

ROBERT OMBRES

«HOW CAN THIS BE JUSTIFIED?». REFLECTIONS
ON CANON 868 § 2 OF THE 1983 CODE OF CANON LAW ⁽¹⁾

Some theological elements. — The legislative history. — Understanding the canon.
— The need for an authentic interpretation. — Conclusion.

At a time when great respect is given to conscience and its dignity, and Vatican II's declaration on religious freedom is much quoted ⁽²⁾ (Latin) Catholic canon law considers licit the baptism of infants in danger of death even against the wishes of their parents (canon 868 § 2). How can this be justified, especially as the baptised child might survive the danger of death and face life as a Catholic in a family that had opposed the baptism? The question in the title of this paper was in fact asked along these lines by one of the consultants drafting the present Code ⁽³⁾, and the approaching beatification of Pope Pius IX in 2000 revived memories of the international furore surrounding the Mortara case.

We are dealing with a canon that rests on centuries of troubled experience, and that seeks to order issues of great ecclesiological importance. This terse juridical norm embodies a host of theological complexities as fundamental as the nature of God's providence,

⁽¹⁾ This is the revised version of a paper presented on 16 May 2001 at the annual conference of the Canon Law Society of Great Britain and Ireland.

⁽²⁾ *Dignitatis humanae* in N.P. TANNER (ed.), *Decrees of the Ecumenical Councils* (London 1990) II, 1001-1011; H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II* (London 1969) IV, 49-86 (Pietro Pavan). Pavan helped formulate the Declaration.

⁽³⁾ *Communicationes* 30 (1998) 299.

knowledge of an individual's eternal destiny, original sin, competing fundamental rights and duties, and the necessity of the sacrament of baptism for salvation. Catholic theology today has to balance the hope that there is a way of salvation for children who die unbaptised with the urgent call not to prevent infant baptism⁽⁴⁾. An infant is a child under 7 years of age (canon 97 § 2), and so all the issues involved in applying canon 868 § 2 have to be resolved in the highly-charged context of parents' opposition to the baptism of their critically ill child.

Some theological elements.

Canon law is a theological science, but a distinct one with its own sources, objectives, methods and traditions. The canon we are looking at connects with several other theological disciplines, from Scriptural exegesis to ecclesiology, but on its own terms and within the limits proper to each discipline. Infant baptism even against the wishes of the parents needs to be approached in a multi-disciplinary way if its full Christian meaning is to be discovered. Canonists need an awareness of this, whilst proceeding in ways proper to their own subject. Many of the theological issues involved are among the most profound and subtle in the whole of Catholic teaching, long debated⁽⁵⁾.

Briefly, and without analysing in detail the relevant canons and their sources, some of the essential theological elements embodied in our canon can be set out. Canon 849 is the foundational canon. Baptism, either by actual reception or at least by desire, is necessary for salvation. Its necessity is based on its effects, even in babies. The baptised are freed from sins, are regenerated as children of God and, made like to Christ by an indelible character, and are incorporated into the Church. In case of necessity, any person who has the requisite intention may lawfully baptise (canon 861), a valid baptism cannot be repeated (canon 845), and the character it confers is indelible (canon 849). For infant baptism to be lawful in what we might call normal circumstances, there is required the consent of at least one parent, together with a founded hope that the child will then

⁽⁴⁾ *The Catechism of the Catholic Church* (rev.ed.London 1999) p.286. The topic proved difficult and many-sided from the very beginning of Vatican II; G. ALBERIGO & J.A. KOMONCHAK (eds.), *History of Vatican II* (Maryknoll 1995) I, 245 and 310.

⁽⁵⁾ I am grateful to Fr Denis Geraghty OP for clarifying the Scriptural and theological issues.

be brought up in the Catholic religion (canon 868 § 1). If there is danger of death, infants are to be baptised without delay (canon 867 § 2), and aborted fetuses, if they are alive, are to be baptised, in so far as this is possible (canon 871). In case of necessity, anyone who has the requisite intention may lawfully baptise (canon 862) ⁽⁶⁾. Children whose parents had intended to have them baptised but who died before baptism may be allowed Church funeral rites by the local Ordinary (canon 1183 § 2).

Even from this sketch of some key theological elements explicitly stated in current canon law we can begin to see the nature of the issues and problems involved in understanding canon 868 § 2. We can restate these elements to set the interpretative context for our canon. Whatever interpretation is to be given to the canonical norm and however it is to be put into practice, this must be within the total canonical ordering and its theological meaning. Baptism, then, is necessary for salvation, and once validly conferred it cannot be undone, whatever the subjective wishes of the baptised person. All the baptised enter into some degree of communion with the Catholic Church (canon 205). Once fully in communion by baptism or reception, a person cannot undo this membership ⁽⁷⁾. Indeed, once a Catholic, always a Catholic ⁽⁸⁾. In the case of a healthy infant, the consent to baptism of at least one parent is required. In danger of death, baptism is not to be delayed, anyone with the requisite intention may baptise, and such baptism may take place even against the wishes of the parents.

⁽⁶⁾ Establishing the foundation of this power to baptise, particularly if the minister is unbaptised, is complex. In the unbaptised minister, the power is by concession of the Church given the necessity of baptism for salvation: A. URRU, «Ministro Straordinario del Battesimo: Fondamento di Tale Potestà» in Pontificia Università S. Tommaso, *Questioni Canoniche* (Milan 1984) 200-213.

⁽⁷⁾ A breach of communion may be subjectively sinful, and it may also lead to sanctions because of apostasy, schism or heresy (canons 209 and 1364). Vatican II's declaration on religious freedom is carefully subtitled to refer to social and civil liberty. Traditional Catholic teaching on the moral obligation towards the true religion and the one Church is left intact (*Dignitatis humanae* n. 1).

⁽⁸⁾ The Catholic Church is not a voluntary association in that a member can never resign or totally abandon it. Exceptions as in canons 1086, 1117 and 1124 prove the rule; L. NAVARRO, *Persone e Soggetti nel Diritto della Chiesa* (Rome 2000) pp. 36-7. The contrary position was argued by P. COLELLA, *La Libertà Religiosa nell'Ordinamento Canonico* (Naples 1979).

Justification for the existence of the canonical norm, and for its use in practice, can be provided from a variety of directions. From the point of view of the Church, it has a mission to baptise, which is a right and a duty, and it cannot deny the sacraments to those who opportunely ask for them, are properly disposed and are not prohibited by law from receiving them (canon 843 § 1). From the point of view of the infant, the claim to be baptised can be justified on various grounds. Baptism in danger of death meets a real need in the infant; it gives the infant the benefits of the sacrament; and it assures its eternal salvation in heaven if death occurs in infancy. A separate justification for the infant's claim would be its status as a *right*. This claim for a right to baptism is separate from the standing of catechumens⁽⁹⁾.

How might a right to baptism be constructed in terms of canon law?⁽¹⁰⁾ Theologically it can be said that there is a natural desire for salvation and that baptism, either actual or by desire, is necessary for salvation. Even without the acceptance of the gospel, the unbaptised are related to the People of God in various ways. This is the clear conciliar teaching in *Lumen gentium*⁽¹¹⁾. In Thomist terms, referred to in the conciliar teaching, the unbaptised although not actually belonging to the Church do so «*in potentia*»⁽¹²⁾. It is also Catholic doctrine that the human person has a right to religious freedom⁽¹³⁾. Without expanding this theological account further, it can be said that in its essentials it is crystallised in canon 849 (necessity of baptism)⁽¹⁴⁾, and in canon 748. The latter states that everyone is bound to seek the truth in the matters which concern God and his Church; when they have found it, then by divine law they are bound, and they have the right, to embrace and keep it. The new canon extends the terms of canon 1322 § 2 of the 1917 Code, and indeed of the con-

⁽⁹⁾ G. TREVISAN, «Lo "Statuto Giuridico" del Catecumeno» *Quaderni di Diritto Ecclesiale* 10 (1997) 243-258.

⁽¹⁰⁾ L. BENDER, «Donatio ad Causam Piam Facta ab Infideli» *Ephemerides Iuris Canonici* 11 (1955) 439-478; G. LO CASTRO, *Il Soggetto e i suoi Diritti nello Ordinamento Canonico* (Milano 1985); C.J. ERRAZURIZ, «Il Battesimo degli adulti come Diritto» *Ius Ecclesiae* 2 (1990) 3; R. OMBRES, *Infant Baptism: The 1983 Code of Canon Law and Church of England Law* (PUST, Roma 1999) pp. 44-7.

⁽¹¹⁾ *Lumen gentium* n. 16 in N.P. TANNER (ed.), *Decrees II*, 861-2.

⁽¹²⁾ AQUINAS, *Summa Theologiae* III q. 8 a.3 ad 1; A. URRU, *art. cit.*

⁽¹³⁾ *Dignitatis humanae* n. 2 in N.P. TANNER (ed.), *Decrees II*, 1002.

⁽¹⁴⁾ The canons should include a reference to baptism by desire because of its great doctrinal importance; *Communicationes* 15 (1989) 177.

iliar declaration on which it is based⁽¹⁵⁾, and speaks of a «right» (*ius*) to embrace the truth. As for any particular individual coming for baptism, certain conditions will have to be met either by the adult candidate (canon 865) or by the infant (canon 868). Some of these conditions affect validity, others licitness. A request for the baptism of someone in danger of death is to be evaluated differently from a request made in normal circumstances. It is a vital norm that sacred ministers may not deny the sacraments to those who opportunely ask for them, are properly disposed and are not prohibited by law from receiving them.

For our purposes, a «right» is taken to mean a justified claim to be given something by someone else who therefore has the duty to give it⁽¹⁶⁾. The position being proposed aims at demonstrating the existence of a right to baptism, indeed no less than «the fundamental and eminently ecclesial right of every well-disposed person to receive baptism»⁽¹⁷⁾. As well as the right to receive instruction and to be baptised, an unbaptised person has other expectations as regards the Church's constitutional organisation. At the basis of it all, is the unbaptised person's ordering towards the People of God flowing from Christ's universal and founding will. If, as is being argued, there is a right to baptism, then such a right has not only to be respected by all the faithful, but it places what might be called an «institutional duty» on the Church as a whole not only to respect the right but actually to promote it. To consider only the respect owed by everyone to the bearer of the right to baptism would be to hold an extreme and unsatisfactory individualistic position⁽¹⁸⁾. It is at least arguable, therefore, that an infant in danger of death has a right to baptism, but there are conceptual difficulties in maintaining this. Moreover, if such a right exists, it would also be difficult to deny it in practice and yet canon 868 § 2 is far from making baptism a duty. But as has been shown already, the infant's claim to baptism in danger of death can be justified without recourse to any right to baptism.

(15) *Dignitatis humanae* n. 1 in N.P. TANNER (ed.), *Decrees II*, 1002; *Codex Iuris Canonici, Fontium annotationae* (Vaticano 1989) p. 209.

(16) J. FINNIS, *Natural Law and Natural Rights* (Oxford 1980) pp. 199-205.

(17) CANADIAN, *Commentary* p. 87.

(18) J. HERVADA, *Diritto Costituzionale Canonico* (Milano 1989) pp. 99-100 and 140-3.

The problematic nature inherent in these canons became a topic of international news coverage and polemic in the Mortara case. It is not impossible that a similar case may come to prominence again, either in terms of alleged violation of parental rights in a particular State or in the context of Human Rights⁽¹⁹⁾. There have been at least two recent reported cases in international law involving infant baptism⁽²⁰⁾. Last year, a leading British ecclesiastical lawyer drew attention to baptism as an area of possible application of the Human Rights Act 1998⁽²¹⁾. When the administrative board of the Canadian Conference of Catholic Bishops accepted a cautious policy statement concerning canon 868 § 2, the pro-nuncio immediately counselled against too much prudence⁽²²⁾. Turning from the prediction of likely future clashes between canon law and secular law relating to infant baptism against the wishes of parents, we can examine a famous case now retold at length by David Kertzer⁽²³⁾.

The Mortaras were a Jewish family living in Bologna before the unification of Italy. Edgardo, their son born in 1851, was secretly baptised as a child by their maid whilst very ill. The child survived, eventually news of the baptism spread, and Edgardo was taken away from his family and put in an institution in Rome to give him a Catholic upbringing. Pius IX took a personal interest. Mortara grew up to become a priest and died at a great age in 1940. He travelled round Europe, often weaving into his sermons the remarkable tale of how God chose an illiterate servant girl to give a child the power of divine grace. When the events first became known publicly there was international polemic, chiefly concerning the separation of the child from his parents. The case illustrated dramatically the canon law on

⁽¹⁹⁾ Under English law, a county court remitted to the High Court a Muslim father's request for an injunction under the Children Act 1989 to prevent the mother having their child baptised in the Church of England; N. DOE, *The Legal Framework of the Church of England* (Oxford 1996) p. 317 n. 47.

⁽²⁰⁾ *X v Denmark* (7374/76) DR 5,157 and *Prussner v Germany* [1986] 8 EHRR 79. Essential background in P. SIEGHART, *The International Law of Human Rights* (Oxford 1983); J.E.S. FAWCETT, *The Application of the European Convention on Human Rights* (2nd ed. Oxford 1987); M.D. EVANS, *Religious Liberty and International Law in Europe* (Cambridge 1997).

⁽²¹⁾ M. HILL, «The Impact for the Church of England of the Human Rights Act 1998» *Ecclesiastical Law Journal* (2000) 431-9 at p. 439.

⁽²²⁾ W.H. WOESTMAN, *Sacraments* (2nd ed. Ottawa 1996) p. 64.

⁽²³⁾ D.I. KERTZER, *The Kidnapping of Edgardo Mortara* (London 1997).

infant baptism in danger of death, its indelible consequences, the requirements for valid baptism and its proof. As Secretary of State, Cardinal Antonelli explained to the minister of the King of the Low Countries that the matter was entirely religious, involving baptism administered to a child with all the consequences that flow from it⁽²⁴⁾. On behalf of the Mortaras, in 1858 the Jewish community in Rome presented Pius IX with a learned account of its objections to the Church's actions. The Holy See replied publicly and at length⁽²⁵⁾.

The legislative history.

A recent work has drawn attention systematically to the « legislative history » behind the making of the canons of the 1983 Code⁽²⁶⁾, and the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law published in 1989 an edition of this Code with sources going back to the 1917 Code for almost every canon. In its turn, there are editions of the 1917 Code indicating for its canons sources going back to the medieval period. A few soundings may be helpful in gaining a full understanding of canon 868 § 2 and guiding its application in practice.

Canon 750 § 1 of the 1917 Code had provided that the infants of « infidels » are baptised licitly when their life is in danger and it is prudently foreseen they will die before attaining the use of reason, even if the parents are opposed⁽²⁷⁾. The long history of debate, practice and disputes behind the 1917 Code cannot be gone into here. Suffice to say that the provision in the 1971 draft of the present canon was that an infant in danger of death was not baptised licitly if both parents were expressly contrary to the baptism⁽²⁸⁾. The current law is exactly the opposite, a remarkable difference on such a basic issue.

(24) D.I. KERTZER, *op. cit.*, p. 124. Fr Pier Gaetano Feletti OP, as chief Inquisitor of the Holy Office in Bologna, was prosecuted in the secular courts for his part in the Mortara case.

(25) D.I. KERTZER, *op. cit.* chpt 15. The Pope later speculated that the Jews had the help of a renegade priest, for who else could be so knowledgeable of canon law and Church precedent, and capable of writing a Latin text?

(26) E.N. PETERS, *Tabulae Congruentiae inter Codicem Iuris Canonici et Versiones Anteriores Canonum* (Montréal 2000).

(27) Canon 751 extended these norms to other kinds of parents, such as schismatics or heretics.

(28) *Communicationes* 3 (1971) 200.

To a consultor who argued in 1969 in favour of keeping the 1917 norm because recent theories lessening the necessity of infant baptism were not wholly safe as eternal salvation was involved, a long reply was offered based on Vatican II's teaching on the right to religious freedom and the need for free consent. It is according to natural law that parents exercise the rights of their infants⁽²⁹⁾. A major justification, then, for reversing the 1917 canonical norm could rely explicitly on the teaching in *Dignitatis humanae* n. 10 that the act of faith is of its nature voluntary, and requires a free and rational allegiance of faith. The adult seeking baptism has to act voluntarily, and the parents do so on behalf of the infant⁽³⁰⁾. This was still the position adopted in the 1975 schema. By 1978, the proposed norm allowed infant baptism even if the parents were opposed, unless there was danger of hatred of religion arising as a consequence⁽³¹⁾. The caveat was already established among commentators on the 1917 Code. This norm entered the 1980 schema and subsequently the words of the final clause regarding hatred of religion were suppressed.

A rapid perusal of the legislative history of canon 868 § 2 shows a surprising set of draft texts and a number of arguments for and against the current law. To the extent that the issue concerns rights, we can note that a *plurality* of rights and duties is involved: of the infant, of the parents, of civil society and of the Church. These rights can be and have been specified in different ways, but rights have not only to be listed but also to be coordinated and weighed⁽³²⁾. The imminence of death affects their interplay. Rights and duties should not be considered or applied except within a total understanding of the human person, related to God and to others. Apart from talk of rights, we have seen already how there are issues of meeting needs and conferring benefits. Incidentally, the canons and their legislative history do not elaborate on the validity of infant baptism against the wishes of parents whether the infant is healthy or in danger of death — the concern is with licitness. The position as to the baptism of an

⁽²⁹⁾ *Communicationes* 30 (1998) 297-8.

⁽³⁰⁾ *Communicationes* 7 (1975) 30.

⁽³¹⁾ *Communicationes* 13 (1981) 224.

⁽³²⁾ S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (New York 1946) I, 336; the child is «in extreme spiritual need in which all inferior rights must give way».

adult, both in health and in danger of death, is regulated by canon 865. Canon law is categorical that it is never right (*fas*) for anyone to force others to embrace the catholic faith against their conscience (canon 748 § 2). Comparing this last canon with canon 1351 of the 1917 Code, we notice the insertion of the word «conscience». The equivalent canon for Eastern Catholics (canon 586) is even more protective of religious freedom.

Understanding the canon.

Canon 868 § 2 regulates canonically a difficult problem; difficult in terms of theology as well as of pastoral sensitivity. Aquinas's medieval discussion of the baptism of children of unbelievers when the parents are unwilling does not include danger of death situations⁽³³⁾. Whilst quoting Aquinas extensively, and acknowledging the high standing among canonists of his opposition to baptising the children of unwilling Jews and other «infidels», in 1747 Pope Benedict XIV supported baptism where death threatened the child⁽³⁴⁾. This first, authoritative papal intervention came appropriately from a Pope (Prospero Lambertini) who was a canonist of great learning and remarkable experience. With some qualifications, canon law and canonists have come to follow Benedict XIV.

Medieval canon law and its commentators dealt with infant baptism in a variety of ways, including a basic defence of the practice itself by Innocent III against heretics who considered it unbiblical⁽³⁵⁾. Yet given the high rate of infant mortality in the Middle Ages and the stress in the canon law of the period on baptising infants in case of necessity⁽³⁶⁾, it seems odd that no source earlier than 1637

⁽³³⁾ AQUINAS, *Summa Theologiae* II-II q. 10 a. 12 and III q. 68 a. 10; S. GRAYZEL, *The Church and the Jews in the XIIIth Century* II: 1254-1314 (New York 1989).

⁽³⁴⁾ BENEDICT XIV, *Instructio «Postremo mense»* (1747) n. 8, DS 2555; «...When it happens that a child of the Jews be found by any Christian to be close to death, I opine that he do a laudable thing, pleasing to God, in proffering eternal salvation to the child with cleansing water...». The complete text (see also n. 23) is in P. GASPARRI (ed), *Codicis Iuris Canonici Fontes* (Rome 1924) II, 62-91. See also the Pope's letter «*Probe*» (1751) n. 14 in P. GASPARRI, *op. cit.*, II, 347-8.

⁽³⁵⁾ INNOCENT III, *Maiores* (X 3.42.3).

⁽³⁶⁾ Simply to refer to England, see the Council of London (1237) on teaching the laity to baptise in necessity (F.M. POWICKE and C.R. CHENEY (eds.), *Councils & Synods: A.D. 1205-1313* (Oxford 1964) II, I, p. 247), and WILLIAM LYNDWOOD, *Provinciale* (Oxford 1679) p. 241 s.v. *propter necessitatem* for a wide interpretation of necessity.

could be indicated for canon 750 § 1 of the 1917 Code, and no source earlier than 1600 for canon 751. Benedict XIV cited no medieval authorities for his position⁽³⁷⁾. Concern with baptising the infants of unwilling parents in emergencies may have increased as a consequence of the great missionary expansion of the Church from the 16th century onwards. Missionaries had differing policies on mass conversions and permissible inducements. Finding a rationale for the law, and consequently applying it in practice, has remained problematic.

Canon Mahoney's representative modern explanation of the danger of death norm in the 1917 Code claimed constant theological support for it, provided baptism could be administered without danger of scandal⁽³⁸⁾. Even with this caveat, the reasons justifying the norm were not «perhaps, very satisfying». In such circumstances, it is thought the parental right ceases or since death is likely to deprive parents of their children parental rights suffer very little injury compared to the injury done to a child dying unbaptised⁽³⁹⁾. Since Vatican II and the promulgation of the 1983 Code, debates over the norm are cast differently but have not disappeared⁽⁴⁰⁾, and the canon has been seen to generate «justified perplexities»⁽⁴¹⁾.

The 1990 Code of Canons of the Eastern Churches needs to be mentioned in discussions of the Latin norms because it is of course doctrinally a fully Catholic document, was promulgated by the same supreme legislator, and dates from after the Latin code⁽⁴²⁾. Canon 681 § 4 states expressly that an infant of catholic or noncatholic parents is licitly baptised if it is prudently foreseen that death will occur

⁽³⁷⁾ It was different if a child of unbelievers had been abandoned or the like; GREGORY IX, *De infantibus et languidis expositis* (X 5.11). Benedict XIV did quote this medieval predecessor. See R.H. HELMHOLZ, *The Spirit of Classical Canon Law* (London 1996) for baptism in medieval canon law.

⁽³⁸⁾ A clause limiting canon 868 § 2's application when there might ensue hatred of religion was deleted because the danger that this might arise was the lesser evil; *Communicationes* 15 (1983) 182.

⁽³⁹⁾ E.J. MAHONEY, *Questions and Answers* II (London 1949) pp. 21-3.

⁽⁴⁰⁾ J.W. ROBERTSON, «Canons 867 and 868 and Baptising Infants against the Will of Parents», *The Jurist* 45 (1985) 631-8; J.M. MARTI, «La Regulación Canónica del Bautismo de Niños en Peligro de Muerte», *Ius Canonicum* 31 (1991) 709-733.

⁽⁴¹⁾ E. CORECCO & L. GEROSA, *Il Diritto della Chiesa* (Milano 1995) pp. 128-9.

⁽⁴²⁾ I am grateful to Fr Becket Soule OP for his assistance in connection with Eastern canon law. He must not be taken to share my interpretations.

before the use of reason is attained. Nothing is said about the attitude of the parents to the baptism.

As with the revision of Latin canon law, the Eastern norm was not easy to formulate. It was proposed that baptism where death was expected in infancy could take place without the consent of the parents but not if they were expressly opposed to it⁽⁴³⁾. The change in the law was linked to *Dignitatis humanae* n. 10⁽⁴⁴⁾. By 1982, however, «there were no more doubts» about the fact that the supreme good of dying infants prevails over every other right of the parents and the community. A wording very similar to the present canon 681 § 4 was adopted, and the norm was said to apply to all infants. Such baptisms are always licit⁽⁴⁵⁾. It would seem that the legislative history of the Eastern norm is similar to its Latin equivalent, and that the outcome is the same although not explicit in the Eastern Code. Commentators do not, however, have a common opinion. Pospishil says nothing at all about the norm⁽⁴⁶⁾, while Faris, without any reason being given, interprets it to mean that baptism can be without the consent of the parents but not against their wish⁽⁴⁷⁾. Salachas holds that although the Eastern code does not mention «expressly» the case where parents are opposed, baptism in such cases would be licit. The right of children to salvation when death threatens prevails over parental rights⁽⁴⁸⁾.

Justifying the norm is important both to gain a full understanding of it but also to help decide whether or not to baptise in practice. The wording of canon 868 § 2 does not require baptism and does not speak of validity. Given certain facts, it says that an infant is licitly baptised. It is worth noting that the *Catechism of the Catholic Church* is silent on the matter⁽⁴⁹⁾. If its justification is the essential value of

⁽⁴³⁾ *Nuntia* 4 (1977) 23.

⁽⁴⁴⁾ *Nuntia* 10 (1980) 5. It was said that the act of faith is of its nature voluntary, and that the parents act for their infants by the law of nature.

⁽⁴⁵⁾ Thus the *ius vigens* was reaffirmed, without using the words «*etiam invitis parentibus*» of canon 750 of the 1917 Code: *Nuntia* 15 (1982) 16.

⁽⁴⁶⁾ V.J. POSPISHIL, *Eastern Catholic Church Law* (2nd ed. New York 1996) p. 389. Nothing was said in the first edition either (New York) p. 295.

⁽⁴⁷⁾ J.D. FARIS, *Eastern Catholic Churches: Constitution and Government* (New York 1992) p. 161.

⁽⁴⁸⁾ D. SALACHAS, *Teologia e Disciplina dei Sacramenti nel Codice Latino e Orientale* (Bologna 1999) pp. 83-84.

⁽⁴⁹⁾ M. RIVELLA, «Battezzare i bambini in pericolo di morte anche contro la volontà dei genitori», *Quaderni di Diritto Ecclesiale* 9 (1996) 66-75.

baptism for the infant, then this value would seem to be the same universally and cannot be affected by the possible reaction of the parents or society. The kind of justification that stresses the spiritual needs of the dying infant or the importance of baptism favours an extensive use of the canon⁽⁵⁰⁾. If the rights of the parents and the socio-cultural repercussions are given weight, then another justification is needed so as to distinguish between unbaptised infants in danger of death and baptise only some. On this view, restrictive use would be made of the canon⁽⁵¹⁾.

The need for an authentic interpretation.

Canon 868 § 2 can only be applied in practice if the minister of baptism is clear as to its justification and rationale; which, of course, the canon itself does not indicate. Depending on this choice will follow an extensive or restrictive practice. It will now be suggested that a similar approach is needed to interpret the words «*non catholicorum*» in the canon. The canon states that it deals with an infant «of catholic parents, indeed even of non-catholic parents». What does «non-catholic» mean? Does it mean anyone who is not a catholic or is it a more restricted category, the baptised non-catholics? Once again, we shall be faced with an extensive and a restrictive possibility.

The 1983 Code states that ecclesiastical laws are to be understood according to the proper meaning of the words considered in

⁽⁵⁰⁾ The English edition of the Navarre commentary, says that danger of death dispels the danger of future perversion of the child, who is removed from the *patria potestas* by death and not by baptism. Likewise, the eternal salvation of the child prevails over the rights of parents; E. CAPARROS, M. THÉRIAULT, J. THORN (eds), *Code of Canon Law Annotated* (Montréal 1993) p. 568. Mgr Chiappetta mentions in a footnote the uncertainty of the consultors, but limits himself to saying that in danger of death the eternal salvation of the child prevails over the rights of the parents: L. CHIAPPETTA, *Il Codice di Diritto Canonico* (2nd ed Rome 1996) II,108. A number of objections to the canon are met by I. PÉREZ DE HEREDIA, «I Profili Ecumenici della "Salus Animarum" nella Codificazione della Chiesa Cattolica», *Ius Ecclesiae* 12 (2000) 465-491 at pp. 487-8.

⁽⁵¹⁾ Because of practical difficulties and taking into account religious pluralism, great prudence and reflection was advocated in Canada. «If the parents are opposed to the baptism, it should not take place unless there are particularly attenuating circumstances»; W.H. WOESTMAN, *op. cit.*, p. 64. *The Canon Law: Letter & Spirit* (London 1995) comments that in some countries or regions it may be wise or even necessary to bear in mind the civil law, or the custom-based, implications of baptising a child against the wishes of its parents (p. 478).

their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator (canon 17). Moreover, to the extent that the canons reproduce the former law, they are to be assessed also in the light of canonical tradition (canon 6 § 2). Even after the deployment of all these guides to interpretation, it would seem that only an authentic interpretation (canon 16) can resolve the remaining doubts.

This interpretative doubt has been adverted to by some commentators. Rivella has argued that only Christian parents come within the scope of the canon, so it is illicit to baptise the child of unbaptised parents against their will. Rivella relies on a contrast with the wording of the 1917 Code, and on the meaning of «non-catholic» elsewhere in the 1983 Code. He also adduces the absence of a similar provision in the 1990 Eastern Code and the *Catechism of the Catholic Church* ⁽⁵²⁾. Pavanello also restricts the canon to baptised non-catholic parents but gives no explanation for this ⁽⁵³⁾.

The 1917 Code treated the matter first as to parents who are «infidels» (the unbaptised) in canon 750, and then as to parents who are heretics, schismatics or catholics who have fallen into apostasy, heresy or schism in canon 751. Does the 1983 Code embrace all these categories in its reference to «non-catholics» or only the baptised? It is unlikely that the present canon 868 § 2 does not embody the former canon 750 § 1. In the earliest stages of revision it was remarked that what was said in canon 750 § 1 «applied to all infants» ⁽⁵⁴⁾, and the edition of the 1983 Code with sources indicates canon 750 § 1 for the present canon. In terms of parallel passages, canons 813 and 1170 use «non-catholics» to include the unbaptised. The term has been taken to include the unbaptised, e.g. Jewish parents, in the context of Canadian civil law ⁽⁵⁵⁾, and by some canonists ⁽⁵⁶⁾. On balance, it would seem that all infants in danger of

⁽⁵²⁾ M. RIVELLA, *art. cit.* 69-70, 72-3.

⁽⁵³⁾ P. PAVANELLO, «Rilevanza del Principio della Libertà Religiosa nell'Interno dell'Ordinamento Canonico», *Quaderni di Diritto Ecclesiale* 11 (1998) 267-283.

⁽⁵⁴⁾ *Communicationes* 32 (2000) 297.

⁽⁵⁵⁾ B. DALY, «Canonical Requirements of Parents in Cases of Infant Baptism according to the 1983 Code», *Studia Canonica* 20 (1986) 409-438.

⁽⁵⁶⁾ J.H. PROVOST and P.J. COGAN (eds), *Canon Law Society of America Advisory Opinions 1984-1993* (Washington 1995) p. 258.

death come within the scope of the canon. If so, it would have been better had the canon simply said that «any infant» is licitly baptised in danger of death, even if the parents are opposed.

Conclusion.

The canon law of the Latin Church states clearly that baptism is necessary for salvation, that parents are obliged to see that their infants are baptised within the first few weeks, and that if an infant is in danger of death it is to be baptised without any delay. It adds that an infant of catholic parents, indeed even of non-catholic parents, is licitly baptised in danger of death, even if the parents are opposed to it. It is this last norm (canon 868 § 2) that has proved difficult to interpret and therefore apply in practice. There is no information from the process of revising the 1917 Code as to why the attempt to change the received position was rejected. Commentators on the 1983 Code seem divided. The canon does not state an obligation, it does not command, and it is not expressly permissive. It is not even certain that all unbaptised infants in danger of death come within the scope of the canon. Keeping in mind the risk of controversy and even litigation or prosecution in the civil courts, it is difficult to assess how often and in what circumstances the canon is applied in practice.

The provision of canon 868 § 2 cannot be justified in any straightforward manner, and the kind of justification adopted by the minister of baptism will affect the interpretation and the application of the canon. At issue is the doctrinal teaching on the destiny of infants who die unbaptised and the respect owed to the decision of parents to oppose baptism when their child is in danger of death. The equivalent norm in Eastern canon law is also problematic. What has long been a delicate issue is further complicated by the teaching of Vatican II, the contemporary respect for rights, and the value now given to conscience and to faiths other than Christianity. Once again, danger of death has a great impact on canon law.