iuris*, have functioned fully, under the different statutes that govern the operation of the "personal status" laws, independent of formal legal organization and religious community status, the vaunted "autonomy" that this independence gives the churches might itself, in the last analysis, turn out to be something quite different. Any possible benefits of the churches' independence surely are outweighed by such results of this system as the deleterious "balkanization" of society and the inequality of citizens before the law. It could be argued that the State, far from recognizing the independence of the canonical legal order, co-opts it materially, and makes it formally part of its own law, with a variety of possible consequences, such as the possible ability of the civil courts to treat questions of canon law arising before them as questions of law coming within judicial notice, as in *iura novit curia*, rather than questions of fact as would presumably be the case

20. *See* The Greek Patriarchate v. Ramle Municipality, *Israel Law Reports* (ILR) 36 (3) 670 (exemplifying the Israeli Supreme Court's rejection of such challenges). The Israeli Court's landmark decisions, such as *Greek Patriarchate*, came to play an important role in shaping the favorable position assumed by the Delegation of the State of Israel, which made it possible to adopt Article 3, paragraph 3 of the Fundamental Agreement, as well as the Agreement's further implementation by means of the Legal Personality Agreement (currently awaiting signature).

with any independent legal order.[21] In addition, the tribunals of the churches, put in the false position of servicing the civil legal construct of the "Recognized Religious Community," may find themselves having to hear cases and decide questions that fall distinctly outside the proper, or at least appropriate, reach of ecclesiastical or spiritual law, and to regulate issues for which no body of canonical norms actually may exist. Hence, a body of norms or "Personal Status" code may have to be invented to deal with matters more appropriately and expertly dealt with by the civil legislature and judiciary, such as matters in which all citizens should be equal before a body of enlightened law made by their democratically elected representatives "without distinction of religion, race or sex."[22]

Finally, the *millet*, or the system of "Recognized Religious Communities," does not recognize the Catholic Church at all. It only makes reference to the several church *sui iuris* that are endowed with distinct regional and local hierarchies and particular laws. These churches consist of the several Eastern Catholic Churches and the Latin Church. The system effectively has disregarded the fact that these several churches are in reality "parts" or "manifestations" of a single body of religious believers—the Catholic Church.

III. THE EMERGENCE OF THE NEW RÉGIME

All of the tensions—indeed, the contradictions—inherent in the survival of the *millet* régime of the modern State of Israel became instantly visible in the negotiations over the Fundamental Agreement between the Holy See and the State of Israel. The chief purpose of these negotiations was to lay the foundations for the normalization of church-state relations. The revelation of these contradictions would not in itself have been a problem if the Delegation of the State of Israel had not assumed that the Fundamental Agreement could be crafted in such a way as to reflect, in essence, the *status quo ante* with respect to church-state relations, without any substantial change in the relationship itself and, in part, by using rather than disregarding the Religions Communities Ordinance. For its part, however, the Delegation of the Holy See was bound to insist that in the fundamental legal relationship between the Church and the

21. This is, of course, not a simple matter. For a profound, masterly exposition of the interaction between state law and "religious law" in Israel, at least under the "*ancien régime*," see IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 49-77 (1975).

22. Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, (1948).

State, there had to be a precise determination that the active subject (the titular or holder) of rights and obligations vis-à-vis the State would be the Catholic Church,[23] not simply the several "Recognized Religious Communities," or even their aggregate, or any other fragmentary institutional expression of the Church.

Because there was so much at stake for either side, the confrontation between the differing approaches and expectations of the two Delegations was intense. In the end, Israel yielded by acknowledging that the negotiations could not go forward at all unless it was prepared to depart radically from its inherited and incongruously preserved régime of state-church relations. This meant recognizing the Catholic Church as a juridical subject. In other words, the Catholic Church would be the active subject of rights and duties vis-à-vis the State, which is another term for the church-state relationship. It was this courageous, farsighted, and revolutionary decision on the part of Israel that made it possible for the negotiations to proceed and for the Fundamental Agreement to take shape.

The Delegation of the Holy See never intended to demand the abolition, *hic et nunc*, of the "Recognized Religious Communities" régime. The Delegation assured the State of Israel that it understood that the curious survival of this old régime was tied to internal needs and debates within the majority Jewish population, and that its continued applicability to the State's Christian citizens was simply incident to these factors. For this reason, the Church had not taken any public position or initiative on the matter, but would simply await the eventual resolution of the internal Jewish debate, at times, almost a *Kulturkampf*, in the confident hope that ultimately the inherent logic and dynamic integrity of the *Declaration of Independence* would prevail, leading to the quiet abandonment of the "Recognized Religious Communities" régime. The Delegations of the Holy See and of the State of Israel converged on this matter, laying the foundations for a totally new legal régime of church-state relations. This new régime under the Fundamental Agreement would operate in conjunction with the old *millet* or "Recognized Religious Communities" régime. While utterly incompatible in their assumptions, principles, and essential purposes, the two régimes are destined to live side by side for the foreseeable future and need not clash much in practice. The "Recognized Religious Communities" régime needs to ex-

23. *Cf.* Fundamental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., art. 3, para. 2, 33 I.L.M. 153, 155 (1994) [hereinafter Fundamental Agreement] (recognizing the rights of the Catholic Church).

tend to a very narrow and specialized area, mostly certain parts of family law, while the vast expanse of church-state relations is left without competition to the terms of the Fundamental Agreement.

Still, some of the legal experts taking part in the negotiations insisted on the need to create some link between the old and the new régime. Accordingly, the legal experts identified this new, hitherto unheard of subject, the Catholic Church, in terms of the several bodies that were considered to be known to the law under the old régime as the new subject of the Fundamental Agreement. These complex, delicate, and arduous negotiations ultimately became Article 13, paragraph 1 of the Agreement.

Initially, the Delegation of the Holy See entertained some doubt as to whether there was really a need to link the two régimes. In the end, it agreed that some transitional language between the old and the new order could be devised, provided it was absolutely clear that this entirely "new" active subject, the Catholic Church, was in no way reducible to the aggregate of the bodies "recognized" by the old régime. Hence, the all important "*inter alia*" language in Article 13, paragraph 1(a) was created. This transitional norm can be said to represent a distinct advantage to the Church. While the language makes it clear that the Church's rights and freedoms proclaimed and recognized in the Fundamental Agreement apply to all of the "recognized" bodies, it by no means confines these rights and freedoms to previously "recognized" bodies, but extends them to the Catholic Church as such.

As the compromise formulation also suggests, the Delegation of the Holy See was able to maintain the integrity of its position that the Church "does not know" the "Recognized Religious Communities," as such an autonomous creation of the civil law, but only "knows" the church *sui iuris*: those bodies that belong to it, are legislated by it, and are subject exclusively to its own laws. The attentive reader of the treaty norm will see clearly that the Holy See does not refer directly to the "Recognized Religious Communities." Instead, it provides that the Holy See "knows" the Church *sui iuris* and the State "knows" the "Recognized Religious Communities." The assumption is made that these are two formalities under which the same material reality is found. Although this is not an entirely accurate assumption, there is enough truth to it to serve the present purpose.[24]

24. Article 13, paragraph 1(c) was added both to respect the principle of reciprocity and to prevent any claims (of which the Delegations were warned in the course of the negotiations) by Israel's local authorities that they were not bound by the state's treaty. *See*

The Fundamental Agreement's creation of a whole new conceptual framework for church-state legal relations necessarily reaches far beyond the Agreement itself, providing the entire dynamic for the process set in motion by the Fundamental Agreement.[25] The Fundamental Agreement gives broad recognition to the Catholic Church's "subjecthood," the independence and sovereignty of its Supreme Authority, and the Church's co-ordinate, rather than subordinate, status with the State.[26] This recognition receives detailed, concrete, and practical expression in the first treaty after the creation of the Fundamental Agreement to be produced by the Bilateral Commission between the Holy See and the State of Israel. The Commission concluded the treaty for the purpose of completing and implementing the Fundamental Agreement. Significantly, this treaty drafted pursuant to Article 3, paragraph 3 of the Fundamental Agreement, and awaiting signature as these words are written, establishes[27] that in the forum of the State, questions of canon law shall be considered questions of fact, as are, in Israel, all questions concerning the law of other independent legal orders, such as foreign states. Thus, the treaty sweepingly ends any possibility of the appropriation of canon law by the State, which might have resulted from the *millet* or "Recognized Religious Community" régime. More importantly, the treaty recognizes the canonical legal order as being as complete, independent, and sovereign within the sphere of competence proper to the Church as that of the State itself, or any State. This advance does, in turn, involve assumptions, implications, and consequences that are the exact opposite of those characterizing the attitude to the Church of the *millet* or "Recognized Religious Communities" régime.

More profoundly, the Fundamental Agreement and the Legal Personality Agreement[28] put an end definitively and irrevocably to any possible applicability to the Catholic Church or any of its Church *sui iuris* of the model of religious community organization legislated in the aforementioned Religious Communities Ordinance, otherwise still in force. Instead of being an amorphous *substratum* that needs to be organized by government edict, the Catholic Church is now fully recognized as a whole and in its diverse formations and expressions. The Church has solidified

---

Fundamental Agreement, *supra* note 23, art. 13, para. 1(c), at 158.

25. *See id.* art. 12; *id.* art. 3, para. 3; *id.* art. 10, para. 2.

26. *See id.* art. 3, paras. 1-2.

27. *See id.* art. 9.

28. The Legal Personality Agreement was made pursuant to Article 3, paragraph 3 of the Fundamental Agreement. *See* Fundamental Agreement, *supra* note 23, art. 3, para. 3, at 155.

its status as an organic, sovereign, and independent society, with its own primary legal order, Sovereign Authority, and administrative, judicial, and legislative apparatus.

Thirteen centuries of legal history have come to an end. A new legal régime of relations between the Catholic Church and the State has been put in place in the heart of the Middle East. Both as a testimony to some other states in the region, where salutary secularization, democratization, and legal modernization are still to reach analogous levels, and as a milestone on Israel's long road to achieving more fully the vision articulated in its own *Declaration of Independence*, the new legal régime built on the foundation of the Fundamental Agreement is at once a notable achievement and solemn promise, a solid realization, and a beacon of hope.