Ethical and legal aspects of refusal of blood transfusions by Jehovah's Witnesses, with particular reference to Italy

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Reasons for the refusal of blood transfusions by Jehovah's Witnesses

Jehovah's Witnesses originated near Pittsburgh (Pennsylvania) in the 1870s, when Charles T. Russell formed a movement based on a literal millennialist interpretation of the Bible. However, it was not until 1945 that the Watch Tower Bible and Tract Society (the legal organisation of leaders of the Congregation of Jehovah's Witnesses, usually known simply as the Watch Tower Society) concluded that blood transfusions are contrary to divine law. The Society leaders based their conclusions on parts of the Scripture, specifically: "Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things. But flesh with the life thereof, which is the blood thereof, shall ye not eat" (Genesis 9, 3-4). "And whatsoever man there be of the House of Israel, or of the strangers that sojourn among you that eateth any manner of blood; I will even set my face against that soul that eateth blood, and will cut him off from among his people" (Leviticus 17, 10). "Therefore I said unto the children of Israel, No soul of you shall eat blood, neither shall any stranger that sojourneth among you eat blood" (Leviticus 17, 12). "For it is the life of all flesh; the blood of it is for the life thereof: therefore I said unto the children of Israel, Ye shall eat the blood of no manner of flesh; for the life of all flesh is the blood thereof: whosoever eateth it shall be cut off" (Leviticus 17, 14). "Only thou shalt not eat the blood thereof; thou shalt pour it upon the ground as water" (Deuteronomy 15, 23). "For it seemed good to the Holy Ghost and to us to lay upon you no greater burden than these necessary things; that ye abstain from meats offered to idols, and from things strangled, and from fornication: from which if ye keep yourselves ye shall do well (Acts 15, 28-29).

Although the above verses clearly refer to blood as food, an article published in the movement's magazine The Watch Tower on 1st July 1951 argued that food and blood transfusions amount to the same thing.

Jehovah's Witnesses refuse transfusions of whole blood, of red and white corpuscles, platelets and plasma. They also refuse both natural and recombinant haemoglobin, although positions differ among them regarding blood-derived products such as albumin, immunoglobulin and coagulation factors.

The ethical and legal issues raised by the refusal of a potentially life-saving transfusion are dramatic[1], and it is worth noting that they are a matter of debate even among Jehovah's Witnesses[2]. There is thus the possibility that at some future time the official position may change, or at least become less rigid[3,4].

On 16th May 2001 the Belgian Advisory Committee, which was in the process of preparing a document on the question of blood transfusions for Jehovah's Witnesses (see below), wrote to the Christian Congregation of Jehovah's Witnesses of Belgium asking them to explain the "spiritual impact of giving a blood transfusion to a Jehovah's Witness". The reply, dated 24th May 2001, stated that for a Witness, who believes in the resurrection of the body, "the problem is unlikely to be seen in terms of resurrection and life eternal. He or she would more likely be devastated by the feeling that someone had taken advantage of a moment of weakness due, for example, to illness or unconsciousness, to impose a form of treatment totally at odds with his or her wishes and consent"[5].

The conflict between values and duties: the ethical-legal problem for physicians

The autonomy that is expressed through informed consent is a fundamental value in bioethics[6]. The principle of self-determination is expressly enshrined in numerous authoritative documents, including the Council of Europe's Convention on Human Rights and Biomedicine (Article 5: "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it")[7].

In Italy the principle of self-determination is rooted in the Constitution ("Article 32: "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person"[8]), and is explicitly expressed in numerous binding documents such as, for example, the Code of Medical Ethics (Article 35: "A physician may not undertake diagnostic or therapeutic actions without obtaining the explicit and informed consent of the patient (…). If the patient

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is incompetent, the physician must act in accordance with his or her knowledge and conscience and in respect for the dignity of the individual and the quality of life, avoiding futile treatments and taking into account the previously expressed wishes of the patient")[9].

While in the USA[10] autonomy is generally interpreted by referring to respect for a person's privacy and the right to be left in peace, the European approach tends to place a limit on the right to autonomy in the form of the duty to assist and save persons exposed to serious danger, particularly life-threatening events[11].

In regard to the degree to which pre-treatment declarations are held to be binding, Article 9 of the Convention on Human Rights and Biomedicine states that "The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account"[12]. In Italy the Convention was ratified by Law no.145 of 28th March 2001[13], but although it has been passed by Parliament it has not yet been filed by the Italian government with the General Secretariat of the Council of Europe, so that the ratification is not actually effective. The Convention is nonetheless cited in Italian case law and is an important point of reference for both bioethicists and jurists. The position expressed in the Convention is reflected in Article 38 of the Code of Medical Ethics, which states that "If the patient is not able to express his or her own wishes, the physician must, in deciding which course to follow, take account of any wishes previously documented and unequivocally made known by the patient"[14].

The situation addressed in the present article, in which an individual who is in a life-threatening position refuses a blood transfusion, finds the physician in an extremely problematic situation: failure to act may lead to criminal charges of negligence or even, should the patient die, of culpable homicide[15]; intervention, on the other hand, could lead to criminal charges of trespass against physical integrity[16] or to claims for damages by the patient for violation of the right to self-determination.

And faced with this dilemma the physician is alone: the law will act, if at all, after the event and case law on these issues is contradictory.

Three trends in Italian legal doctrine and case-law

Legal precedent in Italy is by no means unanimous on the subject of the refusal of blood transfusions by Jehovah's Witnesses. As in legal doctrine, however, three main principles can be identified.

The first school of thought considers informed consent as protecting an absolute right to self-determination[17]. Accordingly, the right to refuse treatment is above question, even when it places the patient's life at risk.

The second holds that when the patient is unconscious and his or her physical integrity is in serious and immediate danger the physician has a duty to intervene and to give a transfusion, and that this cannot constitute grounds either for claims of liability or for charges of trespass against physical integrity.

This approach is based mainly on the "state of necessity"[18] (see below) that limits the patient's consent: the right to self-determination is limited in favour of the inalienable good that is life. This approach appears to prevail in both legal doctrine and case law, as demonstrated in the ruling described below.

A third approach holds that the "state of necessity" is applicable even when the patient is fully able to comprehend and express him or herself, if the refusal of treatment would imply a risk of death or serious harm. This is argued by invoking variously: the legal obligations of health workers; the conception of life as an inalienable good[19]; professional ethics (see, for example, the section headed "Duties of physicians to patients" in the International Code of Medical Ethics of the World Medical Association[20]).

The third position is favoured by French case law. As an example, the case in France of a young Jehovah's Witness who suffered a serious post-partum haemorrhage received wide attention: the woman was given a transfusion of four units of blood against her will. In giving judgement, the Administrative Court of Lille noted that the Public Health Code states that no medical intervention can be performed without the consent of the patient[21], but also recognised that it was the physicians' duty not to respect the patient's will when her life was in imminent danger[22].

Thus although ethical/moral indications (such as the examples just described) would seem to consider a patient's dissent an insurmountable obstacle, in clinical practice and in emergency situations where the patient is unconscious, the prevailing interpretation is that intervention (in the case in point, a blood transfusion) is not only legitimate but right and proper.

The state of necessity

Both the second and third positions mentioned above refer to the so-called "state of necessity" established in Article 54 of the Italian Penal Code. This "state of necessity" implies that anyone who has "committed an act because he/she was obliged to do so by the need to save him/herself or others from immediate danger of serious bodily harm not caused wilfully by him/herself and not otherwise avoidable" is not punishable, "provided that the act is proportionate to the danger". The same article specifies that the situation of danger that

necessitates the act must be immediate and the danger must involve the risk of serious harm to the person committing the act or to others[18].

Article 2045 of the Civil Code (Book Four; "Of obligations", Chapter Nine: "Illicit acts") also mentions the "state of necessity", stating that: "When the person who has committed a harmful act was obliged to do so by the need to save him/herself or others from immediate danger of serious bodily harm and that danger was not wilfully caused by him/her and was not otherwise avoidaible, the victim shall receive an indemnity in an amount that is referred to the equitable evaluation of the judge"[23].

The pertinence of a "state of necessity" in relation to the problems addressed here is nonetheless a matter of debate. Some authors have opined that "it can be said that the state of necessity referred to in the Codes is not perfectly identical to the state of necessity under discussion in relation to medical liability for treatment performed without the consent of the patient"[24].

Decisions by the Court of Cassation

The principle of a physician's duty to intervene when a patient is unconscious and his/her physical integrity is in serious and immediate danger has been upheld in various rulings by the Court of Cassation. One significant example is the Court's decision n. 4,211 of 23rd February 2007[25], which was followed by others. The legal process that gave rise to the decision is worth recalling briefly.

Decision n. 4211 of 23rd February 2007

On 15th May 1990 at 7.05 am a Jehovah's Witness, T.S., was taken to the Accident & Emergency department of Santa Chiara hospital in Trento following a road accident. The diagnosis was of "polytrauma, lesion to the subclavian artery and vein and left brachial plexus, fractured scapula (…)". The patient was fully competent and declared his refusal of blood transfusions, asking to be transferred to a hospital equipped to offer alternative treatments. His clinical record was annotated with the words: "N.B. Jehovah's Witness (refuses transfusions)". At 12.15, his condition having deteriorated, the patient underwent surgery, in the course of which an "ample laceration of the subclavian artery and vein" was ascertained. While surgery was in progress the physicians consulted the Public Prosecutor on the telephone and were authorised to go ahead with a blood transfusion.

T.S. subsequently sued for moral damages for having been forced, against his will, to receive a blood transfusion that he had expressly refused. The Court of Trento dismissed the claim[26].

The patient took his case to the Court of Appeal, which declared the appeal unfounded. In its decision the Appeal Court stated: "while there is no doubt that S., who was of age and lucid at the time of admittance to the hospital, expressed his dissent, there is equally no doubt that his clinical condition at that time was certainly less serious than it was later ascertained to be in the operating theatre. The time factor of these two events cannot be overlooked when evaluating the real situation: the moment of admission, when S. declared his refusal of a blood transfusion on religious grounds -as confirmed by his national health card- and the moment in the operating theatre when S. was obviously unconscious and the situation was revealed to be much more serious than expected. In these circumstantes it is unquestionably reasonable to ask whether, had S. known of the real seriousness of the lesion and of the immediate threat to his life, he would still have reiterated his dissent. While the Court certainly does not ignore the law or precedent regarding the binding nature of dissent, it is nonetheless necessary -if the latter is to be validly made known- that it should be not only unambiguous but also current, effective and deliberate: in other words it presumes proper knowledge of the real state of health and the possible consequences (informed consent-dissent) (…). Dissent was thus made known when the prospective situation (…) was quite different from that subsequently ascertained, in other words when the importance and decisive nature of that (…) decision were associated with a less serious situation than that which was later revealed. Bearing in mind that the patient's very life depended on the decision taken, this is already serious grounds to doubt both the effective duration of the refusal of treatment and the certainty that it was indeed deliberate"[27].

The case was then taken to the Court of Cassation which, in decision n. 4211 of 23rd February 2007, accepted almost *in toto* the motivations of the Court of Appeal. Specifically, the Court of Cassation emphasised that the original dissent, expressed before the patient's clinical condition worsened and he became unconscious, had been manifested in an earlier, different setting when the patient's life was not in danger. Therefore, according to the Supreme Court, in "very different clinical circumstances, with the patient's life in immediate danger and with no means of consulting the patient anew as he was by then under total anaesthesia", the doctors acted legitimately[25]. The Court held that this did not run counter to Article 9 of the Convention on Human Rights and Biomedicine ("The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account")[12]. The patient's wishes had indeed been taken into account, as demonstrated by the fact that the physicians contacted the Public Prosecutor during the operation and were authorised to act.

In summary, the Court of Cassation's decision does not diminish the right to self-determination, but affirms that when there is a state of necessity and the patient is not able to express his or her wishes the physician is justified in administering the most appropriate treatment to protect the patient's life even when the latter has previously expressed dissent in relation to the treatment in question.

Decision n. 23676 of 15th September 2008

The position adopted above was confirmed the following year by the Court of Cassation[28]. The case concerned a Jehovah's Witness who arrived at a hospital in Pordenone in a state of unconsciousness. He was carrying a card on which were annotated the words "No blood" but nonetheless received a blood transfusion. The subsequent legal process ended when the Supreme Court recognised that, bearing in mind the Hippocratic Oath, the physicians had acted correctly in giving the transfusion and could not "logically presume the real "resistance" of a patient's religious convictions in the face of a sudden life-threatening event".

In passing judgement the Court indicated two possible options that could guarantee the right to refuse a transfusion even in life-threatening circumstances. The first would be for the "patient to carry on his/her person an articulate, precise declaration expressing unambiguously the wish to reject a transfusion even when his/her life is in danger". Notes bearing the words "no blood" are not to be considered sufficient to manifest a person's wishes. The second possibility would be to appoint a representative *ad acta* who could confirm the person's refusal of treatment in the presence of the physicians. In the absence of either of these requisites it is the physician's duty to save the patient's life, even without the authorisation of the Public Prosecutor.

Contrasting positions

Notwithstanding the position expressed by the Supreme Court, case law still offers contrasting opinions. One such example is decision n. 14883 handed down by the Court of Milan in 2008[29]. The case concerned Remo Liessi, a minister in the sect of Jehovah's Witnesses, who died in San Carlo hospital in Milan (where he was receiving treatment for a malignant gastric tumour) during a transfusion that he had strenuously refused, to the extent that the physicians had been obliged to request a compulsory treatment order and to call the police to remove his relatives. The Court awarded the deceased man's relatives compensation of €12,000, plus revaluation, but only because of the brutal methods used to give the transfusion which, according to all the technical experts consulted, had contributed to cause the patient - who was already very weak on account of a tumour - to have a heart attack. In motivating her decision, the judge, Iole Fontanella, emphasised that case law is virtually unanimous in holding that informed consent "obliges the physician not to attribute to his/her own evaluations and decisions, no matter that they are intended to safeguard the patient's right to health, a justificatory power that they do not inherently possess (…) as they must be weighed against the other constitutional right to individual freedom". The judge nonetheless concluded otherwise, on the basis of the fact that Article 40 of the Criminal Code attributes legal obligations to the physician, as well as the fact that contractual and ethical constraints "impose the performance of such urgent interventions as are in the best therapeutic interest of the patient", whose technical knowledge is not comparable to that of the physician. Article 40 of the Criminal Code, which concerns "Causal relations" states that: "No person can be punished for an act that is legally considered a crime if the harmful or dangerous event on which the existence of the crime depends is not the consequence of his/her act or omission. Failure to prevent an event that one has a legal obligation to prevent is equivalent to causing it"[30]. Decision n. 2359 of the Milan Court of Appeal, of 19th August 2011, nonetheless held that the physicians had violated the patient's constitutional rights and ordered them jointly to pay the heirs the sum of €400,000. The ruling affirmed that if "the patient's faculty to refuse to allow a physician to administer a non-compulsory -albeit necessary- treatment is rejected, the patient's right to self-determination is substantially stripped of its most significant content, the negative component, and limited to the positive faculty to decide whether or not to trust him or herself to the care of a physician. It is, instead, precisely the negative component that is best expressed within the physician-patient relationship, that adds substance to the patient's right to self-determination -the individual right- recognised in Article 32 of the Constitution[8], to refuse health treatment. In other words, it is necessary to reaffirm the principle according to which the contemporary physician, having discarded the role of *dominus* of the patient's health, may legitimately operate only within the confines of a "therapeutic alliance" with the patient who has entrusted him/herself to his/her care, and the patient must be fully informed in order to be able consciously to exercise the right to self-determination regarding which treatments to accept"[31]. According to the Court of Appeal, the court of first instance, in affirming the patient's partial self-determination "and the right to request and obtain his/her discharge in the event of differences of opinion regarding treatment" had confused the hierarchical arrangement of the sources of Law. The Court of Appeal noted that on the one hand there is Article 32 of the Constitution,

while on the other hand there is only a legal obligation set out in Article 40 of the Criminal Code.

Italian case law and the opinions of national bioethics committees: a comparison

The Italian position generally, albeit with some variations, holds that when unconsciousness supervenes and the patient's physical integrity is in serious and immediate danger, the physician is obliged to intervene. In order to examine this position in ethical terms it is interesting to compare it with the opinions expressed by the Italian National Bioethics Committee and other similar bodies in other countries. As many of the regulations in force in EU member countries are derived from EU Directives, the bioethics committees of EU member countries are a good starting point. To date the only countries other than Italy whose bioethics committees have addressed this topic are Belgium and Portugal. As is evident from the following excerpts, the national committees' position is in line with both the Italian Court of Cassation and the positions of other similar committees.

Italian National Bioethics Committee

One of the earliest opinions adopted by the Italian National Bioethics Committee addressed the issue of informed consent. It includes a paragraph on the question of the refusal of blood transfusions by Jehovah's Witnesses: "A particular case is represented by patients who are seriously anaemic as a result of haemorrhage or haematological disease who, even though in danger of dying, refuse blood transfusions. This mainly happens in the observance of a particular religious belief, as in the case of the Jehovah's Witnesses. Despite the suffering of the doctor who sees patients die without being able to give treatment that would probably save them, he must base his own behaviour on art. 40 of the code of medical deontology (1990) which states that "the doctor must refrain from any diagnostic or therapeutic procedure as no medical treatment against the will of the patient is allowed". The case in which the refusal of transfusion regards a minor and is expressed by the parent having parental authority is different; in this case, in accordance with art. 41, the doctor must take the consideration as valid that nobody can be deprived of life by their own parents and can therefore ask immediately for the ordinance of the mayor or the magistrate to authorise the transfusion"[32].

The above position has elicited various comments. One of these pointed to the fact that "in order that a physician should not be indictable for the death of the patient he cannot merely desist from administering a therapeutic procedure. The patient's wish (autonomy) not to receive treatment with a transfusion should lead to his/her leaving the healthcare facility either on his/her own initiative or on that of his/her relatives, as logically, so long as he/she remains there, the physician has a duty to save his/her life. In cases of extreme emergency, if the patient is in a coma or unconscious, or the relatives are not in agreement among themselves, we believe that authorisation by a mayor or a magistrate to proceed with treatment should be 'presumed' "[33].

Comité Consultatif de Bioéthique de Belgique

In its "Opinion n.16 on the refusal of blood transfusions by Jehovah's Witnesses" the Belgian Advisory Committee on Bioethics states that if a major Jehovah's Witness who is *de facto* and *de iure* of sound mind refuses a life-saving blood transfusion the physician is obliged to respect his/her wishes, even if to do so means that the patient will die. It does, however, add a list of conditions that must be met: the patient must reiterate his/her refusal even after being informed of the consequences and should be able to discuss the issue *tête-à-tête* with the physician in a calm environment; the physician must obtain the patient's signature on the release of liability form and add this form to the patient's clinical record; the patient must not suffer from any psychiatric syndrome that might prejudice his/her ability to make a decision specifically in the matter of a blood transfusion and tests should be performed to confirm his/her *de facto* competence to understand the consequences of a refusal, for which at least one reason must be given; the refusal of relatives or other persons accompanying a major Jehovah's Witness who is unable to express his/her wishes is never sufficient. The physician *may* comply with the refusal to accept a life-saving transfusion if the patient made a sufficiently recent signed declaration to that effect while conscious and competent; if the parents of a minor Jehovah's Witness who is incompetent refuse permission for a life-saving blood transfusion, the physician may decide not to respect the parents' wishes[34].

Conselho Nacional de Ética para as Ciências de Vida

According to the Portuguese National Council of Ethics for Life Sciences, the fact that the doctor is duty-bound to do whatever is in the best interests of the patient justifies any life-saving procedure, including blood transfusions. Every form of treatment should be clarified between physician and patient beforehand. The patient, for his/her part, has the right to refuse blood transfusions on religious grounds (autonomy) provided he or she is competent and able to do so. Only if a patient repeatedly, explicitly and freely refuses treatment with blood and blood-derived products in a life-threatening situation is the physician obliged to respect the patient's wishes, which in the case of refusal should preferably be given

in writing. A previously prepared medical declaration is merely indicative and informed consent must still be obtained, after the consequences of refusing treatment have been properly explained. If proper consent cannot be given and the situation is life-threatening, the physician's ethical duty to act in accordance with the principle of beneficence shall prevail. In the case of patients who are legally incompetent or who suffer from mental disorders and minors lacking the requisite comprehension, life-saving procedures or measures to prevent complications, including blood transfusions, may be performed without obtaining consent, though in these cases authorisation should be sought from legal representatives. If this is refused, the principle of beneficence shall prevail, as any authorisation so obtained is not equivalent to the patient's exercise of personal autonomy. This does not preclude recourse to the law when indicated[35].

Ethics, the law and values in conflict: a proposal

The problems associated with the refusal of blood transfusions by Jehovah's Witnesses are emblematic of the conflict that can arise between divergent moral values of equal merit. Clearly, the well-known principles of North American bioethics proposed by T.L. Beauchamp and J.F. Childress (respect for autonomy, beneficence, non-maleficence, justice)[36] can enter into conflict. In the particular case in point, respect for autonomy (the patient's consent) and beneficence (the physician's duty of care) are antithetical.

The North American principles of bioethics are a widely accepted model, but by no means the only one: numerous alternative models have been proposed and each can be variously interpreted[37]. This is not the place to examine them all. In a personalist perspective the North American principles can be re-defined as the principle of freedom-responsbility, the therapeutic principle and the principle of sociality-subsidiarity[38].

These three principles can be considered *prima facie* duties, as defined by D. Ross[39], who proposed a redefinition of the typical Kantian moral principle[40], drawing a distinction between *prima facie* duties, known also as conditional duties, and actual duties. *Prima facie* duties are assumed to be the primary principles of moral ethics: they are self-evident, intuitive, immediately recognisable and imperative. Actual duties are instead currently active, or effective obligations. *Prima facie* duties should always be respected, although this may sometimes be impossible, mostly on account of conflicts between equally *prima facie* values. When this is the case criteria must be found to decide whether or not a violation is justified.

In the case in point there is a clear conflict between freedom (autonomy and informed consent) and therapeutic aims (beneficence). The same authors who defined the North American principles of bioethics also proposed a reference grid to help decide - when there is a conflict between principles - when a violation of one or more of those principles is jsutified. According to T.L. Beauchamp and J.F. Childress, a violation may be justified provided that[36]:

- the moral goal that justifies the violation has a realistic chance of being achieved;
- the violation of an obligation is necessary in the specific circumstances, meaning that no other morally preferable alternatives are available;
- the violation is of as little significance as is compatible with achieving the goal;
- the agent attempt to minimise the effects of violation.

In the case of a refusal to accept a blood transfusion, however, the clash between the patient's autonomy and the doctor's moral duty as a physician to save a life is total and not easily accommodated.

With specific reference to the actual operating conditions of those who work in hospitals (and particularly to the Italian legal-regulatory context referred to earlier), three possible scenarios can be hypothesised.

The first envisages the absolute priority of the patient's wishes. In the context of a blood transfusion, this would generate a host of ethical concerns.

The second envisages the absolute priority of the physician's duty to heal. This too would give rise to uncertainties, albeit of a different nature.

The third scenario involves an attempt at mediation and is based on the premise that the refusal of treatment, including a transfusion or the administration of blood-derived products, is legitimate. However, if the patient becomes unconscious and his or her physical integrity is in serious and immediate danager the physician could be obliged to intervene without thereby incurring either civil or criminal liability, thanks to the discriminating circumstances of a state of necessity. It might also be expedient to establish that a physician who, in certain contingencies, decides to adhere to a patient's wishes not to receive a blood transfusion even in life- or health-threatening circumstances should not be either civilly or criminally indictable.

Keywords: autonomy, bioethics, blood transfusion, informed consent, responsibility.

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