WELFARE OF THE CHILD AND BELIEFS OF THE PARENTS

Blood Transfusion,
Religious Education and Custody

Achilles C. Emilianides, Editor

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A Critical Analysis of the Case-Law of the European Court of Human Rights on Blood Transfusion and Religious Beliefs

Javier Martínez-Torrón*

Introductory Remarks

The topic of this conference is indeed a most interesting one, for conscientious objection to blood transfusions involves a conflict between two fundamental rights of particular significance: the right to life, without which no other right has any meaning, and the right to religious freedom, which guarantees that people are free to take the most essential choices in their lives. As in other conflicts of fundamental freedoms,[1] the State, being obliged to protect both

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1 Think, for instance, of the clash between freedom of expression and freedom of religion, which has attracted much attention in recent years. See, with respect to the European Court of Human Rights case law on these issues, J. Martínez-Torrón, 'Freedom of Expression versus Freedom of Religion in the European Court of Human Rights' in A. Sajo, (ed.), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, Budapest, 2007, pp. 233-269.

freedoms, must engage in a balancing process to determine which of them must prevail in any one particular case. This is not an easy task at all, at least for those of us who are persuaded that the State, when limiting a fundamental freedom, must endeavour to use the least restrictive means. This often implies the refusal to resort to *'simple'* solutions, which may unduly impair the fundamental rights of citizens.

These observations are particularly applicable to the conflict we consider here, for many people may be inclined to think that, when the right to life is in danger, no other right or freedom should be taken into consideration, without any further nuance. This would be, in my view, the typical case of a too *'simple'* solution that ignores the complexities involved in an accurate and refined protection of human rights.

The issue of refusal of blood transfusions is, of course, not exclusive to Cyprus, and neither is it exclusive to Jehovah's Witnesses. Although typically the adherents of this religion have an absolute rejection, on conscience grounds, of blood transfusions, there are other religions that go even beyond and refuse most medical treatments of any kind.[2] Here, I will focus on the issue of blood transfusions and on the attitude of Jehovah's Witnesses.

1. Tendencies in Comparative Law

With respect to conscientious objection to blood transfusions, and to medical treatments in general, the tendencies in comparative law vary according to two initial and important distinctions: on the one hand, the situation of adults and minors, respectively; and on the other hand, whether or not the treatments are necessary to prevent a serious risk for the life or health of the patient[3] – most often, the issue of blood transfusions arise when they are deemed essential to save the patient's life.

In the case of adults, the rule generally is that the free choice of individuals prevails even over the protection of the right to life. The reason is the guarantee of religious freedom as well as that of the right to privacy, which requires the informed consent of adults as a *sine qua non* for any medical intervention on their

2 See, for further references, R. Navarro-Valls & J. Martínez-Torrón, *Las objeciones de conciencia en derecho español y comparado*, Madrid, 1997, pp. 119 et seq. (there is an updated and much extended edition forthcoming).

3 See, for further details, R. Navarro-Valls & J. Martínez-Torrón, 'La objeción de conciencia a tratamientos médicos' in Base de Conocimiento Jurídico, Iustel (www.iustel.com).

bodies − except, of course, in emergency cases when the person is unconscious and cannot express any opinion.

In the case of minors the rule is just the opposite when there is a serious threat for the life or health of the minor in question. The right to life must prevail and medical treatments − blood transfusions included − can be imposed when the physicians in charge consider them necessary. The procedures to follow in these cases vary from country to country.[4] Very often, the judge decrees a temporary removal of the right to custody from the parents and authorises the physicians to perform the blood transfusion. Once the medical problem is solved and the child has recovered, the custody is returned to the parents. One of the issues that often arise in this type of case is the extent to which the judge must listen to the minor before removing the custody from the parents and authorising the transfusion. This will depend on the age and maturity of the child in question − the more mature the child is the more obliged the judge is to listen to him. However, judges almost always authorise transfusions when the probabilities of danger for the minor's life are high.

Although these rules seem clear and simple, the reality is much more complex and difficult, as illustrated by some examples. In the United States,[5] for instance, the courts have imposed medical treatments on pregnant women, or on parents with young children in their care, considering that the protection of the rights of the unborn child or of the young children were legal interests important enough to justify the limitation on the parents' right to religious freedom (and on the intangibility of their bodies).[6]

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4 See, for further details and references, R. Navarro-Valls, J. Martínez-Torrón & M.A. Jusdado, 'La objeción de conciencia a tratamientos médicos: Derecho comparado y Derecho español' in *Las relaciones entre la Iglesia y el Estado. Estudios en memoria del Profesor Pedro Lombardía*, Madrid, 1989, especially pp. 911-915, 925-928 & 936-949 (this essay is also published in: [1988] Persona y Derecho 163-277).

5 The case-law of the United States is especially rich in dealing with these situations. For an interesting and comprehensive study, by a Spanish professor, with abundant bibliographical references, see R. Palomino, *Las objeciones de conciencia: Conflictos entre conciencia y ley en el derecho norteamericano*, Madrid, 1994, pp. 255-355. Among US legal literature, see H.L. Hirsh & H. Phifer, 'The Interface of Medicine, Religion and the Law: Religious Objections to Medical Treatment' [1985] Medicine and Law 121-139; and M.L. Moore, 'Their Life is in the Blood: Jehovah's Witnesses, Blood Transfusions and the Courts' (1982-1983) 10 North Kentucky Law Review 281-304.

6 See, for instance, *Matter of Melideo*, 390 N.Y.S. 2d 523 (1976); *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964); *Raleigh-Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*, 42 N.J. 421, 201 A.2d 537 (1964); *John F. Kennedy Memorial Hospital* v. *Heston*, 58 N.J. 576, 279 A.2d 670 (1971); *In re Baby Doe*, N.E.2d

In a number of countries, one of the greatest concerns has been whether objector parents are criminally liable when a child dies out of negligence in providing a blood transfusion or other medical treatment necessary to preserve his life. The responses of the courts to this delicate issue have been diverse, and sometimes depend on the degree of cooperation (or lack of cooperation) provided by the objector parents.[7] In Spain, the Constitutional Court has held that parents are exempt from criminal responsibility if they adopted a passive cooperative attitude with respect to the intervention of the medical team but refused to actively cooperate to persuade their child – a minor, aged 13 – to accept a blood transfusion that he had refused.[8]

Another interesting issue, especially within the European system of healthcare, is whether the State has some economic liability when a public hospital refuses to perform a surgical intervention without a blood transfusion, as requested by the patient, but the same intervention is later performed by a private clinic without transfusion – with the consequence that the patient had to pay a large sum of money for an intervention that, in principle, was covered by his social security and would, therefore, have cost him less if performed in the public hospital. The issue is controversial but the trend is to deny that the patient has any right to be reimbursed for the expenses he incurred because his intervention has been carried out in a way compatible with his religious beliefs.[9]

2. The European Court of Human Rights and the Rights of Individual Conscience

With respect to the rights of individual conscience the attitude of the European Court of Human Rights (hereinafter *'ECtHR'* or 'the Court') has been arguably less protective than with respect to the corporate dimension of freedom of religion.[10] This seems awkward, considering that the European Convention

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(unpublished: 1979); *In the matter of an unnamed "infant", child of Cheryl and Anthony Lancaster*, No. C121-4104, Court of Chancery for the State of Delaware, 21 August 1981.

7 See R. Navarro-Valls, J. Martínez-Torrón & M.A. Jusdado, 'La objeción de conciencia a tratamientos médicos', cited in n. 4 above, pp. 915-919, 933-938 & 940-943.

8 See STC 154/2002, 18 July 2002.

9 See for instance, in Spain, STC 166/1996 (Constitutional Court), 28 October 1996 (with an interesting dissenting opinion); and STS 4926/2009, 25 June 2009 (Rec. No. 3404/2008, Sala de lo Social, Sección 1ª).

10 See J. Martínez-Torrón & R. Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe' in T. Lindholm, W.C. Durham & B.G. Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden, 2004, pp. 228-236.

(hereinafter *'ECHR'*), like all international documents on human rights, looks at the freedom of thought, conscience, and religion as a right that belongs primarily to individuals − on a conceptual level, the right of religious groups appears to be derivative from the individual's right. In any event, the Court's approach has not been very clear until now.

The problem of insufficient protection of individual freedom of religion or belief arises from the terminology utilised by the European Convention and most other international texts that describe the content of the freedom of religion and belief. Among the aspects of this freedom that deserve protection, article 9(1) ECHR mentions the right to manifest one's religion or belief in worship, teaching, *practice*, and observance. If we focus on the term practice, the most obvious interpretation seems to be that article 9 guarantees the right of individuals to behave in accordance with the prohibitions and dictates of their own consciences. It does not seem accurate to interpret the term practice as the mere practice of rites, considering that the ritual dimension of religious freedom is referred to in other terms used in article 9, in particular with the words *worship* and *observance*. For the rest, the guarantee offered by article 9 should be granted irrespective of whether these practices are based on the tenets of an institutional religion or derive from strictly personal beliefs and whether or not the individual's conscience is grounded on religious or non-religious beliefs. Of course, this guarantee is necessarily limited according to article 9(2).

This broad construction of the right to manifest one's belief in practice has been proposed by the General Comment of the Committee of Human Rights on article 18 of the 1966 UN International Covenant on Human Rights.[11] I am afraid, however, that the attitude of the Strasbourg jurisdiction has been different with regard to article 9 of the European Convention. I will try to summarise their approach to this question below.[12]

The ECtHR's case law has stressed the need to distinguish between the *internal* and *external* aspects of religious liberty. The former is the freedom to believe, which embraces the freedom to *choose* one's beliefs − religious or non-

11 The General Comment on article 18 was adopted by the Committee on 20 July 1993 *(General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93; CCPR/C/21/Rev.1/Add.4, General Comment No. 22).* For an analysis of the text, see B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective Legal Protection*, The Hague, 1996, pp. 307-375.

12 On this subject, see also M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge, 1997, pp. 293 et seq; and C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford, 2001, pp. 67 et seq. & 168 et seq.

religious − and the freedom to *change* one's religion. The latter consists of the freedom to *manifest* one's religion or belief. The internal dimension of religious freedom is *absolute* and may not be restricted, while the freedom to manifest religious beliefs in action is by its very nature *relative* and may be subjected to the restrictions specified in article 9(2).[13]

All this seems indisputable and is reflected in the notion that the State cannot judge on the legitimacy of religious beliefs or the means that believers choose to express them.[14] As a consequence, public authorities can neither take nor permit any direct action to impel the citizens to believe or not to believe in something. For this reason, in the *Kjeldsen* case in 1976, the Court held that the State, when organising the educational system, is not allowed to develop any activities that amount to indoctrinating the students with a particular religious or moral view of life contrary to the convictions of their parents.[15] In a similar direction, the Court

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13 This distinction, which has already been made by the European Commission of Human Rights, disappeared in 1998. See App. 10358/83, *C.* v. *United Kingdom,* 37 Decisions and Reports 147, Dec., in which the Commission utilises the expression *'forum internum'*. The same doctrine is reiterated in App. No. 10678/83 and 14049/88, *V.* v. *The Netherlands*, 39 Decisions and Reports 268. See also App. 11581/85, *Darby* v. *Sweden*, Rep. Com, 9 May 1989, § 44. The Court, following the Commission's approach, has subsequently alluded to this double side of religious freedom and has emphasised that the limits stated in article 9(2) are applicable only to the freedom to *manifest* one's religion or belief but not to the freedom to *choose* one's religion or belief. See App. 14307/88, *Kokkinakis* v. *Greece*, 25 May 1993, §§ 31 & 33.

14 '*[…] But for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate*'. See App. 18748/91, *Manoussakis et al.* v. *Greece*, Judgment of 26 September 1996, § 47; App. 30985/96, *Hasan and Chaush* v. *Bulgaria*, Judgment of 26 October 2000; § 78; App. 45701/99, *Metropolitan Church of Bessarabia* v. *Moldova*, Judgment of 13 December 2001, § 123; App. 72881/01, *Moscow Branch of the Salvation Army* v. *Russia*, Judgment of 5 October 2006, § 92.

15 Apps. No. 5095/71, 5920/72 & 5926/72, *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*, Judgment of 7 December 1976. This case related to the conscientious objection of some parents to the implementation of a new system of sex education in public schools intended to prevent undesired pregnancies among teenagers. The decision − favourable to the Danish government − focused on the interpretation of article 2 of the First Protocol (right to education and right of parents concerning their children's education). The same doctrine has been reaffirmed in more recent cases involving religious education: App. 15472/02, *Folgerø* v. *Norway*, Judgment of 29 June 2007, and App. 1448/04, *Zengin* v. *Turkey*, Judgment of 9 October 2007, both decided in favour of the applicants (for a comment on those decisions, see M.A. Jusdado & S. Cañamares, 'La objeción de conciencia en el ámbito educativo. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos Folgerø v. Noruega'; and J. Martínez-Torrón, 'La objeción de conciencia a la enseñanza religiosa y moral en la reciente jurisprudencia

sustained, in the *Buscarini* case, that a citizen cannot be compelled to take an oath on the Gospels as a requirement to hold a public office voluntarily assumed − this would be equivalent to forcing him to express a religious belief against his will.[16]

However, the crucial issue is understanding the protection of the freedom of individuals to *act* or *practice* according to the dictates of their own conscience, an issue that is closely connected with the problem of conflicts between law and conscience, between legal and moral duties. In my opinion, the analytical framework proposed by the European jurisdiction is not the most appropriate. Its approach has consisted mainly in drawing a line of separation between the concepts of *manifestation* and *motivation*. From this perspective, the European Convention would not necessarily guarantee the right to practice any particular external behaviour adapted to one's belief. In other words, the term *practice* does not include each and every act motivated or influenced by a religion or belief.[17]

This approach seems reasonable in abstract, for behaviour *obliged* by conscience − which seems to be the behaviour protected by article 9 − is different from behaviour simply *permitted* by conscience. Nevertheless, the truth is that the Strasbourg case law reveals a rather restrictive attitude. In particular, it has tended to consider that the protective umbrella of article 9 does not necessarily extend to an individual's behaviour imposed by his own conscience, especially

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de Estrasburgo', both in (2007) 15 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (www.iustel.com).

16 App. 24645/94, *Buscarini and Others* v. *San Marino,* Judgment of 18 February 1999. Other recent cases on public oaths, with different profiles, are App. 19516/06, *Alexandridis* v. *Greece*, Judgment of 21 February 2008, and Apps. 42837/06, 3237/07, 3269/07, 35793/07 & 6099/08, *Dimitras et al.* v. *Greece*, Judgment of 2 June 2010 − the Court held that requiring a person to publicly declare that he/she is not an Orthodox, in order to be permitted to take a solemn promise instead of an oath, constitutes a violation of article 9 ECHR.

17 This doctrine had been repeatedly stated by the European Commission of Human Rights and was later assumed by the Court in App. 20704/92, *Kalaç* v. *Turkey,* Judgment of 1 July 1997, § 27; and in App. 30985/96, *Hasan and Chaush* v. *Bulgaria*, Judgment of 26 October 2000, § 60. With regard to the Commission's decisions, see App. 7050/75, *Arrowsmith* v. *United Kingdom,* 19 Decisions and Reports, pp. 19-20 (Rep. Com., 12 June 1979) (concerning a British pacifist sentenced to a term of imprisonment for having distributed illegal leaflets among English soldiers in Northern Ireland); App. 10358/83, *C.* v. *United Kingdom*, 37 Decisions and Reports, p. 147 (conscientious objection to paying taxes in the percentage of the State budget aimed at military costs); App. 10678/83, *V.* v. *The Netherlands*, 39 Decisions and Reports, p. 268 (conscientious objection to contributing to the public system of pensions); App. 11579/85, *Khan* v. *United Kingdom*, 48 Decisions and Reports, p. 255 (conflict between the laws governing religious and civil marriages); Dec. Adm. on App. No. 14049/88 (conscientious objection to paying taxes in the percentage of the State budget aimed at financing legal abortions in France).

when individuals endeavour to adapt their conduct to their moral obligations in ordinary life through behaviour that does not strictly consist in religious teaching or correspond to specific ceremonial practices.[18] Moreover, the ECtHR has stated that certain professional situations voluntarily assumed may entail additional specific restrictions on religious freedom, as in the case of the military.[19]

The European Court on the other hand, has often drawn implicitly a distinction between state's actions that have a direct and an indirect impact on religious freedom. In the Court's view, the state interferes with the exercise of freedom of religion or belief when an individual's behaviour is prevented or punished by a law or by other state activity *directly* aimed at restricting the manifestation, the worship, or the expansion of certain or of all religions. In these cases, the European Convention requires that the state justify the interference on the individual's freedom according to article 9(2), especially proving that the restrictive measures are *'necessary in a democratic society*'. This was indeed the approach of the Court when it decided in favour of the applicant in the *Kokkinakis* case because the Greek courts, based on the national laws in force against religious proselytism, had sentenced a Jehovah's Witness without enough evidence that he had been engaged in *'improper proselytism'.*[20]

The same occurred in the *Buscarini* case, where the Court held that requiring newly elected members of Parliament to swear allegiance to the Constitution on

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18 For further details on this approach of the Strasbourg jurisdiction, see J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, cited in n. 10 above, pp. 228 et seq.

19 See *Kalaç* v. *Turkey*, § 28. The Court affirmed that '*this occurs particularly within a system of military discipline that by its very nature implie[s] the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians'*. This case involved the compulsory retirement of an officer of the Turkish army, decreed by the Supreme Military Council, for his membership of an allegedly Islamic fundamentalist movement supporting ideas contrary to the constitutional principle of secularism.

20 See App. 14307/88, *Kokkinakis* v. *Greece*, Judgment of 25 May 1993. See J. Martínez-Torrón, 'Libertad de proselitismo en Europa: A propósito de una reciente sentencia del Tribunal europeo de derechos humanos' in [1994] Quaderni di diritto e politica ecclesiastica 59-71; J. Gunn, 'Adjudicating Rights of Conscience Under the European Convention on Human Rights' in J.D. van der Vyver & J. Witte, (eds.), *Religious Human Rights in Global Perspective*, Boston, 1996, pp. 305-330; P. Edge, 'The Missionary's Position After *Kokkinakis* v *Greece*', in [1995] 2 Web Journal of Current Legal Issues, available in http://webjcli.ncl.ac.uk/articles2/edge2.html. On the problems involved in determining a concept of proselytism in international law, see N. Lerner, 'Proselytism, Change of Religion, and International Human Rights' in (1998) 12 Emory International Law Review, pp. 477-561.

the Gospels, on pain of forfeiting their parliamentary seats, was contrary to the provisions of article 9 ECHR.[21] And a similar way of reasoning was followed by the Court in several cases that involved the use of Islamic headscarves or other religious symbols in public schools in different countries.[22] Although the ECtHR decided almost always against the applicants,[23] its analysis also began by recognising that imposing the prohibition of carrying certain religious symbols − on teachers or on students − constituted an interference with the applicants' religious freedom and the State was obliged to provide a sound justification under article 9(2) ECHR. I must add, however, that in cases of prohibition of religious symbols the Court has been too deferential to the margin of appreciation that is normally recognised to States in the interpretation of legitimate limitations on religious freedom according to the same article 9(2).[24]

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21 See n. 16 above and accompanying text.

22 See App. 16278/90, *Karaduman* v. *Turkey*, Judgment of 3 May 1993; App. 18783/91, *Bulut* v. *Turkey*, Judgment of 3 May 1993; App. 42393/98, *Dahlab* v. *Switzerland,* Judgment of 15 February 2001; App. 44774/98, *Leyla Şahin* v. *Turkey (Grand Chamber)*, Judgment of 10 November 2005; App. 26625/02, *Köse and 93 other applicants* v. *Turkey*, Judgment of 24 January 2006; App. 65500/01, *Kurtulmus* v. *Turkey*, Judgment of 24 January 2006; App. 27058/05 *Dogru* v. *France* and App. 31645/04, *Kervanci* v. *France*, Judgments of 4 December 2008, both decided by the same chamber of the ECtHR, the same day and with almost identical text; and App. 43563/08, *Aktas* v. *France*, 14308/09, *Bayrak* v. *France*, App. 18527/08, *Gamaleddyn* v. *France*, App. 29134/08, *Ghazal* c. *Francia*, App. 25463/08, *Jasvir Singh* c. *Francia*, and App. 27561/08, *Ranjit Singh* c. *Francia*, all of them dated 30 June 2009 (the latter two decisions referred to sikh turbans). For a further discussion of these cases, see, for instance, S. Cañamares Arribas, *Libertad religiosa, simbología y laicidad del Estado*, Pamplona, 2005, pp. 179-180; B. Rodrigo Lara, *Minoría de edad y libertad de conciencia*, Madrid, 2005, pp. 399-403; N. Lerner, 'How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance' in (2005) 13 Willamette Journal of International Law and Dispute Resolutions, pp. 65-85; B. Chelini-Pont & E. Tawil, 'Brèves remarques sur l'arrêt Leyla Sahin', in (2006-2007) 2 Annuaire Droit et Religions, pp. 607-611; T.J. Gunn, 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin* v. *Turkey*', in (2006-2007) 2 Annuaire Droit et Religions, pp. 639-665; J. Martínez-Torrón, 'Islam in Strasbourg: Can Politics Substitute for Law?' in W.C. Durham, T. Lindholm & R. Torfs (eds.), *Islam in Europe: Emerging Legal Issues*, forthcoming in 2010.

23 In a recent case, App. 41135/98, *Ahmet Arslan et al.* v. *Turkey*, Judgment of 23 February 2010, the Court decided in favour of the applicants but on that occasion the religious attire had been worn in the streets, not in an educational centre.

24 For further details on the margin of appreciation doctrine, and in general on limitations on freedom of religion, see J. Martínez-Torrón, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' in (2005) 19 Emory International Law Review 587-636, and the bibliography there cited.

The Strasbourg approach has been very different when dealing with *'neutral'* laws, i.e. laws that pursue legitimate secular goals. When the legal duties imposed by a *'neutral'* law collide with the moral obligations of certain individuals, these persons see their right to practice their religion or belief as being *indirectly* and nonetheless unavoidably restricted by that law − this accentuates the different types of conscientious objection.[25] The immediate consequence is that a moral burden is placed upon the shoulders of these people, as they must choose between disobedience to the law and disobedience to their conscience − one receives a worldly punishment, the other entails a spiritual sanction. In those cases, the Strasbourg jurisdiction has apparently tended to deny that article 9 offers any protection, affirming that there was not a State interference with religious freedom. In short, its analysis can be summarised as follows: it is not necessary to consider whether the State can provide a legitimate justification for the legislation under attack (according to article 9[2]) because the right to freedom of thought, conscience, and religion (according to the description of its content in article 9[1]) has not actually been (directly) violated.

Although there is not yet a conclusive doctrine of the ECtHR on the issue of conflicts between neutral laws and individuals' freedom of conscience, we could mention three cases in which it is possible to observe some traces of the foregoing mode of reasoning. Significantly, all three cases referred to problems arising within the educational environment, which might lead to consider them as right to education cases rather than freedom of religion cases. One is *Kjeldsen*, in 1976, which concerned the opposition of the parents of some students to compulsory sex education for teenagers in the public schools of Denmark. The case was decided − against the applicants − in the light of article 2 of the First Protocol and the Court proposed a restrictive interpretation of the parents' right with regard to the religious and philosophical orientation of their children's education. In brief, the Court held that the school authorities are not obliged to accommodate the parents' claims of conscience against some educational contents, and that the State's power to control the educational environment is only limited by the prohibition of indoctrination.[26]

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25 An extensive analysis of conscientious objections in international and comparative law, with numerous bibliographical and case law references, can be found in R. Navarro-Valls & J. Martínez-Torrón, *Las objeciones de conciencia*, cited in n. 2 above (there is also an Italian version: *Le obiezioni di coscienza: Profili di diritto comparato*, Torino, 1995).

26 See n. 15 and accompanying text. For a more detailed analysis of the *Kjeldsen* decision, see R. Navarro-Valls & Martínez-Torrón, *Las objeciones de conciencia ...*, cited in n. 2 above, at 199-203.

Twenty years later, the twin decisions *Efstratiou* and *Valsamis* dealt with the applications of two Greek secondary school students, Jehovah's Witnesses, who refused, on religious grounds, to participate in the school parades organised in a national festivity.[27] The European Court, in the light of article 9 of the Convention and of article 2 of the First Protocol (as interpreted in *Kjeldsen*), sustained the Greek government's position and considered that the moderate sanction imposed to the students − one day's suspension from school − did not violate the applicants' rights under the ECHR.

In my opinion, this interpretation of article 9 inverts the logical order of concepts in this matter. It is universally accepted that human rights must be construed broadly. Therefore, in order to understand the exact meaning of the freedom to manifest one's religion or belief in *'practice'* it seems that we should approach the question in the following sequence. On the one hand, freedom to practice one's religion or belief must be understood as protecting, in principle, every act of the individual when he obeys the dictates of his own conscience (religiously or non-religiously inspired). But on the other hand, paragraph 2 of article 9 − the limitations on religious liberty − will be utilised, when necessary, as a corrective element for a freedom that by its own nature tends to be exercised in an undefined and unpredictable way.

Thus, we would manage to reconcile two paramount interests that can easily conflict with each other: the maximum degree of initial protection of the freedom of belief and the security that the legal order demands. Furthermore, we introduce an important assumption: the State has the burden of proof with regard to the necessity of a restrictive measure − i.e. it must affirmatively prove that, in a particular case of conflict, it is *'necessary in a democratic society'* to restrict the exercise of religious freedom. Following this approach would obstruct the development of policies that are a little sensitive towards religious freedom and that are especially harmful to minority groups.

3. The European Court and the Issue of Objection to Blood Transfusions

Turning now to the specific issue of conscientious objection to blood transfusions on religious grounds, the first remark is that this issue has never been

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27 App. 24095/94, *Efstratiou* v. *Greece* and App. 21787/93, *Valsamis* v. *Greece*, both of 18 December 1996. The texts of both decisions are almost identical, as indeed were the facts in issue. The applicants argued that their conscience prohibited them from being present in a civic celebration in which a war was remembered and in which military and ecclesiastical authorities took part.

submitted directly to the ECtHR jurisdiction. If it comes in the future, the Court would most likely sustain the right to objection in the case of adults − even at their lives' risk − considering that articles 8 and 9 ECHR move to respect the free will of a competent adult and therefore to require his informed consent before performing any medical intervention on his body (a different question is to what extent the Court would determine that public authorities are liable, and must compensate for damages, if they failed to respect this right). It is also predictable that the ECtHR would justify the imposition of a blood transfusion if the life or health of minors were at risk, in application of article 9(2) ECHR − religious freedom can be limited *'for the protection of the rights and freedoms of others'*.

However, the issue of conscientious objection to blood transfusions has been raised in the Court implicitly or incidentally, and the Court has never affirmed that this type of conscientious objection should or could have any negative effect for the person or the institution involved. The issue has been raised implicitly in those cases in which the legitimate activity of Jehovah's Witnesses was questioned by the national authorities for one or other reason, for it is well known that refusal of blood transfusion is a definite characteristic of the doctrine of that church. When dealing with these cases, the Court has never made any reference whatsoever to the possibility that the doctrine of Jehovah's Witnesses in general, or its religiously grounded refusal of blood transfusions in particular, could make the activity of this church limitable or less legitimate.

Thus, for example, in *Kokkinakis*, the ECtHR affirmed that the religious proselytism of Jehovah's Witnesses was legitimate, and could not be prohibited or punished by the law, as far as it was not improper or abusive.[28] In *Manoussakis*, also decided in favour of the applicant, the Court found that the Greek authorities' restrictions on the opening of a worship place for Jehovah's Witnesses were unjustified and excessive.[29] In *Tsavachidis*, a case regarding the surveillance of Jehovah's Witnesses by the Greek National Intelligence Service, the application was declared admissible − and the Commission reported that there was a violation of article 8 ECHR − but ended with a friendly settlement in which the Greek government submitted a formal statement declaring that *'the Jehovah's Witnesses are not, and will not in the future be, subject to any surveillance on account of their religious beliefs'*.[30]

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28 See n. 20 and accompanying text.

29 *Manoussakis*, cited in n. 14 above.

30 App. 28802/95, *Tsavachidis* v. *Greece*, Judgment of 21 January 1999. By the time the friendly settlement was reached, the European Commission of Human Rights had already written its report on the merits of the case and expressed the opinion that there had been a violation of

In *Paturel*, a case regarding freedom of expression, the ECtHR decided in favour of the applicant, a member of Jehovah's Witnesses that had written a very critical book against a French anti-sect association of Catholic inspiration, accusing it of persecuting religious minority groups in general and Jehovah's Witnesses in particular; the Court found that the sanctions imposed on the applicant by the French courts had violated article 10 ECHR and could not be justified by the animosity demonstrated by the applicant in his accusations.[31]

In two recent cases against Austria, the ECtHR held that the government's refusal to grant Jehovah's Witnesses the same legal status of other comparable religious communities was discriminatory and therefore violated article 9 ECHR read in conjunction with article 14 ECHR;[32] in one of the decisions it is noted that among the reasons alleged by the Austrian government were this church's *'refusal to perform military service or any form of alternative service for conscientious objectors, to participate in local community life and elections and to undergo certain types of medical treatment such as blood transfusions'*.[33]

In addition, the Strasbourg jurisdiction has dealt incidentally with the issue of objection to blood transfusions by Jehovah's Witnesses in two other cases. One of them referred to the denial of registration of Jehovah's Witnesses as a religious community in Bulgaria. Among the reasons for the rejection the Bulgarian government explicitly mentioned and emphasised their doctrine on blood transfusions. The application was declared admissible by the European Commission of Human Rights in 1997 and the parties reached a friendly settlement in 1998. According to the terms of this settlement, the Bulgarian government agreed to register Jehovah's Witnesses as a religious community whereas this church agreed − among other things − not to distribute forms among minors aimed at the refusal of blood transfusions, and accepted to respect Bulgarian law on medical care as well as to respect the free choice of each one of

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article 8 ECHR (thirteen votes to four) and that there had been no violation of article 9 ECHR (nine votes to eight).

31 App. 54968/00, *Paturel* v. *France*, Judgment of 22 December 2005. For further details and a comment on this decision, see J. Martínez-Torrón, 'Freedom of Expression versus Freedom of Religion in the European Court of Human Rights' in A. Sajo, (ed.), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, Budapest, 2007, pp. 245-247.

32 App. 40825/98, *Religionsgemeinschaft der Zeugen Jehovas et al.* v. *Austria*, Judgment of 31 July 2008; App. 76581/01, *Verein der Freunde der Christengemeinschaft et al.* v. *Austria*, Judgment of 26 February 2009.

33 *Religionsgemeinschaft der Zeugen Jehovas et al.* v. *Austria*, above, § 26.

their adult members with regard to blood transfusions.[34] It is not difficult to presume that, had the friendly settlement not been reached, the Court would have declared that the doctrine on blood transfusions was not a legitimate reason, under the European Convention, to reject registration as a religious legal person, especially taking into account the previous decision of the ECtHR in the *Hoffmann* case.

Hoffmann v. *Austria*[35] is, indeed, the case in which the ECtHR has given most consideration to the issue of conscientious objection to blood transfusions, even though the issue arose only in hypothetical terms. The applicant was Ingrid Hoffmann, a woman that had been baptised as Catholic and had married a Catholic in 1980, but later converted to Jehovah's Witnesses. The couple had two children (born in 1980 and 1982, respectively) that had also been baptised and raised as Catholics. Three years after the marriage, the applicant instituted divorce proceedings against her husband. One year later, in 1984, the divorce proceedings still pending, she abandoned her husband and took the children with her by unilateral decision with the intention to educate them according to the tenets of her new religion − as she actually did. The divorce was pronounced in June 1986 but prior to that date, in January and March 1986 respectively, the district court and the regional court granted custody rights to the mother.[36]

However, in September 1986, the Supreme Court of Austria overruled the decisions of the lower courts and granted custody to the father, considering that

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34 The Commission declared the application admissible in App. 28626/95, *Khristiansko Sdruzhenie "Svideteli na Iehova" (Christian Association Jehovah's Witnesses)* v. *Bulgaria*, Dec. Adm. 3 July 1997. The report of the same Commission, accepting the friendly settlement, was adopted on 9 March 1998. There was a subsequent case in which the issue of objection to blood transfusions was mentioned: App. 39015/97, *Lotter & Lotter* v. *Bulgaria*. The applicants were two Austrian nationals living in Bulgaria to whom the government decided not to extend their residence permit because they were Jehovah's Witnesses; the doctrine of this church, with explicit mention of blood transfusion, was indicated as ground for the government's decision. The Court declared the application admissible on 6 February 2003, and sanctioned a friendly settlement on 19 May 2004.

35 App. 12875/87, *Hoffmann* v. *Austria*, Judgment of 23 June 1993. For further details and a critical comment on this decision, see B. Rodrigo Lara, *Minoría de edad y libertad de conciencia*, Madrid, 2005; J. Martínez-Torrón, 'Derecho de familia y libertad de conciencia en la jurisprudencia del Tribunal Europeo de Derechos Humano' in *Derecho de familia y libertad de conciencia en los países de la Unión Europea y el derecho comparado*, Bilbao, 2001, pp. 153-156.

36 There is another interesting case concerning custody rights after a divorce between a Catholic husband and a wife that had converted to Jehovah's Witnesses, but on this occasion the issue of objection to blood transfusions was not raised: App. 64927/01, *Palau-Martinez* v. *France*, Judgment of 16 December 2003.

he was in a better position for the upbringing of their children and that the mother had infringed an implicit marital agreement about the religious education of the children. With regard to this latter point, the Supreme Court considered that the lower courts had incurred *'manifest illegality*' by not appreciating the violation of that implicit marital agreement by the mother − the national legislation on the religious education of children *(Bundesgesetz über die religiöse Kindererziehung)* provides that, in the absence of an explicit agreement, during the existence of the marriage neither parent may decide without the consent of the other that the child is to be brought up in a faith different from that shared by both parents at the time of the marriage or from that in which he or she has hitherto been brought up.[37] On the other hand, the Supreme Court accepted the father's argument about the possible risks for the children if they were integrated into the mother's religion, namely a certain social isolation − they were living in the Tyrol, an area with a large Catholic majority − and a danger for their health should they need an urgent blood transfusion in the future.

The ECtHR held that the decision of the Austrian Supreme Court had violated the applicant's rights under article 8 ECHR (right to private and family life) in conjunction with article 14 (principle of equality). In essence, the ECtHR accepted that the Supreme Court could have legitimately adopted the same position with regard to which parent was more suitable for the children's upbringing if its decision had been taken based only upon issues related to the children's well-being. But the European Court added that the Austrian Supreme Court had introduced a new element, the federal legislation on the religious education of children, which was based on the religion of parents, and in that respect held that '*a distinction based essentially on a difference in religion alone is not acceptable'*.[38] I will not go into the details of the Court's reasoning here,[39] but it is worth commenting on some aspects of the decision.

The main reason mentioned by the ECtHR to decide in favour of the applicant was that it is not legitimate for a court to make a distinction *'essentially based on a difference in religion'* between the parents when deciding which of them must be granted custody. This principle is correct but in my opinion was misapplied in the present case. The Supreme Court of Austria was not endeavouring directly to make a distinction between the parents on religious grounds. It was merely trying to analyse which parent was better qualified for custody taking into account

37 See *Hoffmann*, § 15.

38 Ibid., § 36.

39 See, the bibliography cited in n. 35 above.

various factors − among them, the fact that the mother had forcibly taken the children during the divorce proceedings, had infringed the implicit marital agreement on the children's education (in violation of the Austrian law) and was imposing on them her religious views, which included a drastic refusal of blood transfusions even in the case of a life threatening emergency.

The Supreme Court was not judging the value of the mother's religious doctrines but just assessing their potential impact on the children's lives. In this respect, its conclusion was different from the one adopted by the lower courts but it must be noted that under Austrian law the decisions taken by the latter could only be overruled if the Supreme Court found that they had incurred *'manifest illegality'* − this is the reason why the Supreme Court argued on the base of the federal act on the religious education of the children. We should not forget, on the other hand, that both parents were well placed to take care of the children, the main difference being that the father would need some help from his mother.[40] What the Supreme Court did, after all, was to balance this fact against the potential negative consequences that the religion of the mother could have for the children's welfare, including her opposition to blood transfusions.

With regard to the particular issue of the mother's conscientious objection to blood transfusions as a result of her religious ideas, the ECtHR did not express any opinion about it but just acknowledged that the lower courts and the Supreme Court of Austria had evaluated this fact differently. The ECtHR seem to have left it to the discretion of the Austrian courts[41] but, at the same time, invalidated the judgment of the Supreme Court because it linked this factor to the different religion of the mother after her conversion to Jehovah's Witnesses.[42] In other words, in its reasoning the Court was apparently more concerned about the equal consideration of the religious choices of the parents than about the potential effect of their respective choices on the children's lives, in spite of mentioning that "in cases of this nature the interests of the children are paramount".[43]

It is probably for these reasons that the *Hoffmann* decision was adopted by a divided Court − five votes to four − and that the judges disagreeing with the majority wrote firm dissenting opinions.[44] The four dissenting judges emphasised that the judgment of the Supreme Court of Austria was not based directly on a

40 See *Hoffmann*, § 11.

41 See *Hoffmann*, § 32-33.

42 See ibid., §§ 33 & 36.

43 *Hoffmann*, § 35.

44 The dissenting judges were: Matscher (Austria), Walsh (Ireland), Valticos (Greece) and Mifsud Bonnici (Malta).

religious distinction but rather on an assessment, according to the Austrian law in force, of how the children's best interest would be better guaranteed, and this included taking into account the effects of the parents' diverse religious choices. These four judges underlined that the role of the ECtHR was not to hear an appeal from the Supreme Court of Austria on the provisions of Austrian law and as to whether Austrian court decisions contradicted Austrian law. One of the judges indicated that there had been no interference of Austrian courts with the mother's fundamental rights, since the fact that the mother had taken the children with her by her unilateral decision did not give her any additional rights, and therefore the fact that the children were taken back to their father's home following the final decision of the Supreme Court was not in itself an interference with the mother's rights within the meaning of Article 8 ECHR.[45]

Two dissenting judges[46] specifically mentioned that the issue of objection to blood transfusions was very significant and the Austrian Supreme Court was perfectly entitled to take it into account when deciding on which of the parents was better qualified for custody. The Irish judge, in particular, emphasised that the mother's objection to blood transfusions created a hazard of the health of the children. This was an objective factor, irrespective of its religious origin, and could be assessed discretionary by the Austrian courts when deciding on the children's custody without incurring religious discrimination, for the existence of the hazard was independent from its religious cause:

> *'The father's notice of appeal to the Supreme Court specifically mentioned the withholding of possible blood transfusion as the reason for seeking a reversal of the order of the lower court. That was an objective ground which a court might or might not, in any given case, regard as a sufficient ground for the transfer of custody. That is not a matter upon which this Court could usurp the discretion of the national court. The matter before the Supreme Court was a question of the hazard of the health of the children. In gauging the seriousness of the hazard the Supreme Court recognised that the cause of the hazard was, admittedly, the applicant's new religious views. The reason or motives for the creation of the hazard are but secondary to the objective effect of the existence of the hazard. If the applicant's attitude was not traceable to a religious belief the question before the national court would remain essentially the same. The fact that*

45 See dissenting opinion of Judge Matscher, § 1.

46 See dissenting opinion of Judges Walsh and Valticos.

> *the hazard was brought into existence by a religious belief not shared by those upon whom it was sought to impose it does not create a situation where the removal of the hazard must necessarily, if at all, be regarded as a discrimination on the grounds of religious belief. The national court's duty was to evaluate or weigh the effects as distinct from the cause'*.[47]

In my view, the dissenting opinion of Judge Walsh grasped which the crucial question was in *Hoffmann* much better than the majority opinion. It is true that, as the ECtHR affirmed, *'a distinction based essentially on a difference in religion alone is not acceptable'*.[48] However, in this case the distinction made by the Austrian Supreme Court was not based on a religious difference alone but rather on the best interest of children, which, as the ECtHR itself recognised, are paramount in cases of this nature.[49] This leads us to the real question underlying this type of case: can, or must, the assessment of the best interest of the child include elements related to the religious choices of parents? The answer of the European Court is negative. Personally, I think that this answer is unrealistic, for religion is important in people's lives and therefore the religious choices of parents are bound to have effects on minors.

Naturally, it would be unacceptable to establish a sort of priority order among religions or to judge the content of religious tenets − we have already seen that the Court has discarded this possibility with all good reason.[50] However, ignoring the fact that the religious choices of parents affect children's lives is wrong because it does not correspond to reality, and understanding reality is essential to assess the best interest of the child, which is the point of reference in this area. This is probably the reason why the European Commission, in the past, had held that it was appropriate for national authorities to adopt the necessary measures to guarantee continuity in the religious upbringing of children.[51]

If the religious choices of parents are relevant for children's lives, it seems reasonable that the courts take this factor into account when they decide which parent is better qualified for custody in a case of divorce, especially when, as in the case of conscientious objection to blood transfusions, those choices imply a

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47 Dissenting opinion of Judge Walsh, § 3.

48 *Hoffmann*, § 36.

49 See *Hoffmann*, § 35.

50 See n. 14 and accompanying text.

51 See App. 2648/65, *X.* v. *The Netherlands*, Dec. Adm. 16 February 1968, in *Yearbook of the European Convention* 11, pp. 354 et seq. (also available online in the data base of the ECtHR, HUDOC).

hazard of the children's health. As Judge Walsh put it, a court can *'evaluate or weigh the effects as distinct from the cause'*. I am not saying that this should be the only or even the most significant criterion, but it can − and probably must − be used together with other criteria to tip the scales in favour of one or other of the parents seeking the custody of the children.