

**ASCRPTION AND TRANSFER
CCEO CANONS 35 AND 32 AND THE FUNDAMENTAL CONFLICTS RELATED TO
ECCLESIAL MEMBERSHIP**

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2017

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ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicæ Sedis, Commentarium officiale</i>
<i>AS</i>	BENEDICT XIV, Encyclical Letter <i>Allatae sunt</i>
<i>c.</i>	canon
<i>cc.</i>	canons
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP.II promulgatus, fontium annotatione auctus</i>
<i>CIC/17</i>	<i>Codex iuris canonici, Pii X Pontificis Maximi iussu digestus</i>
<i>CIC</i>	<i>Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgates</i>
<i>CS</i>	PIUS XII, Apostolic Letter <i>motu proprio Cleri sanctitati</i>
<i>DC</i>	BENEDICT XIV, Encyclical Letter <i>Demandatam caelitus</i>
<i>EP</i>	BENEDICT XIV, Apostolic Constitution <i>Etsi pastoralis</i>
<i>FLANNERY1</i>	A. FLANNERY (gen. ed.), <i>Vatican Council II: The Conciliar and Post-Conciliar Documents</i> , vol. 1
<i>FLANNERY2</i>	A. FLANNERY (gen. ed.), <i>Vatican Council II: More Post Conciliar Documents</i> , vol. 2
<i>LG</i>	SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church <i>Lumen gentium</i>
<i>OE</i> Churches	SECOND VATICAN COUNCIL, Decree on the Catholic Eastern <i>Orientalium Ecclesiarum</i>
<i>OD</i>	LEO XIII, Encyclical Letter <i>Orientalium dignitas</i>
<i>PCCICOR</i>	Pontifical Commission for the Revision of the Eastern Code of Canon Law

INTRODUCTION

Paul VI once asked, “Do I really belong to the Church? Who belongs to it? How is this belonging conferred?” Despite the steps the Church has taken in attempting to answer these seemingly simple questions, particularly during the Second Vatican Council, a number of issues remain, especially with respect to Eastern Christians and Eastern Catholics, who often find their membership status or place within the Catholic Church unclear. These problems seem to arise from difficulties concerning the notion of ascription, a notoriously elusive concept that has been dealt with a number of ways throughout the Church’s long history. Today, *CCEO* c. 35 addresses ascription: “Baptized non-Catholics coming into full communion with the Catholic Church should retain and practice their own rite and should observe it everywhere in the world as much as humanly possible. Thus, they are to be ascribed to the Church *sui iuris* of the same rite with due regard for the right of approaching the Apostolic See in special cases of persons, communities, or regions.” Similarly, *CCEO* c. 32 describes transfer following ascription: “§1. No one can validly transfer to another Church *sui iuris* without the consent of the Apostolic See. §2. In the case of Christian faithful of an eparchy of a certain Church *sui iuris* who petition to transfer to another Church *sui iuris* which has its own eparchy in the same territory, this consent of the Apostolic See is presumed, provided that the eparchial bishops of both eparchies consent to the transfer in writing.” What this paper intends to do is trace the development of these canons and provide clarity on two particularly ambiguous issues: namely, whether *CCEO* c. 35 establishes *ipso iure* or automatic ascription to the Eastern Catholic Church for baptized Eastern Christians, or if it simply provides a requirement for liceity; and, whether *CCEO* c. 32 can be applied when an Eastern Catholic attempts a transfer of ascription out of an Eastern Catholic Church and into the Latin Church, allowing one to supersede the requirement of consent from the Apostolic See for such a

transfer. From the analysis of these two canons, it is hoped that a clearer and perhaps more robust understanding of the concept of Church *sui iuris* itself will come into focus.

A hypothetical may be best for expressing the necessity of this analysis. Paul, born in a small town in Nebraska, was baptized into Greek Orthodoxy as an infant and never again practiced the faith. His parents, third-generation immigrants, were also not practicing, but they felt it was important to continue the tradition of baptism into the Orthodox Church. In college, Paul became friends with a group of Latin Catholics with whom he began to attend Mass at a Roman Catholic parish. Seeking greater spiritual fulfillment and having been drawn in by his friends' faith, Paul decided to join the Catholic Church. Having become comfortable with the parish church he was attending, Paul met with the parish priest, eventually completed the required formation, and was received into the Church. According to the common opinion of English-speaking canonists, despite Paul's intention and despite having been received by a Latin pastor, per *CCEO* c. 35, Paul was automatically ascribed *ipso iure* into the Greek Catholic Church *sui iuris* upon reception into the Church, making him an Eastern Catholic. This would no doubt be an unexpected result to Paul and even for the pastor who received him into the Catholic Church. Assuming that this is in fact the case and Paul is an Eastern Catholic, what then could Paul do to join the Latin Church? Looking to *CCEO* c. 32, Paul could transfer to another Church *sui iuris* with the permission of the Apostolic See *or* with permission from his eparch and the written permission of the eparch of the Church *sui iuris* receiving him. Despite developments on this question, certain doubts might be raised as to whether *CCEO* c. 32 applies to the Latin Church. As such, were he to receive permission from his Eastern Church eparch and a bishop from the Latin Church, Paul's membership status would remain unclear. The consequences of these problems are of course numerous. The validity of marriages between Eastern Catholics (who were presumed to be Latin Catholics) can be called

into question. The membership of the children of Eastern Catholics (who were presumed to be Latin Catholics) is likewise an issue, compounding the problem.

To better approach the problems posed in the canons at issue, this paper will briefly provide an overview of the particular terms and concepts in play. As with much of canon law, a clear understanding of the history and an analysis of terms is imperative in answering even the simplest of questions. Chapter I will establish this necessary background before the paper more fully approaches the canons, and the above hypothetical case. Canon 35 will be treated directly in Chapter II and Canon 32 in Chapter III, both of which will draw on the principles and elements derived from Chapter I, finally drawing out workable standards to be applied in other cases.

This paper also intends to address something more fundamental. It seeks to address *why* conflicts that necessarily flow from these legal principles exist. The legal questions, in many ways, can be answered without ever addressing this fundamental conflict. This paper argues that this fundamental conflict is related, primarily, to an individual faithful's inherited cultural identity (which might be broadly called his rite, or patrimony) and his personal and individual expression as a member of the Christian faithful (which he does in his Church *sui iuris*), which is most often defined by how or where he lives the faith. In the modern age, these two notions, which were once one, have been separated by circumstance and globalization. The law, in an attempt to accommodate both identity and personal circumstance has created a kind of bifurcated approach to membership, wherein scenarios like the hypothetical above articulates, that can become untenable.¹ In other words, as Paul loses his identity as Greek living in the United States, so too

¹ "It was the task of the Second Vatican Council to recapture the original *kerygma* and restructure the Church according to the ancient traditions but in answer to the present day conditions. This vision had to be translated into canonical language to obtain juridical validity and stability." A. VALIYAVILAYIL, "The Notion of *Sui Iuris* Church," in J. CHIRAMEL and K. BHARANIKULANGARA (eds.), *The Code of Canons of the Eastern Churches: A Study and Interpretation*, Essays in Honour of Joseph Cardinal Parecattil, Alwaye, St. Thomas Academy for Research, 1992, 57.

does he lose his identity as *ritually* Greek, and attempts to compensate legally for this fact will often lead to conflict. While the paper cannot fully provide a solution to this problem, as it runs deep within culture, it does hope to show why and how it comes about from a legal perspective, providing answers to these legal questions in a direct way.

I. THE HISTORY AND NATURE OF RITES AND CHURCHES *SUI IURIS*

Introduction

Much of the difficulty in answering the above hypothetical case and other questions implicit within canons 35 and 32 arise from a lack of clarity concerning the nature of membership itself. What does it mean for a person to be a “member” of the Catholic Church? How does one become a member? To *what* does one become a member? Faris, after recalling that members are those baptized in or received into the full communion of the Catholic Church, observes that “This membership is never ‘at large’ in the Catholic Church, but the person is enrolled in a specific autonomous church, determined according to the provisions of law.”² Since this membership can never be at large, an understanding of what these autonomous Churches really are is necessary. The term “Church *sui iuris*” does not appear in any significant detail until the Second Vatican Council and more extensively in the 1983 and 1990 Codes. Instead, the ancient notion of “rite” dominates most of the issues that have come to define the concept of membership. It is best then to begin with a brief history of rite, a term which has taken on many meanings throughout Church (and human) history, and then move on to the concept of Churches *sui iuris*. Besides providing a helpful context, this history seeks to provide a background for why and how the Church came to

² J. FARIS, *Eastern Catholic Churches: Constitution and Governance according to the Code of Canons of the Eastern Churches*, Brooklyn, Saint Maron Publications, 1992, 174 (=FARIS, *Eastern Catholic Churches*).

separate these concepts. It is this separation that has led to a number of the controversies that this paper hopes to address.

In this case, one should begin with the end, that is, with the current law on the meaning of both rite and Church *sui iuris*. With respect to rite, *CCEO* c. 28 states: “A rite is a liturgical, theological, spiritual and disciplinary heritage, differentiated by the culture and the circumstances of the history of peoples, which is expressed by each Church *sui iuris* in its own manner of living the faith.” With respect to Church *sui iuris*, *CCEO* c. 27 states: “A community of the Christian faithful, which is joined together by a hierarchy according to the norm of law and which is expressly or tacitly recognized as *sui iuris* by the supreme authority of the Church, is called in this Code a Church *sui iuris*.” For the majority of the Church’s canonical history, these two definitions, at one point or another, were conceived of as a single idea: a “rite.” This word has taken on any number of meanings, including and not limited to the definitions used in c. 27 and c. 28. These meanings, which converged and diverged over many years of Church history, are treated in three sections dealing with the notion of *ritus*.

1.1 – *Ritus*

In the early Church, there were a number of different liturgical forms and disciplines in various regions and provinces.³ The definition of rite at this time, and as it remained for many generations, was vague. For the Church, the concept referred to the liturgical uses in the celebration of the Eucharist, the administration of the sacraments, or, more broadly, to the disciplines of a

³ W. BASSETT, *The Determination of Rite*, *Analecta Gregoriana*, Series Facultatis Canonici: Sectio B, n. 21, vol. 157, Rome, Gregorian University Press, 1967, 13.

local Church.⁴ The New Testament referred to these early Christian communities as “churches,”⁵ but this notion of *rite* developed in the earliest stages of the Church. As the apostles were charged with covering the whole world with Christ’s message, the gospel was spread and, as a result, various expressions of the faith developed into a number of communities, being shaped by the cultural and geographic influence in which they developed.⁶ These expressions continued to become more varied through the Oriental-Occidental division, a division that traces its roots to the jurisdictional division of the Roman Empire in 395 after the death of Theodosius.⁷ After the peace of Constantine in 313, developed ritual types became associated with provincial and diocesan boundaries of the patriarchal jurisdictions, which spread the ritual traditions to local churches in communities in proximity.⁸ Kokkaravalayil argues that this transition from “churches” to “rites” was birthed out of this oriental-occidental division, which he claims is the result of a particular Western ecclesiology that viewed the Church as *one* Church under authority of the Roman pontiff. This necessitated a concept of “rites,” as compared to “churches,” as there could be only one Church conceptually.⁹ Faris follows this line of thinking, noting that “In the past, diversity was seen as a threat to unity, which was identified with uniformity. As far as spiritual life, liturgical

⁴ L. NAGY, *Transfer of Ascription in a Church Sui Iuris with Particular Application to the Archdiocese of Alba-Iulia, Romania*, JCD thesis, Washington, DC, The Catholic University of America, 2001, 1 (=NAGY, *Transfer of Ascription*).

⁵ S. KOKKARAVLAYIL, *The Guidelines for the Revision of the Eastern Code: Their Impact on CCEO*, *Kanonika*, 15, Rome, Pontificio Istituto Orientale, 2009, 303-304 (=KOKKARAVLAYIL, *The Guidelines for the Revision of the Eastern Code*).

⁶ NAGY, *Transfer of Ascription*, 2-3.

⁷ BASSETT, *The Determination of Rite*, 9.

⁸ *Ibid.*, 14.

⁹ KOKKARAVLAYIL, *The Guidelines for the Revision of the Eastern Code*, 301-302.

practices, theology, and ecclesiology, the Catholic Church was virtually identified with the Latin Church.”¹⁰ John XXII, perhaps following this idea and seeking this unity, wrote in 1319 to the King of Armenia that he found any difference in rite “detestable.”¹¹

Whether this thesis holds concerning a desire to degrade the Eastern Churches or elevate the Latin Church, most ritual differences were broadly territorial.¹² Particular traditions existed in particular areas and came to define a particular rite.¹³ But how was rite more broadly conceived by the Church at the time? Its etymology is unclear, tracing back to ancient Sanskrit meaning something like “order” or “mode” or “use.”¹⁴ In Latin, *ritus* carried a liturgical meaning. St. Jerome’s vulgate Bible, for example, uses the words *ritus* and *caeremonia* interchangeably.¹⁵ In general, though, the word seemed to be related to *how* a particular action was done, whether religious or otherwise. This was the sense in which the Romans (who used it to describe any sort of ceremony, including secular ceremonies) understood it.¹⁶ The word *ritus* had a number of original meanings: the form and manner of religious observances, a religious usage or ceremony, a custom, usage, manner.¹⁷ Faris, echoing Bassett, claims that the term comes from the Etruscan

¹⁰ FARIS, *The Communion of Catholic Churches: Terminology and Ecclesiology*, Brooklyn, Saint Maron Publications, 1985, 55 (=FARIS, *The Communion of Catholic Churches*).

¹¹ BASSETT, *The Determination of Rite*, 32.

¹² *Ibid.*, 16.

¹³ NAGY, *Transfer of Ascription*, 7.

¹⁴ *Ibid.*

¹⁵ BASSETT, *The Determination of Rite*, 22.

¹⁶ NAGY, *Transfer of Ascription* 9-10.

¹⁷ KOKKARAVLAYIL, *The Guidelines for the Revision of the Eastern Code*, 305.

term *eritu*, which means “sacred ministry.”¹⁸ Whatever its origins, by the middle ages, the concept took on a sense more related to a whole tradition, and the likely first use in a pontifical document occurred under Celestine III.¹⁹ Innocent III, additionally, spoke of ordination according to one’s own rite, and Aquinas described it as the total expression of a religion.²⁰ The Council of Florence (1431-1499) echoed this sentiment, viewing a rite as extending beyond purely liturgical celebrations to customs, traditions, beliefs, law, and disciplines of a group of people.²¹ It even referred to different ethnic communities as “rites.” But this definition was not by any means uniform (Florence used it in 35 different ways), and different popes would use the term differently depending upon circumstance.²² Other groups were not referred to as rites, for example, but instead were called “nations and peoples,” and in 1448, Nicholas V decreed a rite to be a canonical attribute of a people, perhaps moving toward the connection of ritual tradition with a community.²³

Trent, which sought to tackle the concept more fully, used the term in a way that was almost entirely liturgical. Clement VIII after Trent reversed this liturgical trend and again began referring to a rite as a community’s makeup or attributes.²⁴ To this end, joining a community simply meant joining that community’s rite. Thereafter, and as will be discussed in Chapters II and III below, emphasis was placed (and problems arise) concerning retaining rites among peoples across nation

¹⁸ FARIS, *Eastern Catholic Churches*, 147.

¹⁹ BASSETT, *The Determination of Rite*, 10.

²⁰ NAGY, *Transfer of Ascription*, 9-10.

²¹ BASSETT, *The Determination of Rite*, 33.

²² KOKKARAVAYIL, *The Guidelines for the Revision of the Eastern Code*, 305. FARIS, *Eastern Catholic Churches*, 147.

²³ NAGY, *Transfer of Ascription*, 17.

²⁴ KOKKARAVAYIL, *The Guidelines for the Revision of the Eastern Code*, 306.

and place. Benedict XIV in *Allatae sunt* was the first to divide the Eastern rites into liturgical families.²⁵ He also sought greater protection of these rites with respect to missionary activities by Latin missionaries: "...he may not strive to induce him to embrace the Latin Rite; for only the duty of bringing back the Orientals again to the Catholic faith is entrusted to the missionary, not of inducing him to the Latin Rite."²⁶ After this, Pius IX again reverted back to a more liturgical understanding of rite in *In suprema*.²⁷ This understanding carried over into the commission he set up to prepare a schema on the Eastern churches for the First Vatican Council. The commission had difficulty in aligning the notion of rite as liturgy with history and the document was never discussed in the Council, which ended unfinished.²⁸ Nedungatt describes the many varied meanings of the term at this time, which he splits into three categories: the means by which a liturgy is celebrated; the traditions, rules and practices of a community of the faithful; and the community itself.²⁹ This third meaning began to dominate the Church's understanding from around the time of Leo XIII, who began to use the term in references to the communities themselves more regularly.³⁰

²⁵ BENEDICT XIV, Encyclical Letter *Allatae sunt*, 26 July 1755, § 3, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, 9 vols, Rome, Typis polyglottis Vaticanis, 1926, vol. 2, 458. BASSETT, *The Determination of Rite*, 52.

²⁶ P. PALLATH, "The Teaching of the Popes Concerning the Heritage and Identity of Eastern Churches," in P. PALLATH (ed.), *Catholic Eastern Churches: Heritage and Identity*, Rome, 1994, 142 (=PALLATH, "The Teaching of the Popes").

²⁷ PIUS IX, Apostolic Letter *motu proprio in suprema*, 6 January 1848, in *Pii IX Pontificis Maximi acta*, 5 vols, Rome, 1854, vol. 1, 78–91. NAGY, *Transfer of Ascription*, 21.

²⁸ *Ibid.*, 22-23.

²⁹ G. NEDUNGATT, *The Spirit of the Eastern Code*, Placid Lecture Series 15, Bangalore, Dharmaram Publications, 1993, 64.

³⁰ NAGY, *Transfer of Ascription*, 23.

This multifaceted use of rite was carried over into the 1917 Code, which used the term in both a liturgical³¹ and canonical sense.³² “Canonical” here means the customs and laws and traditions of a community, as well as the community itself. This somewhat conflicting view of rite led to the split and development of rite and Church *sui iuris*. Before that occurred, though, in 1952, c. 303 of the *motu proprio Postquam apostolicis litteris* was published, which stated: “The Oriental rites that the canons treat are the Alexandrian, Antiochean, Constantinopolitan and Armenian, and other rites that the Church either expressly or tacitly recognizes as *sui iuris*.”³³ This canon represents a kind of middle ground between rite as a single concept and the split with Church *sui iuris* that soon followed with the second Vatican Council.

1.2 – The Transition to Church *sui iuris*

During Vatican II the notion of rite was heavily refined and the concept of “Church *sui iuris*” came about. Vatican II was likely the first point in the Church’s history that she began to view the Eastern rites as complete churches in themselves, as compared to merely vaguely defined ritual traditions. *Orientalium Ecclesiarum*, for example, states: “The Holy Catholic Church, which is the Mystical Body of Christ, is made up of the faithful who are organically united in the Holy Spirit by the same faith, the same sacraments and the same government. They combine into different groups, which are held together by their hierarchy, and so form particular churches or rites.”³⁴ The whole Church, then, is seen as a unified group of smaller churches. Kokkaravalayil writes: “The

³¹ Canons 2, 249, 253, 755-760, 814-820, 823, 851, 866, 945-947, 1002-1005, 1110, 1169, 2141, 2378.

³² Canons 782, 819, 820, 851, 866, 906, 966, 1004, 1006.

³³ PIUS XII, *motu proprio Postquam apostolicis litteris*, 2 February 1952, in AAS 44 (1952), 144, English translation in NAGY, *Transfer of Ascription*, 39.

³⁴ SECOND VATICAN COUNCIL, Decree on the Eastern Catholic Churches *Orientalium Ecclesiarum*, 21 November 1964, no. 2, in AAS, 57 (1965), 76–89, English translation in *FLANNERY I*, 441.

self-understanding of the Catholic Church as a communion of Churches marks one of the most significant moments of its growth in modern history.”³⁵ Notable here is the use of both “Church” and “rite,” almost interchangeably.³⁶ This interchangeability is used throughout the document. Regardless of the terminology used, a clear move was made here to define the Eastern rites (what might be called communities) as independent churches. Nedungatt notes, though, that rite as a kind of Church envisioned here was not conceived of in Eastern ecclesiology.³⁷ In *OE*, rite also referred to “liturgy, ecclesiastical discipline, and spiritual tradition.”³⁸ Rite, in this sense, represents a sort of spiritual patrimony of a people, something inherited and passed along, not simply a juridic designation. In this way, the document represents the continued split view that existed before this time. More complicating as well was the Council’s use of “particular Church” in *OE* to refer to the rites, a term used in both *Lumen gentium* and *Christus Dominus* to refer to dioceses.³⁹ Other terms as well, like “local Church,” “individual Church,” and “ritual Church,” were also used to describe the Eastern Churches.⁴⁰

These problems were addressed in the drafting of the 1983 Code, which created a special designation, “ritual Church *sui iuris*,” in an attempt to delineate between a rite and a church. This designation was developed further in the 1990 Eastern Code, which, as noted at the beginning of

³⁵ KOKKARAVILAYIL, *The Guidelines for the Revision of the Eastern Code*, 300.

³⁶ G. NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika, 10, Rome, Pontificio Istituto Orientale, 2002, 110 (=NEDUNGATT, *A Guide to the Eastern Code*).

³⁷ *Ibid.*

³⁸ *OE*, no. 3, *FLANNERY I*, 442.

³⁹ VALIYAVILAYIL, “The Notion of *Sui Iuris* Church,” 57-58. Nedungatt refers to “particular church” as an “ecclesiological” designation. NEDUNGATT, (ed.), *A Guide to the Eastern Code*, 101-105.

⁴⁰ FARIS, *The Communion of Catholic Churches*, 85-100.

this background, separated the two in “rite” and “Church *sui iuris*.”⁴¹ This inconsistency was further addressed in the 2016 moto proprio *De concordia inter Codices*, which modified the canons in the Latin Code that used the older “ritual Church *sui iuris*” to the less complicated “Church *sui iuris*” designation of the Eastern Code.⁴² A *sui iuris* Church today is described perhaps best as an autonomous community of believers with a particular hierarchical authority that governs it.⁴³ Nedungatt gives a Church *sui iuris* four constitutive elements: community of faithful, hierarchy, norm of law, and recognition by supreme authority.⁴⁴ Primarily, though, the most succinct and relevant way of describing such churches is as autonomous bodies that express their underlying ritual traditions.

1.3 – The Nature of Rite and Church *sui iuris*

This takes us back to the beginning. How then should we properly conceive of these terms, rite and Church *sui iuris*? What sort of analogy might we be able to develop to better come to grasp the difference and importance of the idea? As this issue arises out of problems that flow from the mass immigration of peoples into various nation states, particularly in the twentieth century, a comparison might be made between ethnicity and nationality to rite and Church *sui iuris*. As a person may have a ritual heritage that he is born into, with tradition, value, and organization, so

⁴¹ “In effect, it aims to canonize the Council teaching itself.” VALIYAVILAYIL, “The Notion of *Sui Iuris* Church,” 59.

⁴² FRANCIS, Apostolic Letter *motu proprio De concordia inter Codices*, 15 September 2016, https://w2.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_20160531_de-concordia-inter-codices.html (11 February 2017), English translation in “To harmonize the Codes,” in *L’Osservatore Romano*, English ed., 23 September 2016, 9-10.

⁴³ NEDUNGATT, *A Guide to the Eastern Code*, 99-100.

⁴⁴ Attention is often placed on the three-tiered hierarchical model of the Eastern Churches, in contrast to the two-tiered model of the Latin Church; he also prefers the term “juridic autonomy.” FARIS, *Eastern Catholic Churches*, 140, 145.

too does he have an ethnic heritage, which includes his language, cultural celebrations, and values. Similarly, he has a Church *sui iuris* in the same way he might have a nation or state. In principle and in history, his Church and his nation are an expression of his underlying tradition, but in many cases, especially today, they can become separated in an untenable way.⁴⁵ As Valiyavilayil notes:

Cultural, ethnic, national, linguistic and other such criteria are the unifying forces of the members of community.... Historically, the canonical rites were distinguished on the basis of these criteria.... However, the fact that these elements are eliminated from the definition of *sui iuris* Church is a clear indication that the concept of *sui iuris* Church bypasses these criteria.

It is this separation which, while reasonable, has led to these conflicts, both within the Church and outside of it. This comparison is not merely conceptually helpful for identifying the difference between rite and Church *sui iuris*; it is helpful in articulating a fundamental thesis of the paper. If a rite is comparable to an ethnicity or a cultural background, it might be clearer why rite, as a concept, can come across as restrictive, unnecessary, or even counterintuitive in light of particular circumstance. That is, when an immigrant moves to the United States, for example, his children often lose their ethnic and cultural heritage, and legal attempts to maintain it, even if a vitally important aspect of a person, seem burdensome in light of the immigrant's or his child's national identity. This fundamental conflict is expressed in the above hypothetical, and it can be seen in the following analysis.

⁴⁵ "A *rite* is the specific manner of living the faith which is observed by each autonomous church." FARIS, *Eastern Catholic Churches*, 149.

II. CCEO C. 35 AND ASCRIPTION OF EASTERN NON-CATHOLICS

Introduction

As the concept of Church *sui iuris* developed, so too did the notion of ascription. Beginning vaguely and eventually developing into a more restricted and regulated concept, it culminated in the Eastern Code in canon 35. This chapter will trace that development, analyze opinions on the canon today, and finally analyze the hypothetical in light of those opinions, paying particular attention to the purpose of the law itself in addressing the fundamental problems identified above.

2.1 – Development of CCEO c. 35

Canon 35 deals primarily with ascription and the preservation of rites. The preservation of rites became more pressing as people began to mix and ecclesiastical jurisdictions began to overlap.⁴⁶ As the hypothetical case intended to show, this concern has only become more pressing in an increasingly globalized world. Through the development of this issue, what the many legislators of the Church fundamentally intended to address was how is it that one attains a rite, and as a consequence, how is it that one gains membership in the Church in accordance with one's own rite. At issue through the development of answering this question was the balancing of the interests of the convert, who may desire a specific Church, and the interests of the Eastern Churches to maintain their rites (and membership). It is important to keep this balancing in mind when approaching this issue and its history.

⁴⁶ M. SOUCKAR, Baptized Eastern Non-Catholics Coming into Full Communion with the Catholic Church and their Preservation of Rite, JCD Thesis, Rome, Pontifical Gregorian University, 2012, 152 (=SOUCKAR, Baptized Eastern Non-Catholics).

For a significant period of the Church's history, there was an explicit claim of preeminence of the Latin rite over the Eastern rites.⁴⁷ This was expressed, perhaps most clearly, by Benedict XIV (1740-1758) in *Allatae sunt*: "Because the Latin rite is the rite of the holy Roman Church and because this Church is the mother and teacher of the rest of the churches, the Latin rite ought to be preferred to all other rites."⁴⁸ Despite this claim, emphasis was placed by Benedict XIV on the desire to maintain the Eastern rites, especially with respect to Eastern non-Catholic converts to the Church.⁴⁹ This desire is expressed additionally in documents like *Etsi pastoralis* and *Demandatam caelitus*.⁵⁰ All three of these documents emphasized the desire of Eastern Catholics to retain membership and practice in Eastern Churches, even when those Churches fell within Latin jurisdiction. *Etsi pastoralis*, for example, explicitly articulated the requirement of Orthodox converts to maintain their rite when coming into the Church.⁵¹ Similarly, *Demandatam caelitus* requested that the Melkites restore any Eastern practices that may have been lost and moreover

⁴⁷ FARIS, *Eastern Catholic Churches*, 143. "The Latin missionaries were able to transmit to the Orientals only what they themselves possessed. They were interested in their students, who were orthodox, but they were not interested in Orthodox. They gave them their Latin, prepared, pre-fabricated Catholicism." J. MADEY, "The Melkite Greek Catholic Church between East and West," in J. VELLIAN (ed.), *The Romanization Tendency*, Kottayam, Deepika Book Stall, 1975, 58. NEDUNGATT, *A Guide to the Eastern Code*, 112-113.

⁴⁸ AS, no. 20 in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, vol. 2, 459 (1926): "Cum Latinus Ritus is sit, quo utitur Sancta Romana Ecclesia, quae Mater est et Magistra aliarum Ecclesiarum, reliquis omnibus Ritibus praeferrere debet."

⁴⁹ *Ibid.*, nos. 21-22, 460-461.

⁵⁰ BENEDICT XIV, Apostolic Constitution *Etsi pastoralis*, § IX, 26 May 1742, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, 9 vols, Rome, Typis polyglottis Vaticanis, 1926, vol. 1, 750-755. BENEDICT XIV, Encyclical Letter *Demandatam caelitus*, §15, 24 December 1743, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, 9 vols, Rome, Typis polyglottis Vaticanis, 1926, vol. 1, 800.

⁵¹ EP, § IX, in *Codicis iuris canonici fontes*, vol. 1, 750-755 (1926).

restricted Melkite Catholics who observed the Greek rite from transferring to the Latin rite.⁵² *Allatae sunt*, as well, explicitly called for the Orthodox who were to convert to the Church to maintain their traditions and not become Latins.⁵³

As a result of these documents, in 1756, the Sacred Congregation of the Propagation of the Faith was asked by the Custodian of the Holy Land whether an Orthodox convert was free to join the Latin rite upon conversion.⁵⁴ The Congregation, following the principles of *Allate sunt* and *Demandatam caelitus*, answered in the negative. Additional requests by the Custodian, even when he noted the difficulty in following this requirement, were likewise met with refusal to permit ascription to the Latin rite.⁵⁵ The Congregation relented many years later, in 1837, only when the Custodian noted that many converts made entrance to the Latin rite a condition to their conversion.⁵⁶ A final development occurred in 1838, wherein the Congregation allowed a convert to ascribe to any *Eastern* rite of his choosing.⁵⁷ Ascription to a Latin rite continued to require permission from the Apostolic See.

⁵² DC, §3, in *Codicis iuris canonici fontes*, vol. 1, 797 (1926). “It remains for us to describe the ways in which the Melkite church was a victim of the latinisation of the Near East during the centuries of her life in full communion with Rome. Because she usually enjoyed a sound self-consciousness, the Melkite church was able to escape most of the Latin innovations which made their way into the eastern churches.” MADEY, “The Melkite Greek Catholic Church between East and West,” 57.

⁵³ AS, nos. 21-22, in *Codicis iuris canonici fontes*, vol. 2, 460-461 (1926).

⁵⁴ SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, 22 May 1756, in *Acta Sacrae Congregationis de Propaganda Fide pro Terra Sancta*, L. LEMMENS (ed.), 2 vols, Firenze, Collegio di S. Bonaventura, 1921-1922, vol. 2, no. 58, 43.

⁵⁵ *Ibid.*, 43-44.

⁵⁶ SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, in *Acta Sacrae Congregationis de Propaganda Fide pro Terra Sancta*, vol. 2, no. 83, 104 (1922).

⁵⁷ SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, 20 November 1838, in *Collectanea Sacrae Congregationis de Propaganda Fide: seu Decreta, Instructiones, Rescripta*, 2 vols, Ex Typographia Polyglotta, 1907, vol. 1, no. 878, 499-500. Nagy, Transfer of Ascription, 54.

This issue was taken up directly in Vatican I, particularly in the drafting of the schema *De Ritibus*. During the debate of that drafting, the Latin Patriarch of Jerusalem argued that non-Catholics should have the choice of entering any rite they choose, even the Latin rite, and that restrictions on such choice merely inhibited the conversion process.⁵⁸ The proposal was broadly approved by a majority of the consultors and the final draft did not include any explicit restriction on Orthodox converts joining the Latin rite.⁵⁹ Vatican I was suspended before a vote could be had on the document, but freedom of choice in selecting a rite became a more popular and influential position.⁶⁰ This position held obvious influence over Leo XIII's 1894 apostolic letter *Orientalium dignitas*. In this document, Leo XIII modified the longstanding rule of restricting Orthodox converts joining the Latin rite. In Article 11 of the document, he explicitly permitted Orthodox to join the Latin rite without any special apostolic dispensation if it were made a condition for their conversion.⁶¹ As maintenance of the Eastern rites was still a significant goal, despite this relaxation, the document permitted these converts to revert back to an Eastern rite at will.⁶²

The presumption that Orthodox could maintain their rite carried through the 1917 Code, with the right to choose being upheld and expanded to include cases where the convert did not make joining the Latin rite a condition of conversion. The explicit recognition of the equality of rites occurred in the early 20th century among Popes Benedict XV (1914-1922) and Pius XI (1922-

⁵⁸ CONGRESSUS TERTIUS, 15 November 1867, in MANSI, G. (ed.), *Sacrorum Conciliorum Nova et Amplissima Collectio*, 53 vols, Parisiis-Arnheim-Leipzig, H. Welter, 1899-1927, vol. 49, cols. 999-1000.

⁵⁹ BASSETT, *The Determination of Rite*, 217.

⁶⁰ *Ibid.*, 217-218.

⁶¹ LEO XIII, Apostolic Letter *Orientalium dignitas*, 30 November 1894, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, 9 vols, Rome, Typis polyglottis Vaticanis, 1933, vol. 3, XI, 458.

⁶² PALLATH, "The Teaching of the Popes," 143-145.

1939), calling for unity and equal rights among the rites.⁶³ Then came Pius XII's 1957 *Cleri sanctitati*,⁶⁴ which made clear in canon 11 that all Eastern non-Catholic converts to the Church shall have the unconditional right to choose their rite upon conversion.⁶⁵ Canon 11 was strongly opposed by some Eastern patriarchs, who argued that it would lead to Latinization of the East. This concern carried over into Vatican II. Preparation of the schema on the Eastern Churches for Vatican II was fiercely debated by the Latin and Eastern bishops. Many Eastern bishops strongly opposed the principles behind c. 11, while Latin bishops supported the fundamental right of freely choosing one's rite, some even suggesting a compromise, wherein only Eastern non-Catholics who are *living in* Eastern lands be obligated to retain their rite.⁶⁶ After significant back and forth, though, the final decree sent to Paul VI for promulgation broadly reflected the Eastern bishop's desires in revoking c. 11, while providing for some compromise in recognizing the individual faithful's right to make recourse to the Holy See if a change of rite is desired.⁶⁷ This expression was ultimately found in *OE* 4, which states:

Finally, each and every Catholic, as also the baptized of every non-Catholic church or denomination who enters into the fullness of the Catholic communion, should retain his own rite wherever he is, should cherish it and should observe it to the best of his ability, without prejudice to the right in special cases of persons, communities or areas, to have recourse to the Apostolic See, which, as the supreme judge of interchurch relations, will, acting itself or through other authorities, meet the needs of the occasion in an ecumenical spirit, by the issuance of opportune directives, decrees or rescripts.⁶⁸

⁶³ PALLATH, "The Teaching of the Popes," 146-149.

⁶⁴ PIUS XII, Apostolic Letter *motu proprio Cleri sanctitati*, 2 June 1957, can. 11, in *AAS*, 49 (1957), 439.

⁶⁵ M. WOJNAR, "The Code of Oriental Law *de ritibus orientalibus* and *de personis*," in *The Jurist*, 19 (1959), 234-236.

⁶⁶ SOUCKAR, Baptized Eastern Non-Catholics, 177-179.

⁶⁷ *Ibid.*, 187-192. See also E. FARRUGIA, "Re-Reading *Orientalium Ecclesiarum*," in *Gregorianum*, 88 (2007), 354-355.

⁶⁸ *OE*, no. 4, in *AAS* 57 (1965), 77, *FLANNERY*1, 441.

Many agree that this language expressly revoked the rights granted in c. 11 of *Cleri sanctitati*, while others argue that because the language of the document did not use explicit invalidating language, the freedom granted by Pius XII was in fact not revoked. A reason that may suggest the value of this latter opinion is the use of the subjunctive verbs: *retineant* (“should retain”), *colant* (“should practice”), and *observant* (“should observe”), which suggests that the retaining of one’s rite is merely a *desire* of the Church, not a requirement. This question carried over into the *CCEO*.

In 1972, Paul VI established the Pontifical Commission for the Revision of the Eastern Code of Canon Law (*PCCICOR*), which was tasked with reforming a new Eastern code in accordance with the norms and theology of Vatican II. It is important to point out, as articulated above, the distinction between rite and Church *sui iuris* became more clear.⁶⁹ The consequence of this development is that much of the prior discussions concerning preservation of rite is not *directly* applicable to the ascription to a Church *sui iuris*, which the *PCCICOR* and the *CCEO* sought to address. That is, the issue became more difficult to explain as it expanded into the concept of Church *sui iuris*. The *PCCICOR* adopted the exact language of *OE 4* into *CCEO* c. 35, including the subjunctive verbs. It begins: “Baptized non-Catholics coming into full communion with the Catholic Church should retain and practice their own rite and should observe it everywhere in the world as much as humanly possible.”⁷⁰ From this, the new separation of rite and Church *sui iuris* can be seen. That is, the second half of the canon calls for ascription to the Church *sui iuris* of the rite (of which a person is *already* a part): “Thus, they are to be ascribed to the Church *sui iuris* of

⁶⁹ SOUCKAR, *Baptized Eastern Non-Catholics*, 195.

⁷⁰ *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Libreria editrice Vaticana, 1995, English translation *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 2001, c. 35.

the same rite” The language of this implies, in line with a proper understanding of rite, that one gains his or her rite at baptism, and that this rite is the relevant characteristic that one uses in the process of determining to which Church *sui iuris* he or she should be ascribed.

Two issues are important to point out. One of the earlier drafts of c. 35 reads as follows: “The baptized of any Church or non-Catholic community coming into the fullness of the Catholic communion **are ascribed** to the Church of their own rite, without prejudice to the right of recurring to the Apostolic See in special cases of persons, communities, or regions.”⁷¹ That is, a clear change was made during development from “are ascribed” to “are to be ascribed,” from *adscribuntur* to *ascribantur*. Nedungatt says “Canon 35 effectively forbids an Eastern non-Catholic Christian to be received into the Latin Church without a special permission from the Apostolic See of Rome.”⁷² Moreover, in discussions on the final draft of the canon, the consultors discussed whether the canon was one for validity or liceity. These discussions led to the conclusion that “no one today any more maintains that the Council wanted to give a norm *ad validitatem* in this matter,” foregoing a need to explicitly note that the canon was for liceity, presuming c. 10 of the *CIC* concerning invalidating clauses would be sufficient to address the issue.⁷³

⁷¹ PONTIFICAL COMMISSION FOR THE REVISION OF THE EASTERN CODE OF CANON LAW, “Schema canonum de constitutione hierarchica ecclesiarum orientalium,” 12 October 1984, c. 14, in *Nuntia*, 19 (1984), 22, English translation in J. HUELS, “Valid Ascription and Marriage in the Latin Church of an Eastern Christian without a Rescript from the Apostolic See,” in S. EUART, J. ALESANDRO, and T. GREEN (eds.), *Roman Replies and CLSA Advisory Opinions 2016*, Washington, DC, CLSA, 2016, 118 (=HUELS, “Valid Ascription and Marriage”): “Baptizati cuiusvis Ecclesiae vel Communitatis acatholicae ad plenitudinem communionis catholicae convenientes, ad Ecclesiam proprii ritus **adscribuntur**, salvo iure recurrendi ad Sedem Apostolicam in casibus peculiaribus personarum, communitatum vel regionum.”

⁷² NEDUNGATT, *A Guide to the Eastern Code*, 125.

⁷³ PCCICOR, “La nuova revisione dello Schema canonum de constitutione hierarchica Ecclesiarum orientalium,” *Nuntia*, 22 (1986), 31.

2.2 – Canonical Opinions

Most canonical opinions among the English-speaking authors hold that ascription occurs *ipso iure* upon reception into the Church, wherein, for example, a Greek Orthodox person's reception into the Church would automatically ascribe him to the Greek Catholic Church.⁷⁴ This position has been held, for example, by Mendonça, Marini, Faris, Pospishil, and others.⁷⁵ Some even conflate the reasoning behind rite and c. 11 and the notion of Church *sui iuris*: “Can. 35 has definitively removed the right granted in CS can. 11 § 1 to the baptized non-Catholic to choose a church *sui iuris* at the time of his coming into full communion with the Catholic Church.”⁷⁶ This position is possibly untenable for a number of reasons. For one, c. 11 of CS never addressed the notion of choosing a Church *sui iuris*. It dealt with rite specifically, a separate concept as conceived of in c. 35. Canon 35 presumes that existence of the convert's rite and makes no determination on whether or not he or she *can* choose rites at all. Moreover, even if it *does* abrogate c. 11 in full and addresses rite as suggested, other problems exist. The canon explicitly removed any sort of invalidating clause during drafting (and there is no reason, following c. 10, to presume that the canon is invalidating), and moreover, the language employed (“are to be ascribed”) implies that another party will be doing the ascribing. As Huels writes: “Such a person is required by the law to ascribe the new Catholic to the Church *sui iuris* of the same rite of baptism. The canon does not

⁷⁴ Cf. N. RACHFORD, “Ascription to a *Sui Iuris* Church of One Who is Received into Full Communion,” in S. EUART, J. ALESANDRO, and T. GREEN (eds.), *Roman Replies and CLSA Advisory Opinions 2011*, Washington, DC, CLSA, 2016, 126–129 for the alternative position concerning non-Eastern, baptized non-Catholics coming into full communion with the Church. See also E. STRICKLAND, “Reception into Full Communion: Canonical Issues and Pastoral Challenges,” in *The Jurist*, 61 (2001) 265, holding that the intention of the one being ascribed and the one ascribing is “irrelevant.”

⁷⁵ HUELS, “Valid Ascription and Marriage,” 117-118.

⁷⁶ See also F. MARINI, “*Ipsa iure* Ascription to a Catholic Church *sui iuris* of Baptized Converts,” in F. PEDONE and J. DONLON (eds.), *Roman Replies and CLSA Advisory Opinions 2003*, Washington, DC, CLSA, 2003, 115.

say, however, that the one so ascribing (e.g., the Latin pastor) acts invalidly if, out of respect for the intention of the newly received Catholic, he ascribes him or her to the Latin Church.”⁷⁷ This becomes even clearer when one considers that the wording, “are ascribed,” was rejected during the drafting process.

These arguments are brought forth by a minority of canonists, including Gaefuell, Salachas, and Huels.⁷⁸ If the minority position is correct, an interesting question arises: What might be the effect on valid but illicit ascription to the wrong Church? Assuming that a Greek Orthodox convert is in fact validly (but illicitly) ascribed to the Latin Church, would this entail his being *of an Eastern rite* but ascribed to the Latin Church? If so, would he be, in some sense, ritually mixed, as the various Churches *sui iuris* exist to express their underlying rites? Note that his rite is acquired at baptism, not at ascription, and since his Church is a separate concept from his rite, he could, in principle and because he never licitly received permission to transfer rites (the Code is silent on whether he can transfer rites), be of a rite separate from his Church.⁷⁹ What would this mean of the Church’s desire under c. 35 and *OE* to practice his rite as much as humanly possible? Would this mean that, were he able to attend an Eastern rite Divine Liturgy and a Latin rite Mass on Sunday, he should rightfully opt for the Eastern rite Divine Liturgy? This would seem counterintuitive, especially if the reason he initially (unintentionally) violated the law was because he sought community in the Latin Church (which occurs, most fully, in the Eucharist). Huels argues that this is the purpose of the final clause of c. 35: “with due regard for the right of

⁷⁷ HUELS, “Valid Ascription and Marriage” 120.

⁷⁸ *Ibid.*, 118-123.

⁷⁹ As Nedungatt notes: “The terms “church” and “rite” are not synonymous nor are they interchangeable. NEDUNGATT, G., “Equal Rights of the Churches in the Catholic Communion,” in *The Jurist*, 49 (1989), 1–22.

approaching the Apostolic See in special cases of persons, communities or regions,” which, he argues, refers to the right to request permission to observe another rite.⁸⁰ A sufficiently interesting question arises if the Apostolic See rejects such a request to observe the Latin rite, of course. Alternatively, the view might be suggested that when one validly ascribes to a Church *sui iuris*, he automatically transfers to the corresponding rite. This seems to be a stretch of the language of the canon itself though.⁸¹ Moreover, if rite is understood as something one inherits, it does certainly seem suspect that one could *transfer* this inheritance or patrimony. Note, of course, though, that prior to this newer understanding of Church *sui iuris*, transfer of *rite* was the focus of documents like *OE*. Might it be said now though that the concept of Church *sui iuris* makes incoherent the question of transferring rites? That is, now that rite and Church *sui iuris* have been split, perhaps any prior discussion of transferring rites is properly applied to transferring Churches *sui iuris*. Additional discussion on transfer follows in Chapter III below.

2.3 - Analysis as Applied to Hypothetical Case

If the minority position among English-speaking canonists is followed, Paul would unquestionably validly, but illicitly, be ascribed to the Latin Church, while remaining of an Eastern rite. As such, he would not face any of the interecclesial issues he may have faced being ascribed to an Eastern Church. If the majority opinion among English-speaking canonists were to hold, though, it seems that *ipso iure* Paul is ascribed to the Greek Catholic Church upon acceptance into the Church, even if this acceptance took place in a Latin Church and in a Latin rite: “For example, a member of the Apostolic Armenian Church would be received into the Armenian Catholic

⁸⁰ HUELS, “Valid Ascription and Marriage,” 120

⁸¹ See *ibid.*

Church, faithful of the Greek Orthodox Church would be enrolled into the Greek Catholic Church, and so forth.”⁸² Assuming this were to be the case, he would be bound by the laws of the *CCEO*, including, for example, with respect to matrimony. Accordingly, were he to marry in a Latin Church by a Latin pastor without any delegation from an Eastern Catholic authority, his marriage would likely be seen as invalid, per *CIC* c. 1109. This is the reasoning many tribunals appear to follow, perhaps in error.

To the average Western Catholic, the majority’s view no doubt comes across as contrary to their intuitions, especially in light of how many view religious freedom and the right of a member of the faithful to express his faith in a way conducive to his spiritual growth. To tie a person to something he no longer feels any real connection to (or never even had) based solely on the circumstances he inherited at birth runs contrary to how many perceive the freedom afforded them by Christ and the Church. As they may come from a particular background, they might emigrate to another nation, keeping some of their background, but ultimately modifying and adopting to the place they go. Faris writes: “... it is logical that an Eastern non-Catholic be required to retain and observe the rite which he or she had observed while enrolled in an Eastern non-Catholic Church.” This may be true. But is it logical for an Eastern non-Catholic to be required to retain and observe a rite which he has *never* observed but simply inherited?⁸³ Gnesko writes: “A rite reflects so to speak the soul of a community.”⁸⁴ Does the modern Church subscribe to this notion, an inherited soul of a community, even when the members of that community do not

⁸² J. ABBASS, *Two Codes in Comparison*, Kanonika, 7, Rome, Pontificio Istituto Orientale, 1997, 287.

⁸³ FARIS, *Eastern Catholic Churches*, 175.

⁸⁴ M. GNESKO, *Interritual Relations*, 10-11.

practice its expressions? The tradition of the Church maintaining culture and peoples cannot simply be forgotten, though. As was stated in *Allatae sunt*: “The Holy See is not demanding from the schismatics coming to the Catholic unity that they should abandon their Rites, but only that they should give up and execrate the heresies, desiring eagerly and vehemently that the diversity of their nations should be preserved and should not be destroyed, and that all should become Catholics and not Latins.”⁸⁵ Churches *sui iuris* exist to protect and express the underlying rite, which has value that transcends an individual person’s desires and circumstances. Presumptively viewing the many Churches *sui iuris* the same way that emigration to various nation states is viewed may in fact be a flawed view of the Universal Church itself. It is the balance of these two interests, which in many ways may be irreconcilable, that lies at the root of this issue of ascription. And it moreover carries over into the perhaps more complicated issue of transfer between rites and Churches *sui iuris*, a concept that includes additional history and complexity.

III. CCEO c. 32 AND TRANSFER OF EASTERN NON-CATHOLICS

Introduction

Assuming *arguendo* that the majority position is in fact correct and Paul is ascribed automatically to the Greek Catholic Church, what could he do in this situation to right his situation if he desired to have full membership in the Latin Church? To this, he would need to turn to c. 32, which deals with the equally contentious issue of transfer. This chapter, like the last, will trace the history of the development of c. 32, address how it is understood today, and apply it to the hypothetical case presented above. Particular attention will be placed on whether c. 32 § 2 actually

⁸⁵ PALLATH, “The Teaching of the Popes,” 142.

envisions transfer to the Latin Church, allowing Paul to transfer without explicit permission from the Apostolic See.

3.1 – Development of *CCEO* c. 32

Early notions of transferring rites are unclear or non-existent: “[o]ne searches in vain for norms regulating transfers of rite in the early centuries of the Church.”⁸⁶ The norm of the Church was primarily local (tied to local authorities) and seemed to follow the principle that one merely take on the rite of where one lives without any sort of Church authorization for doing so. This was not uniform though.⁸⁷ When an individual emigrated to another territory, for example, he or she would often simply take on the rite of the local territory. When a large community emigrated, though, it would normally retain its rite. This led to an intermixing of ritual traditions between East and West.⁸⁸ As a general rule, especially into the middle ages, popes recognized the importance of keeping the rites separate from one another and of proper coexistence between them all. Leo IX and Innocent III both emphasized this in the 11th and 12th centuries. With significant confusion concerning what constituted a rite at all, popes made efforts to protect what they conceived of rites.⁸⁹ By the 1600’s, transfer of rite was addressed almost entirely at the local level, without any reference to the universal church. Moreover, a decree in 1838 from the Sacred Congregation for

⁸⁶ NAGY, *Transfer of Ascription*, 15.

⁸⁷ *Ibid.*, 15-16.

⁸⁸ *Ibid.*, 15.

⁸⁹ *Ibid.*, 15-16.

the Propagation of the Faith permitted the transfer of rites between *Eastern* rites (and excluding Latin rites) with permission of two bishops of the rites⁹⁰

Benedict XIV was the first pope to deal extensively with the transferring of rites.⁹¹ In *Etsi pastoralis* (which might be called a “miniature Code of Oriental Canon Law”⁹²) he restricted any transferring of rites without the intervention of the Apostolic See, except in particular exceptions laid out in the document.⁹³ The express desire to maintain and protect the Eastern rites continued into Vatican I, with documents like Pius IX’s *In suprema* and *Amantissimi humani* in 1848 and 1862 respectively, which effectively limited transfer, especially when such transfer resulted in expanded Latinization of the Eastern rites.⁹⁴ *Orientalium dignitas* continued this preservation trend and established basic norms concerning transfer, particularly the right of Easterners to transfer back to their Eastern rite, even after accepting the Latin rite with approval of the Apostolic See.⁹⁵ These principles which sought to protect the Eastern churches (what would have been called “rites” at this time) from Latinization were finally codified in the 1917 Code, specifically in c. 98 § 3: “It is not lawful for anyone, without coming to the Apostolic See, to transfer to another rite, or, after

⁹⁰ SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, 20 November 1838, *Collectanea Sacrae Congregationis de Propaganda Fide: seu Decreta, Instructiones, Rescripta*, no. 878, 499-500. Nagy, *Transfer of Ascription*, 54.

⁹¹ BASSETT, *The Determination of Rite*, 48.

⁹² PALLATH, “The Teaching of the Popes,” 140.

⁹³ *EP*, § IX, in *Codicis iuris canonici fontes*, 750–755 (1926).

⁹⁴ *Is suprema*, in *Pii IX Pontificis Maximi acta*, 78–91. PIUS IX, Encyclical Letter *Amantissimi humani generis*, 8 April 1862, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, II, Rome, Typis polyglottis Vaticanis, 1928, 955–961. *OD*, in *Codicis iuris canonici fontes*, 454–459 (1933). BASSETT, *The Determination of Rite*, 59-60.

⁹⁵ *OD*, *Codicis iuris canonici fontes*, 454–459 (1933).

legitimate transfer, to return to the former.”⁹⁶ The meaning of this law was debated by canonists, particularly with respect to whether it referred to liceity or validity, a problem, noted above, that plagues *CCEO* c. 35.⁹⁷ This problem was addressed in 1957 with *CS*, which acted to modify and interpret the 1917 Code, providing the norms for transfer for the Eastern churches. *CS* canon 8 made it clear that the transfer requirements, as expressed in the 1917 Code, were for validity. Accordingly, one could not validly transfer to another rite without explicit permission from the Apostolic See. This remained the law until the 1990 Code, with minor concessions such as a rescript to the Oriental Congregation in 1962 which granted certain papal legates the faculty to permit transfer when the ordinaries *a quo* and *ad quem* agreed.⁹⁸ Notable here is that transfer from an Eastern rite to the Latin rite still required explicit permission from the Apostolic See.

CCEO canon 32 today provides the standard by which transfer is analyzed in the Church today. Important to keep in mind in understanding c. 32 is the aforementioned history of the development of transfer in general, as it will provide the necessary context for understanding the law. The first draft of the schema for replacing canon 8 of *CS* was largely similar to the current form in the Code. The only significant difference is that the original schema called for the Hierarchs of the Churches, as opposed to bishops of the two territories, and that the original schema also called for a grave reason that necessitated transfer.⁹⁹

⁹⁶ *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus*, Typis polyglottis Vaticanis, 1917, English translation E. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, 56.

⁹⁷ GNESKO, *Interritual Relations*, 11. See also J. DUSKIE, *The Canonical Status of the Orientals in the United States*, Canon Law Studies, no. 48, Washington D.C., The Catholic University of America Press, 1928.

⁹⁸ NAGY, *Transfer of Ascription*, 27.

⁹⁹ *Ibid.*, 103-104.

3.2 – Canonical Opinions

The meaning of Church *sui iuris* has plagued c. 32 since its creation, and much of the controversy concerning the relationship of the two Codes has revolved around these few words. Specifically, when c. 32 uses the phrase “Church *sui iuris*,” does it refer to the Latin church or does it only refer to the Eastern churches? If it does refer to the Latin Churches, would this mean that Eastern Catholics may transfer to the Latin Church with the written permission for their eparchial bishop and a bishop of the Latin Church in the same territory? Nedungatt called opinions on this “divided.”¹⁰⁰ The other side of the question was addressed by the Secretariat of State in 1992 via a special rescript *ex audientia Sanctissimi*, which filled in gaps in c. 112 by stating that a Latin Catholic seeking to transfer to an Eastern Church need only the permission of his Latin bishop and the eparchial bishop in that territory.¹⁰¹ While helpful, this failed to address the question created by c. 32. This issue has been addressed by a number of canonists, with a variety of opinions. Abbass argues that there are two approaches to the question: the minority “restrictive” approach and the majority “inclusive” approach.¹⁰² The minority approach argues that Church *sui iuris* in c. 32 does not refer to the Latin Church, and accordingly, even if an Eastern Catholic had permission from his bishop and a Latin bishop in the same territory, he could not validly transfer without explicit consent of the Apostolic See. This position has previously been held by canonists like Fürst, Brogi, Erdö, and Gefaell, who argue that *CCEO* c. 1 requires an explicit reference to the

¹⁰⁰ NEDUNGATT, *A Guide to the Eastern Code*, 121.

¹⁰¹ SECRETARY OF STATE, rescript *ex audientia Sanctissimi*, 26 November 1992, in AAS 85 (1993), 81, English translation in “Transfer to Another Church *Sui Iuris*, Including the Latin Church (*CCEO* C. 32 § 2),” in *The Jurist*, 72 (2012), 645.

¹⁰² J. ABBASS, “Transfer to Another Church *Sui Iuris*, Including the Latin Church (*CCEO* C. 32 § 2),” in *The Jurist*, 72 (2012), 646, 650 (=ABBASS, “Transfer to Another Church *Sui Iuris*).

Latin Church to in fact relate to the Latin Church. As Abbass has noted, this lies at the root of the disagreement. “Indeed, defining the exact relationship between the Latin and Eastern Codes has been a question that has occupied some canonists since the 1990 promulgation of the new Eastern legislation. To a great extent, the definition arrived at has depended on one’s interpretation of *CCEO* canon 1.”¹⁰³ Moreover, attention is placed on the language actually employed by the canon, which is particularly Eastern: “eparch” and “eparchial bishop.” Brogi, for example, juxtaposes this with the rescript, which uses language like “diocesan bishop” that distinguishes between the Latin church and the Eastern churches.¹⁰⁴ This position is more in line with the Church’s history as concerns transfer in that it is protective of the Eastern Churches. Restrictiveness as concerns the Eastern Churches has always been quite common.

The majority approach (which includes canonists like Salachas, Abbass, Lorusso, and Nedungatt) is more inclusive, arguing that the term Church *sui iuris* refers to the Latin church by implication, permitting an Eastern Catholic such a transfer if both his eparchial bishop and the diocesan bishop agree to his transfer.¹⁰⁵ This, they argue, is the case because the very nature of the matter (*ex natura rei*) involves the Latin Church. Finally, it is argued that the rescript focusing exclusively on Latin Catholics seeking to transfer to Eastern Churches by implication already assumes the alternative to be true in that it *was not* addressed.¹⁰⁶ Their position is perhaps best supported, though, by the 2011 Explanatory Note from the Pontifical Council for Legislative

¹⁰³ J. ABBASS, “*CCEO* Canon I and Absolving Eastern Catholics in the Latin Church,” in *Studia canonica*, 46, (2012), 76.

¹⁰⁴ ABBASS, “Transfer to Another Church *Sui Iuris*, 646-649.

¹⁰⁵ Cf. J. ABBASS, “The Eastern Code at the Service of Interecclesial Communion,” in *CLSA Proceedings*, 68 (2006), 65–86.

¹⁰⁶ ABBASS, “Transfer to Another Church *Sui Iuris*,” 650-655.

Texts, a document created in response to questions like those surrounding c. 32, which held that “one must hold that the Latin Church is implicitly included by analogy each time that *CCEO* explicitly uses the term “Church *sui iuris*” in the context of interecclesial relations.”¹⁰⁷

The majority view of this Note creates problems, even if it might shine light on how to deal with c. 32. Most importantly, what counts as “interecclesial relations”? How can one know if it is an interecclesial issue unless one first assumes that Church *sui iuris* refers to the Latin Church? Take c. 32 § 2 for example. In order for the majority of scholars to justify their claim that “Church *sui iuris*” in c. 32 applies to the Latin Church, they would need to show that c. 32 is an issue of “interecclesial relations.”¹⁰⁸ But this is precisely what is at issue in the debate. They cannot simply assume that c. 32 does actually concern transferring between Eastern Churches and the Latin Church (is “interecclesial”) in order to show that c. 32’s use of Church *sui iuris* applies to the Latin Church. One could simply ask, “I do not believe that c. 32 applies to the Latin Church, so how could it be an issue of interecclesial relations sufficient to invoke the Explanatory Note?” To respond that the Code uses the term Church *sui iuris* would be to miss the point of the question. There would need to be an additional argument to justify this, which brings the debate back to where it began. This same problem arises if one argues that c. 32 § 2 applies *ex natura rei* to the Latin Church, as, again, how would one know that is it by its nature related to the Latin Church unless it is first assumed that such a transfer to the Latin Church is even possible the way § 2 conceives? So how then would one evaluate this question? “Interecclesial” could not mean that

¹⁰⁷ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Explanatory Note regarding *CCEO* canon 1, 8 December 2011, in *Communicationes*, 43 (2011), 315-316, English translation in J. ABBASS, *The Eastern Code (Canon 1) and Its Application to the Latin Church*, Bangalore, Dharmaram Publications, 2014, 9-10.

¹⁰⁸ ABBASS, “*CCEO* Canon I and Absolving Eastern Catholics in the Latin Church,” 77.

the Latin Church is simply automatically invoked when it is an issue of *any* interecclesial activity or any times Church *sui iuris* is used, else even canons that explicitly refer to issues between just the Eastern Churches would pull in the Latin Church. Moreover, the Note sought to address relations between the Latin Church and the Eastern Churches, not between Churches as such. It had no view of simply the Eastern Churches.

Is c. 32 in fact an issue of interecclesial relations though? The Note does not explicitly say so, and the canon, as written, need not necessarily involve the Latin Church. In fact, that it uses language like “eparchial” and fails to mention the Latin Church at all (as compared to *CCEO* cc. 41, 207, 322, 432, 696, 830, 916, 1465, which mention it explicitly) seems to imply the opposite. It could simply be a canon that seeks to address relations between the Eastern Churches, something that would make sense considering the context in which it is placed. It is important to point out as well that Church history is not conducive to a formal process by which an Eastern Catholic could transfer as implied by the majority reading of c. 32. In fact, much of Church history was protective of the Eastern rites, rarely allowing transfer and not in the way imagined by c. 32. In many ways, c. 32 is not new, as it echoes the 1838 decree from the Sacred Congregation of the Propagation of Faith, which permitted transfer between rites with permission of bishops in the territories at the *exclusion* of the Latin Church. As such, unless c. 32 represents a change in the underlying protective principles of the Church, it is difficult to argue that it allows such transfers. Regardless, as the majority is certainly devoted to this reading, it must be given a great deal of credence, especially considering the context that the Note was delivered.

3.2 – Analysis as Applied to the Hypothetical Case

If the majority position does in fact hold, then Paul would need to seek permission from the Apostolic See for transfer (which may not be granted) or simply seek permission from his

eparchial bishop and the diocesan bishop in the same territory. But if the minority position holds, Paul could only seek the right to transfer if he petitions the Apostolic See. Any other transfer would be invalid.

To an additional question: why might this Note and this result have been delivered the way it was? It was perhaps the desire of the Church to permit these sort of transfers under c. 32, whether they were imagined or not, because of the problems that arise in situations like Paul's. This might be seen as a kind of concession to the modern faithfuls' rejection of the concept of inherited ritual tradition when they have no connection to it. Such a reading of c. 32 might provide them with some space for flexibility, to pass the decision on bishops of the Churches which seek a separate identity. As the same time, these sort of concessions come at a cost. The Eastern Churches face pressures to maintain identity in traditionally Latin territories. For the Eastern Churches, who feel their ancient traditions being replaced, despite having a desire to be who they are, this can lead to legitimate resentment.¹⁰⁹ "A Church will either seek its identity and draw its borders in self-protections; or it makes concessions to ecumenism, and then boundaries of clarity and identity are quickly lost."¹¹⁰

CONCLUSION

There is no simple solution to the fundamental problems underlying these conflicts. They exist in any circumstance where groups of people with particular identities relocate into new communities. More than this, though, these problems exist when any group seeks to preserve or

¹⁰⁹ "Though there may exist some underground latinizing tendencies, it will be easier for the Melkite church than for the others to become what she wishes to be – one hundred percent oriental." MADEY, J., "The Melkite Greek Catholic Church between East and West," in J, VELLIAN (ed.), *The Romanization Tendency*, Kottayam, Deepika Book Stall, 1975, 60.

¹¹⁰ FARRUGIA, "Re-Reading *Orientalium Ecclesiarum*," 369.

protect a particular tradition or group identity in a foreign context. In the case of immigration, this problem is well known. Problems surrounding assimilation, pluralism, nationalism, and globalism are certainly no more easily solvable than this problem. The Church's solution to this tension tends to lean protectionist, insofar as it seeks to maintain identity, with concessions given slowly over time to changes in an individual's identity. The paper's hypothetical case hoped to identify why this approach may be insufficient. On the one hand, while reading c. 35 to automatically ascribe Paul to the Greek Catholic Church would ensure continued membership, it also does nothing to actually connect him to his ritual tradition, which was abandoned before he was even born. His identity, as compared to flowing from a sense of birth and self, seems instead to be imposed downward upon him in an authoritative and inorganic way. He was not raised upon the milk of his Mother Church. Any legal consequence that may result from his ascription status will merely serve as a stumbling block to his faith. One might argue that his ascription status is mostly irrelevant to his actual living as a Catholic in the United States as he will more than likely be largely ignorant of his ascription status, and he is free to attend Mass at a Latin parish and believe himself to be Latin Catholic. If this is the case, though, might the law do more to protect his ritual tradition and membership?

While solving fundamental questions of identity and group is far outside the scope of this paper, some legal suggestions might be made. Primarily, a suggestion might be given for a multidimensional approach to how ascription and transfer might apply based on territorial location. In the discussions of c. 11 of *Cleri sanctitati*, there were suggestions that maintenance of rite need only take place if the person is within Eastern lands. Perhaps this idea should be reexamined in light of current circumstances. It is not a completely foreign concept to the Eastern Code either. See, for example, c. 588, which recommends that care be taken so that catechumens ascribe to a

Church *sui iuris* “more appropriate to their culture.” This principle could apply to both cc. 35 and 32. That is, with respect to c. 35 a change might be made so that ascription is in fact automatic for any Eastern Christian joining the Church *who resides in a traditionally Eastern territory* as defined by the Apostolic See or the bishops. But ascription would be urged (similar to c. 35 today) to maintain his rite in a traditionally Latin territory. Similarly, in c. 32 a suggestion might be made not to apply the canon to the Latin Church *in traditionally Eastern territories* as defined by the Apostolic See or the bishops, but to do so in territories that are traditionally Latin.

Regardless of any solutions the Church might devise, attention should be placed in balancing these two interests of identity and unity.¹¹¹ If the Church does in fact subscribe to a kind of ritualistic pluralism as concerning identity, it needs to provide clear mechanisms that do not passively impede a faithful’s conversion and expression in the Church. Attention must be placed on the fact that Paul was brought to the Church in a Latin environment. Faith, in many ways, is fragile, and particular graces at particular times convert hearts. This being true, though, the Church, a bastion of tradition, an ark against quickly changing tides, must find a means of protecting its ancient disciplines. As Farrugia writes, thinking back upon *OE*: “Much to its credit, *OE* established identity as double-pronged, looking inwards and outwards. It takes more than acrobatics to coordinate both directions without harmonizing them irenically.”¹¹²

¹¹¹ FARRUGIA, “Re-Reading *Orientalium Ecclesiarum*,” 367-370.

¹¹² *Ibid.*, 369.

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