

O (DES)AMPARO LEGAL À OBJEÇÃO DE CONSCIÊNCIA

LEGAL (DE) SUPPORT TO CONSCIENTIOUS OBJECTION

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RESUMO

O presente artigo tem por escopo a análise da objeção de consciência. O direito à liberdade de consciência e a garantia ao seu exercício, por meio da objeção de consciência, são objeto de muitas controvérsias na doutrina e na jurisprudência brasileiras e estrangeiras, merecendo a atenção de juristas e da população em geral. O objetivo do presente trabalho é a análise de tal fenômeno, que se manifesta na oposição ao cumprimento de normas ou disposições legais por motivo de consciência. Tal reflexão é realizada por meio do método dedutivo e da pesquisa teórica. Ao final, chegou-se à conclusão de que há vários projetos de lei visando abordar o tema da objeção de consciência, porém, sem técnica legislativa e muitas vezes de forma preconceituosa.

PALAVRAS-CHAVE: Objeção. Consciência. Liberdade. Direitos Fundamentais.

ABSTRACT

The purpose of this article is to analyze the conscientious objection. The right to freedom of conscience and the guarantee of its exercise through conscientious objection are the subject of many controversies in Brazilian and foreign doctrine and case law, deserving the attention of jurists and the general population. The aim of the present work is the analysis of such phenomenon, which manifests itself in the opposition to the fulfillment of norms or legal rules for reasons of conscience. Such reflection performs through the deductive method and theoretical research. At the end, the conclusion was that there are several bills addressing the theme of conscientious objection, however, without legislative technique and often in a prejudiced way.

KEYWORDS: objection, conscience, freedom, fundamental rights.

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INTRODUCTION

In recent years, conscientious objection, with limited specific national legislation and still little doctrinally addressed, has been gaining media attention and also attracting the interest of jurists who have begun to broaden the discussion on the subject. In a concise approach, it is the search by the conscientious objector for an exemption to the fulfillment of a legal duty or action that is conflictant with his moral code.

The topic of conscientious objection is one of the least addressed aspects of the right to liberty and was chosen to be discussed in the present paper because it has major reflexes in the lives of some groups of individuals, as well as being of special interest to Constitutional Criminal Law.

For this, a discussion on freedom of conscience will be presented, with an analysis of the concept, foundation, requirements, and most common hypotheses of conscientious objection, its distinction from civil disobedience and the right of resistance, as well as the protection of the right to conscientious objection in international documents.

The deductive method was used to carry out this work, consisting of the research and study of doctrine, journal articles, legislation, and jurisprudence pertinent to the theme, as well as electronic documents that deal with the subject.

1 CONSCIENTIOUS OBJECTION

Of freedom and conscientious objection: constitutional foundation and scope

In order to better understand the phenomenon of freedom of conscience, its scope and consequences, it is necessary to bring up some definitions. According to José Carlos Buzanello (2001, p. 175):

A liberdade de consciência é o núcleo de fundamentação da objeção de consciência, pois reflete a liberdade de crença e de pensamento, não de uma liberdade geral, mas de uma liberdade singular não pautada na igualdade entre os indivíduos.

The Federal Constitution of 1988 deals with freedom of conscience in two dimensions: as an intimate thought and as the right to adhere, or not, to a particular religious belief, or philosophical or political conviction (SILVA, 2014, p. 241).

There are also those who believe that freedom of conscience has a positive aspect, because the State is responsible for "providing effective means for the autonomous formation of people's conscience" (BRANCO; COELHO; MENDES, 2009, p. 498).

Conscientious objection presents itself as a relatively new conflictive phenomenon, which calls for responses in the orders: ethical, political, and legal, and which, in a way, is becoming an instrument able to serve as a means of claim, propaganda, or protest, in a political bias (MARTÍN DE AGAR, 2019).

According to Bruno Heringer Júnior (2007, p. 43), the conscientious objection is about

[...] comportamento, geralmente individual e não-violento, de rechaço, por motivo de consciência, ao cumprimento de dever legal, no marco das configurações de mundo constitucionalmente possíveis, com intenção imediata de alcançar isenção pessoal, a qual pode, ou não, vir a ser reconhecida pela ordem jurídica mediante a compatibilização das normas jurídicas em conflito.

For Rogério Carlos Born (2014, p. 59),

É o direito individual de oposição ao cumprimento das leis, atos normativos e disposições privadas que causem aversão, constrangimento ou ojeriza ao destinatário em razão de conflito com os seus dogmas e valores pessoais.

On the other hand, there are those who state that conscientious objection calls out for the non-interference of the state in matters exclusive to the individual conscience:

A objeção de consciência é uma modalidade de resistência de baixa intensidade política (negação parcial das leis) e de alta repercussão moral. Caracteriza-se por um teor de consciência razoável, de pouca publicidade e de nenhuma agitação, objetivando, no máximo, um tratamento alternativo ou mudanças da lei (BUZANELLO, 2001).

The Constitution of the Federative Republic of Brazil of 1988, in Article 5, item VI, expressly provides that "freedom of conscience and belief is inviolable", protecting it as a fundamental right of the individual. Also in item VIII of the same article, it states that "no one shall be deprived of rights on the grounds of religious belief or philosophical or political conviction, except when invoking them in order to evade a legal obligation imposed on all and to refuse to comply with an alternative provision, fixed by law".

The analysis of such provisions shows that, besides guaranteeing the free formation and development of conscience, it also seeks to protect its manifestations, given the possible exemption from legal duties. It is important to emphasize that freedom of conscience is a right, while the objection is a guarantee of the exercise of this right (BORN, 2014, p. 125).

Despite this, it is noted that the conscience excuses constitutionally provided for in the Brazilian legal system are only those arising from religious belief and filosófica and political convictions, thus missing countless hypotheses, such as those of an ethical, moral, scientific, and cultural nature, since people become conscientious objectors for countless reasons.

The types of guaranteed freedom of belief include freedom of religion, agnosticism and atheism, given that this covers the right of individuals to believe, or not, in the existence of a divine entity that can spiritually protect them and guide their steps. Freedom of filosófic conviction, on the other hand, ensures the right to belong to and exercise one's thoughts in accordance with one's own concept of ethics or morals, or as a result of the teachings of filosófic orders, such as the Spiritist Doctrine or Masonry. Finally, political conviction guarantees political rights, which are manifested in the possibility of electing one's preferred candidate and party, running in elections, supporting non-nazifascist ideologies, opposing political determinations that firm one's ethics and morals, and all without state interference (BORN, 2014, p. 45).

It should be emphasized that conscientious objection is a guarantee, since the individual can choose to invoke it, or not, being able to renounce and comply with the legal determination, even if he has an aversion to it (BORN, 2014, p. 130).

Among the hypotheses of conscientious objection, the only one that is specifically provided for in the Constitution is military objection, which is the refusal to comply with the legal obligation to serve in the armed forces in times of peace for moral reasons, and which is regulated in § 1 of article 143 of the Federal Constitution:

Às Forças Armadas compete, na forma da lei, atribuir serviço alternativo aos que, em tempo de paz, após alistados, alegarem imperativo de consciência, entendendo-se como tal o decorrente de crença religiosa e de convicção filosófica ou política, para se eximirem de atividades de caráter essencialmente militar.

Still on the subject of the constitutional foundations of freedom of conscience, it should be noted that this is closely related to the dignity of the human person, which is also expressly provided for in the Constitution in Article 1, Subparagraph III, as one of the foundations of the Democratic State of Law, given that it favors the free development of the personality and individual values. However, the authorization to be exempted from legal duties due to imperatives of conscience cannot introduce unjustified privileges, therefore, respecting the constitutional principle of equality (Article 5, caput of the Federal Constitution), which is revealed in the form of treating those who are equal equally and unequally those who are unequal, to the extent of their inequalities (HERINGER JÚNIOR, 2007, p. 26).

For these reasons, seeking to avoid inequalities and privileges, and to concretize isonomy, there are constitutional provisions in the sense of the need of fulfillment of alternative provision by the conscientious objector (arts. 5, VIII, and 143, first article, both of the Federal Constitution), in situations where it is possible, for this reason, it is necessary to analyze the limits of freedom of conscience, as well as to delimit them with legal norms that currently, in the majority, do not exist.

Conscientious objection, civil disobedience, and right of resistance: definition and distinctions

The institutes of civil disobedience, conscientious objection, and right of resistance are easily confused, which is why an individual analysis of these is in order to firmly delineate their distinctions.

With a modern concept formulated, in 1849, by Henry David Thoreau, in his essay "Civil Disobedience", in support of the abolitionist cause, civil disobedience would be a form of political protest, which deals with the disrespect for a certain law or order that has an unjust behavior, or against a government seen as oppressive by the individuals who opt for disobedience (THOREAU, 1997, p. 5-56).

Thoreau's thought gained adherents worldwide, as exemplified by Mohandas Karamchand Gandhi, known as Mahatma Gandhi, who led civil disobedience campaigns against unjust racial laws by putting his principle of nonviolent resistance into practice, mobilizing crowds, and leading India to independence by making use of this movement (LELYVELD, 2012, p. 50).

In Hannah Arendt's teaching (1973, p. 86-87):

A desobediência civil aparece quando um número significativo de cidadãos se convence de que, ou os canais normais para mudanças já não funcionam, e que as queixas não serão ouvidas nem terão qualquer efeito, ou então, pelo contrário, o governo está em vias de efetuar mudanças e se envolve e persiste em modos de agir cuja legalidade e constitucionalidade estão expostos a graves dúvidas.

Thus, for António Damasceno Correia (1993, p. 18), civil disobedience represents the manifestation of a phenomenon that is illegal and unauthorized by the Public Power; refers to a public objective; has the finality of publicly encouraging non-compliance with the law; and aims to revoke or modify a law or order. Conscientious objection, on the other hand, is based on legality and normative provision, refers to a private reason, does not aim to influence any citizen, and seeks the fulfillment of an internal requirement or self-interest.

Bruno Heringer Júnior, in asserting that the elements that constitute civil disobedience are its public, non-violent and commonly collective character, which seeks to change a law or government policy that is questioned by the moral code of the individual, albeit within the constitutional-democratic framework. In a different manner, conscientious objection, as much as it encompasses a manifestation contrary to a legal norm that is legal and legitimate, but incompatible with the moral code and principles of the individual, does not require the change of the norm and, furthermore, as a rule, takes place individually (HERINGER JÚNIOR, 2007, p. 40-42).

In turn, the right of resistance is a self-defense mechanism of democratic society, in the sense that every person can rise up or resist against unjust laws and governments. This right has been used to justify several revolts around the world, the most notorious being the French Revolution and the American Revolution. It should be noted that the first texts that contain the principle of self-determination of peoples, one of the types of resistance, are described in the charters of those revolutions (CLEMENTE, 2015, p. 15).

Guimarães (2019, p. 213) define resistance as the right of every citizen to oppose, in his or her own defense, or that of others, illegal or unjust orders, or the embarrassment of which he or she is a victim by agents of authority. It will be active resistance if violence is used against an act considered illegal or unjust; and passive resistance when it comprises the non-execution of the intended act or the refusal to obey it. Heringer Junior (2007, p. 40), when referring to a active or passive

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revolutionary resistance, states that this is the contestation of the legal-constitutional order, by peaceful or violent means, with a view to its radical transformation.

According to Buzanello (2001, p. 17), the right of resistance is a genus, and its species are conscientious objection, political strikes, civil disobedience, the right to revolution, and the principle of self-determination of peoples. Still, in the political sphere, the author argues that it is "the ability of people or social groups to refuse to

fulfill a certain legal obligation, based on legal, political or moral reasons". As for the legal variable, it corresponds to "a constitutional reality in which gestures are qualified that indicate confrontation, by action or omission, with the unjust act of legal norms, the ruler, the political regime and also third parties. O reconhecimento do direito de resistência se deu explicitamente na Constituição Federal, no artigo 5º, inciso VIII, c/c o artigo 143, § 1º⁴, no que tange à objeção de consciência; do artigo 9º, referente à greve política; e no artigo 4º, inciso III, quanto ao princípio da autodeterminação dos povos, oportunidade em que ficou previsto que este é um dos princípios que rege a República Federativa do Brasil nas suas relações internacionais (BUZANELLO, 2001, p. 21).

However, because of the regime and the principles adopted by the Constitution, it is argued that "there is a constitutional opening for the right of resistance which would also include other rights, in the form of art. 5, § 2º, CF" (BUZANELLO, 2005, p. 22), which states that "the rights and guarantees expressed in this Constitution do not exclude others arising from the regime and the principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party".

Since this paper aims to comment on conscientious objection, the other types of the right of resistance will not be dealt with in more depth.

Requirements

According to António Damasceno Correia, there are three requirements that make up the definition of conscientious objection: the refusal to obey a legal rule, in submission to a directive from a public authority or in rejection of a proposal or imposed behavior; the invocation of the refusal in rejection being based on reasons or reasons of the objector's innermost being; and no violence being used in the act (CORREIA, 1993, p. 18).

⁴Art. 5º. Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes: [...] VIII - ninguém será privado de direitos por motivo de crença religiosa ou de convicção filosófica ou política, salvo se as invocar para eximir-se de obrigação legal a todos imposta e recusar-se a cumprir prestação alternativa, fixada em lei."

"Art. 143. O serviço militar é obrigatório nos termos da lei. § 1º Às Forças Armadas compete, na forma da lei, atribuir serviço alternativo aos que, em tempo de paz, após alistados, alegarem imperativo de

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consciência, entendendo-se como tal o decorrente de crença religiosa e de convicção filosófica ou política, para se eximirem de atividades de caráter essencialmente militar.”

The clash between freedom of conscience and some legal duty must be resolved through analysis, in the concrete case, of the legal norms in question. Furthermore, it indicates requirements for recognizing the legal relevance of conscientious objection, for cases in which there is no reasonable specific regulation (HERINGER JÚNIOR, 2007, p. 45-49).

The existence of requirements enables guarantees to conscientious objectors and also to the constitutional principle of isonomy. They are: the relevance of the conflict of conscience, which causes harm to the moral integrity of the individual, whether for political, religious, ethical, philosophical reasons, among others; the need for a procedure of verification of the real existence of imperatives of conscience that are incompatible with the law, commonly by the Judiciary, without, however, any type of criticism being expressed about the individual's choice; need for the clash of conscience to arise from a current, direct, and inexorable obligation or legal duty, that is, the objector cannot have placed himself, voluntarily, in the situation of moral conflict that he wishes to evade by the excuse of conscience; and that the individual, in addition to following a personal code resulting from his convictions, needs these to be incompatible with legal duties (HERINGER JÚNIOR, 2007, p. 45-49).

The author goes on to say that the legally tolerated conscientious objection is only the constitutionally adequate one, "which is based on a moral code capable of proposing an alternative normative conformation without radically subverting the legal order", which is why racist expressions and violent actions are not permitted. Finally, the manifestation with existential consequences can only be made by an adult and capable individual, able to decide, by himself, on his conscience conflict. As for those who are relatively incapable, their legal representatives are not legally authorized to make a moral choice on their behalf, thus avoiding the "instrumentalization of the human being to the conscience imperatives of others" (HERINGER JÚNIOR, 2007, p. 51).

Most common hypotheses

There are many classifications for conscientious objection, and among the most common cases are: conscientious objection as a journalist; fiscal; military; abortion; medical treatment; employment; jury duty; and election.

The so-called conscience clause of the journalist is a right of the journalist to oppose the execution of any work that fira the principles of the Code of Ethics of

Journalists (FEDERATION, 2019) or that assails their personal convictions and beliefs. However, as pointed out in the aforementioned Code, in article 13, sole paragraph⁵, this device cannot be brought in as a justification for the professional to stop listening to people whose opinions are divergent from their own.

The fiscal objection, on the other hand, occurs when individuals omit their legal duty to pay taxes, in order to prevent the resources collected by the State from being used to finance activities that go against their morals. Instead of contributing towards the cost of war or buying armaments, for example, individuals seek to use their taxes for other purposes, such as charitable institutions (HERINGER JÚNIOR, 2007, p. 53).

Military conscientious objection is the refusal to comply with the legal obligation to serve in the armed forces, in times of peace, for moral reasons, being a modality legislated by almost all Western legal systems, even having regulation in the Brazilian Constitution and in the scope of International Law (HERINGER JÚNIOR, 2007, p. 53).

For its part, *conscientious objection* to abortion refers to the refusal by healthcare professionals or hospitals to perform abortions on patients for reasons of conscience, even in legal cases. However, according to many laws, it is necessary for abortive practices to be carried out when there is a risk to the pregnant woman, and there is no one who can replace the professional in the act, which is why, in Brazil, the agent who omits to do so incurs a crime under article 135 of the Penal Code (BUZANELLO, 2001, p. 178).

Conscientious objection to medical treatments consists of patients' refusal to undergo treatments, as by Jehovah's Witnesses, who do not accept receiving blood transfusions, even if it means their own death (HERINGER JÚNIOR, 2007, p. 55).

Conscientious objection to work concerns preventing certain people from working on specific days for religious reasons. The best known conscientious objectors to work are Seventh-day Adventists, who refuse to work on Saturdays. Even Fridays, Saturdays, and Sundays are days of rest and

⁵Dispõe o art. 13 do Código de Ética dos Jornalistas: “A cláusula de consciência é um direito do jornalista, podendo o profissional se recusar a executar quaisquer tarefas em desacordo com os princípios deste Código de Ética ou que agridam as suas convicções. Parágrafo único. Esta disposição não pode ser usada como argumento, motivo ou desculpa para que o jornalista deixe de ouvir pessoas com opiniões divergentes das suas”.

devotion to God, practiced by Muslims, Jews, and Christians, respectively (HERINGER JÚNIOR, 2007, p. 55).

A *juror's conscientious objection* occurs when a juror summoned to judge a specific crime (in Brazil, a felony against life or related crimes, according to Article 5, XXXVIII, of the Federal Constitution) refuses to do so. The participation of a juror in the Jury Tribunal is mandatory, as stated in article 436 of the Code of Criminal Procedure; however, the excuse of conscience may be invoked for religious, filosófico or political reasons, on which occasion the juror may be excused from jury duty; however, he or she will have to perform alternative service, as stipulated in article 438 of the Code of Criminal Procedure.

Lastly, there is electoral conscientious objection, which occurs when the voter refuses to participate in the electoral process due to a mismatch between his political conscience and the parties and/or candidates put forward for the election, or when, as a citizen, he decides not to take part in the production of political power. Thus, it is necessary for the voter to justify his absence within a fixed period of time. However, there are arguments to the effect that it would be the citizen's duty to show up and vote in blank, complying with the constitutional command to do so (BUZANELLO, 2001, p. 179).

Of the International Law

The importance of international recognition of conscientious objection is not only because countries, after ratifying the norms, will be obliged to comply with them, thus avoiding international liability, but also because this will standardize the law within international society, and even

(...) nos Estados onde o direito à objeção de consciência não contém previsão constitucional ou legal expressa ou possui regulamentação deficiente, a jurisprudência interna e internacional têm entendido que se trata de um direito natural implícito e subjetivo da pessoa humana e atribuem efeito de injunção e conferem aos objetores o direito de oposição ao cumprimento da lei que lhe causa aversão (GOMES, 2012, p. 135).

It is noted that the 1948 Universal Declaration of Human Rights, a resolution adopted by the General Assembly of the United Nations Organization, provides about freedom of conscience, in its article XVIII, as follows:

Todo ser humano tem direito à liberdade de pensamento, consciência e religião; este direito inclui a liberdade de mudar de religião ou crença e a liberdade de manifestar essa religião ou crença, pelo ensino, pela prática, pelo culto e pela observância, em público ou em particular (ONU, 1948).

Although this Declaration is not a treaty and, in technical terms, is not binding, the understanding in international law that human rights norms are binding, *lato sensu*, is currently harmonious, especially considering that many provisions of the Declaration are also included in the Constitutions of the States that are part of the United Nations (GOMES, 2012, p. 121).

The United Nations Commission on Human Rights, through Resolution No. 1. 998, 1977, celebrated the fact that some States accept claims of conscientious objection without inquisition; formally requested that States that do not have a positively established system for adjudicating conscientious objection cases do so in an independent, impartial manner, without discriminating against conscientious objectors based on the nature of their particular beliefs; recommended that states with compulsory military service offer various forms of alternative service to those who claim conscientious objection, in a non-punitive manner; emphasized that states should refrain from imprisoning or punishing conscientious objectors, and encouraged states to grant asylum to conscientious objectors compelled to leave their home countries for fear of persecution (UN, 1998)

The American Convention on Human Rights or Pact of San José da Costa Rica holds supra-legal status in Brazil, considered an international human rights treaty, ratified and internalized by Brazil, without reservations, in 1992. The Pact safeguarded the right to freedom of conscience, in the following terms:

Artigo 12. Liberdade de consciência e de religião. 1. Toda pessoa tem direito à liberdade de consciência e de religião. Esse direito implica a liberdade de conservar sua religião ou suas crenças, ou de mudar de religião ou de crenças, bem como a liberdade de professar e divulgar sua religião ou suas crenças, individual ou coletivamente, tanto em público como em privado. 2. Ninguém pode ser objeto de medidas restritivas que possam limitar sua liberdade de conservar sua religião ou suas crenças, ou de mudar de religião ou de crenças. 3. A liberdade de manifestar a própria religião e as próprias crenças está sujeita unicamente às limitações prescritas pela lei e que sejam necessárias para proteger a segurança, a ordem, a saúde ou a moral públicas ou os direitos ou liberdades das demais pessoas. 4. Os pais, e quando for o caso os tutores, têm direito a que seus filhos ou pupilos recebam a educação religiosa e moral que esteja acorde com suas próprias convicções (CADH, 1992).

With these provisions set forth in the Covenant, and also considering the constitutional provision in article 5, item VI, of the Federal Constitution, it is up to Brazil to implement measures, in order to guarantee the right to conscientious objection, as well as the other guarantees addressed by the Covenant.

It should be noted that item 3 of the American Convention on Human Rights was limited to externalizing beliefs to legal determinations, just as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, April 4, 1950), firm after the events of World War II, did in item 2:

Artigo 9.º (Liberdade de pensamento, de consciência e de religião). 1. Qualquer pessoa tem direito à liberdade de pensamento, de consciência e de religião; este direito implica a liberdade de mudar de religião ou de crença, assim como a liberdade de manifestar a sua religião ou a sua crença, individual ou colectivamente, em público e em privado, por meio do culto, do ensino, de práticas e da celebração de ritos. 2. A liberdade de manifestar a sua religião ou convicções, individual ou colectivamente, não pode ser objecto de outras restrições senão as que, previstas na lei, constituírem disposições necessárias, numa sociedade democrática, à segurança pública, à protecção da ordem, da saúde e moral públicas, ou à protecção dos direitos e liberdades de outrem (CEDH, 1950).

Although the European Convention protects freedom of conscience, it does not specifically address the issue of conscientious objection, not even in its Additional Protocols. Furthermore, the International Covenant on Civil and Personal Rights, adopted by the United Nations in 1966 and approved by Brazil in 1992, through Decree No. 592, addresses the subject in a manner similar to the European Convention on Human Rights (ECHR), in its article 18, by stating that:

Toda pessoa terá direito a liberdade de pensamento, de consciência e de religião. Esse direito implicará a liberdade de ter ou adotar uma religião ou uma crença de sua escolha e a liberdade de professar sua religião ou crença, individual ou coletivamente, tanto pública como privadamente, por meio do culto, da celebração de ritos, de práticas e do ensino. 2. Ninguém poderá ser submetido a medidas coercitivas que possam restringir sua liberdade de ter ou de adotar uma religião ou crença de sua escolha. 3. A liberdade de manifestar a própria religião ou crença estará sujeita apenas à limitações previstas em lei e que se façam necessárias para proteger a segurança, a ordem, a saúde ou a moral públicas ou os direitos e as liberdades das demais pessoas. 4. Os Estados Partes do presente Pacto comprometem-se a respeitar a liberdade dos pais e, quando for o caso, dos tutores legais - de assegurar a educação religiosa e moral dos filhos que esteja de acordo com suas próprias convicções

The 2000 Charter of Fundamental Rights of the European Union deals with freedom of conscience with freedom of religion and thought in Article 10.

The right to conscientious objection is recognized in section 2 of this article, which states that "The right to conscientious objection is recognized by the national laws governing the exercise thereof. This provision leads to the understanding that laws should delimit the scope of conscientious objection, as well as regulate its application.

Furthermore, the Geneva Conventions on Humanitarian Law of 1949 guarantee religious freedom even in times of war, ensuring worship and funeral honors according to the creed of military personnel, prisoners, and civilians in occupied areas.

2 THE LEGISLATIVE "ATTENTION" CONCERNING FREEDOM AND CONSCIENTIOUS OBJECTION

Considering that there are many cases in which there is no legal regulation regarding freedom and conscientious objection, for the sake of legal security, it is necessary for special legislation to discuss the main existing aspects. For this reason, some of the Bills currently in progress on this subject will be analyzed below.

Bill no. 6.335, of 2009, deals with the right to conscientious objection as an excuse to the principle of legality, foreseen in article 5, clause II, of the Federal Constitution. Article 2 of this Bill presents a concept of conscientious objection, and Article 3 discusses its scope, as follows:

Art. 2º Para os efeitos desta Lei, considera-se objeção de consciência a possibilidade de recusa por um indivíduo da prática de um ato que colida com suas convicções morais, éticas e religiosas, por imperativo de sua consciência.

Art. 3º A objeção de consciência pode se dar no campo do exercício profissional, por motivos de religião, ou por qualquer outro que agrida os princípios e o foro íntimo do indivíduo.

With such provisions, it can be seen that, extending the constitutional approach, expressly provides for conscientious objection on the grounds of religious belief or philosophical or political conviction, the bill also provides for freedom on moral and ethical convictions.

Despite this, the bill does not regulate philosophical or political motivations and ends up restricting the right to conscientious objection by limiting it to the field of a person's professional exercise in Article 3.

In its article 4, there is the possibility of requiring proof of the conscience imperative from the individual, as grounds for refusing to practice the act that goes against his convictions:

Art. 4º No exercício da objeção de consciência, além dos argumentos éticos, morais ou religiosos, pode ser exigida do cidadão a apresentação de histórico que comprove seu envolvimento com a convicção alegada, a fim de fundamentar sua recusa à prática do ato.

Furthermore, the Justification of the Bill is based on the allegation that "nothing is more undemocratic and anti-liberal than forcing citizens to practice an action that their conscience condemns". For this reason, it emphasizes that legal and express provision for conscientious objection is fundamental, "thus allowing public power to be legally delimited, so that people's honest freedom is not restricted more than it should be.

Another legislative matter related to conscientious objection is Bill No. 860 of 2019, which has the central objective of amending Law No. 7,716 of 1989 to definit and punish crimes resulting from intolerance, discrimination or prejudice due to sex, sexual orientation and gender identity," thus criminalizing homophobia, to protect the LGBT (lesbian, gay, bisexual, transvestite and transgender) population.

Currently, article 14 of Law No. 7,716 of 1989 states that "Impeding or preventing, by any means or form, marriage or family and social coexistence" carries a penalty of 2 to 4 years' imprisonment. There is a request in the bill to include § 2 in this criminal type and provide that the penalty does not apply to the civil registry professional who, "by force of concession of faith or conscientious objection, opposes the fulfillment of the functional duty to register the marriage, with the demand being forwarded to another civil servant of the same public office".

Moreover, the law currently in force, in its article 20, criminalizes only the conduct of "practicing, inducing or inciting discrimination or prejudice of race, color, ethnicity, religion or national origin," which is why Bill No. 860 of 2019 originally sought to expand the protection to sex, sexual orientation or gender identity as well. Following the pattern of the other amendments, the following paragraph was added, again including exceptions:

Não se aplicam as condutas previstas nesse artigo, quando do exercício da liberdade de consciência e de crença, incluindo-se, nesses, o discurso religioso e moral, em público ou em privado, presencial, televisivo,

telemático ou por radiodifusão, discordante com o comportamento social de determinada orientação sexual ou identidade de gênero.

Such proposal, drafted by Senator Daniella Ribeiro, intends to use freedom and conscientious objection as a way of exempting conducts from being considered criminal, with the justification of her amendment stating that the repression of possible acts of intolerance, prejudice and discrimination against the LGBT+ population "cannot be done in the absence of other human and fundamental rights, unduly restricting the breadth of freedom of religion and belief (art. 5, VI and VIII, of the Federal Constitution)" (Bill no. 860 of 2019). There is, therefore, a clear clash between the legal goods of freedom (to come and go, religious freedom, freedom of belief) and the dignity of the human person.

Another bill in progress in the Senate is Bill No. 149 of 2018, which deals with advance directives of will on health treatments, because it allows any adult and capable person, in advance, to express their consent or to refuse to undergo any health treatments, in case of serious illness with no prospect of cure, or if they are in a terminal phase.

To this end, article 8 of this project provides for the right of health professionals to claim conscientious objection when asked to comply with the advance directive document, by means of justification in medical records of the reasons for their objection, but only when another professional can provide the care, so as not to deprive the patient of adequate health care.

Currently being processed, the bill was amended to only provide that health professionals have the right to use conscientious objection when they do not agree with the patient's requests, and should refer the patient to another professional (Art. 7). Therefore, the need to present justification in medical records of the reasons for the objection was left out.

Regarding labor relations, there is Bill No. 3,346 of 2019, which brings changes to article 67 of the Consolidation of Labor Laws (CLT), aiming to guarantee alternative provision to the employee who, for reasons of conscience, abstains from working on a certain day.

Article 67 of the Consolidation of Labor Laws provides for the paid weekly rest period, making no mention of cases in which the work day or shift conflicts with those in which, by religion, work is not allowed. Thus, the project provides that the employee, without onus or loss, and in agreement with the employer,

may choose the day of the week in which he/she will take paid rest, or compensate the working hours, when a coincidence occurs, by means of advance notice.

Moreover, Bill No. 1,089 from 2015 proposes to ensure that it is neither a civil nor a criminal offense to "disseminate, in the public or private sphere, ideas contrary to a certain social behavior or to a belief professed by a certain group, religious or not, as long as they are done without incitement to violence."

It should be noted that Bill no. 1,089 of 2015 was joined to Bill no. 6,314 of 2005, which seeks to add an item to article 142 of the Criminal Code, in order to exclude the offenses of libel and slander when the content, in theory criminal, is the opinion of a teacher or religious minister. This Bill is awaiting the creation of a Temporary Committee by the Bureau.

Another important piece of legislation is Bill No. 882 of 2015, which, in addition to establishing public policies on sexual health and reproductive rights and regulating abortion up to the 12th week of gestation, devotes an entire title to conscientious objection. In Title V, it states that it is the physician's right to refuse to perform acts indicated in the text and contrary to the dictates of his or her conscience, and must inform the authorities of the establishments to which they belong, for registration.

However, § 2 of article 18 emphasizes that it is not possible to claim conscientious objection in cases of voluntary interruption of pregnancy, when there is a risk to the woman's life; in legally permitted cases, when there is no other doctor who can do so, when the woman may have her health harmed due to the omission of the professional; and in emergency care, in the face of complications arising from unsafe abortion. Finally, in early 2019, Law No. 13,796 was sanctioned, amending Law No. 9,394, of 1996 (Law of Directives and Bases of National Education), with the finality of establishing alternative instalments to the application of tests and attendance to classes held on a religious guard day, when students raise a conscience excuse.

In summary, it can be seen that there are several bills seeking to regulate freedom and conscientious objection. However, the biggest problem in this area is linked to the fact that there is no prior discussion about the limits of the institutes and the legal goods in question, in order to definitively the priorities and demands of society. Furthermore, the procedure is lengthy, which is why legislative gaps remain for a long period of time, leaving the population at the mercy of

understandings of judges without many established parameters to ground their decisions with more technicality.

It is important to remember that the absence of a law regulating the matter and foreseeing the alternative provision to which the Constitution refers in art. 5, item VIII, should not necessarily lead to the impracticability of the conscience exemption. This is because the fundamental rights must be presumed to be of immediate applicability, in the terms of art. 5, § 1, of the Federal Constitution.

CONCLUSIONS

With the examination of what is related to the right to freedom of conscience and the guarantee of the exercise of conscientious objection, a theme which has been the source of interesting discussions, it can be concluded that conscientious objection, in Brazilian law, is a fundamental right of the individual, in view of what is contained in article 5, items VI and VIII, of the Federal Constitution. Moreover, there is ample international protection of freedom of conscience, such as through the Universal Declaration of Human Rights, of 1948, the Pact of San José of Costa Rica and the European Convention for the Protection of Human Rights and Freedoms.

It follows that, in addition to guaranteeing the free formation and development of conscience, it also seeks to protect its manifestations, given the possible exemption from legal duties.

Despite the fact that the theme is little covered in legal and doctrinal terms, it is observed that it affects the inner and daily lives of many citizens who, due to legislative gaps and even lack of information, may have their rights violated.

There are several bills that, with the mission of regulating conscientious objection, but in a superficial manner, some even in a prejudiced manner, violate individual constitutional rights and evidence a frequent absence of legislative technique in Brazilian laws.

It is observed, therefore, that it is necessary to determine evaluative parameters of the reasons for conscientious objection, pondering on rights and values that culminate in a just society, all in the light of fundamental human rights.

This prevents the indiscriminate use of refusal, to the detriment of third parties, and prevents the curtailment of rights due to the absence of clear regulations.

Furthermore, it is necessary that the Public Authorities promote respect for conscientious objectors, who suffer damage to their dignity and discrimination, and are still marginalized by their own culture and convictions, when they externalize them by refusing for reasons of conscience.

Thus, it is essential that special legislation regulate conscientious objection and its hypotheses, but not before expanding the debate on the subject, in order to establish what the population needs and wants, and making the necessary considerations regarding the clash between different legal goods, thus avoiding bills that are divergent in their objectives, unconstitutional, and that fire individual rights.

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Recebido em: 23/04/2020

Aprovado em: 15/05/2020